

ORIGINAL

In the  
Supreme Court of Ohio

STATE OF OHIO EX REL. MICHAEL DEWINE, et al.,	:	Case No. 2010-1216
	:	
Relators-Appellants,	:	On Appeal from the
	:	Lorain County
	:	Court of Appeals,
v.	:	Ninth Appellate District
	:	
HON. JAMES M. BURGE,	:	Court of Appeals Case Nos.
	:	09CA009723
Respondent-Appellee.	:	09CA009724
	:	

APPELLANTS' OPPOSITION TO NANCY SMITH'S MOTION  
FOR LEAVE TO INTERVENE

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FILED  
FEB 16 2011  
CLERK OF COURT  
SUPREME COURT OF OHIO

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**APPELLANTS' OPPOSITION TO NANCY SMITH'S MOTION  
FOR LEAVE TO INTERVENE**

On January 27, 2011, this Court held that Judge Burge lacked jurisdiction to acquit Nancy Smith of various child-sex offenses—offenses that a jury convicted Smith of in 1994. Smith now seeks to intervene in this case under Civ. R. 24 in an effort to overturn that judgment. The Court should deny the motion for three reasons—it is incomplete, it is untimely, and it offers no sound basis for this Court to reconsider its decision.

**STATEMENT OF CASE AND FACTS**

In 1994, a jury convicted Nancy Smith of gross sexual imposition, attempted rape, rape, and complicity to rape. The Ninth District affirmed the conviction on appeal two years later, and this Court denied discretionary review. See *State v. Smith* (9th Dist. 1996), No. 95CA6070, 1996 Ohio App. Lexis 241, *jur. denied*, 76 Ohio St. 3d 1419.

In 2008, Smith discovered a clerical error in her criminal judgment entry—it did not reflect that she “was convicted by a jury.” Smith filed a motion for resentencing in the Lorain County Common Pleas Court. Judge Burge agreed that the judgment was defective under Crim R. 32(C), but then undertook a sua sponte review of the trial record, announced that he had “absolutely no confidence” in the jury verdict, and entered a judgment of acquittal for Smith.

Attorney General Richard Cordray and Lorain County Prosecuting Attorney Dennis Will sought a writ of prohibition against the judge. After two years of litigation, this Court issued the writ. It held that “[a]ny failure to comply with Crim R. 32(C) . . . vested the trial court with *specific, limited jurisdiction* to issue a new sentencing entry.” *State ex rel. DeWine v. Burge*, slip op., 2011-Ohio-235, ¶ 19. The Court further stated that Crim. R. 32(C) error did not give the judge “jurisdiction to vacate Smith’s convictions and sentence.” *Id.* at ¶ 21.

The Court ordered the judge to vacate his acquittal order. *Id.* at ¶ 23. In an effort to overturn that judgment, Smith has now filed a motion to intervene and a motion for reconsideration.

## DISCUSSION

### I. Smith's motion to intervene is deficient.

“A person desiring to intervene shall serve a motion to intervene upon the parties.” Civ. R. 24(C). That motion “shall be accompanied by a pleading, as defined in Civ. R. 7(A), setting forth the claim or defense for which intervention is sought.” *Id.*; accord *Tatman v. Fairfield County Bd. of Elections*, 102 Ohio St. 3d 425, 2004-Ohio-3701, ¶ 11 (“Civ. R. 24(C) requires that any such motion be accompanied by a pleading ‘setting forth the claim or defense for which intervention is sought.’”).

Smith filed a motion to intervene and a motion for reconsideration, but did not file an answer or other responsive pleading as defined by Civ. R. 7(A). Her intervention motion is thus incomplete and, consistent with longstanding precedent, this Court must deny intervention due to non-compliance with Civ. R. 7(A). See *Tatman*, 2004-Ohio-3701, at ¶ 11.

### II. Smith's motion to intervene is also untimely.

The civil rules allow non-parties to intervene in litigation, either as of right or with leave of court, “[u]pon *timely* application.” Civ. R. 24(A),(B) (emphasis added). “Whether a Civ. R. 24 motion to intervene is timely depends on the facts and circumstances of the case.” *State ex rel. First New Shiloh Baptist Church v. Meagher* (1998), 82 Ohio St. 3d 501, 503.

Under these facts and circumstances, Smith's motion for intervention is untimely. First, Smith filed her motion ten days after this Court issued its final judgment. “Intervention after final judgment has been entered is unusual and ordinarily will not be granted.” *Id.* at 503-04.

Second, Smith “knew or should have known of [her] interest in the prohibition action prior to judgment.” *Id.* at 504. Attorney General Cordray and Prosecutor Will filed their notice of appeal with this Court on July 12, 2010. Five days later, counsel for Smith publicly criticized Appellants for pursuing the appeal. See Brad Dicken, High court asked to review acquittals, Lorain County Chronicle-Telegram, July 17, 2010 available at <http://www.chronicle.northcoastnow.com/2010/07/17/high-court-asked-to-review-acquittals> (last visited Feb. 15, 2011) (“Jack Bradley, Smith’s attorney, said he was upset that prosecutors are continuing their efforts to return his client to prison. . . . ‘I want Nancy Smith to be left alone.’”). Counsel made further statements to the media as the parties submitted their merit briefs. See, e.g., Kelly Mertz, Head Start acquittal case goes to high court, Lorain Morning Journal, Oct. 29, 2010, available at <http://www.morningjournal.com/articles/2010/10/29/news/mj3566688.txt> (last visited Feb. 15, 2011). These statements demonstrate that Smith’s counsel was aware of and understood these proceedings, and nothing prevented counsel from filing a motion to intervene at that time.

Third, Smith “fail[s] to advance any viable reason necessitating postjudgment intervention” in this case. *Meagher*, 82 Ohio St. 3d at 504. Judge Burge and the Ohio Public Defender have filed motions for reconsideration in this Court, reasserting their position that the judge had jurisdiction to issue the judgments of acquittal. Smith seeks intervention to press the very same legal argument—that the judge had jurisdiction over the underlying criminal proceedings. Thus, “the purpose of [Smith’s] attempted intervention is not compelling because it would probably result only in reconsideration of claims or objections” that are already before the Court. *Id.*

Fourth, even if Smith is granted leave to intervene, the Court’s “judgment granting the writ was appropriate.” *Id.* As explained below, Smith offers no justification to revisit that decision.

As a final matter, Smith's status as a defendant in the underlying criminal case does not change the calculus. Civ. R. 24 still requires a "timely application," and this Court has not hesitated to deny untimely intervention motions brought by criminal defendants in writ actions. See, e.g., *State ex rel. Mason v. Griffin*, 104 Ohio St. 3d 279, 2004-Ohio-6384, ¶ 10. Smith had knowledge of these proceedings, has had unimpeded access to counsel, and could have filed an intervention motion in the normal course of briefing. This unexplained delay undermines her present request to intervene after final judgment in this case.

For these reasons, the Court should deny intervention.

### **III. Smith's arguments for reconsideration lack merit.**

In any event, the outcome of this proceeding would not change even if Smith had filed a complete and timely motion for intervention, as her arguments in support of reconsideration have no merit.

First, Smith claims that the State of Ohio invited Judge Burge to enter the judgments of acquittal in this case, and that it cannot now object to those judgments under the "invited error doctrine." Recon. Mot. at 6. That assertion is false. At the hearing before Judge Burge, the State may have conceded that Smith's sentencing entry was deficient under Crim. R. 32(C). See *DeWine*, 2011-Ohio-235, ¶ 11. But the State did not agree that a Crim. R. 32(C) deficiency vested the judge with jurisdiction to reopen Smith's criminal case and enter judgments of acquittal. To the contrary, the State reiterated its position that Crim. R. 32(C) error gave the judge only specific, limited jurisdiction to issue a corrected judgment entry. See Hr'g Tr. (Nov. 26, 2008), 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.").

Even if the State had invited the judge's error, the Court's analysis would not change. This writ action implicates Judge Burge's jurisdiction to act. Disputes about subject-matter

jurisdiction do not turn on any statement, waiver, or stipulation by the State. See *Fox v. Eaton Corp.* (1976), 48 Ohio St. 2d 236, 238 (“The parties may not, by stipulation or agreement, confer subject-matter jurisdiction on a court, where subject-matter jurisdiction is otherwise lacking.”). Because “a party cannot waive subject-matter jurisdiction, regardless of procedural deficiencies,” the doctrine of invited error is simply irrelevant to this case. *H.R. Options, Inc. v. Zaino*, 100 Ohio St. 3d 373, 2004-Ohio-1, ¶ 8.

Second, Smith asserts that her “acquittal is non-appealable.” Recon. Mot. at 9; see also *State ex rel. Yates v. Court of Appeals* (1987), 32 Ohio St. 3d 30, 33 (“[A] judgment of acquittal by a trial judge. . . is not appealable by the state as a matter of right or by leave to appeal.”). But the State did not take an appeal from Judge Burge’s order. It instead sought relief by a way of a separate action—a complaint in prohibition. This Court has long entertained extraordinary writ actions when a trial court reaches beyond its jurisdiction to issue a judgment of acquittal. See, e.g., *State ex rel. Cordray v. Marshall*, 123 Ohio St. 3d 229, 2009-Ohio-4986.

Third, Smith contends that the Court’s decision contradicts its recent opinion in *State v. Ross*, slip op., 2010-Ohio-6282. Not so. In *Ross*, the trial court granted a mistrial due to juror misconduct. *Id.* at ¶ 4. Within fourteen days of the jury’s discharge, the defendant moved for an acquittal under Crim. R. 29(C), but the court denied the motion. *Id.* at ¶¶ 5-6. Three years later, the defendant filed a renewed motion for acquittal, and the court granted it. *Id.* at ¶¶ 9-10.

This Court found error in that decision: “[T]he renewed motion was not properly before the trial court and should have been denied” because it was “untimely filed outside the 14-day time period in Crim. R. 29(C).” *Id.* at ¶ 47. The Court nevertheless refused to disturb the acquittal because the fourteen-day deadline was “a rigid claim-processing rule,” not “a

jurisdictional bar.” *Id.* at ¶ 29. Therefore, the trial court had “subject-matter jurisdiction to enter [the acquittal],” and the acquittal was not subject to appeal. *Id.* at ¶ 30.

*Ross* is inapposite for one simple reason: That case was on retrial; it had not yet proceeded to final judgment. The trial court thus enjoyed “general subject-matter jurisdiction” over the case, including jurisdiction to rule on all motions by the parties. *Jimison v. Wilson*, 106 Ohio St. 3d 342, 2005-Ohio-5143, ¶ 11; accord *State ex rel. Shimko v. McMongale* (2001), 92 Ohio St. 3d 426, 428 (“[A] court having general subject-matter jurisdiction can determine its own jurisdiction.”). When the court misconstrued its authority under Crim. R. 29(C) and granted the defendant’s motion for an acquittal, it committed a non-jurisdictional error.

This case, by contrast, has proceeded to final judgment. The trial court entered its final judgment order in 1994. That act divested the court of its jurisdiction over the case “subject to two exceptions”: The trial court “retain[ed] continuing jurisdiction . . . to correct a void sentence,” and “to correct clerical errors in judgment entries so that the record speaks the truth.” *State ex rel. Cruzado v. Zaleski*, 111 Ohio St. 3d 353, 2006-Ohio-5795, ¶ 19. As this Court recognized, the first option was not available to Judge Burge. Smith’s criminal sentence was not void because it contained every “*statutorily* mandated term.” *DeWine*, 2011-Ohio-235, at ¶ 19. Thus, Judge Burge had limited jurisdiction to do only one thing—he could exercise the second option and “issu[e] a corrected sentencing entry that complies with Crim. R. 32(C).” *Id.* at ¶ 21.

The judge here did more than that. When he issued a judgment of acquittal to Smith, he plainly exceeded his jurisdiction. Such an error is subject to correction by way of prohibition, and Smith’s authorities say nothing to the contrary.

#### **IV. This is the wrong forum to address Smith’s claims of innocence.**

Throughout her motions, Smith proclaims her innocence and criticizes the jury’s verdict. Such contentions are serious, and State law gives defendants the right and opportunity to

advance such claims. Defendants can challenge their convictions by filing a petition for post-conviction review in the common pleas court under R.C. 2953.21, or they can file a motion to reopen their direct appeal in the courts of appeal under App. R. 26(B) and *State v. Murnahan* (1992), 63 Ohio St. 3d 60. Defendants may also seek new DNA testing of evidence under R.C. 2953.71 *et seq.* See, e.g., *State v. Prade*, 126 Ohio St. 3d 27, 2010-Ohio-1842. If dissatisfied with these options, they can file a petition for writ of habeas corpus in federal court under 28 U.S.C. § 2254. Finally, defendants may request a pardon or commutation from the Governor. See R.C. 2967.04.

This is simply the wrong arena for Smith to advance her claims of innocence. A jury convicted Smith of numerous sex offenses in 1994, the Ninth District affirmed those convictions on appeal in 1996, and this Court denied discretionary review. Her criminal case then became final. If a trial court can now reopen a case based solely on a clerical error, then an untold number of defendants will come knocking on the courthouse door, press the very same claim of innocence, and demand reversals of jury verdicts affirmed long ago. The law provides avenues for Smith to present her claims of innocence—but the clerical issue underlying this writ action is not one of those paths.

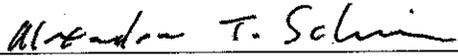
**CONCLUSION**

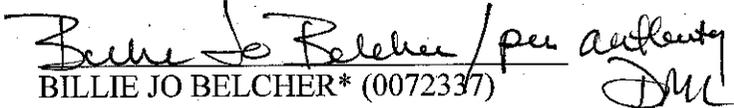
The Court should deny Smith's motion to intervene.

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## CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Appellant's Opposition to Nancy Smith's Motion for Leave to Intervene was served by U.S. mail this 16<sup>th</sup> day of February, 2011, upon the following counsel:

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