

[Cite as *Acre v. Ohio Parole Bd.*, 2017-Ohio-4318.]

DANIEL F. ACRE

Plaintiff

v.

OHIO PAROLE BOARD

Defendant

Case No. 2016-00844

Judge Patrick M. McGrath
Magistrate Sophia Chang

ENTRY GRANTING DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT

{¶1} On February 28, 2017, defendant filed a motion for summary judgment. On March 16, 2017, plaintiff filed what the court construes as a response to defendant's motion without a certificate of service.¹ On March 21, 2017, defendant filed a motion for leave to file a reply to plaintiff's response as well as its response. Upon review, defendant's motion for leave is GRANTED. The motion for summary judgment is now before the court for a non-oral hearing pursuant to Civ.R. 56 and L.C.C.R. 4.

{¶2} As a preliminary matter, plaintiff filed a second amended complaint on February 21, 2017 as well as a third amended complaint on March 3, 2017, without leave of court. Defendant filed motions to strike the amended complaints on February 28, 2017 and March 6, 2017, respectively. Pursuant to Civ.R. 15(A), plaintiff may only amend his complaint "once as a matter of course within twenty-eight days after serving it or, if the pleading is one to which a responsive pleading is required within twenty-eight days after service of a responsive pleading. After that period, plaintiff may amend his complaint only "with the opposing party's written consent or the court's leave. The court shall freely give leave when justice so requires." *Id.* The record shows that defendant filed its answer on December 19, 2016, and plaintiff has failed to comply with Civ.R. 15(A) because he has not obtained defendant's written consent nor did he

¹The court notes that while plaintiff filed his response without a valid certificate of service in violation of Civ.R. 5, defendant replied to the response indicating to the court that it received a copy of the response. Accordingly, the court will consider the response.

request leave from the court in either amended complaint. Accordingly, defendant's motions to strike are GRANTED, and plaintiff's February 21, 2017 and March 3, 2017 amended complaints are hereby STRICKEN.

{¶3} Plaintiff also filed a motion for appointment of counsel on April 3, 2017. "[A]n indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty." *Perotti v. Ohio Dept. of Rehab. & Corr.*, 61 Ohio App.3d 86, 91 (10th Dist.1989), quoting *Lassiter v. Dept. of Social Services*, 452 U.S. 18, 26-27 (1981). Plaintiff is not at risk of losing his physical liberty as a result of any determination that may be made by the court. Accordingly, plaintiff's motion for the appointment of counsel is DENIED.

{¶4} Turning to the motion for summary judgment, Civ.R. 56(C) states, in part, as follows:

{¶5} "Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor." See also *Gilbert v. Summit Cty.*, 104 Ohio St.3d 660, 2004-Ohio-7108, citing *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317 (1977).

{¶6} Plaintiff, an inmate in the custody and control of the Ohio Department of Rehabilitation and Correction at Southeastern Correctional Institution, brings a claim of false imprisonment stemming from a rape and felony assault conviction which occurred

in 1981. Plaintiff states in his amended complaint that his release date was originally in 2011 and that he was released, not just paroled, in 2005. Plaintiff further alleges that defendant is falsely imprisoning him in retaliation for the \$35 million lawsuit he filed against them. Although plaintiff does not challenge the validity of the judgment entry in his amended complaint, he raises the issue in his response to defendant's motion for summary judgment. He argues that even though his sentence was valid in 1981, it became void because his sentence was changed. Plaintiff also seems to argue that the sentencing entry is void because it does not impose post-release control. In addition to these claims, plaintiff seeks to be released because of conflicts with other inmates and because he has cancer and does not want to die while incarcerated.

{¶7} Defendant argues that plaintiff's claim for false imprisonment fails because he has been imprisoned pursuant to a valid judgment entry, that it is entitled to discretionary immunity regarding its decision to revoke plaintiff's parole for violations of his conditions of release, and that plaintiff's proper remedy for his claim that the sentencing entry is void was to petition the trial court for a revised sentencing entry.

{¶8} "False imprisonment occurs when a person confines another intentionally 'without lawful privilege and against his consent within a limited area for any appreciable time * * *.'" *Bennett v. Ohio Dept. of Rehab. & Corr.*, 60 Ohio St.3d 107, 109 (1991), quoting *Feliciano v. Kreiger*, 50 Ohio St.2d 69, 71 (1977). In order to prevail on a claim of false imprisonment, a plaintiff must show that: 1) his lawful term of confinement expired; 2) defendant intentionally confined him after the expiration, and 3) defendant had knowledge that the privilege initially justifying the confinement no longer existed. *Corder v. Ohio Dept. of Rehab. & Corr.*, 94 Ohio App.3d 315, 318 (1994). However, "an action for false imprisonment cannot be maintained where the wrong complained of is imprisonment in accordance with the judgment or order of a court, unless it appear that such judgment or order is void." *Bennett, supra* at 111. See also *Bradley v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 07AP-506, 2007-Ohio-7150, ¶ 10. Thus, the

state is immune from a common law claim of false imprisonment when the plaintiff was incarcerated pursuant to a facially-valid judgment or order, even if the facially-valid judgment or order is later determined to be void. *Id.* at ¶ 11. Facial invalidity does not require the consideration of extrinsic information or the application of case law. *Gonzales v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 08AP-567, 2009-Ohio-246, ¶ 10. Furthermore, “[d]efendant ha[s] no discretion to release an inmate until it receive[s] an entry indicating [defendant] no longer [is] privileged or justified in confining the inmate.” *Trice v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 07AP-828, 2008-Ohio-1371, ¶ 19; see also *Griffin v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 10AP-733, 2011-Ohio-2115, ¶ 21.

{¶9} Furthermore, the Supreme Court of Ohio has held that “[t]he language in R.C. 2743.02 that ‘the state’ shall ‘have its liability determined * * * in accordance with the same rules of law applicable to suits between private parties * * *’ means that the state cannot be sued for its legislative or judicial functions or the exercise of an executive or planning function involving the making of a basic policy decision which is characterized by the exercise of a high degree of official judgment or discretion.” *Reynolds v. State*, 14 Ohio St.3d 68, 70 (1984); *Von Hoene v. State*, 20 Ohio App.3d 363, 364 (1985).

{¶10} In considering an inmate’s claim that the determination of his parole was improperly continued, the Tenth District Court of Appeals has held that “[a] parole board’s decision to grant or deny parole is an executive function involving a high degree of official judgment or discretion. Therefore, under the rationales in *Von Hoene* and *Reynolds*, we conclude that the Court of Claims has no jurisdiction to hear a claim attacking a parole board’s decision to grant or deny parole. Thus, in this case, the Court of Claims properly dismissed appellant’s action attacking the parole board’s decision to continue his sentence.” *Deavors v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 98AP-1105 (May 20, 1999). (Internal citations omitted.)

{¶11} In support of its motion, defendant provides the affidavit of Carol Conn, the Correctional Records Sentence Computation Auditor and Release Supervisor for the Bureau of Sentence Computation, which states the following:

{¶12} “2. I have personal knowledge and am competent to testify to the facts contained in this Affidavit.

{¶13} “3. I am aware of the above captioned lawsuit filed by Inmate Daniel Acre, #164-760. I was contacted by legal counsel for ODRC and the Ohio Parole Board to provide information regarding Acre’s sentence computation.

{¶14} “4. Acre was admitted to ODRC on September 29, 1981, to serve a criminal sentence entered by the Lucas County Court of Common Pleas, case number CR816231. The Lucas County court [sic] sentence Acre to life sentences on each of two counts of Rape, both first degree aggravated felonies. The court ordered the two life sentences to be served consecutive to each other. The court also sentenced Acre to three-to-fifteen years incarceration for one count of Felonious Assault, a second degree felony, to be served concurrent to Acre’s life sentence for Rape.

{¶15} “5. The sentencing court’s entry ordered that Acre receive credit for any time spent in custody, which resulted in 80 days of jail time credit per the Sheriff’s Office. The maximum expiration of Acre’s sentence was Life [sic].

{¶16} “6. Acre was paroled on March 18, 2005. The Adult Parole Authority (“APA”) declared Acre a parole violator at large on January 3, 2007 and his parole was revoked while he was still at large on January 22, 2007. Acre was returned to ODRC as a Technical Parole Violator on February 22, 2007, to serve the remainder of his consecutive life sentences.

{¶17} “7. Acre’s most recent parole board hearing occurred in October, 2016, which resulted in a denial of parole release and a continued hearing scheduled for October, 2020. Acre remains in ODRC custody pursuant to the Lucas County Court of Common Pleas’ sentencing entry.

{¶18} “8. Attached to this Affidavit as Exhibit A-1 is a true and accurate copy of Acre’s Judgment Entry of Sentence from the Lucas County Common Pleas Court (CR816231). Attached as Exhibit A-2 is a true and accurate copy of Acre’s 2007 parole revocation order. Attached as Exhibit A-3 is a true and accurate copy of Acre’s APA Lost Time/New Max Date Request. Attached as Exhibit A-4 is a true and accurate copy of Acre’s October, 2016, Ohio Parole Board Decision and Minutes. These documents are kept in the ordinary course of business at ODRC.”

{¶19} Plaintiff did not submit any evidence to refute the statements contained in the affidavit supporting defendant’s motion. Civ.R. 56(E) provides: “When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon mere allegations or denials of the party’s pleadings, but the party’s response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the party does not so respond, summary judgment, if appropriate, shall be entered against the party.” Therefore, based upon the undisputed evidence, the court finds that defendant, in revoking and subsequently denying plaintiff’s parole, was making a decision involving a high degree of discretion over which this court lacks jurisdiction.

{¶20} Furthermore, the court also finds that there does not appear to be any indication that the sentencing entry is facially invalid or contains any irregularities. To determine that the entry is void would require the court to consider and apply case law. When a judgment entry requires extrinsic information or case law to be determined to be void, it is not a facially invalid judgment entry. *McKinney v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 09AP-960, 2010-Ohio-2323, ¶12.

{¶21} Insofar as plaintiff alleges that his sentence is void because it does not include post-release control language, the court finds that plaintiff’s remedy is in the Lucas County Common Pleas Court, which originally sentenced him. While it has been held that “a trial court is required to notify the offender at the sentencing hearing about

post release control and is further required to incorporate that notice into its journal entry imposing sentence,” the proper remedy is to resentence the defendant.” *State of Ohio v. Ramey*, 10th Dist. Franklin No. 06AP-245, 2006-Ohio-6429, ¶ 6; see also *State v. Fischer*, 128 Ohio St.3d 92, 95, 2010-Ohio-6238, 942 N.E.2d 332. “When a trial court enters a void judgment, it retains jurisdiction to correct the void entry.” *Ramey, supra*, at ¶ 12. Accordingly, the court of claims lacks jurisdiction to review the sentencing proceedings from the Lucas County Common Pleas Court.

{¶22} Based on the foregoing reasons, the court finds that defendant was legally justified to confine plaintiff at all relevant times. There is no evidence presented by plaintiff to indicate that the court documents in Conn’s affidavit exhibits are invalid. Therefore, construing the evidence most strongly in plaintiff’s favor, the court finds that there are no genuine issues of material fact and that defendant is entitled to judgment as a matter of law. Defendant’s motion for summary judgment is GRANTED, and judgment is hereby rendered in favor of defendant. All previously scheduled events are VACATED, and all pending motions are DENIED as moot. Court costs are assessed against plaintiff. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

PATRICK M. MCGRATH
Judge

cc:

Daniel F. Acre, #164-760
P.O. Box 59
Nelsonville, Ohio 45764

Stacy L. Hannan
Assistant Attorney General
150 East Gay Street, 18th Floor
Columbus, Ohio 43215-3130

Filed May 10, 2017
Sent to S.C. Reporter 6/16/17