[Cite as *Bay v. Ohio Dept. of Rehab. & Corr.*, 2004-Ohio-3809.]

IN THE COURT OF CLAIMS OF OHIO

JAMES M. BAY :

Plaintiff : CASE NO. 2002-07231
Judge Fred J. Shoemaker

v. :

DECISION

OHIO DEPARTMENT OF REHABILITATION AND CORRECTION :

:

Defendant

: : : : : : : : : : : : : : : : :

{¶1} Plaintiff brought this action against defendant, Department of Rehabilitation and Correction (DRC), alleging a claim of false imprisonment. The issues of liability and damages were bifurcated and the case proceeded to trial on the issue of liability.

{¶2} Plaintiff alleges that defendant incarcerated plaintiff beyond his lawful term. The tort of false imprisonment is defined as an intentional confinement of an individual in the absence of an intervening justification, despite knowledge that the privilege initially justifying the confinement no longer exists. *Bennett v. Ohio Dept. of Rehab. and Corr.* (1991), 60 Ohio St.3d 107. Defendant counters that it had an absolute privilege to confine plaintiff in accordance with a sentencing order imposed by the Clermont County Court of Common Pleas.

{¶3} Plaintiff did not dispute that he committed the offenses for which he was sentenced. The primary issue presented to the court was whether or not defendant properly calculated plaintiff's expiration-of-sentence date (ESD).

{¶4} Plaintiff testified that he was indicted in 1998 on two charges, theft and tampering with records. Count One of the indictment charged plaintiff with a violation of R.C. 2913.02(A)(3), the theft of property or services valued at between $500 and $5,000

from March to August 1996. Count Two of the indictment charged plaintiff with tampering in violation of R.C. 2913.42(A)(1) which plaintiff committed in January 1997. Plaintiff explained that because his criminal acts spanned a period of time prior to and after July 1996 when the sentencing guidelines were revised by Am.Sub.S.B. No. 2 (S.B. 2), the judge crafted a "hybrid sentence" such that the judge sentenced him to serve one year under the applicable sentencing guidelines for Count One and for Count Two sentenced him to a stated prison term of nine months pursuant to the revised guidelines.

{¶5} Plaintiff contends that defendant should have read the language in the sentencing entry in conjunction with the Ohio Administrative Code (Ohio Adm.Code) Section 5120-2-032, in order to properly execute the sentence that the judge intended. The October 1998 sentencing entry for the case, 98-CR-005077, signed by Judge McBride, contains the following language:

{¶6} "As to Count #2 the Court finds that the Defendant has been convicted of Ct. #2: Tampering With Records contrary to and in violation of Section 2913.42(A) (1) of the Revised Code, a felony of the fifth degree subject to division (B) of Section 2929.13 of the Ohio Revised Code.

{¶7} "The Court has considered the factors under 2929.13 (B) and finds that the following factors apply:

{¶8} "The offender previously was subject to a community control sanction, and the offender committed another offense while under the sanction.

{¶9} "For reasons stated on the record, and after consideration of the factors under Revised Code Section 2929.12, the Court finds that prison is consistent with the purposes of Revised Code Section 2929.11; that community control sanctions are not consistent with the purposes of Revised Code Section 2929.11; and that the Defendant is not amenable to available community control sanctions.

{¶10} "IT IS THEREFORE ORDERED, that the Defendant shall serve a stated prison term of nine (9) months as to Ct. #2.

{¶11} "As to Count #1 the Defendant shall serve one (1) year in prison, to be served concurrently to Ct. #2." (Joint Exhibit B, emphasis in the original.)

{¶12} The Ohio Adm.Code section reads as follows:

{¶13} 5120-2-032 Determination of multiple sentences or prison terms with an offense committed before July 1, 1996 and an offense committed on or after July 1, 1996.

"(A) Definitions "(1) Prison term: For purposes of this rule, *prison term* refers to prison terms imposed for offenses committed on or after July 1, 1996, to be served with the department of rehabilitation and correction. "(2) Sentence: For purposes of this rule, *sentence* refers to prison terms imposed for offenses committed before July 1, 1996, to be served with the department of rehabilitation and correction. "(B) This rule applies when an offender is serving a term of imprisonment for more than one felony and at least one of the felonies was committed prior to July 1, 1996, and at least one of the felonies was committed on or after July 1, 1996. In such situations, two different sets of laws apply and the terms of imprisonment for each felony may be subject to different amounts of reduction for jail time credit. The determination of the length and expiration of the term of imprisonment for each felony must be determined in accordance with the set of laws in effect at the time the felony was committed. These mixed cases will be hereinafter referred to as 'hybrids.' "(C) When a prison term for a crime committed on or after July 1, 1996, is imposed to run concurrently to a crime committed before July 1, 1996, the expiration date of each term of imprisonment must be determined independently in accordance with the appropriate set of laws. The expected expiration of the term for the crime committed on or after July 1, 1996 in most cases will be determined by diminishing the term by jail credit. The expected expiration of the crime committed before July 1, 1996 in most cases will be determined by diminishing the sentence by good time and jail credit. The sentence with the latest expiration date becomes the controlling sentence regarding the offender's expected release. "(D) During the period of imprisonment, the offender may be able to reduce each term by the appropriate amount of earned credit. In addition, the sentence is subject to loss of good time and the prison term is subject to the imposition of bad time and loss of earned credit. Due to such differences, the controlling term can change during the period of imprisonment. Therefore, the expiration date of each term of imprisonment must be determined independently each time there is any reduction

or increase in either term. The offender cannot be released until both the prison term and the sentence have expired; that is, until the term of imprisonment with the latest expiration date has expired. "(E) When a prison term for a crime committed on or after July 1, 1996, is imposed to run consecutively to a sentence for a crime committed before July 1, 1996, the sentence shall be served first, then the prison term. "(F) While the sentence is being served, the offender may be able to reduce the sentence by up to seven days per month of earned credit, and is subject to a potential loss of good time. Upon the expiration of the sentence, the prison term shall be served. While the prison term is being served, the offender may be able to reduce the prison term by one day per month of earned credit and is subject to loss of earned credit and the imposition of bad time." (Emphasis added.) (Plaintiff's Exhibit 2.) Plaintiff points out that Judge McBride's use of the words "stated prison term" for Count Two indicates he is sentencing plaintiff for a crime committed after July 1, 1996, and that when Judge McBride sentenced him "to serve one (1) year in prison" for Count One he fashioned the sentence so that it applied to conduct that took place prior to July 1, 1996. Plaintiff explained that this meant that he was still eligible to reduce his time served for Count One by earning good-time credit, and as such, his sentence would be reduced from one year to eight months and 14 days. According to plaintiff, Count One thus became the lesser sentence and would necessarily be served concurrent to the nine-month sentence. Plaintiff acknowledged that he was required to serve the full stated prison term for Count Two, nine months, minus any jail-time credit.

{¶14} Plaintiff informed the court that he arrived at DRC on December 16, 1998, and that subsequently he was awarded 52 days of jail-time credit. In addition, plaintiff argued that defendant improperly calculated the ESD under the mistaken belief that plaintiff was required to serve a definite sentence of one year concurrently with the nine-month sentence and that, as a result of this mistake, he was not released until October 24, 1999.

{¶15} Plaintiff advised the court that he notified defendant in writing of the error regarding his ESD but stated that his efforts were in vain. Indeed, he went so far as to

petition the sentencing court for a clarification and in December 1999, two months after plaintiff was released, Judge McBride filed a nunc pro tunc entry identifying Count One as a violation of former R.C. 2913.02(A)(3) and stating that the sentence for Count One was in accordance with pre-S.B. 2 law.

{¶16} Defendant acknowledged that it was responsible for calculating an inmate's ESD; that this was accomplished by reviewing the indictment and the journal entry; and that its personnel were trained to look at the degree of felony and the corresponding length of sentence to determine if the sentence conformed to the guidelines. Defendant also explained that under S.B. 2, a reduction of the prison term for good-time is no longer available to inmates who are sentenced for crimes committed on or after July 1, 1996. According to defendant, an inmate may reduce his sentence by earning credit for attending school or other programs offered in the institution. However, that type of credit cannot be earned until the inmate has resided in the parent institution for at least one month. In addition, defendant confirmed that plaintiff was granted 52 days of jail-time credit and stated that jail-time credit accumulates from the date of sentencing to the day the inmate is conveyed to the institution. Defendant noted that the judge had discretion to sentence plaintiff under either the old or the new law.

{¶17} Although the court's original sentencing entry did not specifically state that the sentence for Count One corresponded to the old law, plaintiff nevertheless contends that defendant knew or should have known that the theft offense could never rise to the level of a fourth degree felony under the new law because the amount in controversy did not exceed $5,000. Plaintiff referred to the statutory language for R.C. 2913.02 which states, in pertinent part, as follows: "(A) No person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either the property or services in any of the following ways: *** "(B) Whoever violates this section is guilty of theft. Except as otherwise provided in this division, ***. If the value of the property or services stolen is five hundred dollars or more and is less than five thousand dollars ***, a violation of this section is theft, a felony of the fifth degree. If the value of the property or services stolen is five thousand dollars or more and is less than one hundred thousand dollars, if the

property stolen is a firearm or dangerous ordnance, as defined in section 2923.11 of the Revised Code, a violation of this section is grand theft, a felony of the fourth degree."

{¶18} Defendant responded to plaintiff's argument by contending that it was not required to review the indictment to determine if the inmate was properly charged under the criminal code; it merely checked to see that the degree of offense corresponded to the sentence imposed. Defendant also noted that had plaintiff been charged with a fourth degree felony under the prior version of the statute, pursuant to former R.C. 2913.02(B), the range for the value of the property or services stolen would have been $300 to $5,000, not $500 to $5,000 as listed in the indictment.

{¶19} Defendant asserted that in this instance Judge McBride's entry appeared to correspond to S.B. 2 and that it did not contain any obvious errors. Defendant stated specifically that for Count One, a one-year definite sentence is consistent with S.B. 2. Indeed, defendant insisted that if Judge McBride had sentenced plaintiff under pre-S.B. 2 guidelines, plaintiff would have received an indefinite sentence. Defendant references the language of former R.C. 2929.11(B)(7) which states that for a felony of the fourth degree, "the minimum term shall be eighteen months, two years, thirty months, or three years, and the maximum term shall be five years." Defendant argued that under the old law, plaintiff would not have been entitled to a definite sentence because plaintiff had a prior conviction for domestic violence. Defendant relies on the language of former R.C. 2929.11(D) which states that "[w]hoever is convicted of or pleads guilty to a felony of the third or fourth degree and did not, during the commission of that offense, cause physical harm to any person or make an actual threat of physical harm to any person with a deadly weapon, as defined in section 2923.11 of the Revised Code, and who has not previously been convicted of an offense of violence shall be imprisoned for a definite term, and, in addition, may be fined or required to make restitution." In further support of its position that the sentence conformed to S.B. 2, defendant points to the sentencing entry language that states plaintiff violated prior community control sanctions. Defendant posits that this statement shows that the judge was referencing the earlier domestic violence conviction.

{¶20} However, the court does not find this argument to be particularly persuasive in light of the restrictions contained in former R.C. 2941.143 which refers to sentencing upon a second conviction where either offense was one of violence. Pursuant to this section, "[i]mposition of an indefinite term pursuant to division (B)(6) or (7) of section 2929.11 of the Revised Code is precluded unless the indictment, count in the indictment, or information charging the offense specifies *** that the offender has previously been convicted of or pleaded guilty to an offense of violence. Such a specification shall be stated at the end of the body of the indictment, count, or information and shall be in substantially the following form ***." The court concludes that inasmuch as the indictment for Counts One and Two does not contain an R.C. 2941.143 specification concerning the domestic violence conviction, the trial court would have been bound by former R.C. 2929.11(D) to impose a definite sentence of incarceration as set forth in former R.C. 2929.11(D). See *State v. Hawes* (1996), 113 Ohio App.3d 777. This court specifically finds that any reference by Judge McBride to prior community control sanctions merely acknowledged the judge's intent to sentence plaintiff to a term of imprisonment and explained why, in the judge's view, plaintiff would not be entitled to community control for the offenses.

{¶21} Upon review of the testimony and evidence presented, the court finds that the language in the sentencing entry created problems for both plaintiff and defendant. The court finds that the entry contained many mistakes and inconsistencies and that when read in conjunction with the indictment, the judgment entry raised a serious question as to whether the sentence was indeed a hybrid, spanning two distinct versions of law. The court finds that defendant erred when it failed to recognize that the circumstances surrounding plaintiff's conviction provided for a hybrid sentence. Pursuant to Ohio Adm.Code 5120-2-04(H), in reference to jail-time credit, "if the determination of the sentencing court appears to be erroneous or if a prisoner brings information to the attention of the Adult Parole Authority that causes the Adult Parole Authority to question the accuracy of the determination, the Adult Parole Authority shall address its concerns to the sentencing court." At trial, plaintiff testified quite credibly that he sent more than one

"kite" to defendant and its records department during his incarceration questioning their interpretation of the sentencing entry. Accordingly, the court further finds that defendant erred when it failed to contact the sentencing judge for clarification after plaintiff questioned the release date calculated by defendant.

{¶22} In *State ex rel Corder* (1991), 68 Ohio App.3d 567, 572, the court stated that "[t]he law has been and is still clear that, although the Adult Parole Authority is the body who credits the time served, it is the sentencing court who makes the determination as to the amount of time served by the prisoner before being sentenced to imprisonment in a facility under the supervision of the Adult Parole Authority." While the ruling in *Corder*, supra, does restrict defendant's discretion in interpreting the trial court's order, the constraint is limited to the application of the number of days allowed under R.C. 2967.191 for jail-time credit. It does not absolve defendant of its obligation to ascertain the accurate ESD. See *Stroud v. Dept. of Rehab. and Corr.*, Franklin App. No. 03AP-139, 2004-Ohio-580. The court finds that defendant had an affirmative duty to petition the judge to set forth whether the sentence for each count was levied pursuant to S.B. 2. Once the judge sentenced plaintiff under the previous code section, defendant had no authority to change the sentence to a S.B. 2 sanction. See *Corder*, at 574.

{¶23} For the foregoing reasons, the court finds that defendant confined plaintiff without reason to do so and judgment shall be rendered in favor of plaintiff. Inasmuch as the court finds that plaintiff was falsely imprisoned and is entitled to compensation in an amount to be determined, a trial on the issue of damages shall be scheduled in the normal course.

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JAMES M. BAY :

Plaintiff : CASE NO. 2002-07231
Judge Fred J. Shoemaker

v. :
JUDGMENT ENTRY
OHIO DEPARTMENT OF :
REHABILITATION AND CORRECTION
:
Defendant

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This case was tried to the court on the issue of liability. The court has considered the evidence and, for the reasons set forth in the decision filed concurrently herewith, judgment is rendered in favor of plaintiff in an amount to be determined after the damages phase of the trial. The court shall issue an entry in the near future scheduling a date for the trial on the issue of damages.

FRED J. SHOEMAKER
Judge

Entry cc:

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Filed June 22, 2004
To S.C. reporter July 19, 2004