

IN THE COURT OF COMMON PLEAS OF FRANKLIN COUNTY, OHIO

RAYMOND DEAN AUSTIN,	:	
	:	
Plaintiff,	:	CASE NO. 11CVH-12-15573
	:	
vs.	:	JUDGE TIMOTHY S. HORTON
	:	
GARY MOHR, ET AL.,	:	
	:	
Defendants.	:	

DECISION AND ENTRY
GRANTING THE MOTION TO EXTEND TIME
AS FILED ON SEPTEMBER 20, 2012

AND

DECISION AND ENTRY
GRANTING THE DEFENDANTS' MOTION TO DISMISS AS
FILED ON MAY 7, 2012

AND

DECISION AND ENTRY
GRANTING THE DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS
AS FILED ON MAY 24, 2012

AND

DECISION AND ENTRY
GRANTING THE MOTION FOR JUDGMENT ON THE PLEADINGS AS FILED ON
NOVEMBER 16, 2012

AND

DECISION AND ENTRY
HOLDING PLAINTIFF'S MOTION FOR LEAVE TO INTERVENE AND AMEND
COMPLAINT AS FILED ON MARCH 9, 2012, MOOT

There are three dispositive motions before this Court: (1) Defendants Timothy Young, Wendie Gerus, and 'Unknown Intake Clerk's (hereinafter collectively referred to as "Defendants Young") Motion to Dismiss the Complaint, filed on May 7, 2012; (2) Defendants Sherri Bevan Walsh and 'Unknown Assistant Prosecutor's (hereinafter collectively referred to as "Defendants Walsh") Motion for Judgment on the Pleadings, filed on May 24, 2012; and (3) Defendant Gary

Mohr's (hereinafter referred to as "Defendant Mohr") Motion for Judgment on the Pleadings, filed on November 16, 2012. Plaintiff filed documents titled 'motions to strike' in response to the Defendants Motions.

There is one procedural motion before the Court filed on September 20, 2012 to extend the time for dispositive motions. There is also a 'Leave to Intervene and Amend Complaint' as filed by the Plaintiff on March 9, 2012.

For the reasons that follows, this Court **GRANTS** the Defendant Mohr's Motion to Extend Time, and **GRANTS** the three pending Motions to Dismiss, finds that Plaintiff's Motion for Leave is **MOOT**, and, hereby **DISMISSES**, Plaintiff's Complaint in its entirety.

I. BACKGROUND

Plaintiff filed his 'Complaint' on December 15, 2011. Plaintiff has been incarcerated since 1991 pursuant to Summit County Case No. CR 1991 04 0981, sentenced to 30 to 75 years of imprisonment. The Plaintiff had pled guilty to five counts of Rape in violation of R.C. §2907.02(A)(1)(b). He was denied parole in 2006 and again denied parole in 2011.

Though at times hard to decipher, within the Complaint contests the Parole Board's decision to deny him parole. Plaintiff advanced two theories, the first of which is that the Parole Board applied a new law to his parole requests. The second argument is that a number of the Defendants—both named and unnamed—engaged in specific conduct that kept him in jail and allegedly violated his rights.

When the case was filed the Court provided the parties with the Case Schedule. The parties have each filed a number of motions during the pendency of this matter. Currently, the case is set for a Final Pre-Trial Conference on February 20, 2013 and Trial on March 25, 2013. The Case Schedule has been modified during the litigation, however, the Court is only aware of the original 'Dispositive Motions' deadline. That deadline was set as September 20, 2012.

On May 7, 2012 the Defendants Young filed their Motion to Dismiss the Complaint. On May 24, 2012 the Defendants Walsh filed their Motion for Judgment on the Pleadings. The Plaintiff filed a Motion to Strike in response.

On November 16, 2012, without prior leave, the Defendant Mohr also filed a Motion for Judgment on the Pleadings. The Plaintiff responded with his Motion to Strike on November 23, 2012.

This Court will now review the merits of the pending Motions.

II. STANDARD OF REVIEW

The Defendants Mohr and Walsh have filed separate Motions for Judgment on the Pleadings pursuant to Civ.R. 12(C). The Defendants Young filed a Motion to Dismiss pursuant to Civ.R. 12(B)(6). The courts of Ohio have held that a Civ.R. 12(C) motion is in fact a belated 12(B)(6) motion for failure to state a claim upon which relief can be granted. The language of Civ.R. 12 (C) reads as follows:

C) Motion for judgment on the pleadings. After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings.

Dismissal of a complaint pursuant to Civ.R. 12(C) is appropriate when a trial court: "(1) construes the material allegations in the complaint, with all reasonable inferences to be drawn therefrom, in favor of the nonmoving party as true, and (2) finds beyond doubt, that the plaintiff could prove no set of facts in support of his claim that would entitle him to relief." *State ex rel. Midwest Pride IV, Inc. v. Pontious*, 75 Ohio St.3d 565, 570, 664 N.E.2d 931 (1996).

Civ.R. 12(C) permits consideration of the complaint and answer, but a court's review under Civ.R. 12(B)(6) "must be judged on the face of the complaint alone." *Id.* at 569, citing *Burnside v. Leimbach*, 71 Ohio App.3d 399, 402-03, 594 N.E.2d 60 (1991). While the standards for Civ. R. 12(B)(6) and (C) motions are similar, a Civ.R. 12(C) motion is "specifically for resolving questions of law." *Id.* at 570, citing *Peterson v. Teodosio*, 34 Ohio St.2d 161, 166, 297 N.E.2d 113 (1973). However, a reviewing court must be mindful that it need not accept legal

conclusions contained within the complaint. "A legal conclusion cannot be accepted as true for purposes of ruling on a motion to dismiss." *Cirotto v. Heartbeats of Licking Cty.*, 5th Dist. No. 10-CA-21, 2010-Ohio-4238, at ¶18, 2010 Ohio App. LEXIS 3583 (Sept. 7, 2010), citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937 (2009).

Therefore, all three motions to dismiss are covered by the same legal standard. The Court will address the pending motions to dismiss in the order filed by the parties. But first, this Court will address the Defendant Mohr's Motion to Extend Time.

III. LAW AND ANALYSIS

A. Defendant Mohr's September 20, 2012 Motion to Extend Time:

The docket reflects that Defendant Mohr filed a Motion to Extend the Dispositive Motions Deadline on September 20, 2012. This Court did not rule on that motion. When the Defendant Mohr filed the November 16, 2012 Motion for Judgment on the Pleadings, the Plaintiff responded. One of the Plaintiff's arguments was that the motion was filed after the September 20, 2012 deadline. It is the Court's opinion that granting the Defendant Mohr's September 20, 2012 filing will serve the interest of justice and judicial economy. Furthermore, the Defendant Mohr offered a good cause reason for his delay in filing the dispositive motion. After Granting the request of the Defendant Mohr, the November 16, 2012 filing is no longer 'late.' Ultimately, there is no harm in the filing of the November 16, 2012 motion. Defendant Mohr's Motion to Extend Time as filed on September 20, 2012 is **GRANTED**.

B. Defendants Young May 7, 2012 Motion to Dismiss:

Defendants Young assert that, based upon a review of the Complaint, this Court must conclude that Plaintiff failed to plead an actionable claim. As to Defendant Gerus, the Assistant State Public Defender who provided counsel to the Plaintiff during the May 23, 2011 parole hearing, the Defendants Young assert that there was nothing more than cursory references to Gerus in the Complaint. The same is also true concerning the remaining Young Defendants.

This Court agrees. After a review of the Complaint pursuant to the standard of Civ.R. 12(B)(6), this Court cannot find any actionable claims against the Defendants Young.

However, the Defendants Young also presented an additional argument in support of dismissal of Plaintiff's Complaint against them. They raised the issue of immunity in a Civ.R. 12(B)(1) argument, asserting that as state employees, this Court does not have subject matter jurisdiction to hear the 'claims' advanced by the Plaintiff.

In support, Defendants Young rely on R.C. 9.86 and R.C. 2743.02(F). Pursuant to these statutes, the Defendants Young claim that their actions were immune or in the alternative, as state actors, the Plaintiff was required to file his claim(s) within the Court of Claims because he seeks monetary damages.

This Court could not locate a specific pleading that was filed by the Plaintiff in response to the Defendants Young's motion. However, this Court has reviewed the other motions and 'notices' and 'responses' filed by the Plaintiff. After a review of the law advanced by the Defendants Young and the Plaintiff's arguments this Court finds merit in the Defendants Young's Civ.R. 12(B)(1) and 12(B)(6) analysis. Defendants Young's Motion to Dismiss is **GRANTED**.

C. Defendants Walsh's May 24, 2012 Motion for Judgment on the Pleadings:

The Defendants Walsh also advance an immunity argument, but pursuant to R.C. 2744.03(A)(1) and (7). The relevant portions of the statute read as follows:

2744.03. Defenses - immunities

(A) In a civil action brought against a political subdivision or an employee of a political subdivision to recover damages for injury, death, or loss to person or property allegedly caused by any act or omission in connection with a governmental or proprietary function, the following defenses or immunities may be asserted to establish nonliability:

(1) The political subdivision is immune from liability if the employee involved was engaged in the performance of a judicial, quasi-judicial, prosecutorial, legislative, or quasi-legislative function.

(7) The political subdivision, and an employee who is a county prosecuting attorney, city director of law, village solicitor, or similar chief legal officer of a political subdivision, an assistant of any such person, or a judge of a court of this state is entitled to any defense or immunity available at common law or established by the Revised Code.

Defendants Walsh argue that any reading of Plaintiff's Complaint will lead to the conclusion that the actions of the Walsh Defendants were/are covered by this immunity.

The Defendants Walsh advance undisputed case law that they are immune from a suit stemming from a complaint dealing with a parole hearing. Plaintiff advances no relevant argument to refute the legal assertions of the Defendants Walsh.

In addition, Defendants Walsh point out that there are no claims directed to the 'Unknown Assistant Prosecutor' within the Complaint. As there are no claims against the Unknown Assistant Prosecutor, at a minimum, the Complaint should be dismissed with respect to this listed party. However, the Defendants Walsh also assert that the Complaint fails to state a cause of action against the Defendant Walsh or the Defendant Summit County Prosecutor's Office. Instead, the Defendants Walsh assert that Plaintiff's Complaint is a poorly pled attempt to question the outcome of his parole hearings. Given the fact that the Complaint is nothing more than a collateral attack on the Plaintiff's parole hearings, Defendants Walsh argue that this Court does not have jurisdiction and cite to *Linger v. Ohio Adult Parole Auth.*, 10 Dist. No. 97APE04-482, 1997 Ohio App. LEXIS 4625 (1997) in support of their argument.

The Tenth District Court of Appeals held in *Linger* that the decision to deny parole is not subject to judicial review. "[I]t has long been established that Ohio does not give a convicted person a claim of entitlement to parole before the expiration of a valid sentence of imprisonment." *Linger* at *6, citing *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*, 442 U.S. 1, 60 L. Ed2d. 668, 99 S.Ct. 2100 (1979).

The Court as well as the Defendants Walsh understand that in some parole circumstances a plaintiff may file a request for declaratory judgment. However, the Plaintiff's

Complaint did not plead any of the known exceptions to the rule that a prisoner does not have a right for judicial review of a Parole Board decision.

In an effort to cover all possible areas at issue, the Defendants Walsh address Plaintiff's claim that *State v. Rush*, 83 Ohio St.3d 53 (1998), applied and it created an *ex post facto* clause violation. The Defendants Walsh argue that *Rush* has no impact on parole considerations. Instead, the Defendants Walsh advance the case of *Greene v. Ohio Adult Parole Auth.*, 10th Dist. No. 08AP-555, 2008-Ohio-5972, 2008 Ohio App. LEXIS 5007 to establish that *ex post facto* issues are not triggered under the facts pled by the Plaintiff.

In *Greene*, the Tenth District Court of Appeals examined the issue of whether retroactive application of R.C. 5149.101, regarding the procedures of a full parole board hearing, and the related notice provisions violated the constitutional prohibition against *ex post facto* laws. The Court held that a law that is merely procedural does not increase a prisoner's punishment, and therefore, cannot violate the *Ex Post Facto* Clause even if applied retrospectively. In his response, Plaintiff failed to produce any valid and/or recognizable contrary legal holding.

The Defendants Walsh also address Plaintiff's possible contract claim regarding breach of his plea bargain agreement. Assuming it was Plaintiff's intention to assert such a claim, Defendants Walsh argue that the Complaint fails to plead the necessary facts to assert a breach of an oral contract. Nor did Plaintiff attached a written contract or assert that there was one in existence. The Tenth District Court of Appeals has found that failure to include evidence concerning the terms of an agreement is fatal to a claim for breach of contract of a plea agreement. *Robertson v. Ohio Adult Parole Auth.*, 10 Dist. No. 01AP-1111, 2002-Ohio-4303, at ¶31 2002 Ohio App. LEXIS 4390 (Aug. 20, 2002) ("A court cannot assess whether a plea bargain was breached if there is no evidence in the record concerning the terms of the agreement.").

After a review of the Defendants Walsh's Motion, it is apparent to this Court that the Plaintiff's Complaint fails to advance any valid claim as a matter of law. Not only has Plaintiff

failed to allege any allegations against the 'Unknown Assistant Prosecutor,' he has failed to state a cause of action against the Defendant Walsh or the Defendant Summit County Prosecutor's Office. Defendants Walsh are immune. And, Plaintiff has not presented any legal arguments to the contrary regarding the Defendants Walsh's immunity, nor their arguments regarding the Ex Post Facto Clause. Accordingly, even viewing the Plaintiff's Complaint in a light most favorable to Plaintiff, it is clear that Plaintiff could prove no set of facts in support of his claims that would entitle him to relief. . Accordingly, the Defendants Walsh's Motion is **GRANTED** and Plaintiff's Complaint is **DISMISSED** with respect to these parties.

D. Defendant Mohr's November 16, 2012 Motion for Judgment on the Pleadings:

The Defendant Mohr raises a number of similar argument to the Complaint as advanced by the other moving parties. Accordingly, Defendant Mohr's similar arguments are treated the same and serve as justification for the Dismissal of the Plaintiff's Complaint.

However, in addition to the arguments asserted by the other moving parties, Defendant Mohr also addresses the claims of criminal liability asserted against the Defendant Mohr within the Complaint. There is no cognizable civil claim to hold someone criminal liable. See *Hershey v. Edelman*, 187 Ohio App.3d 400, 2010-Ohio-1992, 932 N.E.2d 386 (10th Dist.). This Court agrees and holds that Plaintiff's claim for civil liability stemming from a claimed violation of the criminal code, as a matter of law, fails.

The Defendant Mohr also addresses the potential *quo warranto* claim of the Plaintiff. A review of the Complaint shows that Plaintiff used the legal term *quo warranto* on a title for his pleading. However, after the listing of the named defendant, the Plaintiff titled his pleading: "Complaint for Civil Rights Violations Declaratory and Injunctive Reliefs requested 'Jury Demand Endorsed Herein'." This Court cannot really be sure if the Plaintiff ever intended to file a *quo warranto* claim. In any event, and in the abundance of caution this Court has reviewed

the substance of the Complaint and its allegations and agrees that there is no valid claim for *quo warranto* pled by the Plaintiff, as a matter of law.

Defendant Mohr's Motion is hereby **GRANTED**.

E. Plaintiff's March 9, 2012 Leave to Intervene and Amend Complaint:

After a responsive pleading had been filed, Plaintiff filed his document titled Leave to Intervene and Amend Complaint. The Plaintiff did not attach a proposed Amended Complaint to his March 9, 2012 filing. A review of the document established no request to materially alter the allegations in the original filing. At best, the document requests to name new defendants and/or to secure the proper spelling and addresses of the defendants against whom the Plaintiff sought to file. Hence, the Plaintiff's request was not for the opportunity to better plead his causes of action or to bring new causes of actions. Therefore, even if granted, the amended complaint would have been subject to the same legal deficiencies that led this Court to rule in the Defendants' favor for the pending motions to dismiss the Complaint.

Additionally, the Court notes that the parties Plaintiff sought to locate by the filing of his March 9, 2012 request have in fact appeared and requested their dismissal. Therefore, at best Plaintiff's Motion of March 9, 2012 is deemed **MOOT**.

IV. DECISION

Defendant Mohr's Motion to Extend Time as filed on September 20, 2012 is **GRANTED**.

Defendants Young's Motion to Dismiss as filed on May 7, 2012 is **GRANTED**.

Defendants Walsh's Motion for Judgment on the Pleadings as filed on May 24, 2012 is **GRANTED**.

Defendant Mohr's Motion for Judgment on the Pleadings filed on November 16, 2012 is **GRANTED**.

Plaintiff's Motion for Leave to Intervene and Amend Complaint filed on March 9, 2012 is deemed **MOOT**.

All other pending motions are **DENIED** or rendered **MOOT** by this Decision and Entry.

THIS IS A FINAL APPEALABLE ORDER.

IT IS SO ORDERED.

JUDGE TIMOTHY S. HORTON

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Franklin County Court of Common Pleas

Date: 01-29-2013
Case Title: RAYMOND DEAN AUSTIN -VS- GARY MOHR
Case Number: 11CV015573
Type: DECISION/ENTRY

It Is So Ordered.

A handwritten signature in cursive script, appearing to read "Timothy S. Horton", is written over a circular official seal. The seal contains text around its perimeter, which is partially obscured by the signature.

/s/ Judge Timothy S. Horton

Court Disposition

Case Number: 11CV015573

Case Style: RAYMOND DEAN AUSTIN -VS- GARY MOHR

Case Terminated: 08 - Dismissal with/without prejudice

Final Appealable Order: Yes

Motion Tie Off Information:

1. Motion CMS Document Id: 11CV0155732012-09-2099980000
Document Title: 09-20-2012-MOTION TO EXTEND TIME
Disposition: MOTION GRANTED
2. Motion CMS Document Id: 11CV0155732012-05-0799950000
Document Title: 05-07-2012-MOTION TO DISMISS
Disposition: MOTION GRANTED
3. Motion CMS Document Id: 11CV0155732012-05-2499970000
Document Title: 05-24-2012-MOTION FOR JUDGMENT ON PLEADINGS
Disposition: MOTION GRANTED
4. Motion CMS Document Id: 11CV0155732012-11-1699980000
Document Title: 11-16-2012-MOTION FOR JUDGMENT ON PLEADINGS
Disposition: MOTION GRANTED
5. Motion CMS Document Id: 11CV0155732012-03-0999980000
Document Title: 03-09-2012-MOTION FOR LEAVE TO FILE
Disposition: MOTION IS MOOT

