ORIGINAL

THE COURT OF CLAIMS OF OHIO

TERRY SWALLEY 224 W. 50th St., Unit #M Ashtabula, OH 44004 Plaintiff,	: CASE NO.	2014-00854 WI
	: JUDGE	
vs.	: COMPLAINT FOR WRONGFUL COMPENSATION FOR IMPRISONMENT	
THE STATE OF OHIO c/o Attorney General 30 E. Broad Street Columbus, OH 43215	:	
Defendant.		

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OF OHIO
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Now comes Plaintiff, Terry Swalley, by and through counsel, and states as follows:

1. This Court has original jurisdiction over this action, pursuant to R. C. §2743.48.

2. Plaintiff, Terry Swalley, is a natural citizen of the United States, and is a citizen of the State of Ohio.

3. From February 23, 2009 through April 10, 2009 and from January 29, 2010 through May 9, 2011, Plaintiff was wrongfully retained and incarcerated at the Ashtabula County Jail and later in facilities run by The Department of Corrections.

4. On January 13, 2010, Plaintiff was found guilty of, but did not plead guilty to, Illegal Assembly or Possession of Chemicals for the Manufacture of Drugs, in Ashtabula County Common Pleas Court Case No. 2009 CR 92, and was sentenced to Two (2) years imprisonment in the Lorain Correctional Institute. (Certified copies of the Judgment Entries of Conviction and Sentence are attached and marked as Exhibits "A" and "B", respectively.)

5. Plaintiff's wrongful conviction arose out of a search where contraband items found were erroneously determined by the police to belong to him.

6. On May 2, 2011, Plaintiff's conviction was reversed and vacated and he was ordered to be immediately released by the Eleventh District Court of Appeals, in *State of Ohio v. Terry Swalley,* Case No. 2010-A-0008, which found there was insufficient evidence as a matter of law to sustain a conviction. (A certified copy of the Appellate Court's Decision vacating Mr. Swalley's conviction is attached as Exhibit "C.")

ON COMPUTER

7. On January 9, 2012, Plaintiff filed a complaint for wrongful imprisonment seeking declaratory judgment against the Defendant in Ashtabula County Court of Common Pleas, pursuant to R. C. §2305.02 and §2743.48(A)(1)-(5), to be declared a wrongfully imprisoned individual as defined by the statute.

8. On June 7, 2012, the trial court entered a Judgment Entry denying Plaintiff's motion for summary judgment and granting the Defendant's cross motion for summary judgment.

9. On December 17, 2012, the trial court's decision was reversed and the matter was remanded by the Eleventh District Court of Appeals, in *State of Ohio v. Terry Swalley,* Case No. 2012-A-0026, which found there was a genuine issue of fact which would preclude the granting of summary judgment to either party. (A certified copy of the Appellate Court's Decision reversing the trial courts decision is attached as Exhibit "D.")

10. On November 25, 2013, the Ashtabula County Court of Common Pleas issued a decision stating that Plaintiff was a wrongfully imprisoned person as defined by statute. (A certified copy of the Judgment Entry is attached as Exhibit "E.")

11. 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.

12. In addition to the specified damages for his wrongful imprisonment, Plaintiff incurred damages and expenses, including but 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 for 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,

Ariana E. Tarighati (0039372)
34 South Chestnut Street, Suite #100
Jefferson, Ohio 44047-1092
Phone: (440) 488-2530
Fax: (440) 563-3739
Counsel for Plaintiff

TO THE CLERK OF COURTS: Please serve the Defendant by certified mail.

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IN THE COURT OF COMMON PLEAS
ASHTABULA COUNTY, OHIO

RECEIVED
JAN 26 2010
By

THE STATE OF OHIO	*	CASE NO. 2009 CR 92
	*	
	*	JUDGE YOST
Plaintiff	*	
	*	JUDGMENT ENTRY
vs.	*	
	*	
TERRY R. SWALLEY	*	
	*	
Defendant	*	

FILED
2010 JAN 14 P 3:27
CAROL A. MEAD
CLERK OF COURTS
COMMON PLEAS COURT
ASHTABULA CO. OH

PROCEEDING: Jury Trial

DATE: January 11-13, 2010

APPEARANCES: Gene Barrett on behalf of the State of Ohio. Dean Topalof on behalf of the Defendant.

The Jury returned a verdict and it finds that the defendant, Terry R. Swalley, is guilty of Illegal Possession of Chemicals for the Manufacture of Drugs, as charged in the Indictment, a felony of the third degree.

Defense counsel requested to have the Jury polled. The Court finds that the verdict is proper and unanimous.

ORDER:

1. The Verdict of the Jury finding the defendant, Terry R. Swalley, guilty of Illegal Possession of Chemicals for the Manufacture of Drugs, as charged in the Indictment, a felony of the third degree, is accepted by the Court.

2. Sentencing is continued until January 29, 2010, at 2:00 P.M.

3. Bond in the amount of $20,00.00, personal recognizance, as previously posted, is continued.

4. The jurors are excused and discharged.

The Clerk is directed to serve notice of this judgment and its date of entry upon the journal upon the following: The Ashtabula County Prosecuting Dean Topolof, Esq.; The Adult Parole Authority; and the defendant.

Gary L. Yost

GARY L. YOST, JUDGE

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PLAINTIFF'S EXHIBIT
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BY

STATE OF OHIO	)	IN THE COURT OF COMMON PLEAS
	) SS:	
COUNTY OF ASHTABULA	)	CASE NO. 2009 CR 92
	)	
STATE OF OHIO	)	
Plaintiff	)	
	)	
vs.	)	JUDGMENT ENTRY OF SENTENCE
	)	
TERRY R. SWALLEY	)	
Defendant	)	

FILED
2010 FEB -1 A 10: 40
CAROL A. MEAD
CLERK OF COURTS
COMMON PLEAS COURT
ASHTABULA CO. OH

PROCEEDING: Sentencing Hearing

DATE: January 29, 2010

APPEARANCES: Gene Barrett on behalf of the State of Ohio. Dean Topalof on behalf of the Defendant.

The Defendant has been found guilty of One Count of Illegal Possession of Chemicals for the Manufacture of Drugs, a violation of RC§2925.041, as charged in the Indictment, a felony of the third degree.

The Court has considered the record, oral statements, any victim impact statement, the purposes and principles of sentencing under RC 2929.11, the seriousness and recidivism factors relevant to the offense and offender pursuant to RC 2929.12, and the need for deterrence, incapacitation, rehabilitation, and restitution.

In fashioning the sentence to be imposed in this case, the Court's discretion has been guided by the following considerations. The offense carries a mandatory prison sentence. The Court finds that the offender would not be amenable to an available combination of community control sanctions, in any event, because of the serious nature of the offense: the drug involved was methamphetamine.

The Court finds that a prison sentence is consistent with the purposes and principles of sentencing under RC 2929.11 because a prison sentence is commensurate with the seriousness of the offender's conduct and its impact on the victim, because it is reasonably necessary to deter the offender in order to protect the public from future crime, and because it would not place an unnecessary burden on governmental resources.

The Court advised the defendant of his appellate rights.

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PLAINTIFF'S EXHIBIT
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The Court further finds that the Defendant has previously served time in a state penal institution.

ORDER:

1. The Defendant shall serve a mandatory term of Two (2) years in prison for the violation of Illegal Possession of Chemicals for the Manufacture of Drugs, a violation of RC§2925.041, as charged in the Indictment, a felony of the third degree.

2. Upon completion of the prison term, the offender may be subject to a period of post-release control up to three (3) years, if determined necessary by the Parole Board pursuant to RC 2967.28. For violations of post-release control, the Parole Board may return the Defendant to prison for up to one-half of the stated prison term.

3. The Defendant's right to drive a motor vehicle in Ohio is suspended for Six (6) months.

4. The Defendant shall pay a minimum mandatory fine in the amount of $5,000.00.

5. The court costs are assessed against the Defendant.

6. The bond is canceled.

7. Credit is granted for Forty-six (46) days, as of January 29, 2010, because of time spent in custody in this case prior to sentence.

8. The Ashtabula County Sheriff shall convey the Defendant to the custody of the Ohio Department of Rehabilitation and Correction forthwith.

The Clerk is directed to serve notice of this Judgment and its date of entry upon the journal upon the following: The Ashtabula County Prosecuting Attorney, Dean Topalof, Attorney for the Defendant, and The Adult Parole Authority.

GARY L. YOST, JUDGE

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[Cite as *State v. Swalley*, 2011-Ohio-2092.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

ASHTABULA COUNTY, OHIO

STATE OF OHIO,	:	**OPINION**
Plaintiff-Appellee,	:	
		CASE NO. 2010-A-0008
- vs -	:	
TERRY R. SWALLEY,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 2009 CR 92.

Judgment: Reversed.

Thomas L. Sartini, Ashtabula County Prosecutor, and *Shelley M. Pratt*, Assistant Prosecutor, Ashtabula County Courthouse, 25 West Jefferson Street, Jefferson, OH 44047-1092 (For Plaintiff-Appellee).

Ariana E. Tarighati, Law Offices of Ariana E. Tarighati, L.P.A., 34 South Chestnut Street, #100, Jefferson, OH 44047-1092 (For Defendant-Appellant).

MARY JANE TRAPP, J.

{¶1} Terry R. Swalley appeals from a judgment of the Ashtabula County Court of Common Pleas entered after a jury convicted him of one count of illegal assembly or possession of chemicals for the manufacture of drugs. The charge stemmed from a tip from a confidential informant that led law enforcement to a large house that had been converted into multiple-unit apartments. In one apartment, leased by Donald Matthews, who regularly "offers his couch" to others who need a place to stay, various items

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known to be used in the manufacturing of methamphetamine were found in a laundry basket, behind a couch, in the living room of that unit. Mr. Swalley had just begun his stint in the living room a day or two before the search. Mr. Swalley claims there is insufficient evidence tying him to that laundry basket to support his conviction. After a thorough review of the evidence, we agree the state's only evidence of his constructive possession of the materials was his recent use of the living room, the access to which was by no means exclusive to him. Therefore, we reverse his conviction because we find that the state failed to present sufficient evidence to support a determination that Mr. Swalley knowingly possessed the materials found at the premises to which he did not have exclusive access.

{¶2} **Substantive and Procedural Facts**

{¶3} Mr. Swalley was indicted on one count of illegal possession of chemicals to manufacture drugs in violation of R.C. 2925.04(A), a felony of the third degree. He pled not guilty and tried his case to a jury. At trial, the state presented nine witnesses to establish Mr. Swalley's possession of chemicals to manufacture methamphetamine.

{¶4} **Confidential Informant's Tip Leads to Search**

{¶5} Scott Zimmerman, a parole officer for Ohio Adult Parole Authority, received information from a confidential informant while conducting home visits on February 18, 2009. He learned that Terry Swalley, an individual under the supervision of Ashtabula County Adult Parole Authority, may be in possession of methamphetamine. Acting on the information, Officer Zimmerman went to a multi-dwelling apartment complex in Conneaut where Mr. Swalley was reportedly staying. The lessee of one of the apartment units, Donald Terry Matthews, showed the officer

the living room area where Mr. Swalley was staying. The area had a chest, couch, and bookshelf. Officer Zimmerman looked around and found, behind the couch, a laundry basket containing some bottles and a gas generator, which, "according to the Ashtabula Sheriff's Department," "could" be used in the manufacturing of methamphetamine. On the bookshelf he found a bottle of HEET (a commercially produced automobile fuel line antifreeze), hydrogen peroxide, and two two-ounce bottles of iodine.

{¶6} Officer Zimmerman also searched a 50-gallon trash tote on the front porch of the apartment building. Among the items inside the garbage can were books of matches, some pills, and an envelope with Mr. Swalley's name written on the return address.

{¶7} Brett Kiser, Chief Probation Officer of Ashtabula County Adult Probation Department, also went to the apartment, which he described as a duplex or triplex. Having been trained in methamphetamine lab recognition, he recognized the gas generator inside the laundry basket as an item used in methamphetamine manufacturing. He testified that the iodine and hydrogen peroxide, both found at the apartment, can be mixed together to make iodine crystal, a main ingredient in methamphetamine production, through the "red phosphorous" method, one of the three methods commonly used to make the drug.

{¶8} Officer Kiser spoke with Mr. Matthews, the lessee of the apartment unit, and learned that Mr. Swalley had stored some items in the detached garage. Officer Kiser was given permission to search the garage, which was cluttered with tools and shelving units. He found a bottle of HEET, a bottle of muriatic acid, and a mason jar

with a pink, powdery substance which he suspected to be residue from pseudoephedrine pills.

{¶9} Officer Kiser then conducted a "trash pull" searching the large garbage tote located on the front porch, which had also been searched by Officer Zimmerman. The tote is a large garbage can with wheels provided to the property owner by the garbage company. The officers described their findings inside the various Wal-Mart and Dollar General bags dumped in the garbage: some loose pills, another gas generator, and several books of matches with the striker plates removed. Officer Kiser explained striker plates could be removed from the matches and soaked in solvent to extract the red phosphorous from them. On cross-examination, however, Office Kiser admitted there were no clear photographs showing the striker plates had been removed from the matches.

{¶10} When asked if the garbage can he searched was a "communal tote" for all the occupants in the apartment complex, he stated he was told that the tote was for Mr. Matthews' unit. The officer was specifically told by a female who lived in one of the upstairs units that the items found did not come from her or her husband, Robert Beville, who, coincidentally, was also on parole under the supervision of the county's adult probation department.

{¶11} On cross-examination, Officer Kiser stated he knew the apartment building to have two units upstairs and two units downstairs. When asked if anyone living in the building could dispose of their trash in the garbage tote he searched, he answered: "I suppose they could, yes." He also admitted he did not search Mr. Matthews' portion of the apartment unit. Although both Mr. Matthews and a female, Rachael Olds, were

present in the apartment when Officer Kiser searched the garbage can, he did not question either of them regarding the items found in the can. The officer also stated he did not know what the loose pills retrieved from the garbage were. He was also unaware if the contents found in the laundry basket were sent to a lab for testing. As to the envelope with Mr. Swalley's name written in the return address, he stated there was no postal marking on the envelope and he did not know who wrote on the envelope.

{¶12} Brian Cumberledge, a detective for the Ashtabula County Sherriff's Department, working under a grant to the department for methamphetamine enforcement, was also at the scene. He testified the laundry basket contained a jug of muriatic acid, a two-liter A&W root beer bottle with brownish or orange liquid inside, a gas generator made out of a Mountain Dew bottle with tubing protruding from its top, some glassware, a funnel, electrical tape, a bottle of red flakes which he suspected to be phosphorous, a can of brake cleaner, a can of HEET, and aluminum foil. The bottle of red flakes found in the laundry basket was sent to a lab for testing, but the other items retrieved from the basket were disposed of by a hazardous waste company.

{¶13} Detective Cumberledge explained HEET and brake cleaners are known to be used to break down pseudoephedrine pills to remove the binding agent from the pills and to extract ephedrine. He opined the pink substance in the mason jar was residue from the breaking down of the pills, but the mason jar, like the hydrogen peroxide and iodine, was also disposed of by the cleanup crew after photographs were taken. The detective also described a coffee filter containing some white powder retrieved from the trash can, which was sent to the lab for testing. Detective Cumberledge confirmed no pseudoephedrine pills or methamphetamine were found in the apartment.

{¶14} **Mr. Swalley's Interview**

{¶15} Detective Cumberledge interviewed Mr. Swalley five days after the discovery of the items in the apartment, when Mr. Swalley contacted his probation officer after learning the police were looking for him. A DVD was made of the interview, which the state submitted as an exhibit. In the interview, Mr. Swalley denied manufacturing methamphetamines. He explained he used the peroxide to clean a MRSA infection in his leg. Because he was preparing to move into the apartment, he cleaned out some trash from the apartment and threw the trash in the can on the porch along with some trash he found strewn around the yard from a storm the night before.

{¶16} **The Residents of the Apartment Complex**

{¶17} Mr. Matthews, the lessee of one of the four apartment units in the complex, has lived in his one bedroom unit for about ten years, allowing others to stay with him for periods of time when they needed a place to stay, as his "couch is open." "Every once in a while somebody would come by and need a space to stay and I'd offer them the couch." Mr. Swalley needed a residence for house probation purposes and Mr. Matthews rented the room to him for $75 a week. About the time Mr. Swalley "was in the process of moving in," another friend, Don Weston, was moving out. Prior to that time, Mr. Swalley had been coming to his apartment to use the driveway and garage area to work on cars, about five or six times a month. While living with Mr. Matthews, Mr. Weston stayed in the bedroom and Mr. Matthews himself slept in the living room. Mr. Matthews moved back to the bedroom after Mr. Weston moved out, "within a day or so" of February 18, 2009.

{¶18} Mr. Swalley had some tools stored in the garage, but the other residents also used the garage to store items, including Mr. Beville, who also worked on bikes in the garage.

{¶19} When asked about the peroxide on the bookshelf, Mr. Matthews stated the bottle belonged to him. He let Mr. Swalley use it, and he had seen Mr. Swalley use the peroxide to clean his MRSA infection. The two bottles of iodine, however, did not belong to him but could belong to Mr. Swalley because Mr. Swalley "used stuff like that for cleaning out his wounds." As for the muriatic acid, Mr. Matthews testified he himself may have stored muriatic acid in the living room and Mr. Swalley may have used it to clean his MRSA. He also stated he may have left hydrogen peroxide and iodine tincture in the living room; he used the peroxide for cleaning his earring and iodine for cuts. He had never noticed odd odors coming from the garage, but did smell diesel when Mr. Swalley worked on diesel engines in the garage.

{¶20} Regarding the garbage can on the front porch, Mr. Matthews testified as follows:

{¶21} "Q. Okay. How did you dispose of the garbage from your apartment, where did you put it?

{¶22} "A. Carried it out and threw it in the trash can. It's usually on the porch or around the porch area there.

{¶23} "Q. Okay. How many garbage cans are on that porch area?

{¶24} "A. There's – the landlord got – gave us – got us four.

{¶25} "***

{¶26} "Q. Okay. Are there any in the upstairs area?

{¶27} "A. No. All the garbage cans are right in front there.

{¶28} "Q. Okay. Do you – all the people in the apartment, do you know where their garbage is disposed of at?

{¶29} "A. At the time, there [sic] had three cans in front of the porch. I had one can on the porch, and whichever can was empty or what not that had room in it, we'd just use it."

{¶30} When asked about the laundry basket found behind the couch in the living room, Mr. Matthews did not know to whom it belonged or how the basket ended up behind the couch—he stated it was "hard to say" because he had helpers move the furniture around after Mr. Weston moved out. In any event, he had not seen either Mr. Swalley or Mr. Weston with the basket, and he was not aware of anyone making methamphetamines either in his apartment or in the garage.

{¶31} **The "Odor"**

{¶32} Mr. Weston, a convicted felon for trafficking in cocaine in 2004, testified he stayed in Mr. Matthews' bedroom until the middle of January 2009. No one else besides Mr. Matthews and Mr. Swalley lived there, but "[e]very once in a while several people stayed there." He smelled "rotten eggs" in the middle of the night while staying there at a time when both Mr. Swalley and Rachael Olds stayed there as well. When he got out of bed to investigate, however, he found "nothing." As to the disposition of trash, he stated there were four garbage cans and each unit was assigned to a can; however, "[t]hey get switched around[,] [because] [t]here's no numbers on them."

{¶33} The manager of the apartment building, Donna Strickler, occupied one of the two units upstairs with her husband, while her daughter, Brittany, and Brittany's husband, Mr. Beville, occupied the other unit, but Mr. Beville was often in jail.

{¶34} Ms. Strickler observed that Mr. Swalley had been "in and out sporadically" of Mr. Matthews' apartment. She delivered newspapers in the early mornings and would sometimes see Mr. Swalley in the driveway or entering the garage, sometimes by himself and sometimes with a girlfriend and her daughter. For a period of time she noticed "odors in the hallway that goes from the front porch to the top apartments." The gas company and the police department had both come by on several occasions to investigate the odor because of a verified gas leak from an old well in the area.

{¶35} She described the odor as "sulfury" and "like a rotten egg smell," which she would smell mainly early morning or late evening. She did not think either Mr. Weston or Mr. Swalley lived there at the time when the odors occurred, but remembered the odors occurred during a time when Mr. Swalley was sporadically in and out of the apartment. Mr. Matthews was the sole resident at the time, but there were a lot of "in and out's"; a "very widely in and out revolving door," with Mr. Matthews, Mr. Swalley, and Mr. Weston being the three main occupants.

{¶36} Brian Rose, also a detective with the Ashtabula County Sheriff's Department, testified about his knowledge of clandestine labs and manufacturing of methamphetamine. When shown the photo of the bottle of red flakes retrieved from the garbage can, he opined that the bottle contained red phosphorous. He also explained that the resulting odor from the heating of various ingredients during the manufacturing process is often described as cat urine, but also sometimes as rotten eggs.

{¶37} **Mr. Swalley's Girlfriend Recants Her Statement**

{¶38} Melissa Wing, Mr. Swalley's girlfriend at the time, also testified. On the day the apartment was searched, Ms. Wing had been with Mr. Swalley. That evening, she was driving with her daughter and was stopped by a deputy sheriff who inquired of Mr. Swalley's whereabouts and then searched her car, her daughter's pockets, and her pockets. Ms. Wing said the deputy was looking for Sudafed and receipts for the purchase of Sudafed. Finding neither, she said that one officer "said he could put me in jail" and "threatened to call CHS [children's services] on me." Fearing that her daughter would be removed from her care, she made a statement to the police about buying Sudafed pills for Mr. Swalley. However, she recanted the statement on the witness stand.

{¶39} **Mr. Swalley's MRSA Infection**

{¶40} April Sartini, a nurse working at the Ashtabula County Jail, examined Mr. Swalley in February 2009 as part of the booking process for this offense. At the time Mr. Swalley entered the jail, he reported suffering from depression and teeth problems. Later, in April, Mr. Swalley complained to her that he was getting an infection. After a culture, she confirmed he had a staph infection, MRSA, on his feet, which was treated with antibiotics, hydrogen peroxide, and iodine.

{¶41} After the state's case-in-chief, the defense moved the court for acquittal pursuant to Crim.R. 29. The court, after expressing doubts regarding whether Mr. Swalley did possess the various items, denied the motion. The court commented that "[Mr. Swalley has] denied it but I think we have evidence that it was found in an area

that had been identified [as a place] that he either stayed at on occasion or was in the process of moving into."

{¶42} The jury found Mr. Swalley guilty, and the court sentenced him to two years of imprisonment for his conviction. On appeal, Mr. Swalley raises two assignments of error:

{¶43} "[1.] The trial court erred to the prejudice of the defendant-appellant when it failed to grant defendant-appellant's Rule 29 motion for acquittal where there was insufficient evidence to sustain a conviction in violation of Article IV of the Ohio Constitution.

{¶44} "[2.] The trial court's failure to determine whether the defendant-appellant made a knowing and intelligent decision to waive his right to testify on his own behalf violated his Sixth and Fourteenth Amendment Rights."

{¶45} Under the first assignment of error, Mr. Swalley asserts there is insufficient evidence to support the conviction of illegal assembly or possession of chemicals for the manufacture of drugs.

{¶46} **Standard of Review for a Sufficiency-of-Evidence Claim**

{¶47} A trial court shall grant a motion for acquittal when there is insufficient evidence to sustain a conviction. Crim.R. 29(A). A sufficiency-of-the-evidence claim challenges whether the state has presented sufficient evidence on each element of the offense to allow the case to go to the jury or to sustain the verdict as a matter of law. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387.

{¶48} "An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to

determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus. Whether a conviction is supported by sufficient evidence is a question of law that this court reviews de novo. *Thompkins* at 386.

{¶49} R.C. 2925.041 prohibits the illegal assembly or possession of chemicals for the manufacture of drugs. It states:

{¶50} "(A) No person shall knowingly assemble or possess one or more chemicals that may be used to manufacture a controlled substance in schedule I or II with the intent to manufacture a controlled substance in schedule I or II in violation of section 2925.04 of the Revised Code.

{¶51} "(B) In a prosecution under this section, it is not necessary to allege or prove that the offender assembled or possessed all chemicals necessary to manufacture a controlled substance I or II. The assembly or possession of a single chemical that may be used in the manufacture of a controlled substance in schedule I or II, with the intent to manufacture a controlled substance in either schedule, is sufficient to violate this section."

{¶52} **Possession**

{¶53} R.C. 2925.01(K) provides that "'possess' or 'possession' means having control over a thing or substance, but may not be inferred solely from mere access to

the thing or substance through ownership or occupation of the premises upon which the thing or substance is found."

{¶54} "Possession of drugs can be either actual or constructive." *State v. Fogle*, 11th Dist. No. 2008-P-0009, 2009-Ohio-1005, ¶28, citing *State v. Rollins*, 3d Dist. No. 11-05-08, 2006-Ohio-1879, ¶22, citing *State v. Haynes* (1971), 25 Ohio St.2d 264. "Actual possession exists when the circumstances indicate that an individual has or had an item within his immediate physical possession. Constructive possession exists when an individual is able to exercise dominion or control of an item, even if the individual does not have the item within his immediate physical possession." *State v. Kingsland*, 177 Ohio App.3d 655, 2008-Ohio-4148, ¶13 (quotation omitted).

{¶55} "Constructive possession will be found when a person knowingly exercises dominion or control over an item, even without physically possessing it. While mere presence in the vicinity of the item is insufficient to justify possession, ready availability of the item and close proximity to it support a finding of constructive possession." *State v. Lamb*, 9th Dist. No. 23418, 2007-Ohio-5107, ¶12 (internal citations omitted). See, also, *State v. Wolery* (1976), 46 Ohio St.2d 316, 329 (constructive possession is established when a person was able to exercise dominion or control over the contraband). The state may prove dominion and control through circumstantial evidence. *Jenks* at 272.

{¶56} "Possession may not be inferred, however, solely from the defendant's ownership or occupation of the location where drugs are found." *State v. Hicks*, 9th Dist. No. 24017, 2008-Ohio-4842, citing R.C. 2925.01(K). Despite the possibility of proving constructive possession by circumstantial evidence, the Supreme Court has

long cautioned against inferring possession when narcotics were found in jointly occupied premises. In *Haynes*, the police found marijuana in the living room, dining room, and kitchen in a house rented by the defendant, which had also been occupied by his girlfriend and three nephews and which the defendant had not occupied for a week prior to the police's discovery of narcotics. As the court reasoned:

{¶57} "The mere fact that one is the owner or lessee of premises upon which narcotics are found -- where such premises are also regularly occupied by others as co-tenants and the narcotics are found in an area ordinarily accessible to all tenants -- is not, without further evidence, sufficient to establish *possession* in the owner or lessee.

{¶58} "When narcotics are discovered in the general living area of jointly occupied premises, one can only speculate as to which of the joint occupiers have possession of the narcotics. In other words, no inference of guilt in relation to any specific tenant may be drawn from the mere fact of the presence of narcotics on the premises.

{¶59} "Criminal convictions cannot rest upon mere speculation; the state must establish the guilt of the accused by proof beyond a reasonable doubt.

{¶60} "In the instant case, there is no evidence which establishes that the accused had possession of the marijuana. The uncontroverted evidence shows that not only were these premises occupied by several persons, but also that the appellant had not occupied them for a week prior to the search. *** The *only evidence* presented by the state *** was that he was the lessee of the premises. Standing alone, that is not sufficient to establish his possession for sale of the narcotic, particularly where the premises are also occupied by other persons." (Emphasis sic.) Id. at 270-271.

{¶61} The appellate courts have heeded the caution against inferring possession when narcotics are found in jointly occupied premises. In *State v. Pumpelly* (1991), 77 Ohio App.3d 470, rent receipts containing the defendant's name were the only evidence linking her to the drugs found in an apartment which she shared with at least one other individual. The Twelfth District concluded that "[t]he rent receipt evidence demonstrated only that appellant rented the premises where the cocaine was found; it did not prove that appellant possessed the cocaine. Because appellant did not have exclusive access to the apartment, the rent receipt evidence, without more, was insufficient to establish the element of possession." Id. at 476.

{¶62} In *State v. Slade* (2001), 145 Ohio App.3d 241, the defendant resided with her boyfriend and two other individuals in a multi-dwelling house, where the police found narcotics on a desk. The Eighth District noted that, without any locks on any of the doors, the house appeared completely accessible to all who lived there. The court, citing the provision of R.C. 2925.01(K) prohibiting the inference of possession through the occupation of the premises upon which the contraband is found, concluded there was no evidence that the defendant exercised dominion or control over the narcotics. Id. at 243.

{¶63} In *State v. Weber* (Mar. 24, 2000), 2d Dist. No. 17800, 2000 Ohio App. LEXIS 1150, the only evidence the state presented linking the defendant to the contraband was his status as lessee of the property. The court emphasized that all rooms in the residence were accessible to the defendant and another tenant, and that the defendant had been away from the premises for several days at the time of the

discovery. The court held that the evidence was insufficient as a matter of law to prove the defendant's knowing possession of the firearms or drugs found on the premises.

{¶64} In *State v. Dawson* (Aug. 13, 1998), 10th Dist. No. 97APA10-1300, 1998 Ohio App. LEXIS 3754, the defendant shared with another individual a residence where narcotics were found. The Tenth District held that because the defendant was not in exclusive control of the residence, the fact that marijuana was found in it was insufficient to establish that he had constructive possession of the narcotics. Id. at *33-34.

{¶65} In *State v. Richardson* (June 2, 1994), 5th Dist. Case Nos. 93-CA-44, 93-CA-451994, Ohio App. LEXIS 3061, the drugs were found in the bathroom of a residence where the defendant lived with another individual. The Fifth District similarly concluded that "mere access and/or occupation of premises are insufficient to infer possession." Id. at *5.

{¶66} Thus, the case law has clearly established that, without evidence of exclusive control over or access to the premises where narcotics are found, there is insufficient evidence to show an occupant's constructive possession of the narcotics.

{¶67} In the instant case, Mr. Swalley was not present at the apartment when the various items known to be associated with the manufacturing of methamphetamine were found. None of the items were tested for fingerprints to connect him to them.

{¶68} The state's only evidence of Mr. Swalley's constructive possession of the methamphetamine paraphernalia was his temporary occupation of Mr. Matthews' apartment. By Mr. Matthews' own testimony, however, his apartment was available to anyone who needed a place to stay. This is confirmed by the apartment manager, who described Mr. Matthews' apartment as a "revolving door."

{¶69} All three areas where suspected methamphetamine paraphernalia were found—the living room, the garage, and the communal trash can on the front porch—were accessible to multiple individuals.

{¶70} Regarding the living room, immediately before Mr. Swalley moved in, Mr. Weston, a convicted felon, had stayed in the apartment, although in a different room. Mr. Matthews also testified he had others help him move the furniture around in the living room, where the laundry basket was found behind a couch, after Mr. Weston moved out. Regarding the garage, where a bottle of HEET and a mason jar with a suspicious pink, powdery substance were found, Mr. Matthews testified he permitted several individuals in the apartment complex to store items there, including Mr. Beville, a parolee under the supervision of the county adult parole authority. Regarding the trash can on the porch, the testimony shows that it was available to the occupants in the entire apartment complex for disposal of trash.

{¶71} Thus, Mr. Swalley did not have exclusive access to any of the three areas where suspected methamphetamine paraphernalia were found. All three areas were accessible to others besides Mr. Swalley.

{¶72} Mr. Matthews also testified Mr. Swalley used the peroxide and iodine found in the living room for medical purposes and, although Mr. Swalley did not complain of an infection until weeks after his arrest, the county jail nurse confirmed she treated his MRSA infections with these solutions. As to the mysterious "rotten egg" odor, the testimony does not clearly establish Mr. Swalley resided in the apartment when the odor occurred. Mr. Matthews, the apartment's lessee, testified he was not

aware of anyone manufacturing drugs in the apartment. No pseudoephedrine or methamphetamine was found there.

{¶73} As such, the record does not contain sufficient evidence as to the elements of illegal assembly or possession of chemicals for the manufacture of drugs to allow the case to go to the jury. The evidence does not establish Mr. Swalley had exclusive control over or access to the premises where the items were found. As the Supreme Court of Ohio has cautioned, the mere fact that one is an occupant of premises upon which narcotics are found when such premises are also occupied by others and the narcotics are found in areas accessible to others is, without more -- such as forensic evidence linking the items to the defendant -- insufficient to establish possession. *Haynes* at 270.

{¶74} Thus, although we are reluctant to reverse a trial court's judgment based on a jury verdict, we are obliged to properly apply the case law and hold that the state failed to present sufficient evidence to allow the jury to decide whether the defendant knowingly possessed the items associated with the manufacturing of methamphetamine found in premises of an apartment to which he did not have exclusive access. "On review for sufficiency, courts are to assess not whether the state's evidence is to be believed, but whether, if believed, the evidence against the defendant would support a conviction." *Thompkins*, supra, at 390 (Cook, J., concurring). In this case, the evidence, even if believed, would not support a conviction as a matter of law. The first assignment is sustained.

{¶75} Mr. Swalley maintains, under the second assignment of error, that the trial court failed to determine whether he understood he had a right to testify on his own

behalf and whether he waived the right knowingly and intelligently. Our resolution of the first issue renders the second assignment of error moot and we need not address it.

{¶76} The judgment of the Ashtabula County Court of Common Pleas is reversed.

THOMAS R. WRIGHT, J., concurs,

DIANE V. GRENDELL, J., dissents with Dissenting Opinion.

DIANE V. GRENDELL, J., dissents with a Dissenting Opinion.

{¶77} I respectfully dissent from the majority's conclusion that there was insufficient evidence to find Swalley in constructive possession of the items used to manufacture methamphetamine.

{¶78} The majority holds that mere access to or occupation of a premises is not enough to infer possession of drugs found on the premises and cites *State v. Haynes* (1971), 25 Ohio St.2d 264, as well as several other cases, to support this holding. However, the facts of the present case are distinguishable from those found in *Haynes*. The record indicates that Swalley's conviction was supported by more than just his occupation of the premises where the items were found, including facts that a letter with Swalley's return address and Swalley's hunting license were found in locations close to drug-related items, as well as testimony that the basket of drug items found in the house was next to the couch in the living room where Swalley was staying.

{¶79} While individuals other than Swalley were often in and out of the premises, this is not dispositive of the issue of whether Swalley had constructive possession of the

items used to manufacture methamphetamine. Where other adults are living in a home, with access to the area where drugs were discovered, a defendant can still be found in constructive possession of drugs. *State v. Jackson*, 11th Dist. No. 2002-A-0039, 2003-Ohio-5863, at ¶¶31-37.

{¶80} Several courts have found that evidence showing a defendant's personal paperwork or documents were located with or near the drug-related items supports a conviction based on constructive possession. See *State v. Scalf* (1998), 126 Ohio App.3d 614, 620 (the court found that there was sufficient evidence that appellant had constructive possession when multiple adults lived in a home and a search of the home revealed cocaine found in a cabinet, along with appellant's papers, in a sitting room shared by all occupants of the house); *State v. Carroll*, 10th Dist No. 99AP-972, 2000 Ohio App. LEXIS 3323, at *9-10 (evidence that appellant's driver's license was found together with receipts bearing his name in a "location next to drugs and cash" supported a finding that appellant was in constructive possession of the drugs).

{¶81} In this case, the State presented the testimony of several officers who stated that a letter with Swalley's name and return address were located in the garbage can, with a gas generator and matchbooks without striker plates, items used to manufacture methamphetamines. Additionally, testimony was presented that Swalley's hunting license was located in a box in the garage, near where the HEET, muriatic acid, and jar containing the residue of pseudoephedrine pills were found.

{¶82} Although this alone may not be enough for a constructive possession charge, coupled with evidence that Swalley was living in the home, along with evidence that he used the trash can and the garage where these items were found, are sufficient

to sustain a conviction. See *Jackson*, 2003-Ohio-5863, at ¶¶31-37 (where three adults lived in a home, drugs were found in appellant's daughter's room, where appellant slept "occasionally," appellant leased the residence where drugs were found, and correspondence to appellant was located in the bedroom where drugs were found, there was sufficient, credible evidence that appellant was in constructive possession of the drugs).

{¶83} Moreover, the items found in the basket were located in the living room, an area that was designated as Swalley's living space. At trial, Probation Officer Kiser testified that the living room was designated as Swalley's sleeping area. Detective Cumberledge also testified that he was informed by Donald Matthews, the renter of the apartment, that the living room was Swalley's "exclusive living quarters." These facts support the conclusion that Swalley was in constructive possession of the items in the living room.

{¶84} In addition, in a video interview conducted with Swalley and presented during trial, Swalley admitted that he uses methamphetamine and had used methamphetamine a week prior to giving the statement. This court has found that the admission of methamphetamine use makes it more likely that a defendant possessed either methamphetamine or items used to manufacture methamphetamine. See *State v. Boczar*, 11th Dist. No. 2007-A-0034, 2008-Ohio-834, at ¶45 (where the court found that a defendant had admitted methamphetamine use, it was more likely that he was in possession of items used to manufacture methamphetamine); *State v. David*, 11th Dist. No. 2005-L-109, 2006-Ohio-3772, at ¶27 (the fact that defendant had admitted in a

statement to police that he had a methamphetamine habit "makes it more likely that he possessed the methamphetamine found in his vehicle").

{¶85} The majority states that the evidence does not establish that Swalley had "exclusive control over or access to the premises where the items were found." However, exclusive control of the premises is not required. "[N]othing in [R.C. 2925.01(K)] states that illegal drugs must be in the sole or exclusive possession of the accused at the time of the offense," and a judge can find that two or more parties jointly controlled a drug. *In re Farr*, 10th Dist. No. 93AP-201, 1993 Ohio App. LEXIS 5394, at *16; *State v. Mann* (1993), 93 Ohio App.3d 301, 308. As long as there is evidence in addition to appellant's access or occupation of the premises, exclusive control of the premises is not necessary. As discussed above, such evidence was present in this case.

{¶86} Accordingly, I would affirm Swalley's conviction, as it is supported by sufficient evidence.

The State of Ohio,
Ashtabula County, ss
I, hereby certify that the foregoing is a true copy of the instrument on file in my office.

ATTEST: Tami Pentek
Clerk of Courts
Ashtabula County, Ohio
BY
Deputy Clerk

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

ASHTABULA COUNTY, OHIO

TERRY SWALLEY,	:	**OPINION**
Plaintiff-Appellant,	:	
		CASE NO. 2012-A-0026
- vs -	:	
THE STATE OF OHIO,	:	
Defendant-Appellee.	:	

Civil Appeal from the Ashtabula County Court of Common Pleas, Case No. 2012 CV 20.

Judgment: Reversed and remanded.

Ariana E. Tarighati, Law Offices of Ariana E. Tarighati, L.P.A., 34 South Chestnut Street, #100, Jefferson, OH 44047 (For Plaintiff-Appellant).

Thomas L. Sartini, Ashtabula County Prosecutor, and *Rebecca K. Divoky*, Assistant Prosecutor, Ashtabula County Courthouse, 25 West Jefferson Street, Jefferson, OH 44047 (For Defendant-Appellee).

DIANE V. GRENDELL, J.

{¶1} Plaintiff-appellant, Terry Swalley, appeals the Judgment Entry of the Ashtabula County Court of Common Pleas, granting summary judgment in favor of defendant-appellee, State of Ohio, on his claim for wrongful imprisonment. The issue before this court is whether an affidavit, asserting the claimant's innocence, is sufficient to defeat an unsupported motion for summary judgment, in the context of a wrongful imprisonment claim. For the following reasons, we reverse the decision of the court below and remand this matter for further proceedings consistent with this opinion.

PLAINTIFF'S EXHIBIT
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{¶2} On January 9, 2012, Swalley filed a Complaint for Wrongful Imprisonment R.C. § 2305.02 against the State of Ohio, arising out of his conviction for Illegal Assembly or Possession of Chemicals for the Manufacture of Drugs, in Ashtabula County Court of Common Pleas Case No. 2009 CR 92. Swalley was sentenced to a prison term of two years at the Lorain Correctional Institute. On April 29, 2011, Swalley's conviction was reversed by this court, in *State v. Swalley*, 11th Dist. No. 2010-A-0008, 2011-Ohio-2092. In *Swalley*, this court held: "the state failed to present sufficient evidence to allow the jury to decide whether the defendant knowingly possessed the items associated with the manufacturing of methamphetamine found in premises of an apartment to which he did not have exclusive access." *Id.* at ¶ 74.

{¶3} Swalley filed the Complaint seeking declaratory relief pursuant to R.C. 2305.02 and R.C. 2743.48. "One who claims to be a 'wrongfully imprisoned individual' under R.C. 2743.48 must prove all of the factors in R.C. 2743.48(A) by a preponderance of the evidence before seeking compensation from the state for wrongful imprisonment. *Doss v. State*, __ Ohio St.3d __, 2012-Ohio-5678, __ N.E.2d __, paragraph one of the syllabus. Specifically, the plaintiff must demonstrate: "(1) the petitioner was convicted of a felony; (2) the petitioner was sentenced for that conviction; (3) the conviction was vacated, dismissed, or reversed; [and] (4) no further prosecution was attempted or allowed for that conviction or any act associated with that conviction." *State ex rel. Jones v. Suster*, 84 Ohio St.3d 70, 72, 701 N.E.2d 1002 (1998), citing R.C. 2743.48(A). Finally, the court of common pleas must determine "that the charged offense, including all lesser-included offenses, either was not committed by the individual or was not committed by any person." R.C. 2743.48(A)(5).

{¶4} On March 22, 2012, Swalley filed a Motion for Summary Judgment. Attached to the Motion were a couple pages from the transcript of Swalley's criminal trial and an affidavit. In the affidavit, Swalley stated that he was sentenced and imprisoned for the Illegal Possession of Chemicals for the Manufacture of Drugs on January 29, 2010. He remained incarcerated until his release on May 9, 2011, following this court's reversal of his conviction. Swalley further deposed as follows:

> {¶5} I did not commit the crime [for] which I was convicted. I never engaged in any criminal conduct arising out of the incident that led to my conviction. I never had possession or ownership of: the items that were located in the laundry basket that was placed behind the couch in Donald Terry Matthews' living room, where I sometimes slept; the incriminating materials that were found in the common garbage can outside of Mr. Matthews' residence; or the incriminating materials in the garage.
>
> {¶6} I did use iodine and muriatic acid to clean my MRSA infection, but I never used any of these items for purposes other than that and never used them for any criminal purpose. I am absolutely innocent of the offense for which I was found guilty. I did not commit that crime and have consistently and without reservation maintained my innocence.

{¶7} On April 23, 2012, the State of Ohio filed its Response to Plaintiff's Motion for Summary Judgment and Cross Motion for Summary Judgment. The State attached no evidentiary materials to its Motion. The State conceded that Swalley satisfied the first four elements of R.C. 2743.48(A). The State contended that it was entitled to summary judgment, however, "because Plaintiff has brought forth no evidence to prove that he was innocent of the crime for which he was convicted and therefore wrongfully

imprisoned." The State argued that the court of appeals decision in Swalley's criminal case "is not evidence and even if it were, it is insufficient to prove that Plaintiff is innocent of the crimes for which he was convicted." Moreover, Swalley's affidavit was "not sufficient to fulfill Plaintiff's burden of affirmatively proving his innocence of the crime for which he was convicted," inasmuch as it consisted of "various unfounded statements that he did not commit the offense for which he was found guilty or it was not committed by any person."

{¶8} On June 7, 2012, the trial court entered a Judgment Entry, denying Swalley's Motion for Summary Judgment, and granting the State's Cross Motion for Summary Judgment. The trial court refused to consider the non-certified transcript pages and this court's decision in *State v. Swalley*, 2011-Ohio-2092, as being "not the type of evidence specifically authorized under Civ.R. 56(C)." With respect to "the remaining evidence," i.e., Swalley's affidavit, the trial court held that Swalley failed to demonstrate that he was entitled to judgment as a matter of law. "Viewing the Defendant's motion for summary judgment in a light most favorable to Plaintiff, reasonable minds can come to but one conclusion, * * * [n]o genuine issue of material fact remains to be litigated, and Defendant is entitled to judgment as a matter of law."

{¶9} On July 5, 2012, Swalley filed a Notice of Appeal. On appeal, Swalley raises the following assignment of error:

{¶10} "[1.] The trial court erred in granting appellee's motion for summary judgment and denying appellant's motion for summary judgment."

{¶11} Pursuant to Civil Rule 56(C), summary judgment is proper when (1) the evidence shows "that there is no genuine issue as to any material fact" to be litigated, (2) "[t]he 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 that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence * * * construed most strongly in the party's favor." A trial court's decision to grant summary judgment is reviewed by an appellate court under a de novo standard of review. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). Under this standard, the reviewing court conducts an independent review of the evidence before the trial court and renders a decision de novo, i.e., as a matter of law and without deference to the conclusions of the lower court. *Bd. of Rootstown Twp. Trustees v. Rootstown Water Serv. Co.*, 11th Dist. No. 2011-P-0084, 2012-Ohio-3888, ¶ 19.

{¶12} "Claimants 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 v. State*, 67 Ohio St.3d 93, 616 N.E.2d 207 (1993), syllabus. "A trial court adjudicating proof of innocence pursuant to R.C. 2743.48(A)(5) may not find that the claimant was wrongfully imprisoned based solely on an appellate court judgment vacating a felony conviction due to insufficient evidence and discharging the prisoner without a remand for a new trial." *Doss*, 2012-Ohio-5678, at paragraph two of the syllabus.

{¶13} "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." (Citation omitted.) *Dempsey v. State*, 8th Dist. No. 94315, 2010-Ohio-5134, ¶ 25.

{¶14} Applying these principles to the record before us, the trial court's grant of summary judgment must be reversed. The sole issue to be determined was whether Swalley committed the offense of Illegal Possession of Chemicals for the Manufacture of Drugs. This court's reversal of Swalley's conviction in *State v. Swalley*, 2011-Ohio-2092, is not determinative of that issue. Swalley's affidavit, however, attests, not only that he avoided conviction of the Possession charge, but that he did not commit such a crime. In the affidavit, Swalley either denied possessing the incriminating materials on which his conviction was based or asserted their use for a lawful purpose. *See* R.C. 2925.041(A) ("[n]o person shall knowingly assemble or possess one or more chemicals that may be used to manufacture a controlled substance * * * with the intent to manufacture a controlled substance"). Construing this evidence in Swalley's favor, a genuine issue of material fact exists as to whether Swalley committed the crime of Illegal Possession of Chemicals.

{¶15} The State introduced no contrary evidence, but contended that the affidavit "is not sufficient to fulfill Plaintiff's burden of affirmatively proving his innocence of the crime for which he was convicted." We disagree. Swalley's sworn claim of innocence and explanation of the incriminating evidence constitutes evidence which, if believed, is sufficient to affirmatively prove his innocence. Accordingly, in order to affirm the trial court's grant of summary judgment in the State's favor, there would have to be "no genuine issue as to any material fact," so that the State would be "entitled to judgment as a matter of law." Civ.R. 56(C). The record before us does not support that

conclusion. *See, e.g.*, *Ballard v. State*, 8th Dist. No. 97882, 2012-Ohio-3086, ¶ 16-17, 28 (trial court erred in granting the State's unsupported motion for summary judgment contrary to the evidence of petitioner's affidavit); *Henderson v. State*, 11th Dist. No. 2006-T-0033, 2007-Ohio-208, ¶ 34 (where both parties filed motions for summary judgment and the petitioner satisfied its initial burden under *Dresher*, "the state of Ohio must point to some evidence that affirmatively demonstrates that [the petitioner] has no evidence to support his claim").

{¶16} In the present case, a genuine issue of material fact exists regarding Swalley's innocence of the crime for which he was convicted that precludes a grant of summary judgment in favor of either party. Although the affidavit is not contradicted, the truthfulness of Swalley's claims relies wholly on his credibility, which must be determined by the trier of fact. *Dempsey*, 2010-Ohio-5134, ¶ 25.

{¶17} The sole assignment of error is with merit.

{¶18} For the foregoing reasons, the judgment of the Ashtabula County Court of Common Pleas, granting summary judgment in the State's favor, is reversed and this matter is remanded for further proceedings consistent with this opinion. Costs to be taxed against appellee.

CYNTHIA WESTCOTT RICE, J.,

THOMAS R. WRIGHT, J.,

concur.

The State of Ohio,
Ashtabula County, ss
I, hereby certify that the foregoing is a true copy of the instrument on file in my office.

ATTEST: Tami Pentek
Clerk of Courts
Ashtabula County, Ohio
BY
Deputy Clerk

COPY

THE COURT OF COMMON PLEAS
ASHTABULA COUNTY, OHIO

FILED

2013 NOV 25 A 10: 04

TAMI PENTEK
CLERK OF COURTS
COMMON PLEAS COURT
ASHTABULA CO OH

TERRY SWALLEY	:	CASE NO. 2012 CV 20
Plaintiff,	:	
vs.	:	JUDGE ALFRED W. MACKEY
THE STATE OF OHIO	:	
	:	JUDGMENT ENTRY
Defendant.	:	

This matter came before the Court for hearing upon Plaintiff's Complaint for Wrongful Imprisonment. Present was the Ashtabula County Prosecutor, Thomas L. Sartini, on behalf of the State of Ohio, and Ariana E. Tarighati, Esq., on behalf of the Plaintiff, Terry Swalley. After hearing arguments of counsel, including the stipulation of the parties to the criteria set forth in R.C. §2743.48(A)(1-4), and premised upon the facts in the matter of State of Ohio vs. Terry Swalley, Ashtabula County Common Pleas Court Case No. 2009 CR 92, and the decisions of the Eleventh District Court of Appeals in the subsequent appeals, (Appellate Nos. 2010-A-0008 and 2012-A0026, copies of which are attached), the Court finds, the Plaintiff, Terry Swalley, has met the criteria under R.C. §2743.48(A)(5), and has established that he was a wrongfully imprisoned individual as defined in R. C. §2743.48. Costs to be paid by the Plaintiff.

IT IS SO ORDERED.

JUDGE ALFRED W. MACKEY

Pursuant to Civil Rule 58(B), the Clerk of this Court is directed to serve notice of this judgment and its date of entry upon the journal upon the following: Thomas L. Sartini, Ashtabula County Prosecutor; Ariana E. Tarighati, Esq., 34 South Chestnut Street, Jefferson, OH 44047.

PLAINTIFF'S EXHIBIT
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