

IN THE COURT OF APPEALS FOR CHAMPAIGN COUNTY, OHIO

REX SMITH	:	
	:	
Plaintiff-Appellant	:	C.A. CASE NO. 2009 CA 22
v.	:	T.C. NO. 09 CV 28
	:	
OHIO ADULT PAROLE AUTHORITY, et al.	:	(Civil appeal from Common Pleas Court)
	:	
Defendants-Appellees	:	

**OPINION**

Rendered on the 19<sup>th</sup> day of March, 2010.

REX SMITH, #A348-574, London Correctional Institute, 1580 State Route 56 S.W., P. O. Box 69, London, Ohio 43140  
Plaintiff-Appellant

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Attorneys for Defendant-Appellee Champaign County Prosecutor Nicholas A. Selvaggio

FROELICH, J.

{¶ 1} Rex Smith appeals from a judgment of the Champaign County Court

of Common Pleas, dismissing his complaint for declaratory judgment and injunctive relief against Champaign County Prosecutor Nicholas A. Selvaggio and the Ohio Adult Parole Authority (“OAPA”), pursuant to Civ.R. 12(B)(6). For the following reasons, the trial court’s judgment will be affirmed.

I

{¶ 2} Smith’s complaint alleges the following facts:

{¶ 3} Smith was indicted in Champaign County for seven counts of rape of a child under the age of 13, in violation of R.C. 2907.02, a first degree felony. Smith initially pled not guilty. Through his attorney, Smith entered into plea negotiations with the State of Ohio, through Prosecutor Selvaggio, during which the prosecutor offered to nolle six counts of rape if Smith agreed to plead guilty to one count of rape of a child under the age of 13, in violation of R.C. 2907.02(A)(1)(b). Smith was informed that he would be eligible for parole consideration after serving ten years. Smith agreed to those terms and on May 30, 1997, he withdrew his not guilty plea and entered a plea of guilty to one count of rape under R.C. 2907.02(A)(1)(b). The court accepted the plea, and the remaining counts were dismissed. On July 3, 1997, the court imposed a mandatory life sentence, with jail time credit of 86 days. Under R.C. 2967.13(A)(5), Smith would be eligible for parole in ten years.

{¶ 4} On February 17, 2007, Smith appeared before the OAPA. In conducting the parole hearing, the OAPA used the Ohio Parole Board Guidelines Manual, Second Edition, dated April 1, 2000, to determine a guideline range of months that Smith needed to serve before eligibility for release. The guidelines

were in the form of a grid, on which thirteen categories of offense seriousness were listed on the vertical axis and four criminal history/risk of recidivism categories were listed on the horizontal axis. By locating the intersection of the categories on the vertical and horizontal axes that applied to the offender and the crime committed by the offender, the OAPA determined a guide range of months to be served by the offender before release. The Guidelines Manual provided that the OAPA could “depart from the guidelines (either upward or downward) for good cause upon the provisions of specific written reasons.” In addition, “[t]he applicable guideline range does not supersede any minimum or maximum sentence applicable to the offender.”

{¶ 5} Subchapter D (Sexual Offenses) of the April 1, 2000, Ohio Parole Board Guidelines Manual provided, in part:

{¶ 6} “231. Rape

{¶ 7} “Use of the greatest applicable category:

{¶ 8} “(A) Category 10 if –

{¶ 9} “(1) serious bodily injury results;

{¶ 10} “(2) the victim is raped by more than one offender;

{¶ 11} “(3) the victim is less than 16 years of age; **or**

{¶ 12} “(4) the victim is kidnapped to facilitate the offense.

{¶ 13} “(B) Category 9 in any other case.

{¶ 14} “(C) The offense for an attempt to commit rape shall be one category lower than that set forth above.”

{¶ 15} Using the 2000 guidelines, the OAPA placed Smith in an Offense

Category of ten and set his Criminal Risk Score at zero. This placed Smith in the position of having to complete his minimum term of imprisonment of 120 months (10 years) to a maximum of 180 months (15 years) before he “would be released” from confinement and placed on parole. The hearing panel scheduled his next hearing for February 1, 2012.

{¶ 16} On May 8, 2007, the OAPA reheld Smith’s initial parole hearing. The OAPA informed Smith that he would have to complete an additional 58 months, for a total of 180 months of incarceration, before he would be eligible to be released.

{¶ 17} On May 14, 2007, Smith received a letter from Quality Assurance, which oversees the actions of the OAPA, regarding his recent parole hearing. Attached to the letter was an Amended Authority Disposition Sheet, which reduced the previously-stated 58 months to four months and rescheduled his next hearing date for September 1, 2007. The four months were given for rule infractions and/or Smith’s receipt of misconduct reports.

{¶ 18} On July 1, 2007, new Ohio Parole Board Guidelines went into effect. Under the new guidelines, Smith’s offense of rape of a child under the age of thirteen was assigned an Offense Category of 13. On July 10, 2007, Smith returned before the OAPA and was informed that the OAPA had changed his Offense Category from ten to thirteen, in accordance with the new guidelines. Smith maintained a Risk Score of zero. With this score, Smith would still have to complete a minimum of ten years, but may have to serve a maximum sentence of life before he would be released. He was given an additional 57 months of imprisonment before he would be considered for release. The next scheduled

hearing date was set for April 1, 2012. Smith alleges that these 57 months “was beyond the previously stated guideline range which imposed a maximum of 180 months to be served before he would be released on State Parole.” The July 10, 2007, Parole Board Decision indicated, however, Smith was required to serve 180 months – not more than 180 months – before his next hearing.

{¶ 19} In January 2009, Smith brought a civil action for declaratory judgment and an injunction against Selvaggio and the OAPA. Smith alleged that the OAPA had breached the contract (his plea agreement) between Smith and the State of Ohio by assigning a Category Offense score of thirteen, which had previously been limited to the offense of murder. Smith also alleged, without elaboration, that “the breach of the plea agreement is in violation of both the State and Federal Constitutions, as well as State law, and is therefore wrongful.” Smith sought a declaratory judgment that the State had breached the contract and an injunction requiring the OAPA to conduct a parole hearing for Smith. Smith asked the trial court to “enjoin the Champaign County Prosecutor and the Ohio Adult Prole Authority to comply with the terms of the plea agreement between the Plaintiff and the State of Ohio by placing the Plaintiff in the offense category for Rape which is the offense the State of Ohio agreed to.”

{¶ 20} Smith attached several documents to his complaint: (1) his plea agreement, dated May 30, 1997, and filed on June 2, 1997; (2) the trial court’s judgment entry, filed on July 3, 1997; (3) an excerpt of the April 1, 2000, Ohio Parole Board Guidelines Manual; (4) an excerpt of the July 1, 2007, Ohio Parole Board Guidelines Manual; (5) Smith’s Ohio Parole Board Decision for the hearing

held on February 15, 2007; (6) correspondence from the Ohio Parole Board, dated March 8, 2007, that the hearing panel's recommendation for the February 15, 2007, hearing had not been accepted; (7) Smith's Ohio Parole Board Decision for the hearing held on May 8, 2007; (8) correspondence from the Ohio Parole Board, dated May 14, 2007, advising him that Quality Assurance had made an amendment to the decision sheet for the May 8, 2007, hearing; (9) Smith's Amended Ohio Parole Board Decision for the hearing held on May 8, 2007; (10) Smith's Ohio Parole Board Decision for the hearing held on July 10, 2007; and (11) and three cases which Smith asserts govern his appeal.

{¶ 21} Selvaggio moved to dismiss the complaint, pursuant to Civ.R. 12(B)(6). Selvaggio argued: “\*\*\* [Smith] has no right, contractual or otherwise, to be released from prison prior to serving the entirety of his prison sentence for raping a child less than thirteen years of age. Further, Plaintiff has no right to have the parole guidelines in effect at the time of his sentencing, or throughout his prison sentence, apply at all times when he is considered for parole. Thus, Selvaggio cannot be liable for breach of the plea agreement due to the denial of Plaintiff's parole.” Alternatively, Selvaggio argued that, because he was not involved in the OAPA hearings regarding Smith's parole, he has not breached any terms of the plea agreement. Selvaggio further asserted that Smith did not adequately allege any constitutional violation and, regardless, that he (Selvaggio) is entitled to absolute immunity with respect to claims brought against him in his capacity as Prosecutor for Champaign County.

{¶ 22} The OAPA also moved to dismiss Smith's complaint, pursuant to

Civ.R. 12(B)(6). The OAPA summarized its arguments, as follows: “Plaintiff Rex Smith’s plea agreement was not breached when the parole board classified him as a Category 13 under the 2007 parole guidelines. Since the use of APA guidelines is discretionary, Plaintiff is not entitled to any specific category classification. Also, Plaintiff does not have a constitutionally protected liberty interest in parole or early release. Most importantly, Plaintiff received a meaningful parole hearing. Plaintiff’s Complaint therefore fails to state a claim upon which relief can be granted. Furthermore, Plaintiff has failed to comply with Ohio Revised Code §§2969.25(A) and §2969.26(A), [setting forth requirements for inmates filing civil actions against the government or its employees,] which alone warrants a dismissal. Thus, Defendants’ Motion to Dismiss should be granted.” The OAPA also argued that a declaratory judgment action was not a proper remedy for Smith’s allegations, because the parole guidelines do not fall under the declaratory judgment procedures outlined in R.C. 2721.03.

{¶ 23} Smith opposed the motions. He acknowledged that he had no constitutional or statutory right to parole before the expiration of his maximum sentence and that he had received a meaningful review hearing. He argued, however, that he was entitled to more than a meaningful hearing and that the OAPA had failed to consider relevant factors in continuing his case. He further argued that the OAPA had violated the Ex Post Facto Clauses of the Ohio and United States Constitutions when it used the 2007 parole guidelines in July 2007. In addition, Smith asserted that he had properly brought a declaratory judgment action, and that he had complied with R.C. 2969.25(A). He stated that the OAPA

is not subject to grievance procedures, and therefore, his complaint was not subject to dismissal under R.C. 2969.26(A).

{¶ 24} On May 7, 2009, the trial court granted the motions to dismiss, finding that Smith had failed to state a claim upon which relief could be granted. In doing so, the trial court adopted the reasoning set forth in the prosecutor's brief and relied upon *Harris v. Ohio Adult Parole Auth.*, Franklin App. No. 06AP-374, 2007-Ohio-142, and *Wright v. Ghee*, Franklin App. No. 01AP-1459, 2002-Ohio-5487.

{¶ 25} Smith appeals, raising four assignments of error. We will address them together.

## II

{¶ 26} Smith's assignments of error state:

{¶ 27} "THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO THE DEFENDANT-APPELLEES WITHOUT FIRST ALLOWING FOR DISCOVERY OF RELEVANT DOCUMENTS.

{¶ 28} "THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO THE DEFENDANT-APPELLEES WITHOUT HOLDING A HEARING TO DETERMINE THE VALIDITY OF APPELLANT'S EX POST FACTO CLAIMS.

{¶ 29} "THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO DEFENDANT-APPELLEES WITHOUT HOLDING A HEARING REGARDING APPELLANT'S CLAIMS OF BREACH OF CONTRACT (PLEA AGREEMENT).

{¶ 30} "THE TRIAL COURT ERRED IN DISMISSING THE CHAMPAIGN COUNTY PROSECUTING ATTORNEY WITHOUT FIRST HOLDING A HEARING

TO DETERMINE IF THE PLEA AGREEMENT WAS OR WAS NOT BREACHED AS A MATTER OF LAW.”

{¶ 31} Smith claims that the trial court erred in dismissing his complaint without a hearing and without providing him an opportunity to conduct discovery. Although not raised as its own assignment of error, Smith further asserts that the trial court erred in concluding that he failed to state a claim upon which relief could be granted.

{¶ 32} As an initial matter, Smith’s assignments of error erroneously state that the trial court granted summary judgment to the OAPA and the Champaign County Prosecutor. As detailed above, the trial court granted Selvaggio’s and the OAPA’s motions to dismiss pursuant to Civ.R. 12(B)(6), not motions for summary judgment pursuant to Civ.R. 56.

{¶ 33} “A motion to dismiss a complaint for failure to state a claim upon which relief can be granted, pursuant to Civ.R.12(B)(6), tests the sufficiency of a complaint. In order to prevail, it must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to relief. *O’Brien v. University Community Tenants Union, Inc.* (1975), 42 Ohio St.2d 242, 327 N.E.2d 753 at syllabus. The court must construe the complaint in the light most favorable to the plaintiff, presume all of the factual allegations in the complaint as true, and make all reasonable inferences in favor of the plaintiff. *Mitchell v. Lawson Milk Co.* (1988), 40 Ohio St.3d 190, 192, 532 N.E.2d 753.” *Grover v. Bartsch*, 170 Ohio App.3d 188, 2006-Ohio-6115, ¶16.

{¶ 34} Because the trial court was required to resolve the Civ.R. 12(B)(6)

motions solely based on the allegations in Smith's complaint, the trial court did not err in resolving the motions without a hearing on the validity of Smith's claims and without providing an opportunity for discovery.

{¶ 35} We turn, therefore, to whether the trial court properly granted Selvaggio's and the OAPA's motions to dismiss. We review the trial court's decision to grant a motion to dismiss pursuant to Civ.R. 12(B)(6) de novo. *Grover* at ¶16.

{¶ 36} Smith claims that Selvaggio and the OAPA breached the plea agreement entered on May 30, 1997. Plea agreements are contractual in nature and are subject to contract law principles. *State v. Dillon*, Darke App. No. 05 CA 1674, 2006-Ohio-4931, ¶21, citing *Randolph v. Ohio Adult Parole Auth.* (Jan. 21, 2000), Miami App. No. 99CA417. The remedies available for the breach of a plea agreement include the traditional contractual remedies of rescission and specific performance. *State v. Johnson*, Greene App. No. 06 CA 43, 2007-Ohio-1743, ¶20, citing *Santobello v. New York* (1971), 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427.

{¶ 37} The plea agreement, which was attached to Smith's complaint, included the following terms:

{¶ 38} "I withdraw my former not guilty plea and enter a plea of guilty to the following offense:

{¶ 39} "Count 1 - Rape - Ohio Revised Code 2907.02(A)(1)(B) – a felony of the first degree.

{¶ 40} "Maximum Penalty. I understand that the possible penalty as to these crimes are as follows:

{¶ 41} “Count 1 - Mandatory life sentence      Fine \$20,000.00

{¶ 42} “[U]nder the provision of Ohio Revised Code 2967.13(A)(5) – parole eligibility ten years

{¶ 43} “\*\*\*

{¶ 44} “I understand the nature of these charges and the possible defense I might have. I am satisfied with my attorney’s advice and competence. I am not under the influence of drugs or alcohol. No threats have been made to me. No promises have been made to me by anyone except as part of this plea agreement stated entirely as follows:

{¶ 45} “The State requests dismissal of Counts 2, 3, 4, 5, 6, & 7. Counsel agree that Defendant will be sentenced under the provisions of Ohio Revised Code 2967.13(A)(5)<sup>1</sup> – parole eligibility ten years.”

{¶ 46} The trial court signed the plea form and dismissed Counts 2-7 with prejudice. Smith was sentenced on Count 1 to a mandatory life sentence on July 3, 1997. In his complaint, Smith alleges that the OAPA first held a parole hearing on February 15, 2007, after serving 119 months of his sentence (including jail time credit).

{¶ 47} There are no allegations to support Smith’s contention that the

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<sup>1</sup>R.C. 2967.13(A) provides, in relevant part:

“Except as provided in division (G) of this section, a prisoner serving a sentence of imprisonment for life for an offense committed on or after July 1, 1996, is not entitled to any earned credit under section 2967.193 of the Revised Code and becomes eligible for parole as follows:

“\*\*\*

“(5) If a sentence of imprisonment for life was imposed for rape, after serving a term of ten full years’ imprisonment[.]”

Champaign County Prosecutor breached the terms of the plea agreement. Smith was sentenced in accordance with the plea agreement, and there are no allegations that the prosecutor made any promises related to his parole, other than that he (Smith) would be eligible for parole after ten years. Even under the amended 2007 parole guidelines, Smith could have been considered for release as early as after 120 months, or ten years. Smith did not allege that his guilty plea was based upon an express representation by the State that he would be released in ten years or even that parole guidelines would remain the same throughout the period of incarceration. And, there are no allegations that Selvaggio played any role in the OAPA's evaluation of Smith's suitability for parole in 2007, or at any time.

In short, Smith's complaint fails to include any factual allegations to support his claim that Prosecutor Selvaggio breached the plea agreement. Accordingly, the trial court did not err in granting Selvaggio's motion to dismiss, pursuant to Civ.R. 12(B)(6). See *State v. Shorter*, Montgomery App. No. 20111, 2004-Ohio-4057 (stating that the parole board's retroactive use of its 1998 parole guidelines did not constitute a breach of the defendant's plea agreement).

{¶ 48} The allegations in Smith's complaint also do not support a claim that the OAPA's use of the 2007 parole guidelines violated his plea agreement. As stated above, nothing in the plea agreement promised Smith that the OAPA would use the same parole guidelines that existed at the time of his plea.<sup>2</sup> Smith's

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<sup>2</sup>We note that Smith appears to argue that the OAPA should continue to use the 2000 parole guidelines, which he attached to his complaint. However, these guidelines were not in existence when Smith entered his plea.

complaint establishes that the OAPA considered Smith's suitability for parole in 2007 – after ten years of incarceration – in accordance with R.C. 2967.13(A)(5), as was contemplated under the plea agreement.

{¶ 49} In addition, Smith's placement under Offense Category 13 was consistent with the offense for which he pled guilty. Subchapter D (Sexual Offenses) of the July 1, 2007, Ohio Parole Board Guidelines Manual provides, in part:

{¶ 50} "231. Rape

{¶ 51} "Use of the greatest applicable category:

{¶ 52} "(A) Category 13 if the inmate is serving a Life sentence for a rape conviction.

{¶ 53} "(B) Category 11 if the inmate is convicted of more than one count of rape involving more than one victim under the age of 16.

{¶ 54} "(C) Category 10 if –

{¶ 55} "(1) serious bodily injury results;

{¶ 56} "(2) the victim is raped by more than one offender;

{¶ 57} "(3) the victim is less than 16 years of age; or

{¶ 58} "(4) the offender is also convicted of kidnapping the victim.

{¶ 59} "(D) Category 9 in any other case

{¶ 60} "(E) The offense category for an attempt to commit a rape shall be one less category lower than that set forth above."

{¶ 61} The Notes and Procedures accompanying this section state:

{¶ 62} "In previous editions of the Guidelines Manual, no distinction was

made between Rape convictions that received Life sentences and Rape convictions that received a definitive number of years as the maximum sentences. To prevent any impression or presumption that an offender convicted [of] Rape with a Life sentence will be released after a definitive amount of time served, and will be required to serve life, Rape with a Life sentence is changed in this edition to an Offense Category 13, which indicates Life as the high end of the guidelines range.”

{¶ 63} In his plea agreement, Smith acknowledged that he could receive a sentence of mandatory life in prison, and that the State agreed that he would be eligible for parole after ten years. Smith was sentenced to a mandatory life sentence and, under R.C. 2967.13, he was eligible for parole after ten years. Smith’s assignment by the OAPA as Offense Category 13, with a Risk Score of 0, provides a guideline range of the minimum sentence to life. This range is consistent with his plea and sentence.

{¶ 64} Smith also alleged that the OAPA’s use of the 2007 guidelines and his reclassification as an Offense Category 13 offender, which resulted in the maximum end of his parole guideline range increasing from 150 months to life, violated the Ohio and United States Constitutions. Although he clarified in his memorandum in opposition to the motions to dismiss that the OAPA’s actions violated the prohibition against ex post facto laws, his complaint does not state, with any specificity, how the OAPA’s conduct violated the Ohio and federal constitutions. Construing Smith’s complaint in the light most favorable to him, he failed to state a constitutional claim.

{¶ 65} Assuming, arguendo, that Smith’s complaint had challenged the

OAPA's conduct under the Ex Post Facto Clause, we agree with the trial court that he failed to state a claim upon which relief could be granted.

{¶ 66} Article I, Section 10 of the United States Constitution provides that no State shall pass any ex post facto law. The Ex Post Facto Clause applies to four types of laws: (1) laws that make an action done before the passing of the law, and which was innocent when done, criminal, and punish such action; (2) laws that aggravate a crime, or make it greater than it was, when committed; (3) laws that change the punishment, and inflict a greater punishment, than the law annexed to the crime, when committed; and (4) laws that alter the legal rules of evidence, and receive less, or different, testimony, than the law required at the time of the commission of the offense, in order to convict the offender. *Rogers v. Tennessee* (2001), 532 U.S. 451, 456, 121 S.Ct. 1693, 149 L.Ed.2d 697, quoting *Calder v. Bull* (1798), 3 Dall. 386, 390, 1 L.Ed. 648 (*seriatim* opinion of Chase, J.). The Ex Post Facto Clause does not forbid every "legislative change that has any conceivable risk of affecting a prisoner's punishment." *California Dept. of Corr. v. Morales* (1995), 514 U.S. 499, 508, 115 S.Ct. 1597, 131 L.Ed.2d 588; *Greene v. Ohio Adult Parole Auth.*, Franklin App. No. 08AP-555, 2008-Ohio-5972, ¶14. "Instead, to determine whether a law is prohibited, we ask whether the change 'produce[d] a sufficient risk of increasing the measure of punishment attached to the covered crimes.'" *Greene* at ¶14, quoting *Morales*, 514 U.S. at 509. Retroactive changes to parole regulations may, in some cases, violate the Ex Post Facto Clause. *Garner v. Jones* (2000), 529 U.S. 244, 120 S.Ct. 1362, 146 L.Ed.2d 236

{¶ 67} Ohio courts have consistently rejected arguments that changes in

Ohio's parole procedures constitute an ex post facto violation. In *State ex rel. Henderson v. Ohio Dept. of Rehab. & Corr.*, 81 Ohio St.3d 267, 1998-Ohio-631, the Supreme Court of Ohio held that the application of new administrative rules that changed an inmate's parole eligibility date did not "constitute *ex post facto* imposition of punishment." *Id.* at 268. The Court reasoned that, because the inmate had no constitutional or statutory right to parole, "he has no similar right to earlier consideration of parole." *Id.* Subsequent to *Garner*, the Ohio Supreme Court held, citing its prior case law, that the OAPA's application of then-new 1998 parole guidelines to an inmate did not constitute an ex post facto violation. *State ex rel. Bealler v. Ohio Adult Parole Auth.*, 91 Ohio St.3d 36, 2001-Ohio-231; *State ex rel. Johnson v. Ohio Adult Parole Auth.*, 104 Ohio St.3d 421, 2004-Ohio-6590, ¶13.

{¶ 68} In summary, "[i]t is firmly established that a prisoner has no right to rely on parole guidelines in effect prior to his parole hearing date, and thus application of amended guidelines does not violate ex post facto prohibitions." *Shorter* at ¶15. As stated by the Tenth District:

{¶ 69} "Changes in the parole matrix or parole guidelines may constitutionally be applied to inmates even though the changes occur after the inmates entered the state prison system. \*\*\* [P]arole is a discretionary decision, and a state may constitutionally add or delete factors which guide the Parole Board's exercise of its discretion without running afoul of the Constitution. Simply put, an inmate has no vested interest in any particular set of parole guidelines, regulations, or matrices which assist the Parole Board in exercising its discretion,

and changes in those matters do not impair any rights enjoyed by state prisoners pursuant to the United States Constitution.” *Harris v. Wilkinson* (Nov. 27, 2001), Franklin App. No. 01AP-598 (quoting *Akbar El v. Wilkinson* (Apr. 28, 1998), S.D. Ohio No. C2-95-472, affirmed (C.A.6, 1999) 181 F.3d 99). See, also, e.g., *State ex rel. Wolfe v. Ohio Adult Parole Auth.*, Franklin App. No. 08AP-346, 2008-Ohio-5619, ¶4; *Budd v. Kinkela*, Franklin App. No. 01AP-1478, 2002-Ohio-4311, ¶10 (stating that “a prisoner has no right to rely on the parole guidelines in effect prior to his parole hearing date, and, thus, any application of amended parole guidelines are not retroactively applied ex post facto”); *Wright* at ¶37 (stating that “application by the OAPA of parole guidelines not in effect at the time an inmate was first sentenced does not violate ex post facto prohibitions”).

{¶ 70} Other appellate districts have reached the same conclusion. See, e.g., *Robinson v. Tambi*, Hocking App. No. 03CA17, 2004-Ohio-2823, ¶12-16; *State v. Cole*, Richland App. No. 2004-CA-108, 2005-Ohio-3048; *State v. Plassman*, Fulton App. No. F-04-019, 2005-Ohio-917.

{¶ 71} Smith relies upon two federal case from the Court of Appeals for the Sixth Circuit – *Dotson v. Collins* (C.A.6, Jan. 15, 2008), Case No. 06-4180, and *Dotson v. Wilkinson* (C.A.6, 2003), 329 F.3d 463, affirmed (2005), 544 U.S. 74, 125 S.Ct. 1242, 161 L.Ed.2d 253 – to support his allegation that the application of the 2007 parole guidelines to him constituted an ex post facto prohibition. *Wilkinson* held that prisoners’ claims against the OAPA based on the procedures used during the parole process, including the application of new parole guidelines, are cognizable under Section 1983, Title 42, U.S. Code. *Wilkinson* does not address

the merits of an ex post facto claim, and it is inapplicable to the issue before us.

{¶ 72} In *Collins*, the Sixth Circuit followed *Michael v. Ghee* (C.A.6, 2007), 498 F.3d 372, and reversed the trial court's dismissal of an inmate's § 1983 complaint, which alleged that the OAPA's retroactive application of 1998 Ohio parole guidelines violated the Ex Post Facto Clause. *Collins*, supra. The Sixth Circuit reasoned, in part:

{¶ 73} “\*\*\* [W]e conclude that Dotson [the inmate] has stated a claim upon which relief could be granted by sufficiently showing that application of the 1998 parole guidelines result in ‘a longer period of incarceration than under the earlier guidelines.’ Id. \*\*\* Dotson presented statements made by the State of Ohio that demonstrate that the practical implementation by the parole board of the 1998 guidelines will result in longer sentences. The 1998 guidelines provide ranges of time for which a defendant might become eligible for parole, but the minimum time for many offenses – included Dotson's – was increased by the 1998 changes. The guidelines were accompanied by a purpose statement that stated that ‘[t]he use of a guidelines “range” rather than a “point” is to allow the Parole Board some discretion to address individual case factors *without departing from the guidelines.*’ (emphasis added.) In its brief for writ of certiorari before the Supreme Court in this case, the State wrote that ‘inmates convicted of more serious crimes generally serve longer periods of incarceration under the 1998 guidelines than they did under prior guidelines.’

{¶ 74} “As stated above, a plaintiff can establish an ex post facto violation when he shows either that ‘the guidelines, on their face, show a significant risk of

increased incarceration’ or by demonstrating that ‘the guidelines practical implementation by the agency charged with exercising discretion, that its application will result in a longer period of incarceration than under the earlier guidelines.’ For the purposes of surviving a 12(b)(6) motion to dismiss, Dotson has sufficiently demonstrated that the implementation of the 1998 Parole Guidelines is likely to result in increased incarceration.” (Internal citations omitted.) *Collins*, supra.

{¶ 75} In *Michael*, which *Collins* followed, the Sixth Circuit discussed the United States Supreme Court’s opinion in *Garner*, which “made clear that guidelines that affect discretion, rather than mandate outcomes, are nevertheless subject to ex post facto scrutiny” and established that “the relevant inquiry, therefore, is not whether the challenged parole regulation is a ‘law’ or whether the guidelines present a significant risk of increasing the plaintiff’s maximum penalty, but rather whether the new guidelines present a significant risk of increasing the plaintiff’s amount of time actually served.” *Michael*, 498 F.3d at 382-83.

{¶ 76} Although *Collins* is relevant to the issue before us, it is factually distinguishable and its holding is contrary to the Supreme Court of Ohio’s binding precedent.<sup>3</sup> Smith has not alleged facts that application of the 2007 parole guidelines presents a significant risk of increasing the amount of time the he will actually serve. In particular, Smith has not alleged that the 2007 parole guidelines

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<sup>3</sup>We note that none of the Supreme Court of Ohio’s precedent and only one of the numerous cases from this Court and other appellate districts – *Robinson v. Tambi*, Hocking App. No. 03CA17, 2004-Ohio-2823 – cites to *Garner*.

increased the minimum time that he must serve before he would be considered for parole, changed the criteria that the OAPA would use to determine his suitability for parole, or significantly lengthened the time between his parole hearings. Smith's complaint indicated that he had received a parole hearing after ten years, in accordance with R.C. 2967.13(A)(5). His complaint establishes that his next parole hearing is scheduled for April 1, 2012, at which time he will have served approximately 180 months, or fifteen years. Although Smith has alleged that, under the 2007 parole guidelines, he could serve his life sentence before he is considered for eligible for parole, "there is no objective criteria upon which he can base his claim that he will almost certainly be required to serve a longer term of incarceration than he anticipated after his last parole hearing." *Nur v. Mausser* (N.D. Ohio, Apr. 7, 2008), Case No. 1:08-CV-110 (rejecting plaintiff's ex post facto challenge to the retroactive application of Ohio's 2007 parole guidelines). See, also, *Ridenour v. Collins* (S.D. Ohio, Feb. 10, 2010), Case No. 2:08-CV-682. Moreover, Smith makes no allegations that other inmates in his predicament have experienced incarceration for longer periods due to the amended parole guidelines. Thus, his claim is based on "uncertain or contingent future events that may not occur as anticipated, if at all." *Nur*, supra. Accordingly, Smith has not stated an ex post facto claim.

{¶ 77} Smith's assignments of error are overruled.

### III

{¶ 78} The trial court's judgment will be affirmed.

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DONOVAN, P.J. and BROGAN, J., concur.

Copies mailed to:

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Hon. Roger B. Wilson