

[Cite as *Moore v. Ohio Dept. of Rehab. and Corr.*, 2005-Ohio-3939.]

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

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|--|---|-----------------------|
| Robert Lee Moore, | : | |
| | : | |
| Plaintiff-Appellant, | : | |
| | : | |
| v. | : | No. 05AP-53 |
| | : | (C.C. No. 2002-03651) |
| Ohio Department of Rehabilitation and Correction, | : | |
| | : | (REGULAR CALENDAR) |
| Defendant-Appellee. | : | |
| | : | |

O P I N I O N

Rendered on August 2, 2005

Robert Lee Moore, pro se.

*Jim Petro, Attorney General, Lisa M. Eschbacher and
Karl W. Schedler, for appellee.*

APPEAL from the Ohio Court of Claims.

FRENCH, J.

{¶1} Appellant, Robert Lee Moore, appeals from the judgment of the Ohio Court of Claims overruling appellant's objections to a magistrate's decision and adopting

the magistrate's decision as the court's final judgment in favor of appellee, the Ohio Department of Rehabilitation and Correction ("ODRC").

{¶2} At all relevant times, appellant was an inmate in the custody of ODRC. The events giving rise to appellant's claim occurred shortly after ODRC transferred appellant from the Mansfield Correctional Institution ("ManCI") to the Southern Ohio Correctional Facility ("SOCF") on May 10, 2001. In his complaint, appellant alleged that, after his transfer, ODRC lost or destroyed his personal property without authorization.

{¶3} Appellant tried his case to a Court of Claims magistrate on March 24, 2003. On October 25, 2004, the magistrate issued a decision recommending that the court enter judgment in favor of ODRC.¹ The magistrate concluded that appellant failed to prove, by a preponderance of the evidence, that he suffered a loss that was proximately caused by ODRC's negligence.

{¶4} Appellant filed timely objections to the magistrate's decision, pursuant to Civ.R. 53(E)(3)(a), essentially arguing that the magistrate's decision was unsupported by the evidence. However, appellant did not support his objections with a copy of the transcript or an affidavit of the evidence presented to the magistrate, as required by Civ.R. 53(E)(3)(c). On December 10, 2004, having no transcript to review, the trial court overruled appellant's objections, adopted the magistrate's decision, and rendered judgment in favor of ODRC.

¹ During the time period between trial and issuance of the magistrate's decision, appellant filed a motion for leave of court, in which he set forth claims of perjury and tampering with evidence against witness Sergeant Mark Emmons, two motions for production of a trial transcript, a motion for a new trial, a motion to modify the prayer for relief in his complaint, and a motion for summary judgment. The Court of Claims

struck appellant's motion for leave of court, granted appellant's motion to modify his prayer for relief, and denied all other motions.

{¶5} Appellant appealed to this court and sets forth the following assignments of error:

ERROR #1. PERJURY, as defined within, O.R.C. 2921.11 (F3) and, ERROR #2. TAMPERING WITH EVIDENCE, as defined within, O.R.C. 2921.12 (F3).

In his brief, appellant primarily attacks the credibility of Sergeant Mark Emmons' testimony, arguing that it was untruthful and intended to impair the outcome of the trial. Appellant also argues that the documentary evidence presented at trial contradicts Sergeant Emmons' testimony. Although appellant labels his assignments of error as "perjury" and "tampering with evidence," appellant is essentially making a manifest weight of the evidence argument.

{¶6} The magistrate's decision sets forth the following facts and recitation of evidence. Although a portion of appellant's personal belongings arrived at SOCF with appellant on May 10, 2001, the remainder of appellant's personal belongings arrived from ManCI approximately two weeks later. On May 28, 2001, Corrections Officer ("C.O.") Shonkwiler approached appellant with an Inmate Property Record – Disposition and Receipt form containing an inventory of appellant's property that had recently arrived from ManCI. The form listed several items, including two photograph albums, which SOCF considered contraband. When an ODRC facility deems property transferred with an inmate to be contraband, the inmate has the option of sending it home or giving ODRC consent to destroy the property.

{¶7} Appellant disputed SOCF's determination that the items listed as contraband on the Inmate Property Record – Disposition and Receipt form were actually prohibited. Appellant claimed that he completed a cash withdrawal slip provided to him

by C.O. Shonkwiler on May 28, 2001, authorizing the purchase of postage and instructing that the contraband items be shipped to ODRC's central office in Columbus for a determination of whether such items were prohibited. C.O. Shonkwiler does not recall giving appellant a cash withdrawal slip and does not know what happened to appellant's property.

{¶8} Beginning in January 2002, appellant made various inquiries requesting an explanation as to the disposition of his property. In response to one such inquiry, Sergeant Emmons replied that appellant signed a destroy form with respect to the property. In his decision, the magistrate cites no trial testimony from Sergeant Emmons connecting the specific destroy forms introduced at trial to appellant's missing property.

{¶9} After receiving a complaint from appellant, Ohio State Highway Patrol Trooper Warren Hunter conducted an investigation and concluded that there was no evidence of criminal activity and that appellant's file contained a destroy form related to the missing property. Appellant testified that he does not know what happened to his property, but that he did not sign a form authorizing destruction of the property. Based upon the evidence presented, the magistrate concluded that appellant failed to prove, by a preponderance of the evidence, that he suffered a loss that was proximately caused by ODRC's negligence.

{¶10} In his objections, appellant argued that the magistrate's decision was unsupported by the evidence presented at trial. Appellant also attacked the credibility of Sergeant Emmons' testimony, including testimony regarding the relationship between the destroy forms introduced at trial and appellant's missing property. We are cognizant of the rule that the credibility of witnesses is primarily for the trier of fact to determine.

State v. DeHass (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. Additionally, pursuant to Civ.R. 53(E)(3)(c), "[a]ny objection to a [magistrate's] finding of fact shall be supported by a transcript of all the evidence submitted to the magistrate relevant to that fact or an affidavit of that evidence if a transcript is not available." Appellant did not file a transcript or an affidavit of the evidence presented to the magistrate in support of his objections to the magistrate's decision.

{¶11} Resolution of appellant's objections required an examination of the evidence presented to the magistrate, including Sergeant Emmons' testimony. In the absence of a transcript, the trial court could not have evaluated Sergeant Emmons' testimony or determined whether the evidence presented to the magistrate supported the magistrate's findings. See *Roberts v. Payton* (1995), 105 Ohio App.3d 597, 600. Therefore, " 'the trial court was required to accept the magistrate's findings of fact and examine only the legal conclusions based on those facts.' " *DAK, PLL v. Borgerding*, Franklin App. No. 02AP-1051, 2003-Ohio-3342, at ¶9, quoting *Galewood v. Terry Lumber Supply Co.* (Mar. 6, 2002), Summit App. No. 20770; see, also, *Layne v. Layne*, Franklin App. No. 03AP-1058, 2004-Ohio-3310, at ¶12, citing *State ex rel. Duncan v. Chippewa Twp. Trustees* (1995), 73 Ohio St.3d 728.

{¶12} The Ohio Supreme Court has held that, "[w]hen a party objecting to a [magistrate's decision] has failed to provide the trial court with the evidence and documents by which the court could make a finding independent of the [decision], appellate review of the court's findings is limited to whether the trial court abused its discretion in adopting the [magistrate's decision.]" *Duncan* at 730. Thus, our review of appellant's assignments of error is limited to whether the trial court abused its discretion

in applying the law to the magistrate's findings of fact. *H.L.S. Bonding Co. v. Fox*, Franklin App. No. 03AP-150, 2004-Ohio-547, citing *Duncan* at 730. An abuse of discretion connotes more than an error in law or judgment; it implies that the court's attitude was unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶13} Upon review, we find that the magistrate's findings of fact supported the magistrate's conclusion that appellant failed to prove, by a preponderance of the evidence, that ODRC was responsible for the loss of his property. In addition to appellant's admission that he did not know what happened to his property, the magistrate cited testimony from Trooper Hunter that appellant's file contained a destroy form related to appellant's missing property. The magistrate also noted Sergeant Emmons' response to one of appellant's inquiries, in which Sergeant Emmons indicated that appellant had signed a destroy form for the missing property.

{¶14} Although appellant contests the truthfulness of Sergeant Emmons' testimony that one of the destroy forms admitted at trial authorized destruction of appellant's property, appellant failed to provide either the trial court or this court with a transcript of Sergeant Emmons' testimony. Appellant's assignments of error require a review of Sergeant Emmons' testimony. Without a transcript, this court has no record of the proceedings before the magistrate and is unable to evaluate the testimony presented. Thus, we must assume the validity of the trial court's proceedings. See *Ray-Whittaker v. Liquor Control* (June 22, 2000), Franklin App. No. 99AP-1114, citing *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197. Having done so, we find

that the trial court did not abuse its discretion by adopting the magistrate's decision as its own, and we overrule appellant's assignments of error.

{¶15} For the foregoing reasons, appellant's assignments of error are overruled and we affirm the judgment of the Ohio Court of Claims.

Judgment affirmed.

BROWN, P.J., and McGRATH, J., concur.
