ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE EX REL. CORDRAY [DEWINE], ET AL.,	)	Supreme Court Case No.: 2010-1216
RELATORS-APPELLANTS,	)	
vs.	)	**INTERVENING-APPELLEE'S MOTION FOR RECONSIDERATION**
THE HONORABLE JAMES M. BURGE,	)	
RESPONDENT-APPELLEE.	)	

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NOW COMES Nancy Smith, by and through counsel of record, Jack W. Bradley, and pursuant to S.Ct. Prac. R. 11.2, respectfully requests this Court to reconsider its

decision of January 27, 2011 that granted a writ of prohibition ordering the Lorain County Court of Common Pleas to vacate Ms. Smith's Crim. R. 29(C) acquittal, reinstate her conviction, and send her back to prison. A Memorandum in Support is attached hereto and incorporated herein.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

In August of 1994, Nancy Smith was convicted of crimes she did not commit. It was the first and only time in her life she was ever arrested. Smith was immediately taken into custody, sentenced to a prison term of 30 to 90 years and ultimately transported to the Ohio Reformatory for Women, where she was incarcerated for over five thousand (5,000) terrifying days and sleepless nights. Sentencing to prison meant more than mere incarceration, more than just the loss of her freedom. It also meant separation from her family; a brother, sisters, daughters and sons, eventually thirteen grandchildren. Ms. Smith missed graduations, birthday parties, weddings and funerals. She was banished by the State from the upbringing of her children, the celebration of their accomplishments, the comforting of their pain. Fifteen (15) years later, a judge decided that such suffering was all for naught.

From the time that Ms. Smith was first shackled in August, 1994 until her acquittal in June of 2009, neither she nor anyone who knew her believed she would be convicted of the crimes she had been accused of. Factually innocent individuals do not, after all, go to prison. It turns out that they do. For a decade and a half, Smith's four children and countless other supporters fought tirelessly to do what they could – appeals, pleas for help, partnership with the Ohio Innocence Project, hearings before the Ohio Parole Board. Ms. Smith was, at the Parole Board hearing, denied parole. It was not because her institutional report warranted such action. She was not denied parole because of the gravity of her alleged crimes. She was denied parole because she refused to lie to the Parole Board. She refused to confess to crimes she was not involved in. She refused to

admit to crimes that had never been committed. This, her greatest chance at opening the door to her freedom, was slammed in her face. This was in 2007.

Nevertheless, a year later, in 2008, this Court decided State v. Baker, outlining the structure of a final, appealable order. Armed with this decision, Smith's attorney asked the trial court to look at Ms. Smith's case again. Pursuant to Baker, it was unquestionable that Smith lacked a final, appealable order. It was certain that her conviction was not final. However, as with innumerable prior disappointments, perhaps these legal arguments would again fall on deaf ears. Certainly, the State of Ohio would vehemently object to Smith's arguments over a mere technicality. Not so. The State of Ohio represented to Judge Burge not only that the sentencing entry depriving Ms. Smith of her freedom was incorrect; the State of Ohio agreed jurisdiction over the case rested with that very judge. Smith sat in the courtroom while the State of Ohio represented that Smith lacked a final, appealable order. The State conceded that Ms. Smith did not have the ability to take her case beyond the trial court until that same court corrected an obvious error. Smith sat in the courtroom, unaware of the legalese being strewn about, but certain that she had heard the State of Ohio, for perhaps the first time, agreeing with what her lawyer was saying. The trial court judge agreed, as well. Without objection from the State of Ohio, Smith was granted a bond. Months later, after an exhaustive review of the record, Judge Burge entered a judgment of acquittal. Again, there was no objection on the record from the State of Ohio.

For Ms. Smith, freedom from her conviction gravitated beyond mere freedom from physical incarceration; it also provided the cleansing of her soul from the stain of a wrongful conviction. While that taint is indelible to a degree, with the support system

that Smith has, she has been able to move beyond it. She not only gained access to freedom outside the confines of a prison; she gained access to a life that was taken from her. She is now able to take part in the lives of her family. She is able to live life with them, not merely read about it in screened letters sent into the prison. Smith is able to take part in the thousands of daily moments that define our lives, from the grandeur of a family wedding to a simple phone call to one of her grandchildren.

Smith was initially wrongfully sent to prison because, as found by the trial court judge, twelve individuals erroneously found proof beyond a reasonable doubt from the evidence produced at trial. It is Smith's respectful contention that seven individuals have erred, to the danger of re-sending Smith back to prison, in finding that the trial court's lack of jurisdiction to acquit her was "patent and unambiguous." In conjunction with the foregoing, the following arguments are set forth for this Honorable Court's reconsideration - first, that any error occasioned upon this case by the trial court was invited by the State of Ohio and, secondly, even assuming a lack of jurisdiction, it was not patent and unambiguous.

I. THE STATE OF OHIO SHOULD NOT BE AWARDED FOR THEIR INVITED ERROR

Under the invited-error doctrine, "[a] party will not be permitted to take advantage of an error which he himself invited or induced." State v. Bey (1999) 85 Ohio St.3d 487 at p.8, *quoting* Hal Artz Lincoln-Mercury, Inc. v. Ford Motor Co. (1986), 28 Ohio St.3d 20, *paragraph one of the syllabus. See also* State v. Kollar (1915) 93 Ohio St. 89. ("The law imposes upon every litigant the duty of vigilance in the trial of a case, and even where the trial court commits an error to his prejudice, he is required then and there to challenge the attention of the court to that error, by excepting thereto, and upon his

failure of the court to correct the same to cause his exceptions to be noted. It follows, therefore, that, for much graver reasons, a litigant cannot be permitted, either intentionally or unintentionally, to induce or mislead a court into the commission of an error and then procure a reversal of the judgment for an error for which he was actively responsible."). This Court said as much in rejecting Appellant-State of Ohio's first assignment of error. State ex rel. DeWine v. Burge, Slip Opinion No. 2011-Ohio-235, quoting Davis v. Wolfe, 92 Ohio St.3d 549, 552 (2001).

However, the State of Ohio has benefitted from a judgment it pursued and supported at the trial level. It has asked for and received this Court's assistance in determining that the trial court did not have jurisdiction despite failing to object on those same grounds during the briefing and oral arguments held at the trial level.

In fact, throughout the proceedings in the trial court, the State repeatedly conceded that Ms. Smith lacked a final, appealable order and that the trial court was properly exercising jurisdiction: [quotes attributable to Asst. Pros. Atty. Thomas Cahill at the hearing of Ms. Smith's resentencing motion on November 26, 2008]

> "First of all, I will stipulate that there was not a final, appealable order." 11/26/08 Tr. at 16.
>
> "What is the purpose of the remedy here when a court fails to comply with Rule 32(C)? The purpose of it is, if they don't, then you can't take your case on appeal." Id. at 16.
>
> "[T]he purpose of the remedy is to provide the defendant an ability to appeal his or her case." Id. at 17.
>
> "[R]evised sentencing order that complies with Rule 32(C), therefore enabling the defendant to go on and appeal her case if she so chooses. And I imagine that will be allowed here." Id. at 17.
>
> "[A]t least [a final, appealable order] gives her the opportunity to . . .appeal her case." Id. at 17.

"[T]he intent of Rule 32(C) [is] to correct [entries] so that they can further – further themselves on in the appeal process." Id. at 18.

"[T]he State is requesting that you . . .file a revised sentencing entry that comports with Crim.R. 32(C), and then the defendant . . .can pursue her appeal from there." Id. at 18.

"[W]ithout that final appealable order, I can't take my case beyond this Court." Id. at 20.

"[T]he remedy is to – is to allow her to continue on appealing the issues she feels she can appeal because right now she's in limbo in regards to appealing anything." Id. at 21.

"What is the purpose of the remedy? To give the defendant a means of appeal, since an appeal that goes up that's not a final appealable order is thrown back out. This will give her her right to appeal." Id. at 28.

"Well that's exactly what the purpose, the State believes, the purpose of 32(C) is, to create a position for the defendant that they have an adequate remedy at law, be it vis-a-vis, appeal; in other words, a final appealable order." 2/4/09 Tr. at 10.

"[W]e concede that it was not a final appealable order." Id. at 10.

"What are we trying to obtain here? A final appealable order." Id. at 10.

"The Court: 'Now, here . . . the judgment entry of conviction and sentence are not a final appealable order, and there they would appear to be voidable. What would you think, Attorney Cahill?

Mr. Cahill: 'Yes, your Honor.'" Id. at 14.

While by no means exhaustive, the foregoing list consists of commentary from the State of Ohio at hearings that culminated in the trial court's acquittal of Ms. Smith. On numerous occasions the State agreed with Appellee that Ms. Smith's sentencing entry was not in compliance with Crim.R. 32(C) and that she did not have a final appealable order. Best said by the State, "[W]ithout that final appealable order, I can't take my case beyond this Court." 11/26/08 Tr. at 20.

The State of Ohio repeatedly took the position that Ms. Smith's entry was not a final, appealable order and, further, recognized that Ms. Smith would be able to move along in the appellate process once the trial court gave her a final, appealable order. Upon the trial court's ruling, the State was required then and there to challenge the attention of the court to that perceived error. The State should not now be rewarded by sitting on its hands for a trial court's ruling that they invited.

II. MS. SMITH'S ACQUITTAL IS NON-APPEALABLE ACCORDING TO THIS COURT'S PRECEDENT

Ms. Smith's timely-filed motion for acquittal coupled with the fact that the State stipulated that she had a voidable sentence, categorizing her case as pending, permitted the trial court to reconsider (and grant) Smith's Rule 29(c) motion for acquittal prior to her resentencing hearing. See State v. Ross, 184 Ohio App.3d 174 (Ohio App. 9 Dist. 2009); 2009-Ohio-3561; 920 N.E.2d 162 citing State v. Abboud, 2002-Ohio-4437; 2002 WL 1986552 at ¶8 and Pitts v. Ohio Dept. of Transp. (1981), 67 Ohio St.2d 378, 379; 423 N.E.2d 1105 ("The denial of a motion for judgment of acquittal prior to final sentencing is an interlocutory order. Accordingly, the trial court was permitted to 'revisit' the order that denied [the defendant's] motion for acquittal").

Additionally, per State v. Bistricky, 51 Ohio St.3d 157; 555 N.E.2d 644 (Ohio 1990), the trial court's acquittal of Ms. Smith is a final verdict that cannot be reversed although the State may appeal the "substantive issue or legal conclusion" underlying the acquittal for clarity of future litigation. *Id.* at 160; 646. In fact, this Court in State ex rel. Yates v. Court of Appeals for Montgomery Cty., 32 Ohio St.3d 30 (1987) granted a writ of prohibition to prevent the court of appeals from exercising jurisdiction over the state's

attempted appeal of an acquittal. Ms. Smith asserts that based on this Court's prior holdings, her final verdict of acquittal cannot be disturbed.

In Eberhart v. United States, 546 U.S. 12 (2005), the Court held that the time periods for motions in Fed.R.Crim. P. 29 and 33 provide "rigid claims-processing rules" but not a jurisdictional bar. Specifically, the Court held that where the Government failed to raise a defense of untimeliness until after the District Court had reached the merits, it forfeited the defense. Id. at 19. In the case at bar, not only did the State fail to argue at the trial level that the court did not have jurisdiction to resentence Ms. Smith, they stipulated to the trial court's jurisdiction. In fact, Eberhart overruled United States v. Gupta, 363 F.3d 1169 (C.A. 11, 2004) and "undercut Gupta's characterization of Fed.R.Crim.P. 29(C)'s time limitation as "jurisdictional"." State v. Ross, Slip Opinion No. 2010-Ohio-6282.

The trial court's decision to grant Ms. Smith's timely-filed Rule 29(c) motion for acquittal placed her similarly-situated as the defendant in Ross. In Ross this Court upheld the Rule 29(c) acquittal per Bistricky and Yates despite the procedural error that the Rule 29(c) motion was filed more than three years after the jury had been discharged. In fact, this Court declined to characterize as jurisdictional the 14-day time limitation in Crim.R. 29(C) for making a motion for acquittal. Ross. It is therefore error for this Court to now hold that the Court patently and unambiguously lacked "jurisdiction" to reconsider (and grant) the trial court's interlocutory order previously denying Ms. Smith's motion for acquittal.

CONCLUSION

WHEREFORE, Ms. Smith hereby requests that the Court reconsider its holding of January 27, 2011 and uphold the 9th District's ruling affirming the acquittal of Nancy Smith.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing Motion was served on the State of Ohio by mailing via regular U.S. Mail a copy of same to the following parties this 4th day of February, 2011.

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