

[Cite as *Dempsey v. State*, 2010-Ohio-5134.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94315

JACK M. DEMPSEY

PLAINTIFF-APPELLANT

VS.

STATE OF OHIO

DEFENDANT-APPELLEE

JUDGMENT:
AFFIRMED IN PART, REVERSED IN PART,
AND REMANDED

Civil Appeal from the
Cuyahoga County Common Pleas Court
Case No. CV-651225

BEFORE: Boyle, J., Gallagher, A.J., and Jones, J.

RELEASED AND JOURNALIZED: October 21, 2010

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MARY J. BOYLE, J.:

{¶ 1} Plaintiff-appellant, Jack Dempsey, filed the underlying declaratory judgment, seeking a declaration that he was a wrongfully imprisoned individual pursuant to R.C. 2743.48, following his acquittal of aggravated arson and burglary. Both Dempsey and the defendant-appellee, State of Ohio, filed cross motions for summary judgment. Dempsey now appeals from the lower court's decision granting the State's motion for summary judgment and denying his

motion. As discussed below, we find that material issues of fact exist that preclude the granting of summary judgment for either party. We therefore find some merit to the appeal and reverse the trial court's granting of the State's motion but affirm its denial of Dempsey's motion.

Procedural History and Facts

{¶ 2} In 1996, Dempsey was convicted of aggravated arson and burglary and sentenced to concurrent indeterminate sentences of 10 to 25 years for aggravated arson and 3 to 15 years for burglary. Dempsey appealed his conviction and sentence, which were both ultimately upheld. See *State v. Dempsey* (Nov. 20, 1997), 8th Dist. No. 71479; *State v. Dempsey*, 83 Ohio St.3d 107, 1998-Ohio-497, 698 N.E.2d 977.

{¶ 3} In October 2001, Dempsey filed a petition for a writ of habeas corpus in federal district court after his attempt to seek relief through a petition for postconviction relief had failed in state court. See *State v. Dempsey* (June 15, 2000), 8th Dist. No. 76386 (upholding the trial court's denial of petition for postconviction relief). The sole basis for his writ of habeas corpus was that his trial counsel was ineffective for failing "to properly investigate, interview, locate, and present the testimony of material witnesses who would have corroborated the defense's theory" and Dempsey's testimony. *Dempsey v. Bobby* (N.D. Ohio 2005), 412 F.Supp.2d 720, 726. Finding that his claim was not barred by the doctrine of res judicata and that he was denied effective assistance of trial

counsel, the federal district court ultimately (four years later) granted a conditional writ of habeas corpus, resulting in the vacation of Dempsey's conviction and sentence. *Id.* at 732.

{¶ 4} We adopt the recitation of the events surrounding the fire that led to the charges against Dempsey as set forth in the federal district court's opinion and this court's decision on his direct appeal as follows:¹

{¶ 5} "On March 11, 1995, shortly before 11:00 p.m., a fire broke out at 11202 Lorain Avenue in Cleveland, Ohio. Cleveland firefighters managed to 'knock down' the fire within twenty or thirty minutes and to eventually extinguish it completely, but not before it had extensively damaged the building. Suspecting arson, Chief Paul Marks of the Cleveland Fire Department called two arson investigators, who arrived on the scene at about 11:40 p.m. The arson investigators noted, among other things, signs of forced entry and two points of origin for the fire on the first floor, ruled out accidental sources of the fire, and concluded that the fire may have been intentionally set. Subsequently, Chief Marks ordered a firefighter to look for the electrical shut-off in the basement. Upon reaching the basement, the firefighter entered a room and discovered * * * Jack Dempsey lying unconscious on his stomach with his

¹ Both parties filed cross motions for summary judgment and stipulated that references may be made to any fact or evidence contained in any criminal, civil, and appellate proceeding, trial transcripts, depositions, medical records, fire and police investigative records, and the expert report of Richard Stripp, Ph.D.

shirt pulled up. Mr. Dempsey was rushed to the hospital and treated for severe smoke inhalation. Although he was eventually released from the hospital on March 21, 1995, Mr. Dempsey continues to suffer from severe memory loss causing him to forget, among other things, many of the events surrounding the fire.” *Dempsey*, 412 F.Supp.2d at 723-724.

{¶ 6} In August 2007, the State retried Dempsey on the same charges. Dempsey maintained the same theory that he advanced in his first trial, arguing that someone drugged him and left him at the scene of the fire. According to Dempsey, on the evening of the fire, he had gone to the Dollhouse, a strip club, to do a favor for his friend, Jean Tomusko; specifically, he went there to see if one of its bouncers and Tomusko’s former boyfriend, Steve Gallegos, was still working there.² But when he first arrived at the bar, it was not yet open so Dempsey went to another strip club where he had a couple of beers, waiting for the Dollhouse to open. He then returned to the Dollhouse a short time later and ordered a nonalcoholic beer from Gallegos. After drinking the beer, Dempsey immediately felt strange and suspected that someone put something in his drink. Although he did not remember leaving the bar, Dempsey testified that his last memories of the evening were being in a strange room with

²Tomusko sought to have Gallegos fired and investigated by the authorities after he propositioned her daughter to dance at the bar. Tomusko also suspected Gallegos of being involved in prostitution. Dempsey agreed to stop by the bar and determine whether Gallegos was still on staff. Although Tomusko did not testify at either of Dempsey’s trials, she did testify in a deposition for purposes of this civil case.

Gallegos and Gallegos putting something in his eye, possibly with a syringe. He then has a vague and partial memory of being surrounded by fire.

{¶ 7} At his retrial, Dempsey also emphasized the implausibility of him having broken into the building through the rear door, given that he had no cuts on him and the difficulty the firemen had in entering through that door.

{¶ 8} Conversely, the State maintained its same theory, i.e., that Dempsey broke into the building, set fires in two different places, entered the basement to look for an exit, became trapped in the basement, and then passed out from the smoke. This time, the jury found Dempsey not guilty of aggravated arson and burglary.

{¶ 9} Following his acquittal, Dempsey commenced this underlying action, pursuant to R.C. 2743.48 and 2305.02, seeking an order declaring him to have been a wrongfully imprisoned person. Both parties moved for summary judgment, which the trial court initially denied but later reconsidered and granted the State's motion on November 2, 2009, thereby finding that Dempsey was not a wrongfully imprisoned person as a matter of law. Dempsey now appeals, raising the following single assignment of error:

{¶ 10} "The trial court erred in denying plaintiff-appellant's motion for summary judgment and granting defendant-appellee's motion for summary judgment when all testimonial and physical evidence in the record supports

plaintiff-appellant's motion, there is no contradictory evidence, and there is no evidence (only conjecture) to support the defendant-appellee's motion."

Standard of Review

{¶ 11} We review an appeal from summary judgment under a de novo standard. *Baiko v. Mays* (2000), 140 Ohio App.3d 1, 10, 746 N.E.2d 618. Accordingly, we afford no deference to the trial court's decision and independently review the record to determine whether summary judgment is appropriate. *N.E. Ohio Apt. Assn. v. Cuyahoga Cty. Bd. of Commrs.* (1997), 121 Ohio App.3d 188, 192, 699 N.E.2d 534.

{¶ 12} 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." *State ex rel. Duganitz v. Ohio Adult Parole Auth.* (1996), 77 Ohio St.3d 190, 191, 672 N.E.2d 654.

{¶ 13} The moving party carries an initial burden of setting forth specific facts that demonstrate his or her entitlement to summary judgment. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 292-293, 662 N.E.2d

264. If the movant fails to meet this burden, summary judgment is not appropriate, but if the movant does meet this burden, summary judgment will be appropriate only if the nonmovant fails to establish the existence of a genuine issue of material fact. *Id.* at 293.

Determination of Innocence

{¶ 14} Dempsey’s single claim arises under R.C. 2743.48, which allows an action against the State for the express purpose of providing compensation to innocent persons who have been wrongfully convicted and incarcerated for a felony. A “wrongfully imprisoned individual” is defined in R.C. 2743.48(A) as an individual who satisfies the following requirements:

{¶ 15} “(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.

{¶ 16} “(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.

{¶ 17} “(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.

{¶ 18} “(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.

{¶ 19} “(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.”

{¶ 20} The State concedes that Dempsey has established the first four elements; the only element in dispute is the final one. Thus, to successfully obtain a declaration that he was a wrongfully imprisoned individual, Dempsey bears the burden of affirmatively proving, by a preponderance of the evidence, his innocence of the two crimes that he was convicted of, namely, aggravated arson and burglary, as well as the lesser-included offense of criminal trespass. See *Walden v. State* (1989), 47 Ohio St.3d 47, 52, 547 N.E.2d 962. And the mere fact that Dempsey was acquitted of these charges does not alone establish his innocence. Indeed, “[e]vidence insufficient to prove guilt beyond a reasonable doubt does not necessarily prove innocence by a preponderance of

the evidence.” *Ratcliff v. State* (1994), 94 Ohio App.3d 179, 182, 640 N.E.2d 560.

{¶ 21} In his sole assignment of error, Dempsey argues that the uncontroverted facts establish that he is innocent of aggravated arson, burglary, and criminal trespass, thereby entitling him to summary judgment. Before addressing the merits of his argument, we initially note that Dempsey relies on some stipulations that he claims were reached at a final pretrial before the court and are attached to his Civ.R. 60(B) motion. But these stipulations were never made a part of the record nor properly before the trial court when it issued its judgment on November 2, 2009. Dempsey cannot attack the final judgment of the trial court in a direct appeal with documents attached to a pending Civ.R. 60(B) motion. See *Russell v. Russell* (July 24, 1985), 2d Dist. No. 2039. Indeed, we may review only what was before the trial court at the time it issued the order being appealed. *Chickey v. Watts*, 10th Dist. Nos. 04AP-818 and 04AP-1269, 2005-Ohio-4974, ¶14 (“Appellate review is limited to the record as it existed at the time the trial court rendered its judgment.”). We therefore cannot consider these purported stipulations on appeal and limit our review to only the evidentiary materials attached to the parties’ motions for summary judgment.

{¶ 22} Dempsey moved for summary judgment advancing two arguments: (1) that the uncontested facts demonstrate that he could not have entered the building of his own volition because it would have been impossible for him to

have entered the building through any of the secured entrances, including the rear door, and (2) that his contention of what happened is supported by corroborating witnesses and the toxicology reports reflecting that Dempsey had morphine, benzodiazepines, and alcohol in his system at the hospital following the fire.

{¶ 23} Dempsey relied on several evidentiary materials in support of his arguments, including, among others, the fire investigation report describing the condition of the entrances, specifically, the rear door; the deposition testimony of the owner of the building describing the near impossibility of entering the rear door through the glass; and the testimony of the fireman that first responded to the scene. Dempsey essentially argued that the State's theory that he forcibly entered the building, as testified to by Chief Marks, is overwhelmingly refuted by the other evidence in the record. He further relied on (1) the deposition testimony of his friend, Tomusko, who corroborated that he did go to the Dollhouse on the night of the fire to investigate Gallegos and (2) the deposition testimony and affidavits of a dancer from the Dollhouse who recalls Gallegos directing her to serve Dempsey a drink the night of the fire, that Dempsey asked her if someone put something in the drink, and that thereafter Gallegos and another man helped escort Dempsey out of the Dollhouse but that Gallegos did not return for nearly an hour after that. The dancer further testified that an

unclaimed set of keys with a key ring matching the description of Dempsey's key ring was found in the Dollhouse shortly after the time of the fire.

{¶ 24} But Dempsey's contention that this evidence proves that he lacked the requisite mens rea to commit any crime and that he was unwillingly placed inside the building, thereby establishing his innocence, places the credibility of Dempsey, as well as his corroborating witnesses, at issue and requires a weighing of the evidence. Under such circumstances, summary judgment is not appropriate. As explained by the Tenth District in *Killilea v. Sears, Roebuck & Co.* (1985), 27 Ohio App.3d 163, 167, 499 N.E.2d 1291:

{¶ 25} "Resolution of a motion for summary judgment does not include trying the credibility of witnesses. If an issue is raised on summary judgment, which manifestly turns on the credibility of the witnesses because his testimony must be believed in order to resolve the issue, and the surrounding circumstances place the credibility of the witness in question — for example, where the potential for bias and interest is evident — then, the matter should be resolved at trial, where the trier of facts has an opportunity to observe the demeanor of the witness."

{¶ 26} Indeed, even if the trial court agreed that the record conclusively establishes that Dempsey could not have forcibly entered the building, the fact remains that he was found in the building without having any permission to be there. Although he contends that he was unwillingly placed there, a reasonable

trier of fact may find otherwise, which would then negate his claim that he is innocent of the lesser-included offense of criminal trespass.¹ Moreover, contrary to Dempsey's contention, the facts are not uncontroverted. For example, the issues of whether Dempsey forcibly entered the building, whether he was totally incapacitated at the time of the fire, the timing of when he ingested the drugs, and whether it was done involuntarily were disputed at trial. Indeed, the resolution of these issues requires a weighing of the evidence — a function reserved for a jury. See *Walker v. State*, 5th Dist. No. 2007CA00037, 2007-Ohio-5262. Accordingly, given these disputed issues that must be resolved by the trier of fact, we find that the trial court properly denied Dempsey's motion for summary judgment.

{¶ 27} Conversely, however, we find that these issues of fact render the granting of the State's motion for summary judgment improper. We disagree with the State's contention that Dempsey's entire case hinges on speculation. Here, Dempsey's story, although bizarre and extraordinary, if believed by a jury would negate the requisite mens rea for any of the offenses. In other words, if the jury found that Dempsey was involuntarily placed in the building after being heavily drugged and rendered unconscious, then he could not have knowingly committed any of the offenses. And given that Dempsey offers some

¹R.C. 2911.21 governs the offense of criminal trespass and provides in pertinent part: "No person, without privilege to do so, shall * * * enter or remain on the land or premises of another."

corroboration as to his claim that he was involuntarily drugged immediately preceding the fire, we find that the resolution of these issues rests with a jury. Accordingly, as a matter of law, this matter cannot be resolved by way of summary judgment on behalf of either party.

{¶ 28} Dempsey's single assignment of error is affirmed in part and reversed in part.

Judgment affirmed in part, reversed in part, and remanded to the lower court for further proceedings consistent with this opinion.

It is ordered that appellee and appellant share the 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.

MARY J. BOYLE, JUDGE

SEAN C. GALLAGHER, A.J., and
LARRY A. JONES, J., CONCUR