[Cite as *Appenzeller v. Dept. of Rehab. & Corr.*, 2017-Ohio-6961.]

RUSSELL E. APPENZELLER Plaintiff v. OHIO DEPARTMENT OF REHABILITATION AND CORRECTION Defendant	Case No. 2016-00444 Judge Patrick M. McGrath Magistrate Sophia Chang ENTRY GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

{¶1} On May 3, 2017, defendant, Ohio Department of Rehabilitation and Correction (DRC), filed a motion for summary judgment. Plaintiff filed a memorandum contra on May 15, 2017, and an "affidavit in opposition" on May 19, 2017. 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 an initial matter, plaintiff argues that the motion for summary judgment is improper under Civ.R. 56(B) because defendant did not seek permission from the court to file the motion. However, in its October 5, 2016 order, the court allowed dispositive motions to be filed on or before May 5, 2017. Defendant filed its motion on May 3, 2017 in accordance with the court's order. Therefore, the court finds that plaintiff's argument is without merit.

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

{¶4} "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).

{¶5} Plaintiff, an inmate in the custody and control of defendant at Belmont Correctional Institution, brings a claim for false imprisonment. Plaintiff states that he was improperly confined under two prisoner identification numbers which caused him to be confined after his term expired on December 1, 2006. Plaintiff further argues that he has been falsely imprisoned ever since that date.

{¶6} "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. 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.

{¶7} Defendant argues in its motion that plaintiff was legally confined at all times pursuant to a facially valid order. In support of its motion, defendant provides the affidavit of Vicki Wallace (Wallace), defendant's Correction Records Sentence Computation Auditor. In her affidavit, Wallace explains plaintiff's incarceration history as follows:

{¶8} "2. In the scope and course of my job duties, I am responsible for reviewing sentencing information from courts and calculating release dates for inmates that are ordered to be incarcerated by DRC.

{¶9} "3. I have reviewed the sentencing information for [plaintiff] that DRC has on file. I am familiar with the sentences imposed on [plaintiff] by the Mahoning and Lake County Courts of Common Pleas and the calculation of sentence with DRC.

{¶10} "4. [Plaintiff] was admitted to DRC on July 3, 2003 under number A431-837. On June 11, 2002, he was sentenced to 1 year in Mahoning County 02CR483. All counts were ordered concurrent to each other for aggregate sentence of 1 year with 117 days jail time credit granted in the entry. (See attachment 1)

{¶11} "5. The sentencing entry filed on June, 20, 2002 [sic] for Mahoning County 02CR210 sentenced Appenzeller to 4 years with 123 days jail time credit consecutive to Mahoning County 02CR483. (See attachment 2)

{¶12} "6. Conveyance time of 13 days was added to this case for a total of 136 days. The aggregate sentence for the two cases was 5 years reduced by 253 days jail

time credit. Attachment 3 is a true and accurate copy of [plaintiff's] Record of Credit for Time Served received from the Mahoning County Sheriff's Office.

{¶13} "7. On December 21, 2004, [plaintiff] was granted Judicial Release and released from DRC on Mahoning County 02CR210. (See attachment 4)

{¶14} "8. On May 4, 2005, [plaintiff] was returned to Lorain Correctional Institution as a judicial release violator. The entry filed April 26, 2005 for Mahoning County 02CR210 re-imposed the original 4-years sentence and granted 876 days credit. An additional 7 days of conveyance time was added for a total of 883 days credit. [Plaintiff's] new Expiration of Stated Term was computed as December 1, 2006.

{¶15} "9. [Plaintiff] went out to court and on October 31, 2006, he was sentenced on a new felony case Lake County 06CR108. He received a 4-years sentence for Counts 1, 3, 6, 9, 11 and 13; a 3-years sentence for Counts 2, 4, 7, 10, 12 and 14; a 1-year sentence for Count 5 and 8; a 2-years sentence on Counts 15 and 17; and, a 1 year sentence on Counts 16 and 18. Counts 1 and 2 were ordered concurrent to each other; Counts 3, 4, and 5 were ordered concurrent to each other but consecutive to Counts 1 and 2; Counts 6, 7, and 8 were ordered concurrent to each other but consecutive with 3, 4, and 5; Counts 9 and 10 were ordered concurrent to each [sic] but consecutive to 6, 7, and 8; Counts 11 and 12 were ordered concurrent to each other but consecutive to 9 and 10; Counts 13 and 14 were ordered concurrent to each other but Consecutive to Counts 11 and 12; Counts 15 and 16 were ordered concurrent with each other but consecutive to Counts 13 and 14; Counts 17 and 18 were ordered concurrent to each other but consecutive with Counts 15 and 16. The entry called out a total of 28 years in prison and granted zero days credit. The case was also ordered concurrent with Mahoning County 02CR210. (See attachment 6)

{¶16} "10. Appenzeller was turned over to a new number A514-991 effective his return from court date of November 1, 2006, due to being a returned violator with a new

felony. His numbers were aggregated and his re-imposed Judicial Release case Mahoning County 02CR210 was brought forward under his new number A514-991.

{¶17} "11. On Mahoning County 02CR210, he received an additional 546 days of prison time credit for time served from his return on May 4, 2005 through October 31, 2006 for a total of 1429 days credit on the 4-year sentence. There was no change to this case expiring on December 1, 2006.

{¶18} "12. His Expiration of Stated Term on the controlling Lake County case was computed as October 24, 2034.

{¶19} "13. [Plaintiff] went out to court on Lake County 06-CR-000108 for a resentencing hearing. On January 28, 2009, he was resentenced to 4 years on consecutive Counts 1, 3, 6, 9, 11 and 13., Burglary Felony 2; 2 years on Counts 15 and 17, Attempted Burglary, Felony 3 and 1 years [sic] on Count 5 and 8, Theft, Felony 5. Counts 2, 4, 7, 10, 12, 14, 16, and 18 were merged. Counts 1, 3, 6, 9, 11, 13, 15, and 17 were ordered consecutive to each other and counts 5 and 8 were ordered concurrent to all other counts for an aggregate total of 28 years. The previous jail time credit of zero days did not change. (See attachment 7)

{¶20} "14. Appenzeller's sentence was recalculated beginning his returned from court date of February 2, 2009 with credit of 824 days for time he had served from November 1, 2006 up to his return from court date of February 2, 2009. There was no change to his computed Expiration of Stated Term date of October 24, 2034."

{¶21} Wallace's affidavit is supported by the judgment entries of sentencing as referred to in her the affidavit.

{¶22} Plaintiff's response to defendant's motion primarily relies on the argument that he was held under two inmate identification numbers and that certain dates do not seem to match up causing an issue of material fact. Plaintiff submits his own affidavit in support, which states in addition to his previous arguments that his judicial release was not revoked and that he did not have new criminal offenses against him. Plaintiff,

however, does not provide any evidence to support his assertion nor does he make any assertion that the court orders from his Lake County case sentencing him until October 24, 2034 are facially invalid.

{¶23} 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."

{¶24} Furthermore, "a party's unsupported and self-serving assertions, offered by way of affidavit, standing alone and without corroborating materials under Civ.R. 56, will not be sufficient to demonstrate material issues of fact. Otherwise, a party could avoid summary judgment under all circumstances solely by simply submitting such a self-serving affidavit containing nothing more than bare contradictions of the evidence offered by the moving party." *White v. Sears*, 10th Dist. Franklin No. 10AP294, 2011-Ohio-204, ¶ 8. Accordingly, the court finds that there are no issues of material fact regarding plaintiff's sentencing orders and his confinement pursuant to those orders.

{¶25} Insofar as plaintiff's claim can be construed to bring a wrongful imprisonment claim, defendant argues that plaintiff has not complied with R.C. 2743.48 by pursuing to overturn his conviction in a common pleas court. Indeed, "the Ohio General Assembly 'enacted R.C. 2305.02 and 2743.48 to authorize civil actions against the state in the Court of Claims for specified monetary amounts by certain wrongfully imprisoned individuals.'" *D'Ambrosio v. State*, 8th Dist. Cuyahoga No. 99520, 2013-Ohio-4472, ¶ 12, citing *Walden v. State*, 47 Ohio St.3d 47, 49 (1989). Under this statutory framework, 'a claimant first files an action in the common pleas court seeking a preliminary factual determination that he meets all of the requirements of R.C. 2743.48(A)(1)-(5).' If successful, the claimant must then 'file an action in the Court

of Claims to recover money damages.'" *Jenkins v. State*, 10th Dist. Franklin No. 12AP-726, 2013-Ohio-5536, ¶ 9, quoting *D'Ambrosio* at ¶ 12. "Only courts of common pleas have jurisdiction to determine whether a person has satisfied the five requirements of R.C. 2743.48(A)." *Griffith v. Cleveland*, 128 Ohio St.3d 35, 2010-Ohio-4905, paragraph one of the syllabus.

{¶26} In this case, there is no indication that plaintiff followed the procedures set forth in R.C. 2305.02 and 2743.48 and first obtained a determination from a common pleas court that he is a wrongfully imprisoned individual. "Such a determination is a mandatory prerequisite to jurisdiction in the Court of Claims." *Dvorak v. Pickaway Corr. Inst.*, 10th Dist. Franklin No. 02AP-452, 2002-Ohio-6447, ¶ 21.

{¶27} Based on the foregoing, 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 Wallace's affidavit exhibits are invalid. The court also finds that plaintiff has failed to follow the proper procedures to bring a wrongful imprisonment claim in this court. 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. 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:

Russell E. Appenzeller, #A514-991
Belmont Correctional Institution
68518 Bannock Road
St. Clairsville, Ohio 43950-0540

Emily Simmons Tapocsi
Assistant Attorney General
150 East Gay Street, 18th Floor
Columbus, Ohio 43215-3130

Filed June 21, 2017
Sent to S.C. Reporter 7/24/17