

2014 JUN 27 AM 11:27

ORIGINAL

IN THE COURT OF CLAIMS OF OHIO

SCOTT CHESSMAN
31 Dewey Street
W. Alexandria, Ohio 45381

Plaintiff,

v.

STATE OF OHIO
Serve: Ohio Attorney General
30 E. Broad St., 17th Floor
Columbus, OH 43215

Defendant.

*
*
*
*
*
*
*
*
*
*
*
*
*
*
*

Case No.
Judge

2014-00591
WI

COMPLAINT FOR
COMPENSATION FOR
WRONGFUL IMPRISONMENT

Now comes the Plaintiff, Scott Chessman ("Plaintiff"), and for his Complaint against the Defendant, the State of Ohio ("Defendant"), states:

1. On Plaintiff Scott Chessman was charged with a first degree felony by an indictment in Montgomery County Court of Common Pleas on March 3, 2009, in case number 2009 CR 591. Plaintiff was charged with a violation of a section of the Revised Code in the indictment.
2. Plaintiff was found guilty of the felony after a bench trial, but did not plead guilty to the felony charge or any lesser included offense, on May 1, 2009.
3. As a result of being indicted Plaintiff was jailed and after he was found guilty by the trial court, he was sentenced to three years of imprisonment in a state correctional institution for the felony offense he was found guilty of.
4. Plaintiff timely filed a Notice of Appeal from his conviction and his appeal was case number CA 23412.
5. On July 9, 2010, Plaintiff's conviction was vacated by the Second District Court of Appeals based upon the fact that there was no penalty associated with Plaintiff's conduct or failure to provide a telephone number. Therefore, the Court ruled that Plaintiff's conduct did not constitute a criminal offense. See Journal Entry and Opinion, attached

ON COMPUTER

hereto as Exhibit A. Plaintiff, who had been incarcerated for over a year, was released from prison.

6. On December 1, 2010 the Ohio Supreme Court denied the State's motion for leave to appeal the Second District Court of Appeals decision.
7. On April 12, 2011, Plaintiff filed a declaratory judgment action against the Defendant in the Montgomery County Court of Common Pleas, pursuant to R.C. 2743.48, to be declared a wrongfully imprisoned individual as defined by the statute.
8. On September 14, 2012, the Montgomery County Court of Common Pleas granted the State's motion for summary judgment, and denied that the Plaintiff was a wrongfully imprisoned individual.
9. On October 11, 2012, the Plaintiff appealed the trial court decision denying his motion for summary judgment and granting the State's motion for summary judgment. On June 28, 2013, the Court of Appeals issued a judgment reversing the trial court's decision and ordering the trial court to issue a decision stating that Plaintiff was a wrongfully imprisoned individual, See Journal Entry and Opinion, attached hereto as Exhibit B.
10. The Defendant appealed to the Ohio Supreme Court. The Supreme Court issued a decision declining to exercise jurisdiction in the matter.
11. The Montgomery County Court of Common Pleas has issued a decision stating that Plaintiff was a wrongfully imprisoned person as defined by the statute. See Entry, attached hereto as Exhibit C.
12. Plaintiff has met all of the requirements set forth in R.C. 2743.48(A)(1)-(5) and is entitled to relief pursuant to that section.
13. In addition to the specified damages for his wrongful imprisonment, Plaintiff incurred damages and expenses, including by not limited to, loss of income while incarcerated, emotional distress, attorney's fees and litigation costs as a result of his wrongful imprisonment.

WHEREFORE, Plaintiff prays that this Court find that his Complaint is well-taken, and grant the requested statutory relief, including attorney's fees and costs associated with this action, as well as any other relief this Court deems equitable and just.

Respectfully submitted,



Andrea G. Ostrowski (0075318)
Ostrowski Law Firm Co., L.P.A.

20 South Main Street
Springboro, OH 45066
Telephone: 937-514-7492
Facsimile: 937-514-7872
Email: aostrowskilaw@gmail.com
Attorney for Plaintiff



FILED
COURT OF APPEALS

2010 JUL -9 PM 3:38

CLERK OF COURT
MONTGOMERY COUNTY, OHIO



IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	Appellate Case No. 23412
v.	:	Trial Court Case No. 09-CR-00591
	:	
SCOTT CHESSMAN	:	(Criminal Appeal from
	:	Common Pleas Court)
Defendant-Appellant	:	

OPINION

Rendered on the 9th day of July, 2010.

MATHIAS H. HECK, JR., by JOHNNA M. SHIA, Atty. Reg. #0067685, Montgomery County Prosecutor's Office, Appellate Division, Montgomery County Courts Building, P.O. Box 972, 301 West Third Street, Dayton, Ohio 45422
Attorney for Plaintiff-Appellee

ANDREA G. OSTROWSKI, Atty. Reg. #0075318, 20 South Main Street, Springboro, Ohio 45066
Attorney for Defendant-Appellant

BROGAN, J.

Scott Chessman has appealed from his conviction under section 2950.05 of Ohio's Sex Offender Registration and Notification Act for failure to notify of a change in telephone

numbers. Because there is no penalty specified for such a failure, there can be no criminal offense. We will vacate the conviction.

I.

On November 21, 2003, Chessman was convicted of rape, a first-degree offense, and was sentenced to three years in prison. He was designated a sexually-oriented offender and told that he must register annually for ten years following his release from prison. When S.B. 10 went into effect in 2008 (bringing Ohio's Sex Offender Registration and Notification Act into compliance with the federal Adam Walsh Child Protection and Safety Act of 2006) Chessman was re-designated a Tier III sex-offender.¹ This meant, among other things, that, beginning on January 1, 2008, he had to verify his address and registration information every 90 days. During 2008, Chessman dutifully complied with all his registration requirements.

On December 18, 2008, Chessman's sister bought him a cell phone. According to the service provider's records, the phone was registered to Chessman at his sister's address. The phone was of the pay-as-you-go variety. This particular phone began with \$10 and, after the phone was activated, \$2 was deducted every day, whether the user talked on the phone all day or not at all. So after five days this phone would stop working unless more days were purchased.

¹While we were considering this case, the Ohio Supreme Court, in *State v. Bodyke*, Slip Opinion No. 2010-Ohio-2424, found that the re-designation provisions, section 2950.031 and 2950.032, violate the separation of powers doctrine, and it severed them from the statutory scheme. Doing so, the Court reinstated the classifications and community-notification and registration orders imposed previously. The Court's decision does not affect our analysis of the issues in this case.

Two days later, on December 20, 2008, Chessman was sent to jail for an unspecified parole violation. His parole officer arranged for Chessman to enter the in-residence New Life Program at Volunteers of America (VOA) upon his release from jail. When Chessman was released on December 31, 2008, before being taken to the VOA, he was brought to the sheriff's department to fulfill his address-verification requirement. In addition to verifying his address, an offender must also verify that all of his registration information is current, including telephone numbers. Chessman completed and signed the verification paperwork, but he did not list the new cell-phone number.

Despite knowing that residents at the VOA were not permitted to have cell phones, Chessman smuggled the phone in with him. Even though the phone was no longer functioning, the \$10 having been used up some time ago, Chessman hoped to get it working again. Somehow (the record does not say how) Chessman did get the phone working while at the VOA. And, on February 6, 2009, a VOA employee caught Chessman talking on it beneath the covers of his bed. The VOA confiscated the phone and handed it over to Chessman's parole officer, who then turned it over to the Montgomery County Sheriff's Office.

Chessman was eventually arrested and indicted on a charge of failure to notify of a change in telephone numbers under division (D) of section 2950.05 in violation of division (F)(1) of that section. After a bench trial, the court found him guilty. Chessman's duty to notify arose because he was convicted of a sexually-oriented offense (rape), so under R.C. 2950.99(A)(1)(a)(ii) his failure to notify is a first-degree felony. The trial court sentenced Chessman to the statutory-minimum for a first-degree felony, three years in prison. See R.C. 2929.14(A)(1). Chessman appealed.

II.

Chessman assigns two errors to the trial court. First, he argues that his conviction is contrary to the manifest weight of the evidence. And, second, he argues that the trial court should not have overruled his motion to dismiss the indictment. We overrule the first assignment of error as moot. We will sustain the second, however, because the indictment does not charge a criminal offense. This means that the trial court had no subject-matter jurisdiction and the court's judgment of conviction is void.

During our review of the above two assignments of error, we noticed that the penalty section of the Sex Offender Registration and Notification Act (SORNA), section 2950.99, does not appear to specify a penalty for violation of the requirement in R.C. 2950.05(D) that offenders provide notification of a change in telephone numbers. Although neither party had raised this issue, in the interest of justice, we ordered them to brief the issue of whether section 2950.99 prescribes a penalty for failing to comply with this notice requirement. After reviewing the parties' supplemental briefs and the penalty section itself, we conclude that the penalty section does not prescribe a penalty for failing to provide notification of a change in telephone numbers. Under Ohio law, where there is no penalty, there is no crime.

Abrogating the common law of crimes, section 2901.03 says that if conduct is not statutorily defined as an offense, that conduct cannot constitute a criminal offense. R.C. 2901.03(A) ("No conduct constitutes a criminal offense against the state unless it is defined as an offense in the Revised Code."). "[U]nder R.C. 2901.03(B), a criminal offense is not defined unless 'one or more sections of the Revised Code state a positive prohibition or enjoin a specific duty, and provide a penalty for violation of such prohibition or failure to

meet such duty." *State ex rel. Quality Stamping Products v. Ohio Bur. of Workers' Comp.* (1998), 84 Ohio St.3d 259, 264, quoting R.C. 2901.03(B).

The touchstone of statutory construction is the intent of the legislature. See *State v. Jordan* (2000), 89 Ohio St.3d 488, 491 ("[T]he cornerstone of statutory construction and interpretation is legislative intention.") (Citation omitted). "[T]he intent of the lawmakers is to be sought first of all in the language employed, and if the words be free from ambiguity and doubt, and express plainly, clearly and distinctly, the sense of the lawmaking body, there is no occasion to resort to other means of interpretation." *Sears v. Weimer* (1944), 143 Ohio St. 312, 316, quoting *Slingluff v. Weaver* (1902), 66 Ohio St. 621, at paragraph two of the syllabus. Intent is determined by giving effect to the words used by the legislature in the statute, not adding or deleting words. *Jordan*, at 492 (saying that a court must "give effect to the *words used* in a statute, not [] delete words used or [] insert words not used") (Citations omitted). "[P]lain language requires no additional statutory interpretation." *State ex rel. Carnail v. McCormick*, Slip Opinion No. 2010-Ohio-2671, at ¶30 (Citation omitted); see, also, *Jordan*, at 492 ("If the meaning of the statute is unambiguous and definite, it must be applied as written and no further interpretation is necessary.") (Citation omitted).

While section 2950.05 positively prohibits failing to provide notification of a change in telephone numbers, the plain language of section 2950.99 provides no penalty for violation.

The SORNA imposes five registration-related requirements on offenders. Sections 2950.04 and 2950.041 impose a general registration requirement and a notice-of-intent-to-reside requirement. (Section 2950.04 applies to offenders guilty of sexually oriented

offenses, see R.C. 2950.04[A][1][a], and 2950.041 applies to those guilty of child-victim oriented offenses, see R.C. 2950.041[A][1][a].) Section 2950.05 imposes a change-of-address-notification requirement and, what we will call, a change-in-other-information requirement. Finally, section 2950.06 imposes an address-verification requirement. Each section also contains a prohibition against failing to comply with the respective requirement.

Here, the relevant requirement is the change-in-other-information requirement in section 2950.05. Division (D) requires offenders to "provide written notice, within three days of the change, of any change in vehicle information, email addresses, internet identifiers, or telephone numbers registered to or used by the offender" to the appropriate sheriff. Subdivision (F)(1) pertinently prohibits violations: "No person who is required to notify a sheriff of * * * a change in vehicle information or identifiers pursuant to division (D) of this section shall fail to notify the appropriate sheriff in accordance with that division." (We will assume that the legislature's use of the term "identifiers" in division [F][1] also refers to "telephone numbers" in division [D].)

Section 2950.99 provides the penalties for violating the prohibitions in these sections: "whoever violates a prohibition in section 2950.04, 2950.041, 2950.05, or 2950.06 of the Revised Code shall be punished as follows." R.C. 2950.99(A)(1)(a). What follows are three romanettes. The first applies "[i]f the most serious sexually oriented offense that was the basis of the *registration, notice of intent to reside, change of address notification, or address verification* requirement that was violated under the prohibition is aggravated murder or murder if committed by an adult or a comparable category of offense committed in another jurisdiction." R.C. 2950.99(A)(1)(a)(i) (Emphasis added). If this is true, "the offender is guilty of a felony of the first degree." *Id.* Romanette (ii) applies "[i]f the most

serious sexually oriented offense or child-victim oriented offense that was the basis of the *registration, notice of intent to reside, change of address notification, or address verification* requirement that was violated under the prohibition is a felony of the first, second, third, or fourth degree." If the underlying felony was one of these, "the offender is guilty of a felony of the same degree." R.C. 2950.99(A)(1)(a)(ii) (Emphasis added). Finally, "[i]f the most serious sexually oriented offense or child-victim oriented offense that was the basis of the *registration, notice of intent to reside, change of address notification, or address verification* requirement that was violated under the prohibition is a felony of the fifth degree or a misdemeanor * * *, the offender is guilty of a felony of the fourth degree." R.C. 2950.99(A)(1)(a)(iii) (Emphasis added). Each of the three romanettes, then, contains a restrictive relative clause that states four of the five registration-related requirements. The one missing is section 2950.05's change-in-other-information requirement. The plain language suggests that this exclusion was deliberate.

As we noted above, sections 2950.04, 2950.041, and 2950.05 each similarly contain two registration-related requirements, in separate divisions. In the first two sections, the two requirements are found in divisions (A) and (B) and division (G). The two requirements in section 2950.05 are found in division (A) and division (D). Also, these sections each similarly prohibit violation of their respective requirements in a single prohibition. Division (E) of sections 2950.04 and 2950.041 says, "No person who is required to register pursuant to divisions (A) and (B) of this section, and no person who is required to send a notice of intent to reside pursuant to division (G) of this section, shall fail to register or send the notice of intent as required in accordance with those divisions or that division." Subdivision (F)(1) (quoted above in part) says, "No person who is required to notify a sheriff

of a change of address pursuant to division (A) of this section or a change in vehicle information or identifiers pursuant to division (D) of this section shall fail to notify the appropriate sheriff in accordance with that division.”

Section 2950.99 states both of the requirements in sections 2950.04 and 2950.041, but from section 2950.05 it includes only the change-of-address-notification requirement. The question here concerns what the legislature actually said. That is, according to the Ohio Supreme Court, “The question is not what did the general assembly intend to enact, but what is the meaning of that which it did enact. That body should be held to mean what it has plainly expressed.” *Sears*, at 316, quoting *Slingluff*, at paragraph two of the syllabus. We conclude that the legislature, for whatever reason, has plainly not provided a penalty for violating the change-in-telephone-numbers requirement.

Because there is no penalty, failing to provide notice of a change in telephone numbers cannot, under section 2901.03, constitute a criminal offense. Since Chessman's indictment, therefore, does not charge an offense, the trial court had no subject-matter jurisdiction over this case. See *State v. Hous*, Greene App. No. 02CA116, 2004-Ohio-666, at ¶15, quoting *State v. Cimpritz* (1953), 158 Ohio St. 490, at paragraph six of the syllabus. Because the court had no subject-matter jurisdiction, the indictment should have been dismissed, and the trial court's judgment of conviction is void. *Id.* (“A judgment of conviction based on an indictment which does not charge an offense is void for lack of jurisdiction of the subject matter.”).

The second assignment of error is sustained.

III.

We overruled the first assignment of error as moot, but we sustained the second assignment of error. Accordingly, Chessman's conviction and sentence is Reversed and Vacated.

.....

GRADY and FROELICH, JJ., concur.

Copies mailed to:

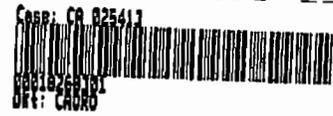
Mathias H. Heck, Jr.
Johnna M. Shia
Andrea G. Ostrowski
Hon. Michael Tucker

Copies faxed to:

Mathias H. Heck, Jr. Fax No. (937) 496-6555
Johnna M. Shia
Montgomery County Prosecutor's Office
P.O. Box 972
Dayton, OH 45422

Andrea G. Ostrowski Fax No. (937) 514-7872
20 S. Main Street
Springboro, OH 45066

Hon. Michael Tucker Fax No. (937) 824-7996
Montgomery County Common Pleas Court
41 N. Perry Street
Dayton, OH 45422



FILED
COURT OF APPEALS

2013 JUN 28 AM 8:45

GREGORY A. BRUSH
CLERK OF COURTS
MONTGOMERY CO. OHIO
39



IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

SCOTT CHESSMAN	:	
Plaintiff-Appellant	:	C.A. CASE NO. 25413
v.	:	T.C. NO. 11CV2696
STATE OF OHIO, et al.	:	(Civil appeal from Common Pleas Court)
Defendant-Appellee	:	

OPINION

Rendered on the 28th day of June, 2013.

ANDREA G. OSTROWSKI, Atty. Reg. No. 0075318, 25 E. Central Avenue, Suite 4,
Springboro, Ohio 45066
Attorney for Plaintiff-Appellant

DEBRA GORRELL WEHRLE, Atty. Reg. No. 0062747, Assistant Attorney General, 150
East Gay Street, 16th Floor, Columbus, Ohio 43215
Attorney for Defendant-Appellee

FROELICH, J.

{¶ 1} Scott Chessman appeals from a judgment of the Montgomery County Court
of Common Pleas, which granted the State of Ohio's motion for summary judgment and

overruled Chessman's motion for summary judgment on Chessman's action to be declared a "wrongfully imprisoned individual" under R.C. 2743.48(A). For the following reasons, the trial court's judgment will be reversed and the matter will be remanded to the trial court with instructions to the trial court to enter judgment in favor of Mr. Chessman.

I. Procedural History

{¶ 2} In 2003, Chessman pled guilty to two counts of rape in the Greene County Court of Common Pleas, and he was sentenced to four years in prison. Chessman was also designated a sexually oriented offender. *State v. Chessman*, Greene C.P. No. 2003-CR-242. Due to errors during the plea hearing, Chessman's plea was vacated on appeal, and the case was remanded to the trial court. *State v. Chessman*, 2d Dist. Greene No. 03 CA 100, 2006-Ohio-835.

{¶ 3} Chessman subsequently pled guilty to two counts of rape, sexual battery, and gross sexual imposition. On June 9, 2006, the trial court sentenced Chessman to three years in prison and again designated him a sexually oriented offender. Due to the amount of time that Chessman had already served in prison (including jail time credit), the court's sentencing entry ordered that Chessman be released from prison. Chessman was placed on five years of post-release control.

{¶ 4} When Senate Bill 10 went into effect in 2008 (bringing Ohio's Sex Offender Registration and Notification Act into compliance with the federal Adam Walsh Child Protection and Safety Act of 2006), Chessman was redesignated a Tier III sex offender. As a Tier III sex offender, Chessman was required, among other things, to verify his

address and registration information every 90 days for life.¹

{¶ 5} Although Chessman initially complied with his reporting requirements, he was eventually charged with failing to notify the sheriff of a cell phone number. We have described the underlying facts as follows:

On December 18, 2008, Chessman's sister bought him a cell phone. According to the service provider's records, the phone was registered to Chessman at his sister's address. The phone was of the pay-as-you-go variety. This particular phone began with \$10 and, after the phone was activated, \$2 was deducted every day, whether the user talked on the phone all day or not at all. So after five days this phone would stop working unless more days were purchased.

Two days later, on December 20, 2008, Chessman was sent to jail for an unspecified parole violation. His parole officer arranged for Chessman to enter the in-residence New Life Program at Volunteers of America ("VOA") upon his release from jail. When Chessman was released on December 31, 2008, before being taken to the VOA, he was brought to the sheriff's department to fulfill his address-verification requirement. In addition to verifying his address, an offender must also verify that all of his registration information is current, including telephone numbers. Chessman completed and signed the verification paperwork, but he did not list the new cell-phone

¹ In *State v. Bodyke*, 126 Ohio St.3d 266, 2010 -Ohio- 2424, 933 N.E.2d 753, the Supreme Court held that reclassification by the attorney general under S.B. 10 violated the separation of powers doctrine and was unconstitutional. We need not discuss here the impact of *Bodyke* on Chessman's classification or his subsequent conviction for failure to notify.

number.

Despite knowing that residents at the VOA were not permitted to have cell phones, Chessman smuggled the phone in with him. Even though the phone was no longer functioning, the \$10 having been used up some time ago, Chessman hoped to get it working again. Somehow (the record does not say how) Chessman did get the phone working while at the VOA. And, on February 6, 2009, a VOA employee caught Chessman talking on it beneath the covers of his bed. The VOA confiscated the phone and handed it over to Chessman's parole officer, who then turned it over to the Montgomery County Sheriff's Office.

Chessman was eventually arrested and indicted on a charge of failure to notify of a change in telephone numbers under division (D) of section 2950.05 in violation of subdivision (F)(1) of that section. * * *

State v. Chessman, 188 Ohio App.3d 428, 2010-Ohio-3239, 935 N.E.2d 887, ¶ 3-6 (2d Dist.).

{¶ 6} In May 2009, Chessman was convicted, after a bench trial, of failure to notify, in violation of R.C. 2905.05, a first-degree felony. The trial court sentenced him to three years in prison. *State v. Chessman*, Montgomery C.P. No. 2009 CR 591 (May 1, 2009). Chessman appealed from his conviction.

{¶ 7} Upon review, we vacated Chessman's conviction for failure to notify. We noted that, under R.C. 2901.03(A), if conduct is not statutorily defined as an offense, that conduct cannot constitute a criminal offense. *Chessman*, 188 Ohio App.3d 428, 2010-Ohio-3239, 935 N.E.2d 887, at ¶ 9. And, under R.C. 2901.03(B), a criminal offense is not

defined unless the Revised Code states a positive prohibition or enjoins a specific duty, and provides a penalty for violation of that prohibition or failure to meet such duty. *Id.* We concluded that, "[w]hile R.C. 2950.05 positively prohibits failing to provide notification of a change in telephone numbers, the plain language of R.C. 2950.99 provides no penalty for violation." *Id.* at ¶ 11. "Because there is no penalty, failing to provide notice of a change in telephone numbers cannot, under R.C. 2901.03, constitute a criminal offense." *Id.* at ¶ 17. Chessman's conviction for failing to notify the sheriff of his cell phone number was therefore vacated as void.

{¶ 8} On April 12, 2011, Chessman filed an action for declaratory judgment, seeking a declaration that he was a "wrongfully imprisoned individual" under R.C. 2743.48, the wrongful imprisonment statute. Chessman subsequently moved for summary judgment on his claim, asserting that he met each of the five requirements to be designated a "wrongfully imprisoned individual" based on his conviction for failing to register his cell phone number. Chessman argued that (1) the charge was a felony, (2) he was found guilty and did not plead guilty to the offense, (3) he was sentenced to prison, (4) his conviction was vacated and no criminal proceeding can be brought against him for his acts associated with the conviction, and (5) he did not commit the alleged offense, because there was no criminal offense under the Revised Code.

{¶ 9} The State opposed Chessman's motion and filed its own motion for summary judgment. The State asserted that Chessman could not satisfy R.C. 2743.48(A)(4), which requires that no criminal proceeding can be brought against the individual for any act associated with the conviction. The State argued that Chessman had violated his reporting requirements as well as "numerous conditions of release." The State emphasized, citing

Gover v. Ohio, 67 Ohio St.3d 93, 95, 616 N.E.2d 207 (1993), that R.C. 2743.48 "was never intended to compensate 'those who have merely avoided criminal liability.'"

{¶ 10} On April 19, 2012, following a telephone conference call with the parties, the trial court ordered the parties to submit supplemental "briefs and/or stipulations, affidavits or other evidence addressing: 1) the actual stated 'conditions' governing Plaintiff's post-release control following his 2006 resentencing; and 2) the legal remedies available to the State of Ohio for violations of those conditions by an individual subject to such conditions." Both parties filed additional memoranda and documentation in response to the trial court's order.

{¶ 11} The trial court ultimately granted the State's motion for summary judgment and denied Chessman's motion for summary judgment. The court initially concluded that Chessman's "entitlement to relief turns on Section 2743.48(A)(4)'s requirement that 'that no criminal proceeding is pending, *can be brought*, or will be brought * * * against [Plaintiff] for any *act associated with*' the wrongful conviction on which his claim is premised."

(Emphasis in original.) The trial court stated:

The evidence presented demonstrates that the conditions governing Plaintiff's post-release supervision relative to his rape conviction required, and Plaintiff agreed, that he would "successfully complete a program for sex offenders." Additionally, the record shows that rules of the VOA sex offender program in which Plaintiff was participating barred him from possessing the cell phone on which his invalid conviction was based. Without question, then, Plaintiff's possession of an unregistered cell phone that led to his allegedly wrongful incarceration constituted a violation of the terms of his

post-release control. The Court thus must consider whether any criminal proceeding could be brought against Plaintiff for that "act associated with" his wrongful conviction.

(Internal citations omitted.) Because imprisonment was a possible sanction for violating post-release control, the trial court further concluded that "some 'criminal proceeding,' however hypothetical, *could* 'be brought' against Plaintiff for his 'act' of possessing a prohibited cell phone, as 'associated with' his wrongful conviction." (Emphasis in original.)

{¶ 12} In reaching its decision, the trial court rejected Chessman's argument that only the parole board could impose imprisonment, and thus he could satisfy R.C. 2743.48(A)(4). The court reasoned:

* * * Ohio R.C. § 2743.48(A)(4) conspicuously does *not* mandate that an offender be subject to a *prison term* for the "associated act" in order to be ineligible for restitution under the wrongful incarceration statute. Rather, Section 2743.48(A)(4) requires only that the offender might be subject to some unspecified "criminal proceeding" based on the same conduct that led to his wrongful conviction. * * * [T]he fact that the State, to date, apparently has not elected to pursue a violation charge against Plaintiff on that basis also is irrelevant. It appears that a different criminal proceeding of some type indeed *could* be instituted against Plaintiff for his illicit possession and use of a cell phone while a resident at the VOA facility. * * *

(Emphasis in original.)

{¶ 13} In its concluding paragraph, the trial court denied Chessman's motion and granted the State's motion on the grounds that "Plaintiff has not sustained his 'burden of

proof in affirmatively establishing his or her *innocence* under R.C. 2743.48(A)(5) * * * and Plaintiff *could* be subjected to a different 'criminal proceeding' based on his 'act' of possessing an unregistered cell phone, which also violated his conditions of post-release supervision." (Emphasis in original.) The trial court did not provide reasons for its conclusion under R.C. 2743.48(A)(5).

{¶ 14} Chessman appeals from the trial court's judgment.

II. Analysis of R.C. 2743.48

{¶ 15} In his sole assignment of error, Chessman claims that "[t]he trial court erred by denying [his] motion for summary judgment and granting [the State's] motion for summary judgment."

{¶ 16} Civ.R. 56(C) provides that summary judgment may be granted when the moving party demonstrates that (1) there is no genuine issue of material fact; (2) the moving party is entitled to judgment as a matter of law, and (3) viewing the evidence most strongly in favor of the nonmoving party, reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made. *State ex rel. Grady v. State Emp. Relations Bd.*, 78 Ohio St.3d 181, 183, 677 N.E.2d 343 (1997); *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 66, 375 N.E.2d 46 (1978). The moving party "bears the initial burden of informing the trial court of the basis for the motion, and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact on the essential element(s) of the nonmoving party's claims." *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 662 N.E.2d 264 (1996). If the moving party satisfies its initial burden, "the nonmoving party then has a reciprocal burden * * * to set forth specific facts showing that there is a genuine issue for trial and, if the

nonmovant does not so respond, summary judgment, if appropriate, shall be entered against the nonmoving party." *Id.*; see Civ.R. 56(E).

{¶ 17} R.C. 2743.48, the wrongful imprisonment statute, authorizes civil actions against the State, for specified monetary amounts, in the court of claims by "wrongfully imprisoned individuals." *Doss v. State*, 135 Ohio St.3d 211, 2012-Ohio-5678, 985 N.E.2d 1229, ¶ 10. Under the statutory scheme, a claimant must first be determined to be a "wrongfully imprisoned individual" by the court of common pleas before seeking compensation from the State in the court of claims. *Id.*, citing R.C. 2305.02 and 2743.48(B)(2); *Griffith v. Cleveland*, 128 Ohio St.3d 35, 2010-Ohio-4905, 941 N.E.2d 1157, paragraph two of the syllabus.

{¶ 18} R.C. 2743.48 provides:

(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:

(1) The individual was charged with a violation of a section of the Revised Code by an indictment or information, and the violation charged was an aggravated felony or felony.

(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.

(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.

(4) The individual's conviction was vacated, 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.

(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 the court of common pleas in the county where the underlying criminal action was initiated that the charged offense, including all lesser-included offenses, either was not committed by the individual or was not committed by any person.

A claimant must satisfy all five criteria, by a preponderance of the evidence, to be declared a "wrongfully imprisoned individual." *Dunbar v. State*, ___ Ohio St.3d ___, 2013-Ohio-2163, ___ N.E.2d ___, ¶ 11, ¶ 17; *Gover v. State*, 67 Ohio St.3d 93, 95, 616 N.E.2d 207 (1993).

{¶ 19} The State does not contest that Chessman satisfied R.C. 2743.48(A)(1)-(3), and the record establishes that Chessman met those criteria, as a matter of law. Chessman was charged by indictment with failure to notify, in violation of R.C. 2950.05(D)(1) and (F)(1). Chessman was subsequently convicted of that charge, a first-degree felony, after a bench trial, and the trial court sentenced him to three years in prison.

{¶ 20} The record also establishes that Chessman satisfied the fifth criterion, R.C.

2743.48(A)(5), as a matter of law. Chessman was charged with and convicted of failing to notify the sheriff's department of his cell phone number, as required by the sex offender registration statute. However, we concluded in Chessman's appeal from that conviction that the failure to provide notice of a change in telephone numbers did not constitute a criminal offense, because there was no statutory penalty for that conduct. Accordingly, "the charged offense" of failure to notify was not committed by Chessman, nor could it have been committed by any person under the circumstances of his case, since legally there was no such charge.

{¶ 21} The State suggests that Chessman merely avoided criminal liability, because R.C. 2950.05 proscribes his failure to register and notify the sheriff about a change of telephone number, yet the statute fails to impose a penalty. In essence, the State argues that Chessman committed the "charged offense" of failure to notify, although this failure was not a crime.

{¶ 22} In *Walden v. State*, 47 Ohio St.3d 47, 52, 547 N.E.2d 962 (1989), the Ohio Supreme Court rejected a similar argument, where the State asserted that the two claimants had committed "offenses" (murder and felonious assault, respectively), but did not commit "crimes" because they had acted in self-defense. The supreme court explained:

As a matter of common usage, the words "crime" and "offense" are synonymous. For example, the words "crime" and "offense" are used interchangeably in Crim.R. 7(D), and the word "offense" is used throughout R.C. Title 29 to refer to crimes. We see nothing in the language or purpose of R.C. 2305.02 and 2743.48 which would impart to the word "offense" any

technical or particular meaning different from this common usage.

Walden at 50. The Court held that a person who acted in self-defense may seek compensation for wrongful imprisonment under R.C. 2305.02 and 2743.48. Because the offense for which Chessman was convicted was not a crime under the facts of his case, he likewise was not precluded under R.C. 2743.48(A)(5) from being declared a wrongfully imprisoned individual.

{¶ 23} On appeal, Chessman (as did the trial court) focuses primarily on R.C. 2743.48(A)(4). R.C. 2743.48(A)(4) requires that (1) Chessman's conviction "was vacated, dismissed, or reversed on appeal," (2) "the prosecuting attorney in the case cannot or will not seek any further appeal of right or upon leave of court," and (3) "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." The parties do not dispute that Chessman's conviction for failure to notify was vacated on appeal and that the prosecuting attorney cannot or will not seek further appeal of that judgment.²

{¶ 24} As stated above, the trial court found that Chessman "could" be subject to a "criminal proceeding" based on his actions, because his possession of the cell phone was a violation of his post-release control. The State argues that the trial court's interpretation is correct, summarizing the third requirement of R.C. 2743.48(A)(4) to be that "no criminal proceeding * * * can be brought * * * against the individual for any act

² The online docket for *State v. Chessman*, 2d Dist. Montgomery No. 23412, reflects that the State appealed our judgment to the Ohio Supreme Court on August 20, 2010. However, the supreme court subsequently denied leave to appeal. *12/01/2010 Case Announcements*, 2010-Ohio-5762.

associated with that conviction."

{¶ 25} The State relies on *Gover*, 67 Ohio St.3d 93, 616 N.E.2d 207 (1993), to support its assertion that Chessman cannot recover under the wrongful imprisonment statute because he could have been subject to criminal proceedings based on his actions. In *Gover*, the defendant was arrested after a police officer observed him emptying his pockets of coins, costume jewelry, and other items that had earlier been part of a restaurant display that apparently resembled, but was not, a safe. *Gover* was later charged with and convicted of safecracking. The supreme court concluded that *Gover* did not satisfy R.C. 2743.48(A)(4). It reasoned that, although *Gover* did not commit the offense of safecracking, he "nevertheless [was] committing other criminal offenses" during his visit to the display location. *Gover* at 96.

{¶ 26} In interpreting R.C. 2743.48(A)(4), the Ohio Supreme Court observed that "[c]laimants seeking compensation for wrongful imprisonment must prove that at the time of the incident for which they were initially charged, they were not engaging in any other criminal conduct arising out of the incident for which they were initially charged." *Gover* at 93. However, the supreme court "did not suggest in any way that conduct divorced in time from the events underlying the safecracking charge could be considered an act associated with the safecracking charge." *Hill v. State*, 10th Dist. Franklin No. 12AP-635, 2013-Ohio-1968, ¶ 37.

{¶ 27} The conduct associated with Chessman's conviction for failure to notify in Montgomery C.P. No. 09 CR 591 was his failure to provide his cell phone number when he registered with the Montgomery County Sheriff, as required by R.C. Chapter 2950. Chessman was subjected to criminal prosecution solely because he failed to notify the

sheriff's office of the number under the sex offender registration and notification requirements. In light of our reasons for vacating his conviction, the State cannot reprosecute this conduct. And, to the extent that Chessman engaged in behavior that violated the conditions of his post-release control, there is no evidence that those actions were "associated with" his failure to notify the sheriff's office regarding his cell phone.

{¶ 28} Chessman's actions might have also subjected him to sanctions by the parole board for violating the conditions of his post-release control. Chessman argues that R.C. 2743.48(A)(4) requires that the criminal proceeding be brought by a prosecuting attorney and that post-release control violations are addressed by the parole board, not a prosecutor. Chessman asserts that the trial court and the State ignored this critical portion of R.C. 2743.48(A)(4). We agree. The parole board is not a "prosecuting attorney, city director of law, village solicitor, or other chief legal officer of a municipal corporation." We cannot add "parole board" to the clear language of R.C. 2743.48(A)(4).

{¶ 29} Upon review of the record, we conclude that the trial court erred, as a matter of law, when it determined that Chessman failed to satisfy R.C. 2743.48(A)(4) and (5). Chessman's assignment of error is sustained.

III. Conclusion

{¶ 30} The trial court's judgment will be reversed and the matter will be remanded to the trial court with instructions to the trial court to enter judgment in favor of Mr. Chessman.

.....

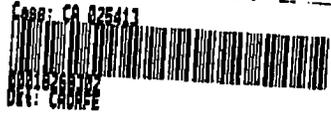
DONOVAN, J. and DONOFRIO, J., concur.

(Hon. Gene Donofrio, Seventh District Court of Appeals, sitting by assignment of the Chief

Justice of the Supreme Court of Ohio).

Copies mailed to:

Andrea G. Ostrowski
Debra Gorrell Wehrle
Hon. Mary L. Wiseman



FILED
COURT OF APPEALS

2013 JUN 28 AM 8:45

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

GREGORY W. CRUSH
CLERK OF COURTS
MONTGOMERY CO. OHIO
39

SCOTT CHESSMAN

Plaintiff-Appellant

C.A. CASE NO. 25413

v.

T.C. NO. 11CV2696

STATE OF OHIO, et al.

FINAL ENTRY

Defendant-Appellee

R

Pursuant to the opinion of this court rendered on the 28th day of June, 2013, the judgment of the trial court is reversed and the matter is remanded to the trial court with instructions to the trial court to enter judgment in favor of Mr. Chessman.

Costs to be paid as stated in App.R. 24.

Pursuant to Ohio App.R. 30(A), it is hereby ordered that the Clerk of the Montgomery County Court of Appeals shall immediately serve notice of this judgment upon all parties and make a note in the docket of the mailing.

Mary E. Donovan

MARY E. DONOVAN, Judge

Jeffrey E. Froelich

JEFFREY E. FROELICH, Judge

Gene Donofrio

GENE DONOFRIO, Judge
(Sitting by assignment of the Chief
Justice of the Supreme Court of Ohio)

Copies mailed to:

**Andrea G. Ostrowski
25 E. Central Avenue
Suite 4
Springboro, Ohio 45066**

**Debra Gorrell Wehrle
Assistant Attorney General
150 East Gay Street, 16th Floor
Columbus, Ohio 43215**

**Hon. Mary L. Wiseman
Common Pleas Court
41 N. Perry Street
Dayton, Ohio 45422**



IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO
CIVIL DIVISION

SCOTT CHESSMAN,

Plaintiff,

-vs-

STATE OF OHIO,

Defendant.

CASE NO.: 2011 CV 02696

JUDGE MARY WISEMAN

**ORDER AND ENTRY GRANTING
PLAINTIFF'S MOTION TO LIFT THE
STAY ON THE JUDGMENT ENTRY**

This matter is before the Court on Plaintiff Scott Chessman's *Motion to Lift the Stay on the Judgment Entry*, filed on March 4, 2014.

On motion of Defendant State of Ohio pending its requested appeal to the Ohio Supreme Court, this Court previously issued a stay of the *Amended Judgment Entry* entered in Plaintiff's favor on August 13, 2013. (See *Entry and Order Granting Defendant, the State of Ohio's, Motion to Stay Amended Judgment Entry*, filed on 8/22/13). On December 4, 2013, the Ohio Supreme Court declined to accept Defendant's discretionary appeal. See *Chessman v. State*, 137 Ohio St. 3d 1421, 2013-Ohio-5285, 998 N.E.2d 1177.

As the basis for the stay issued in this matter no longer exists, Plaintiff's request that such stay be lifted is well taken. Accordingly, Plaintiff Scott Chessman's *Motion to Lift the Stay on the Judgment Entry* hereby is GRANTED, and the stay of judgment entered by this Court on August 22, 2013 hereby is LIFTED.

Pursuant to Ohio R.C. § 2743.48(B)(3), the Clerk of this Court is DIRECTED, within seven (7) days of the date of this *Order and Entry*, to provide to the Clerk of the Ohio Court of Claims a

written copy of this *Order and Entry* and of the *Amended Judgment Entry* entered on August 13, 2013, in order to notify that Court of the name and proposed mailing address of Scott Chessman, and of the fact that Scott Chessman has the right to commence a civil action and to have legal representation as provided in Ohio R.C. § 2743.48.

SO ORDERED:

JUDGE MARY WISEMAN

This document is electronically filed by using the Clerk of Courts e-Filing system. The system will post a record of the filing to the e-Filing account "Notifications" tab of the following case participants:

ANDREA OSTROWSKI
(937) 514-7492
Attorney for Plaintiff, Scott Chessman

JOHN A. CUMMING
(937) 496-7797
Attorney for Defendant, State of Ohio

DEBRA L. GORRELL WEHRLE
(614) 644-7233
Attorney for Defendant, State of Ohio

MARIANNE HEMMETER
Attorney for Defendant, State of Ohio

Copies of this document were sent to all parties listed below by ordinary mail:

THE OHIO COURT OF CLAIMS
THE OHIO JUDICIAL CENTER
65 SOUTH FRONT STREET
THIRD FLOOR
COLUMBUS, OH 43215

Tandi Danklef, Bailiff (937) 225-4384 dankleft@montcourt.org



General Division
Montgomery County Common Pleas Court
41 N. Perry Street, Dayton, Ohio 45422

Type: Entry: (Signed By Judge)
Case Number: 2011 CV 02696
Case Title: SCOTT CHESSMAN vs STATE OF OHIO

So Ordered

Mary Wiseman

Montgomery County Common Pleas Court
General Division

IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO
CIVIL DIVISION

SCOTT CHESSMAN,

Plaintiff,

-vs-

STATE OF OHIO, et al.,

Defendants.

CASE NO.: 2011 CV 02696

JUDGE MARY WISEMAN

AMENDED JUDGMENT ENTRY

FINAL APPEALABLE ORDER

This matter is before the Court following the decision in *Chessman v. State*, 2nd Dist. No. 25413, 2013-Ohio-2757 (June 28, 2013), wherein the Second District Court of Appeals of Ohio reversed this Court's prior judgment in this matter and remanded "with instructions to the trial court to enter judgment in favor of Mr. Chessman." *Id.*, ¶30.

Pursuant to that decision and for the reasons stated therein, this Court hereby WITHDRAWS the September 14, 2012 judgment entry in this matter as void and substitutes this AMENDED JUDGMENT ENTRY, GRANTING Plaintiff Scott Chessman's Motion for Summary Judgment, DENYING Defendant State of Ohio's Motion for Summary Judgment, and ENTERING declaratory judgment in favor of Plaintiff and against Defendant, as follows:

1. Scott Chessman was charged with failure to notify in violation of R.C. §§ 2950.05, a first degree felony, by indictment dated March 3, 2009, in this Court's Case No. 2009 CR 00591;
2. Scott Chessman was convicted of, but did not plead guilty to, the felony offense of failure to notify, on May 1, 2009;

3. Scott Chessman was sentenced to a three year term of imprisonment in a state correctional institution for the failure to notify conviction;

4. Scott Chessman's conviction for failure to notify was vacated by the Second District Court of Appeals on July 7, 2010, in State v. Chessman, 188 Ohio App. 3d, 2010-Ohio-3239, 935 N.E.2d 887, based on the absence of a statutory penalty for the offense of which Scott Chessman was convicted;

5. The prosecuting attorney in Scott Chessman's failure to notify case cannot or will not seek any further appeal of right or upon leave of court, and upon information and belief, no criminal proceeding is pending, can be brought, or will be brought by any other entity against Scott Chessman for any act associated with that conviction;

6. This Court has determined that the charged offense of failure to notify, including all lesser-included offenses, could not have been committed by Scott Chessman because the Second District Court of Appeals has found that the underlying statute lacking a penalty does not set forth a criminal offense, and the charge therefore was void;

7. Scott Chessman is a wrongfully imprisoned individual as defined at Ohio R.C. § 2743.48(A); and

8. Scott Chessman is entitled to commence a civil action for damages against the State of Ohio in the Court of Claims as provided in Ohio R.C. § 2743.48.

In addition, pursuant to Ohio R.C. § 2743.48(B)(3), within seven (7) days of the date hereof, the Clerk of this Court is DIRECTED to provide a written copy of this Decision, Order and Entry to the Clerk of the Ohio Court of Claims, in order to notify that Court of the name and proposed mailing address of Scott Chessman, and of the fact that Scott Chessman has the right to commence a civil action and to have legal representation as provided in Ohio R.C. § 2743.48.

THIS IS A FINAL APPEALABLE ORDER UNDER CIV.R. 58. PURSUANT TO APP R. 4, THE PARTIES SHALL FILE A NOTICE OF APPEAL WITHIN THIRTY (30) DAYS.

SO ORDERED.

JUDGE MARY WISEMAN

This document is electronically filed by using the Clerk of Courts e-Filing system. The system will post a record of the filing to the e-Filing account "Notifications" tab of the following case participants:

ANDREA OSTROWSKI
(937) 514-7492
Attorney for Plaintiff, Scott Chessman

JOHN A. CUMMING
(937) 496-7797
Attorney for Defendant, State of Ohio

DEBRA L. GORRELL WEHRLE
(614) 644-7233
Attorney for Defendant, State of Ohio

Copies of this document were sent to all parties listed below by ordinary mail:

THE OHIO COURT OF CLAIMS
THE OHIO JUDICIAL CENTER
65 SOUTH FRONT STREET
THIRD FLOOR
COLUMBUS, OH 43215

Tandi Danklef, Bailiff (937) 225-4384 dankleft@montcourt.org



General Division
Montgomery County Common Pleas Court
41 N. Perry Street, Dayton, Ohio 45422

Type: Final Judgment Entry
Case Number: 2011 CV 02696
Case Title: SCOTT CHESSMAN vs STATE OF OHIO

So Ordered

Mary Wiseman