

[Cite as *Spencer v. Ohio State Adult Parole Auth.*, 2009-Ohio-4656.]

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Claude Spencer,	:	
	:	
Plaintiff-Appellant,	:	
	:	No. 09AP-143
v.	:	(C.P.C. No. 08CVH-10-14487)
	:	
Ohio State Adult Parole Authority,	:	(ACCELERATED CALENDAR)
	:	
Defendant-Appellee.	:	

D E C I S I O N

Rendered on September 8, 2009

Claude Spencer, pro se.

Richard Cordray, Attorney General, and *Ashley D. Rutherford*,
for appellee.

APPEAL from the Franklin County Court of Common Pleas.

BRYANT, J.

{¶1} Plaintiff-appellant, Claude Spencer, appeals from a judgment of the Franklin County Court of Common Pleas granting the Civ.R. 12(B)(6) motion to dismiss of defendant-appellee, Ohio State Adult Parole Authority. Because (1) plaintiff failed to comply with the requirements of R.C. 2969.25, and (2) plaintiff's complaint fails to state a claim on which relief may be granted, we affirm.

I. Procedural History

{¶2} On October 9, 2008, plaintiff filed a complaint for declaratory judgment and injunctive relief alleging that at the conclusion of his parole board hearing in April 2008, defendant arbitrarily and capriciously recommended his imprisonment continue to at least May 1, 2013.

{¶3} According to plaintiff's complaint, he entered a guilty plea to one count of murder on December 24, 1992 and was sentenced to imprisonment of 15 years to life. Plaintiff's complaint alleges that, despite a parole board hearing on November 18, 2002, he was recalled to the parole board on July 18, 2003 for a "Layne Hearing" to assign him "the category score that corresponds to the offense of conviction." (Complaint, ¶6.) As a result, the parole board reclassified plaintiff from Category 13 to "the proper Category of 11, for the Murder conviction that was encompassed in his plea." (Complaint, ¶7.) The reclassification changed plaintiff's "Guideline Range" for release eligibility from 300-to-life to 180-to-240 months of incarceration. (Complaint, ¶9.)

{¶4} Plaintiff's complaint asserts he returned to the parole board on October 10, 2005. Although plaintiff still was classified in "category 11, Guideline Range 2028" at that time, his guideline for release eligibility was changed to zero to 240 months, and he was continued until February 1, 2008. (Complaint, ¶12, 13.) In February 2008, plaintiff again appeared before the parole board where his specific classification was changed from Category 11 to Category 13, and his "Guideline Section was changed from 2028, Murder to 201 the Section [for] Aggravated Murder." (Complaint, ¶14.) He was continued to April 1, 2008. When he appeared before the parole board in April 2008, plaintiff still was "Categorized in the 13, range of conviction and still was placed under Guideline Section

No. 201." (Complaint, ¶17.) As a result of the April hearing, plaintiff's next hearing before the parole board was continued to May 1, 2013.

{¶5} Plaintiff alleges his eligibility for parole now has "vanished, because the Parole Board has chosen to state that his range now is 0-to-0 months, meaning that [plaintiff] has no conceivable eligibility expectation." (Complaint, ¶21.) Plaintiff asserts "[a] strict reading of the 'New Law' Classification shows that Category 11, has been eliminated and homogenized into Category 13, **Aggravated Murder and Murder.**" (Complaint, ¶23.) According to the complaint, the parole board's actions show it "systematically placed [plaintiff] outside his previous category range, purposefully with the intent of depriving him his right to a meaningful hearing." (Complaint, ¶26.)

{¶6} Plaintiff asserts that in doing so, defendant acted capriciously and arbitrarily, exercising its discretion "afoul of statutory based parole eligibility standards and judicially sanctioned plea agreements." (Complaint, ¶28.) Plaintiff requested that the trial court order defendant to remove him from the classification in which it placed him and to return plaintiff for a new hearing in which he is placed in the proper category of conviction.

{¶7} On the same day plaintiff filed his complaint, he also filed a sworn single sheet of paper entitled "Prior Actions of Petition" and "Affidavit of Indigency," both noted to be in accordance with R.C. 2969.25. The document does not indicate it was served on defendant.

{¶8} In response to plaintiff's complaint, defendant filed a motion to dismiss pursuant to Civ.R. 12(B)(6). Accepting the allegations of plaintiff's complaint, along with its accompanying exhibits, defendant asserted the complaint demonstrated plaintiff received

meaningful consideration. In any event, defendant asserted, plaintiff failed to comply with the requirements of R.C. 2969.25, and his complaint therefore properly was dismissed.

{¶9} After plaintiff filed a response to defendant's motion, the trial court on January 14, 2009 issued a decision and entry granting the motion. The court determined plaintiff's classification "was not elevated for committing an offense for which he was not convicted or where the minimum sentence is greater than the sentence imposed by the trial court." Accordingly, the trial court concluded the complaint failed to allege that plaintiff was denied meaningful consideration under *Ankrom v. Hageman*, 10th Dist. No. 04AP-934, 2005-Ohio-1546 and *Layne v. Ohio Adult Parole Auth.*, 97 Ohio St.3d 456, 2002-Ohio-6719.

{¶10} In addition, the trial court noted R.C. 2969.25(A) requires an inmate, in commencing a civil action against a governmental entity or employee, to file an affidavit that lists each civil action or appeal the inmate filed in the past five years and to provide specific information regarding each action or appeal. Concluding plaintiff did not comply with the requirements at the time he commenced his civil action, the trial court dismissed plaintiff's complaint.

II. Assignments of Error

{¶11} Plaintiff appeals, assigning two issues, which we construe as his assigned errors:

FIRST ISSUE PRESENTED FOR REVIEW AND ARGUMENT

Does the trial Court Abuse its Discretion When It takes the time to Liberally Construe the Pleadings of the State (represented by the Attorney general Office), But does not

take the time to Liberally Construe the Pleadings of an Untrained Pro-se Litigant's Complaint.

SECOND ISSUE PRESENTED FOR REVIEW AND ARGUMENT

Did the trial court abuse its discretion when it disregarded the documented evidence submitted by Appellant that showed that he had submitted the necessary documentation to cover his application under Ohio Revised Code 2969.25.

For ease of discussion, we address the assignments of error out of order.

III. Second Assignment of Error – R.C. 2969.25

{¶12} Plaintiff's second assignment of error asserts the trial court erred in dismissing his complaint for failure to comply with R.C. 2969.25. Plaintiff contends the trial court disregarded the document he submitted showing compliance with the statutory requirements.

{¶13} R.C. 2969.25(A) specifies that "at the time an inmate commences a civil action or appeal against a government entity or employee, the inmate shall file with the court an affidavit" describing "each civil action or appeal of a civil action that the inmate has filed in the previous five years in any state or federal court." R.C. 2969.25(C) provides that "[i]f an inmate who files a civil action against a government entity or employee seeks a waiver of the prepayment of the full filing fees assessed by the court in which the action or appeal is filed," then "the inmate shall file with the complaint * * * an affidavit that the inmate is seeking a waiver of the prepayment of the court's full filing fees and an affidavit of indigency." The affidavit of waiver and indigency must contain a statement setting forth (1) the balance in the inmate's account "for each of the preceding six months, as certified

by the institutional cashier"; and (2) "all other cash and things of value owned by the inmate at the time."

{¶14} Here, when plaintiff filed his complaint, he also filed a sworn document bearing two titles: "Prior Actions Petition" and "Affidavit of Indigency." In the prior actions petition, plaintiff averred he had not filed any civil action in the state of Ohio in the past five years. While apparently not served on defendant, the affidavit itself comports with the statutory requirements.

{¶15} Plaintiff's affidavit of indigency does not. Although the affidavit states plaintiff has no means of financial support and no assets of any value, R.C. 2969.25(C)(1) requires that the affidavit include a statement setting forth the balance in the inmate's account for each of the preceding six months, along with the institutional cashier's certification of the statement. Plaintiff's affidavit fails to include either the balance in his account or the cashier's certification. Although plaintiff re-filed his sworn document with his response to defendant's Civ.R. 12(B)(6) motion to dismiss, the re-filed document contains nothing additional. The trial court correctly concluded plaintiff failed to comply with the requirements of R.C. 2969.25.

{¶16} The Supreme Court of Ohio stated "it is well-settled that ' "[t]he requirements of R.C. 2969.25 are mandatory, and failure to comply with them subjects an inmate's action to dismissal." ' " *State ex rel. Manns v. Henson*, 119 Ohio St.3d 348, 2008-Ohio-4478, ¶4, quoting *State ex rel. Ridenour v. Brunsman*, 117 Ohio St.3d 260, 2008-Ohio-854, ¶5, quoting *State ex rel. White v. Bechtel*, 99 Ohio St.3d 11, 2003-Ohio-2262, ¶5. Plaintiff's failure to comply fully with the requirements of R.C. 2969.25 subjects his complaint to dismissal.

{¶17} Because the trial court did not err in dismissing plaintiff's complaint for failure to comply with the requirements of R.C. 2969.25, plaintiff's second assignment of error is overruled.

IV. First Assignment of Error – Meaningful Review

{¶18} Plaintiff's first assignment of error addresses the merits of the trial court's determination. Plaintiff asserts the trial court erred in dismissing his complaint pursuant to Civ.R. 12(B)(6), as the court failed to liberally construe the complaint in plaintiff's favor. Plaintiff contends *Layne* and *Ankrom*, applied to the allegations of his complaint, require the trial court to grant the requested relief.

{¶19} In deciding whether to dismiss a complaint pursuant to Civ.R. 12(B)(6) for failure to state a claim upon which relief can be granted, the trial court must presume all factual allegations in the complaint are true and construe the complaint in the light most favorable to the plaintiff, drawing all reasonable inferences in favor of the plaintiff. *Mitchell v. Lawson Milk Co.* (1988), 40 Ohio St.3d 190, 192. Before the court may dismiss the complaint, it must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling the plaintiff to recovery. *O'Brien v. Univ. Community Tenants Union* (1975), 42 Ohio St.2d 242, syllabus.

{¶20} "There is no constitutional or inherent right to be released before the expiration of a valid sentence." *State ex rel. Miller v. Leonard*, 88 Ohio St.3d 46, 47, 2000-Ohio-267, cert. denied, 530 U.S. 1223, 120 S.Ct. 2236, citing *Greenholtz v. Inmates of Nebraska Penal & Corr. Complex* (1979), 442 U.S. 1, 7, 99 S.Ct. 2100, 2104; *Robertson v. Ohio Adult Parole Auth.*, 10th Dist. No. 01AP-1111, 2002-Ohio-4303, ¶33. An inmate that is denied parole is deprived of no protected liberty interest.

State ex rel. Hattie v. Goldhardt (1994), 69 Ohio St.3d 123, 125-26. See also *Miller* at 47 (observing that nothing in Am.Sub.S.B. No. 2 conferred a mandatory right to parole). "Rather, 'the OAPA's decision to grant or deny parole is an executive function involving a high degree of official judgment or discretion [and] [t]he discretionary authority in relation to parole eligibility and release given the OAPA, pursuant to R.C. 2967.01 et seq., has been properly delegated by the legislature.' " *Weatherspoon v. Mack*, 10th Dist. No. 07AP-1083, 2008-Ohio-2288, ¶13, quoting *Wright v. Ghee*, 10th Dist. No. 01AP-1459, 2002-Ohio-5487, ¶42.

{¶21} In *Layne*, the Ohio Supreme Court held that "[i]n any parole determination involving indeterminate sentencing, the Adult Parole Authority must assign an inmate the offense category score that corresponds to the offense or offenses of conviction." *Id.* at syllabus. Meaningful consideration is denied if "an inmate's offense of conviction is disregarded and parole eligibility is judged largely, if not entirely, on an offense category score that does not correspond to the offense or offenses of conviction set forth in the plea agreement." *Eubank v. Ohio Adult Parole Auth.*, 10th Dist. No. 05AP-274, 2005-Ohio-4356, ¶8.

{¶22} Applying *Layne*, this court in *Ankrom* determined meaningful consideration also was denied when one of two factors is present. The first involves an inmate "assigned an offense category under the guidelines that nominally corresponds to the inmate's offense of conviction" but "is 'elevated' based upon the parole board's independent determination that the inmate committed a distinct offense for which he was not convicted." *Id.* at ¶19. The second occurs when an inmate's "guidelines fail to give an inmate a meaningful possibility for parole as of the date of initial eligibility because the

lowest possible range for parole eligibility on the guidelines chart is beyond the date of initial parole eligibility." *Id.* at ¶18.

{¶23} Although plaintiff's complaint asserts he was misclassified into Category 13, the documents attached to his complaint belie his contentions. As Exhibit F explains, aggravated murder and murder were in separate offense categories in previous editions of the guidelines manual: "[m]urder was designated as a Category 11 or 12, with a corresponding guideline range reflecting a number of months at the high end of the range, instead of Life." (Exhibit F, 3.) Because both murder and aggravated murder involve a maximum sentence of life under the criminal sentencing laws, the offense of murder subsequently was reassigned to offense Category 13, thus reflecting life imprisonment at the high end of the range. The manual explains that "[b]y making this change, any previous impression or presumption that an offender convicted of Murder will be released after serving a definitive amount of time and will not have to serve Life is removed." (Exhibit F, 3.) Instead, under the new guidelines, "[t]he distinctions between the seriousness of the offenses will be addressed by the different minimum sentences required to be served before parole release eligibility, and when determining release suitability." (Exhibit F, 3.) Accordingly, plaintiff was not misclassified.

{¶24} Similarly, plaintiff's complaint, in the context of the documents attached to the complaint, undermines his contention he was denied meaningful consideration. Under the two-pronged *Ankrom* test, plaintiff was not assigned a classification for an offense for which he was not convicted; nor was he placed in a classification where the minimum time for parole eligibility exceeds the sentence the trial court imposed. Instead, he was classified in Category 13 because it includes all inmates who are serving a life sentence,

and at 187 months, or just over 15 years, he was afforded consideration for release before the parole board. That plaintiff was not granted release as a result of the parole hearing does not mean he was denied meaningful consideration. To the contrary, Exhibit D, attached to his complaint, indicates the rationale for denying him parole: "Inmate expresses appropriate remorse for the harm caused. However, this [murder] was a planned killing of a very innocent, unsuspecting individual. To release inmate at this time would demean the seriousness of this offense and would not promote the general welfare of society." See *Weatherspoon*, supra.

{¶25} In the final analysis, plaintiff has received that which he seeks in his complaint. Plaintiff's complaint requests that he be placed in the proper category or classification and be returned to the parole board for a new hearing. According to the complaint's attachments, plaintiff was placed in the proper category and was given a hearing based on that classification. Because plaintiff's allegations, coupled with the documents attached to his complaint, fail to state a claim upon which relief can be granted, plaintiff's first assignment of error is overruled.

{¶26} Having overruled plaintiff's two assignments of error, we affirm the judgment of the trial court.

Judgment affirmed.

BROWN and TYACK, JJ., concur.
