

ORIGINAL

In the
Supreme Court of Ohio

GERRY E. GRIFFITH, JR.,	:	Supreme Court Case No. 09-1363
	:	
Plaintiff-Appellee,	:	On Appeal from the
	:	Franklin County
v.	:	Court of Appeals,
	:	Tenth Appellate District
STATE OF OHIO,	:	
	:	Court of Appeals Case
Defendant-Appellant.	:	No. 08AP-964

AMICUS CURIAE SETH NELSON'S MEMORANDUM IN RESPONSE,
URGING THE COURT TO DECLINE JURISDICTION

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I. INTRODUCTION: Who is Seth Nelson, and what does he know?

Seth Nelson is one of Ohio's most experienced litigants in the field of wrongful imprisonment, and he has gained useful knowledge during the course of his experience. He and Ronald Larkins have newly-reinstated wrongful imprisonment claims pending in the Court of Claims, the resolution of which claims the State's attorneys hope to delay by appealing the instant case. The State seems to have succeeded already in delaying the progress of four other claimants pending the outcome of this appeal. (*See* p. 15.)

The State appears to have exhausted all other possible methods of thwarting Mr. Nelson's hope of redress. To have appealed directly the decisions in *Nelson* or *Larkins*, State officials would have been required to make arguments contrary to their arguments here. The only intellectually consistent theme to the State's positions throughout the litigation below is that some State officials don't like the law as it exists, and they want it reinterpreted to their tastes before they are willing to execute it in accordance with their oaths. Regardless of the merits of any given claimant's case, and regardless of the procedural posture in which that claim arrives, the State's position has been inveterate opposition on any ground whatsoever. This has caused them to argue in two directions at once on different cases, and in different directions at alternating times during the course of the same case: Mr. Nelson has experienced this.

The State has lost all of its various arguments before each and every one of the ten appellate judges [four panels in two districts, two judges serving twice] which have been called upon to consider them in the course of the *Griffith*, *Nelson* and *Larkins* litigation. Nevertheless, the State hopes to obtain a Supreme Court decision in *Griffith* which could

somehow be sufficiently broad and robust as to embrace all of the varied and opposing positions the State's officials have adopted to date, thereby denying redress to the maximum possible number of the remaining seven claimants, and to two others they fear might re-file. In their ideal world, they would incite the Supreme Court to an activism which would entirely subvert the General Assembly's legislative intentions and undo the law by judicial fiat.

Having arrived in just one Court, on just one case, the State now asserts there is some "public interest" behind its efforts to "correct" a "misapplication" of the law. On the contrary, this appeal represents nothing more than the same tiresome effort at executive obstructionism. The State's officials know that any judicial alteration of the law could lay the groundwork for further barriers to relief for the few individuals the State has wronged in the name of the public, and erecting such barriers is their goal.

Because the State has suggested Mr. Nelson's case is representative of the supposed errors which will follow from the sound decision in *Griffith* below, Mr. Nelson undertakes to explain what has actually transpired in his case. He would thereby demonstrate that Appellant's effort to obtain further review is a waste of more time and judicial resources on an issue in which only about nine individuals are interested, and in which Appellant's arguments below have always been, "Make this guy go away somehow," and in which its strongest arguments now are nothing more than a remonstrance that "All those appellate judges 'got it wrong'." Mr. Nelson urges the Court to decline jurisdiction and send the State's officials back to faithfully execute the duties of their offices and to administer the law they swore to uphold.

A. The Tuscarawas County Common Pleas Court adjudicated Seth Nelson a wrongfully-imprisoned individual pursuant to R.C. § 2743.48, which ruling the State did not appeal.

From November, 1994, through about October 30, 2001, Mr. Nelson was prosecuted and convicted three times from the same incident, and all three of his convictions were overturned. *See, State v. Nelson* (5th Dist.), No. 2001AP 02 0016, 2001-Ohio-1441, or *Nelson v. State* (10th Dist.), 2009 Ohio App. Lexis 2775, 2009-Ohio-3231, pp. 2-3. In 2006, Mr. Nelson filed a complaint for declaratory judgment in the Tuscarawas County Court of Common Pleas in which he sought a determination that he was a wrongfully imprisoned individual within the meaning of R.C. § 2743.48.

The Common Pleas Court initially dismissed Mr. Nelson's Complaint for Declaratory Judgment, erroneously ruling that the six-year statute of limitations applicable to his cause of action [which cause was created by the April, 2003, amendment to R.C. § 2743.48(A)(5)] had accrued upon his initial release from the penitentiary in 1998, and that the applicable period had therefore expired. The Fifth District Court of Appeals reversed that ruling and held that at least one of the elements of the tort at issue [specified at R.C. § 2743.48(A)(4)] had not been completed until the State ceased prosecuting Mr. Nelson, which was sometime after September 27, 2001. *Nelson v. State* (5th Dist.) 2007 Ohio App. Lexis 5509, 2007-Ohio-6274.¹ Following the decision in *Nelson v. State* (5th Dist.) 2007 Ohio App. Lexis 5509, 2007-Ohio-6274, the Court of Common Pleas declared Seth Nelson a wrongfully imprisoned individual, and the State did not appeal any aspect of this ruling.

¹ This case is referenced as "*State v. Nelson*," at pp. 5-6 of Appellant's Memorandum.

B. In the Court of Claims, the State of Ohio formally admitted that Seth Nelson was a wrongfully imprisoned individual pursuant to R.C. § 2743.48.

On September 17, 2008, Mr. Nelson filed a claim for wrongful imprisonment in the Court of Claims, to which claim he attached copies of his conviction and sentencing entries as well as the Common Pleas Court's declaration that he was a wrongfully imprisoned individual. On October 9, 2008, the State of Ohio filed an Answer in the Court of Claims in which it admitted that Mr. Nelson is a wrongfully imprisoned individual entitled to damages. *Nelson v. State* (10th Dist.), 2009 Ohio App. Lexis 2775, 2009-Ohio-3231, p. 3.

C. The Tenth District Court of Appeals upheld and reinstated Seth Nelson's wrongful imprisonment claim following the Court of Claims' *sua sponte* dismissal and the State's second reversal of its position with respect to Seth Nelson's claim.

On November 19, 2008, the Court of Claims dismissed Mr. Nelson's claim *sua sponte*, introducing for the first time the question of whether the Court of Claims had jurisdiction over Seth Nelson's claim. In so doing, the Court of Claims ruled that because there had been no amendment to R.C. § 2305.02 (granting exclusive jurisdiction to Common Pleas Courts to decide whether persons were wrongfully imprisoned individuals) corresponding to the April, 2003 amendment to R.C. § 2743.48(A)(5), which created Mr. Nelson's cause of action, the Court of Claims lacked jurisdiction.

Seth Nelson appealed to the Tenth District Court of Appeals, arguing, *inter alia*, that this interpretation of R.C. § 2305.02 was illogical (confusing general jurisdiction with exclusive jurisdiction) and contrary to the obvious way the wrongful imprisonment

statute, as amended, was supposed to operate. (In other words, Seth Nelson submitted a brief which was strikingly similar in at least one respect to that of Appellant's Memorandum in Support of Jurisdiction herein.) The State then altered its earlier position 180° and argued directly to the contrary on every point, submitting a brief which asserted that the Court of Claims was correct, and that because R.C. § 2305.02 had not been amended, no court had jurisdiction over claims such as Seth Nelson's. The State suggested that if Mr. Nelson could not obtain a declaration of actual innocence, just as all claimants had been required to do prior to April, 2003, his only remedy was to "lobby the state legislature to amend the language of R.C. § 2305.02 to match the language of R.C. § 2743.48(A)(5)...". [Brief of Appellee State of Ohio in *Nelson v. State* (10th Dist.), 2009 Ohio App. Lexis 2775, 2009-Ohio-3231, p. 2.]

The Court of Appeals unanimously cut through the Gordian knot of the parties' overly-complicated arguments with its clear-headed reading of the actual words of the statute itself, delivered in the instant case with flawless logical and grammatical simplicity: There never had been anything in the ten word amendment to R.C. § 2743.48(A)(5) requiring a trip by Mr. Griffith to the Court of Common Pleas at all.

Two weeks later, on June 30, 2009, Mr. Larkins and Mr. Nelson obtained equally logical decisions in their cases from two different panels of the Court. *Larkins v. State* (10th Dist.), 2009 Ohio App. Lexis 2759, 2009-Ohio-3242; *Nelson v. State* (10th Dist.), 2009 Ohio App. Lexis 2775, 2009-Ohio-3231. These three opinions, all unanimous, included seven of the eight judges sitting on the Tenth District Court of Appeals, each one of whom are better readers of plain English than the undersigned counsel.

In both of the latter cases, the Appellate Court refrained from ruling on the unprecedented and un-presented issue of whether the Common Pleas Courts had possessed jurisdiction to issue the wrongful imprisonment determinations which both Messrs. Larkins and Nelson had obtained. Rather, the Court properly decided as little of each case as necessary to reverse the Court of Claims' erroneous rulings that it lacked jurisdiction to hear their claims and award damages.

Contrary to Appellant's repeated assertions throughout its Memorandum, there is nothing anywhere in the *Griffith*, *Larkins* or *Nelson* opinions which requires one type of wrongful imprisonment determination (actual innocence) to be made in the Common Pleas Court and the "other" type of wrongful imprisonment determination (procedural error) to be made in the Court of Claims. Any such potential question was a moot issue in Seth Nelson's case anyway because the State had already admitted in the Court of Claims that he was a wrongfully imprisoned individual. Rather, all which *Griffith*, *Larkins* and *Nelson* established is that nothing anywhere in R.C. § 2305.02 or R.C. § 2743.48(A)(5), or in any other statute, prevents the Court of Claims from exercising jurisdiction in "procedural error cases," and the Court of Claims erred in dismissing them.

Most astonishingly, in light of its present effort to appeal again, the State actually concedes that the Court of Appeals was correct in the second-to-last sentence of Appellant's Memorandum, at page 11: "The court was correct that these sections do not explicitly prohibit a finding of jurisdiction in the Court of Claims, but...". As exasperated parents often tell their charges, "There should be no 'buts' about it!". But the State persists, urging "further analysis" (sophistry), be applied to the "entire statutory scheme"

(mistaking personal opinion for public policy), and a return to that which "this Court previously recognized" (putting the law back the way it was before the General Assembly presumed to change it , a/k/a judicial activism). The State fittingly concludes its Memorandum with a sentence encapsulating the entire sum and substance of its argument, fairly summarized as follows: It was wrong to let Gerry Griffith win.

D. Although the State has again reversed its position toward Seth Nelson by declining to appeal the reinstatement of his claim to the Supreme Court, Appellant has signaled a desire to reverse its position a fourth time in Seth Nelson's claim, if only it can obtain a different result herein:

The State has declined to seek an appeal of Mr. Nelson's case in the Supreme Court. Moreover, in its Memorandum in Support of Jurisdiction, it now purports to embrace two of the positions it had previously abhorred:

1. The State has changed positions three times regarding whether Seth Nelson and others similarly-situated have a cause of action under R.C. § 2743.48(A)(5).

The first of these issues was whether the General Assembly actually intended to change the law of wrongful imprisonment by creating an enforceable cause of action for wrongful imprisonment by reason of procedural error. The State has resisted this statutory change in a number of ways: In the Tuscarawas County Common Pleas Court and in the Fifth District Court of Appeals, the State flatly denied Mr. Nelson's right to relief and argued that in violating Mr. Nelson's rights to presentation of the charges against him and to a speedy trial, it had violated Mr. Nelson's "fundamental" rights in "substantive" areas of law, and that these outrages could not be denominated mere "error

in procedure." This defense of its own venality rather than incompetence was, of course, intended to shorten the applicable period of the statute of limitations to that of an intentional tort, but this was not its only purpose.

The main purpose of this argument was to divest the Legislature's phrase "error in procedure" of any practical meaning. Because convictions are never overturned for any reason short of an egregious violation of fundamental rights, no one would ever be released as a result of "an error in procedure" if the courts were to cynically interpret the phrase so as to make mutually exclusive categories of fundamental rights violations and errors in procedure. The former category would include every reason for which a conviction could be set aside, while the latter category would include nothing known to the law. The State did not appeal the trial court's rejection of that argument, and it buried and abandoned its execrations on the amendment itself in a field which lay fallow for over a year. In the Court of Claims, the State admitted liability to Seth Nelson under the amended statute, thereby sealing the 180° reversal of its initial opposition and memorializing its renewed commitment to the rule of law.

In the Tenth District Court of Appeals, however, the State exhumed the old dispute about whether the April, 2003 amendment had actually changed the law of wrongful imprisonment at all. Ignoring the opinion in *Nelson v. State* (5th Dist.) 2007 Ohio App. Lexis 5509, 2007-Ohio-6274, which recognized the obvious statutory change and Mr. Nelson's new cause of action, the State again executed a 180° turn (for 360° on this issue) and insisted that only persons who could prove their actual innocence could be compensated. The State did acknowledge that the General Assembly may have added a

few words to R.C. § 2743.48(A)(5) which appeared to expand the definition of persons who could be declared wrongfully imprisoned individuals. But, argued the State, the contemporaneous legislative "neglect" to update R.C. § 2305.02 so as to grant some court exclusive jurisdiction to make the determination of who had been wrongfully imprisoned under the expanded definition meant that *no court* had jurisdiction over such claims.

Therefore, the State insisted, the legislature must not have intended that anyone should be able to obtain compensation in redress of *that* type of wrongful imprisonment. Until Mr. Nelson undertook to "lobby the state legislature," the April, 2003 Amendment to R.C. § 2743.48(A)(5) would remain mere aspirational, precatory language creating a "right without a remedy," the General Assembly's expression of a vague wish, perhaps, to acknowledge injustice rather than to enact effective legislation.

In the wake of the decision in *Nelson v. State* (10th Dist.), 2009 Ohio App. Lexis 2775, 2009-Ohio-3231, the State appears now to have come around 540°, reducible for the benefit of geometric purists to the 180° opposite of its original position: "The 2003 Amendments to R.C. § 2743.48 expanded the class of individuals who may be found to be wrongfully imprisoned. ... Regardless of the merits of the individual cases, the expansion of the class of individuals entitled to seek compensation..." (Appellant's Memorandum in Support of Jurisdiction, p. 4.)

This most recent turnaround in the State's position on this issue would be quite satisfactory to Mr. Nelson if he were "born yesterday." It requires no clairvoyance, however, to predict that if the Court accepts jurisdiction in *Griffith*, the State will complete its 720° turn (a double pirouette!) and resume a frontal attack on the legislation

itself. Mr. Nelson urges the Court to simply flee all temptation to judicial activism by declining to watch the ballet at all. Encourage those officials of the executive branch who personally dislike the amended statute to "lobby the state legislature" themselves, in their private capacities, or to run for the General Assembly, where they may lawfully decide what the law *should* be.

2. The State has changed its position three times regarding the main contention it presents herein; namely, whether the Court of Common Pleas has jurisdiction to decide whether one is a wrongfully imprisoned individual.

The State initially denied Seth Nelson's perfunctory allegation that the Tuscarawas County Court of Common Pleas was vested with exclusive jurisdiction to determine whether Seth Nelson was a wrongfully imprisoned individual:

14. Plaintiff claims he is entitled to the procedure and determination described in Paragraph 13 of this Complaint, R.C. §2721.01, *et seq.*, provides a proper means by which this question can be adjudicated for determination by way of an action for Declaratory Judgment, and R.C. § 2305.02 vests the Tuscarawas Court of Common Pleas with exclusive jurisdiction to make such an initial factual determination.

May 23, 2006 Complaint for Declaratory Judgment, Paragraph 14, *Seth Nelson v. State of Ohio*, Tuscarawas County Common Pleas Court Case No. 2006 CV 05 0327.

14. The State of Ohio denies the allegations of paragraph 14 of the complaint and his right to relief asserted therein.

June 5, 2006 Answer of the State of Ohio, Paragraph 14, *Seth Nelson v. State of Ohio*, Tuscarawas County Common Pleas Court Case No. 2006 CV 05 0327.

While deciding the presented issue of when Seth Nelson's cause of action had accrued, the Fifth District Court of Appeals made the following *obiter dictum*, which

admittedly may have discouraged the State from appealing on this issue following the Common Pleas Court's entry of summary judgment in favor of Seth Nelson: "In turn, R.C. 2305.02 grants a court of common pleas exclusive, original jurisdiction to hear an action for wrongful imprisonment such as the one filed by appellant." *Nelson v. State* (5th Dist.) 2007 Ohio App. Lexis 5509, 2007-Ohio-6274, at paragraph 17, page 7.

Regardless of its reasons, the State's failure to preserve this issue then constituted the first reversal of its position by 180°. In the Court of Claims, the State initially remained consistent by admitting that Seth Nelson was a wrongfully imprisoned individual, and it raised no question regarding the jurisdiction of the Common Pleas Court to have made that determination.

After the Court of Claims dismissed Seth Nelson's claim, along with that of every similarly-situated claimant, whether or not he had first obtained a Common Pleas Court determination, the State again turned 180° by "jumping on the bandwagon" and insisting, in the Tenth District Court of Appeals, that neither the Court of Common Pleas nor the Court of Claims, had jurisdiction over a claim like Seth Nelson's.

The State now appears to have to have come around 540°, also reducible to the 180° opposite of its original position: "Accordingly, this Court should hear this case and restore jurisdiction to the courts of common pleas, which law and logic dictate are the proper venue for determining the merits of wrongful imprisonment claims." (Appellant's Memorandum in Support of Jurisdiction, p. 8.)

Again, this most recent reversal in the State's position on this issue would be quite satisfactory to Mr. Nelson if he were still an infant in the world of litigation with the

States' attorneys. Indeed, if their conduct to date had consistently been intellectually honest, he might have filed a one-page *amicus* brief supporting their current stated position, which now matches Mr. Nelson's consistent contention since May 26, 2006.

Mr. Nelson objects, however, because one need not be "The Amazing Kreskin" to predict that if the Court accepts jurisdiction in *Griffith*, the State will complete its 720° turn (a double-double-cross!) and resume its insistence that no court has jurisdiction over claims arising under the amended statute. (Perhaps it is already so contending at the bottom of page 2 of its Memorandum.) Seth Nelson urges the Court to recognize these shenanigans for what they are and decline to entertain any more of them. He suggests it is far better for every potential litigant, including the State, that the law should remain as it now stands, and be executed, than for it to continue to lie impotent while the State's attorneys continue to dance around trying to get the law judicially blue-penciled into their idea of procedural perfection. The law changed in 2003. No one has benefitted yet.

3. The State has already signaled its intention to return (again) to its original, obstructionist positions if jurisdiction is accepted.

Lest the Court think Mr. Nelson too harsh, hardened, or cynical regarding the State's true position, please indulge him while he accentuates a few already evident indicators of the State's intentions:

a) In its Memorandum in Support of Jurisdiction, Appellant asserts that Seth Nelson's case is one of two cases already "affected" by the "erroneous decision" in the instant case of Gerry Griffith. (Appellant's Memorandum, p. 4.)

The audacity of Appellant's position becomes crystal clear at page four of its Memorandum, if one reads it carefully while remaining mindful of what *actually*

happened in *Nelson* and *Larkins* in comparison to the case at issue. In the instant case, the State argues that the Court of Appeals was wrong to reinstate the claim because Gerry Griffith did not first obtain a declaration of his wrongful imprisonment in the Common Pleas Court. The State then glibly suggests that the same mistake was made in *Nelson* and *Larkins* by relying on the instant case. On the contrary, both Seth Nelson and Ronald Larkins *did* obtain prior declarations of wrongful imprisonment from their respective courts of common pleas, but their cases were nevertheless dismissed. Again, the only consistency to the State's arguments is that all "procedural error" wrongful imprisonment claimants should lose, no matter how they go about availing of their statutory remedies.

b) In its Memorandum in Support of Jurisdiction, Appellant inaccurately suggests there was a conflict between the holding in *Nelson v. State* (Fifth District) and the holding in *Nelson v. State* (Tenth District). (Appellant's Memorandum, pp. 5-6.)

As discussed in this Memorandum at pages 10 and 11, the Fifth District Court of Appeals once mentioned its conclusion that the Court of Common Pleas possesses exclusive jurisdiction to determine whether someone was a wrongfully imprisoned individual. This was an *obiter dictum*, however, and not the holding of the case. This issue was never raised by the State or by Seth Nelson in that appeal. Neither did the State, despite a coordinated effort then between the Tuscarawas County Prosecutor's Office and the Attorney General's office [the fax imprimatur of which is visible on some exhibit pages filed by the Prosecutor], pursue this issue in its motion practice beyond its Answer in denial.

II. THIS CASE IS NOT OF PUBLIC OR GREAT GENERAL INTEREST.

A. Nothing about the decision in *Griffith* creates any new difficulty in litigating a wrongful imprisonment case.

The main difficulty for wrongful imprisonment litigants has nothing to do with the law and everything to do with obstructionism by members of the executive branch who disagree with the policy choices made by the legislative branch of state government. The overwhelmingly non-attorney-dominated General Assembly has, to its credit, made and expressed a clear and laudable choice to eliminate the earlier unlawyerly and illogical distinction between citizen-plaintiffs who were not guilty because they were “*really*” not guilty (“actually innocent”) and citizen-plaintiffs who were not guilty “merely” because the State could not lawfully prove otherwise. To its credit, the Law of the State of Ohio recognizes and redresses some of the crushing loss a citizen endures when the State, whether through cheating or incompetence, unlawfully convicts and imprisons anyone.

The procedure for availing of relief is likewise among the least of a litigant's problems. If a claimant must go to the Common Pleas Court first, this has all the advantages of convenience which Appellant cites. If one must begin in the Court of Claims, so what? One must go there eventually anyway, and as Mr. Nelson's experience demonstrates, one can expect no easier time there. Moreover, any question of whether “an error in procedure resulted in the individual's release” will generally be easily resolvable by reference to the documents filed by a plaintiff in the Court of Claims. As for the State, its energetic attorneys are located in all eighty-eight counties, including Franklin County, so the State's convenience cannot be a serious consideration.

B. The "floodgates of litigation" are not open, and nothing about the decision in *Griffith* has much to do with the current or future size of the caseload in the Court of Claims.

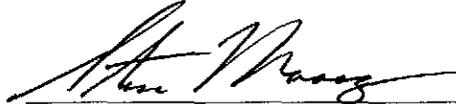
Despots everywhere, and throughout history, have sometimes expressed concern about "opening the 'floodgates of litigation'." Although this is invariably the most pathetic and reprehensible argument for denying redress to the very people whom a government has itself wronged, legitimate concerns about general caseload volume are nothing new. (*See, e.g.*, Exodus 18:13-26.) No such concerns exist here, however.

All one need do to confirm this is to "navigate" the internet to the Court of Claims' convenient website, where the entire history of the Court of Claims' docket of wrongful imprisonment cases, since its first case in 1976, is available at this address: http://www.cco.state.oh.us/scripts/ccoc.wsc/ws_civilcasesearch_2007.r?mode=9.

There one can review a one-page list of the dispositions of all sixty-eight claims in Ohio history, by sixty different claimants. Of those sixty claims, ten were settled. Of the remaining fifty claims, four were voluntarily dismissed and never re-filed. Of the remaining forty-six claims, twenty-seven were decided in favor of the claimants. Of the remaining nineteen claims, nine were dismissed by the Court prior to 2003. Of the remaining ten claims, two were decided in favor of the State. Of the remaining eight claims, four, including *Nelson*, *Larkins*, and *Griffith* are listed, as of August 19, 2009, as having been dismissed by the Court. Of the remaining four pending claims, two are set for trial, (in 2010), and two have pending motions to dismiss. Therefore, no more than nine Ohioans have any likely interest in this case: Their surnames are Griffith, Roche, Fears, Howard, McClendon, Larkins, Nelson, and, possibly, Thomson and Jones.

Respectfully submitted,

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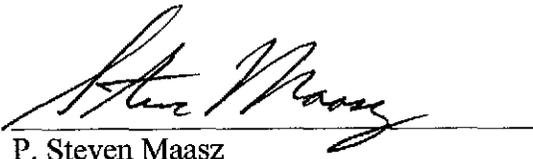
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