[Cite as *Casino v. State*, 2010-Ohio-5492.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 95063

DANIEL CASINO

PLAINTIFF-APPELLANT

vs.

STATE OF OHIO

DEFENDANT-APPELLEE

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-697425

BEFORE: Dyke, J., Blackmon, P.J., and Celebrezze, J.

RELEASED AND JOURNALIZED: November 10, 2010

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ANN DYKE, J.:

{¶ 1} This appeal is before the Court on the accelerated docket pursuant to App.R. 11.1 and Loc. App.R. 11.1.

{¶ 2} Plaintiff-appellant, Daniel Casino ("appellant"), appeals the trial court's granting of summary judgment in favor of the defendant-appellee, the state of Ohio (the "State"), concluding that appellant could not establish that he was a wrongfully imprisoned individual. For the reasons that follow, we affirm.

{¶ 3} On November 14, 2005, the Cuyahoga County Grand Jury indicted appellant for one count of burglary in violation of R.C. 2911.12(A)(1) in Cuyahoga

County Court of Common Pleas Case No. CR-473104. He pled not guilty to the charge and the matter proceeded to a jury trial commencing on December 14, 2005. The following facts were established during trial:

{¶ 4} "Shauntee McCoy, Tinika Tolbert, and their three children lived on the second floor of a duplex located in Garfield Heights, Ohio. Mildred Holcomb lived on the first floor of the duplex. At approximately 6:30 a.m., McCoy awoke when he heard a sound coming from the kitchen. The sound was similar to someone counting change. He thought it was his ten-year old son getting ready for school. When McCoy went to check on the noise, the kitchen was empty, but he discovered a belt, tennis shoes, identification card, and an address book on the counter.

{¶ 5} "At approximately the same time, Ms. Tolbert woke their ten-year old son to get him ready for school. On her way to the kitchen, Ms. Tolbert walked past the bathroom and noticed it was closed. As she joined McCoy in the kitchen, the bathroom door opened. Casino, who appeared disoriented and intoxicated, walked into the hallway wearing only a pair of gym shorts. Casino turned in the direction of a bedroom, but when the ten-year old son screamed at him, Casino turned around and walked towards the kitchen.

{¶ 6} "Terrified at seeing a stranger in the house, Ms. Tolbert screamed, jumped over the table, and ran out of the kitchen. Casino attempted to gather his belongings, but McCoy led him out the front door and down the steps without incident. Once outside, Casino ran down the street.

{¶ 7} "McCoy immediately called the police. Based on the identification card and address book Casino left behind, the police were able to locate him shortly thereafter.

{¶ 8} "Officer Ronald Dodge testified that he recognized the name of the person whose telephone number was in the address book. He relayed the telephone number to police dispatch, which cross-referenced the number and provided an address.

{¶ 9} "The officers went to the address that dispatch had provided. The homeowner informed them that Casino had been living in the basement, but was supposed to have moved out the previous day. After checking the basement, the homeowner reported that Casino was there sleeping. The officers entered the basement, found Casino sleeping, and arrested him.

{¶ 10} "The day after Casino was arrested, he told the police that he had been drinking heavily the previous night and did not remember anything that happened before he was apprehended. The police indicated that Casino was genuinely surprised when he learned he was being charged with burglary." *State v. Casino*, Cuyahoga App. No. 87650, 2006-Ohio-6586, ¶4-10.

{¶ 11} After considering the aforementioned facts, the jury found appellant guilty of the lesser-included offense of burglary in violation of R.C. 2911.12(A)(4) on December 16, 2005. On that same day, the court sentenced him to 17 months imprisonment.

{¶ 12} Appellant appealed his conviction on January 18, 2006 in *State v. Casino*, Cuyahoga App. No. 87650, 2006-Ohio-6586. In that case, we vacated his conviction, finding insufficient evidence establishing the necessary elements of force, stealth, or deception. The prosecutor did not seek appeal of that decision, and appellant was released from prison sometime thereafter.

{¶ 13} On July 1, 2009, appellant filed the instant action against the State seeking the status of a wrongfully incarcerated individual as defined in R.C. 2743.49 as a result of our decision in *Casino*, supra. The State timely answered the complaint and, following discovery, proceeded to file a motion for summary judgment on January 22, 2010. After briefing on the matter, the trial court granted the State's motion for summary judgment on April 6, 2010. The court found that appellant failed to establish by a preponderance of the evidence that he was innocent of the lesser included offense of which he was convicted, that being criminal trespass.

{¶ 14} Appellant now appeals and presents one assignment of error for our review. His sole error provides:

{¶ 15} "The trial court erred when it granted summary judgment in favor of the appellee."

{¶ 16} Within this assignment of error, appellant argues that the trial court erroneously determined that he did not meet the definition of a wrongfully imprisoned individual provided in R.C. 2743.48. The court determined that appellant committed the lesser included offense of criminal trespass, a lesser

included offense of burglary. He maintains that his actions constituted the defense of mistake of fact, thereby negating the mens rea needed for the crime of criminal trespass.

{¶ 17} With regard to procedure, we note that we review de novo a trial court's grant of summary judgment. Civ.R. 56(C) provides that before summary judgment may be granted, a court must determine that "(1) no genuine issue as to any material fact remains to be litigated, (2) the moving party is entitled to judgment as a matter of law, and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing the evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the nonmoving party."

{¶ 18} The moving party carries the initial burden of providing specific facts that demonstrate its entitlement to summary judgment. *Dresher v. Burt*, 75 Ohio St.3d 280, 1996-Ohio-107, 662 N.E.2d 264. If the movant fails to meet this burden, summary judgment is not appropriate. Id. On the other hand, if the movant does meet this burden, summary judgment is only appropriate if the nonmovant fails to establish the existence of a genuine issue of material fact. Id.

{¶ 19} With regard to the substantive law, R.C. 2743.48 provides in relevant part:

{¶ 20} "(A) As used in this section and section 2743.49 of the Revised Code, a 'wrongfully imprisoned individual' means an individual who satisfies each of the following:

{¶ 21} "(1) The individual was charged with a violation of a section of the Revised Code by an indictment or information prior to, or on or after, September 24, 1986, and the violation charged was an aggravated felony or felony.

{¶ 22} "(2) The individual was found guilty of, but did not plead guilty to, the particular charge or a lesser-included offense by the court or jury involved, and the offense of which the individual was found guilty was an aggravated felony or felony.

{¶ 23} "(3) The individual was sentenced to an indefinite or definite term of imprisonment in a state correctional institution for the offense of which the individual was found guilty.

{¶ 24} "(4) The individual's conviction was vacated or was dismissed, or reversed on appeal, the prosecuting attorney in the case cannot or will not seek any further appeal of right or upon leave of court, and no criminal proceeding is pending, can be brought, or will be brought by any prosecuting attorney, city director of law, village solicitor, or other chief legal officer of a municipal corporation against the individual for any act associated with that conviction.

{¶ 25} "(5) Subsequent to sentencing and during or subsequent to imprisonment, an error in procedure resulted in the individual's release, or it was determined by a court of common pleas that the offense of which the individual was found guilty, including all lesser-included offenses, either was not committed by the individual or was not committed by any person."

{¶ 26} There can be no dispute that appellant is able to satisfy R.C. 2743.48(A)(1) through (4). We, however, agree with the trial court that appellant is unable to establish R.C. 2743.48(A)(5).

{¶ 27} Appellant maintains that he is innocent of the lesser included offense of criminal trespass because his presence on the premises was a simple mistake of fact, and he believed he was in his own home. He argues that the requisite mental state of knowingly is missing from the crime of criminal trespass because he was intoxicated and did not enter the house "knowingly."

{¶ 28} In *State v. Stockhoff*, Butler App. No. CA2001-07-179, 2002-Ohio-1342, the twelfth district was presented with a similar argument as appellant posits here. In finding that voluntary intoxication is not a defense negating the mens rea of an offense, the court stated the following:

{¶ 29} "Trespass is prohibited by R.C. 2911.21(A)(1), which provides that '[n]o person, without privilege to do so, shall * * * [k]nowingly enter or remain on the land or premises of another[.]' Accordingly, in order to establish the trespass element of burglary, the state was required to present evidence that appellant acted with a 'knowing' mental state. Appellant contends that he was unable to form the requisite mental state due to his voluntary intoxication.

{¶ 30} "In Ohio, prior to October 2000, evidence of voluntary intoxication was available as an affirmative defense in instances where a defendant was charged with a specific intent crime and could demonstrate that he was 'so intoxicated as to be mentally unable to intend anything.' *State v. Otte* (1996), 74

Ohio St.3d 555, 564, 660 N.E.2d 711. However, pursuant to R.C. 2901.21(C), as amended effective October 27, 2000, 'voluntary intoxication may not be taken into consideration in determining the existence of a mental state that is an element of a criminal offense.' Accordingly, the defense of voluntary intoxication is no longer applicable." *State v. Stockhoff*, Butler App. No. CA2001-07-179, 2002-Ohio-1342.

{¶ 31} For the same reasons provided in *Stockhoff*, supra, we find there is no genuine issue of material fact, and the State is entitled to judgment as a matter of law. In this case, a lesser included offense of burglary is criminal trespass. Despite appellant's assertions to the contrary, the defense of mistake due to voluntary intoxication does not negate the necessary element of "knowingly" contained in the offense of criminal trespass. Accordingly, because reasonable minds can come to but one conclusion, that being that appellant is unable to establish the requirements in R.C. 2743.48(A)(5), we affirm the trial court's granting of summary judgment in favor of the State.

Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

ANN DYKE, JUDGE

FRANK D. CELEBREZZE, JR., J., CONCURS IN JUDGMENT ONLY;
PATRICIA ANN BLACKMON, P.J., CONCURS IN JUDGMENT ONLY
(SEE ATTACHED CONCURRING OPINION)

PATRICIA ANN BLACKMON, J., CONCURRING:

{¶ 32} I concur in judgment only and write separately because I believe that voluntary intoxication is a defense to negate the specific intent of “knowingly” and “purposely.” See *State v. Snowden* (1982), 7 Ohio App.3d 358, 363, 455 N.E.2d 1058.

{¶ 33} However, appellant cannot show that he is not guilty of the reckless element of the criminal trespass offense. Consequently, he cannot show that he is innocent of criminal trespass. Judgment of the trial court should be affirmed.