

ORIGINAL

In the
Supreme Court of Ohio

LANG DUNBAR,

Plaintiff-Appellee,

v.

STATE OF OHIO,

Defendant-Appellant.

: Case No. 2012-0565
:
:
: On Appeal from the
: Cuyahoga County
: Court of Appeals,
: Eighth Appellate District
:
:
: Court of Appeals
: Case No. 97364
:
:

REPLY BRIEF OF DEFENDANT-APPELLANT STATE OF OHIO

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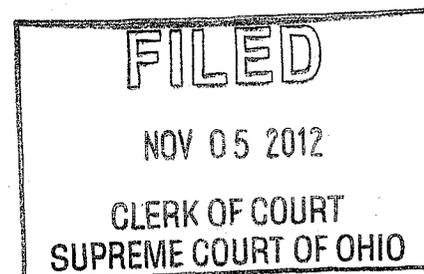


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STATUTES, RULES AND CONSTITUTIONAL PROVISIONS

1988 Ohio Laws 46757

2003 Ohio Laws 35457

2012 H.B. No. 4877

R.C. 2743.48 *passim*

R.C. 2931.038

R.C. 2961.014

R.C. 2961.024

R.C. 3345.234

INTRODUCTION

The utterly clear text of the wrongful-imprisonment statute requires claimants to prove that they “did not plead guilty to” their crimes of conviction. R.C. 2743.48(A)(2). Lang Dunbar pleaded guilty to felony abduction, yet he believes that he deserves compensation as a wrongfully imprisoned individual. He presents no argument that any of the statute’s words could bear multiple interpretations. Nor does he argue that something unusual about his particular case requires an exception. Instead, Dunbar argues that the Court should create an exception to the “did not plead guilty” requirement for *all* claimants whose guilty pleas have been vacated.

Dunbar’s argument runs smack into the unambiguous language of R.C. 2743.48. The text states a flat rule: In order to recover as a wrongfully imprisoned individual, a claimant must “not plead guilty to” his crime of conviction. R.C. 2743.48(A)(2). The statute leaves no room for exceptions. To his credit, Dunbar does not argue that the text itself contains an exception. He instead rejects the State’s argument “that the statute can only mean the words as written,” Dunbar Br. at 11, and asks the Court to recognize an “implicit exception” to the statute’s categorical rule. Dunbar Br. at 10. Dunbar provides no convincing reason why such an exception should be created by this Court instead of the legislature.

Dunbar’s approach would also render the “did not plead guilty” requirement superfluous. To establish eligibility for compensation, a wrongful-imprisonment claimant must prove that his conviction was “vacated or . . . dismissed, or reversed on appeal.” R.C. 2743.48(A)(4). When a court vacates someone’s conviction, it also vacates his guilty plea. So under Dunbar’s reading, every person who satisfies the vacated-conviction requirement would also satisfy the “did not plead guilty” requirement. Put another way, Dunbar’s theory gives the “did not plead guilty” requirement no work to do, reading it out of the statute altogether. In his brief, Dunbar failed to offer a single example of a claimant who, under his reading, would fail the “did not plead guilty”

requirement. Even if the Court were otherwise inclined to recognize an implicit exception to the plain text of R.C. 2743.48, such an exception would violate the rule that statutory interpretation must “give effect to every word and clause in [the statute].” *D.A.B.E., Inc. v. Toledo-Lucas Cnty. Bd. of Health*, 96 Ohio St. 3d 250, 2002-Ohio-4172 ¶ 26 (internal quotation marks omitted).

In the final analysis, Dunbar makes three wrong turns. He finds ambiguity in the clear text of R.C. 2743.48. He dreams up an “implicit exception” to the statute’s unambiguous requirement. And as a result, he offers a wrongful-imprisonment system that compensates *all* individuals who pleaded guilty, as long as they meet the statute’s other requirements. Because the General Assembly did not create such a system, the Court should reverse.

ARGUMENT

In its opening brief, the State pressed two primary textual points. First, the wrongful-imprisonment statute’s “did not plead guilty” requirement is unambiguous. Second, Dunbar’s argument to the contrary would render the requirement superfluous. Dunbar fails to successfully refute these two points, and his efforts to manufacture ambiguity in the plain text of R.C. 2743.48 fall short.

A. The wrongful-imprisonment statute unambiguously denies compensation to all claimants who pleaded guilty.

In categorical terms that leave no room for exception, the wrongful-imprisonment statute authorizes compensation only for individuals who “did not plead guilty to” their crimes of conviction. R.C. 2743.48(A)(2). This unambiguous statutory requirement denies compensation to all claimants who pleaded guilty. Because Dunbar pleaded guilty to felony abduction, he does not qualify as a wrongfully imprisoned individual.

Dunbar seeks to avoid application of this clear statutory requirement by asking the Court to create an “implicit exception” for individuals whose guilty pleas have been set aside. Dunbar Br. at 10. The implicit exception Dunbar desires finds no support in the wrongful-imprisonment statute’s text, and it exceeds the judicial power to “add to, enlarge, supply, expand, extend or improve” the legislature’s work. *State ex rel. Foster v. Evatt*, 144 Ohio St. 65, syll. ¶ 8 (1944). Accordingly, this Court has not lightly found unstated exceptions in Ohio’s statutes. *See, e.g., State ex rel. Boggs v. Springfield Local Sch. Dist. Bd. of Educ.*, 82 Ohio St. 3d 222, 227 (1998) (“We should not and, therefore, do not, judicially graft an exception to the express language of the statute.”); *State ex rel. WBNS TV, Inc. v. Dues*, 101 Ohio St. 3d 406, 2004-Ohio-1497 ¶ 31 (similar). If the General Assembly intended to provide an exception here, it would have done so.

Dunbar seems to agree that the text does not contain the exception he seeks. He belittles the State’s argument “that the statute can only mean the words as written,” Dunbar Br. at 11, and prefers that the Court interpret the “intent of the statute and the General Assembly.” Dunbar Br. at 5. Two considerations undo this argument. First, Dunbar’s invitation to look past the “words as written” conflicts with this Court’s rule that it “must construe the language of the statute as written and not insert words not used.” *Lesnau v. Andate Enters., Inc.*, 93 Ohio St. 3d 467, 472 (2001). Second, his argument asks the Court not to interpret the statute the General Assembly wrote, but instead a hypothetical statute he believes the General Assembly would find desirable. The Court should reject his invitation to re-write R.C. 2743.48.

The General Assembly’s treatment of vacated guilty pleas and convictions in other contexts confirms that it knows how to create exceptions when it wants to do so. To its general rule that a student or employee of a public university must be dismissed from school if he is convicted of a crime of violence, the legislature created an exception if “the conviction is

reversed on appeal.” R.C. 3345.23(A), (E). To its general rule that no person can serve on a jury, hold public office, or cast a vote if she has pleaded guilty to certain crimes, the legislature created an exception if the guilty plea is set aside. R.C. 2961.01(A)(1) (“unless the plea . . . is reversed or annulled”); R.C. 2961.02(C) (“Division (B) of this section does not apply if a plea . . . is reversed, expunged, or annulled.”).

B. Dunbar’s argument would render the “did not plead guilty” requirement superfluous.

Dunbar’s argument is also flawed because it reads the “did not plead guilty” requirement out of the statute. The wrongful-imprisonment statute requires that a claimant’s conviction was “vacated or . . . dismissed, or reversed on appeal.” R.C. 2743.48(A)(4). When a court vacates someone’s conviction, it vacates the guilty plea, too. That means *every* claimant who pleaded guilty in his underlying criminal action will have had his guilty plea vacated. In short, if the “did not plead guilty” requirement does not apply where a claimant’s plea has been vacated, then it never applies.

To see why Dunbar’s position renders the “did not plead guilty” requirement superfluous, consider how the system would work if the Court accepted his argument. Claimants who pleaded guilty and whose convictions had *not* been vacated would not recover, because they would fail a different requirement—the vacated-conviction requirement. So the “did not plead guilty” requirement would never come into play. Claimants who pleaded guilty and whose convictions *had* been vacated could always recover compensation if they met the other statutory requirements because, under Dunbar’s theory, the requirement contains an “implicit exception” for individuals whose convictions have been vacated. Under Dunbar’s view, nothing ever turns on whether a claimant pleaded guilty; it all turns on whether the claimant’s conviction has been

vacated. If the Court accepted Dunbar's argument, then the "did not plead guilty" requirement would never filter out a single claimant.

It is worth noting that Dunbar does not argue that his particular circumstances justify an exception to the "did not plead guilty" requirement. His proposition of law imagines a system where a "vacated guilty plea" would *never* "exist for purposes of determining whether a person" qualifies as a wrongfully imprisoned individual. Dunbar Br. at 5. By arguing for such a broad rule, Dunbar would destroy the "did not plead guilty" requirement altogether.

Tellingly, Dunbar does not dispute this point. He never gives an example of a case where, under his reading, a claimant would fail the "did not plead guilty" requirement. Instead, Dunbar accuses the State of arguing that his theory would compensate all claimants "who were convicted but whose pleas were vacated," whether they met the other statutory requirements or not. Dunbar Br. at 14. That is a distortion. The point is not that everyone whose plea was vacated would be eligible for relief if Dunbar has his way. The point is that everyone whose plea was vacated and otherwise *did* meet the statutory requirements would be eligible for compensation. Put another way, no one who pleads guilty would ever be denied compensation on that ground.

Dunbar also tries to turn the tables, claiming that the *State's* theory would render other provisions meaningless. Not true. He identifies two provisions he believes the State would turn to surplusage: (1) the requirement that "the prosecuting attorney in the case cannot or will not seek any further appeal of right or upon leave of court, and no criminal proceeding is pending, can be brought, or will be brought... against the individual for any act associated with that conviction," and (2) the requirement that the claimant "was found guilty of... the particular charge or a lesser-included offense by the court or jury involved." R.C. 2743.48(A)(2), (4); *see*

Dunbar Br. at 12-14. Dunbar is not altogether clear about how the State's reading would render these sections superfluous, but in any event he is wrong. Those provisions will continue to act as independent filters in wrongful-imprisonment cases, because each covers at least some conduct that the other requirements do not. It is Dunbar's reading—which would have the “did not plead guilty” requirement cover the same conduct as the vacated-conviction requirement—that would render part of the statute meaningless.

Sometimes courts adopt a technical, specialized, or otherwise unusual reading of a statute to avoid surplusage. *E.g.*, *United States ex rel. Mistick PBT v. Hous. Auth.*, 186 F.3d 376, 386-88 (3d Cir. 1999) (Alito, J.). And sometimes courts insist on the ordinary reading of a statute even though that reading creates surplusage. *E.g.*, *Lamie v. U.S. Trustee*, 540 U.S. 526, 536 (2004). What courts never do is adopt an *unusual* reading of a statute that also *creates* surplusage. Dunbar would have this Court do so, and the Court should decline.

C. Dunbar's efforts to create ambiguity in R.C. 2743.48 fail.

Given the clear text of R.C. 2743.48, that should be the end of the matter. Instead, Dunbar insists that the statute is “ambiguous” and that the Court should construe it in his favor. *See* Dunbar Br. at 16. For starters, although he calls the text ambiguous, Dunbar never identifies language that plausibly supports his argument. To qualify as ambiguous, a statute's words must be open to more than one possible interpretation. Dunbar has not identified what word or words in R.C. 2743.48 can be interpreted to allow an exception for vacated guilty pleas. He does not want the Court to interpret ambiguous text; he wants the Court to ignore clear text.

Nor, for similar reasons, can Dunbar rely on the liberal-construction canon. That canon deciphers legislative intent when courts face ambiguous statutes. Before the canon comes into play, a court must first determine that the text can reasonably be construed to contain the liberal

construction. In short, the canon is a tool for determining what a statute says—not for eliding what a statute says in the name of desirable policy.

And that is all Dunbar’s case amounts to: a policy position dressed up as legal argument. Understandably, some may want to create an exception for certain claimants who pleaded guilty. But that is an argument for the General Assembly, not for the courts. The legislature has made difficult policy choices in crafting R.C. 2743.48 and has regularly amended the statute to improve the system. *See, e.g.*, 2012 H.B. No. 487; 2003 Ohio Laws 3545; 1988 Ohio Laws 4675. As other State’s legislatures have done, *see* State Br. at 13-14, the General Assembly may adopt an exception for certain vacated guilty pleas one day. But until that day comes, the Court should refrain from reading an exception into the statute.

D. The criminal court had jurisdiction over Dunbar’s prosecution, so his guilty plea is not void. Dunbar therefore gains nothing by arguing that the “did not plead guilty” requirement does not apply to void pleas.

Dunbar nevertheless claims that R.C. 2743.48 is ambiguous as to the “effect [that] a prior, void guilty plea ha[s] on a subsequent conviction on a not guilty plea.” Dunbar Br. at 7. That claim rests on the premise that Dunbar’s guilty plea and conviction are “void.” Not so. However the “did not plead guilty” requirement treats truly void pleas, it makes no difference here. Dunbar’s plea and conviction do not fit that definition. Time and again, this Court has clarified that “the question of whether a judgment is void or voidable generally depends on ‘whether the Court rendering the judgment has jurisdiction.’” *Miller v. Nelson-Miller*, 132 Ohio St. 3d 381, 2012-Ohio-2845 ¶ 12 (quoting *Cochran’s Heirs’ Lessee v. Loring*, 17 Ohio 409, 423 (1848)). (This Court has recognized an additional, “narrow” category of void judgments—those imposing “sentence[s] that [are] not in accordance with statutorily mandated terms.” *State v. Fischer*, 128 Ohio St. 3d 92, 2010-Ohio-6238 ¶ 8. That sort of judgment is not at issue here.)

The court of common pleas that convicted Dunbar had jurisdiction over his case because common pleas courts have “original jurisdiction of all crimes and offenses,” except minor offenses. R.C. 2931.03. The fact that the Eighth District later vacated his conviction does not mean the trial court lacked jurisdiction; it means only that the trial court was wrong on the merits. *See State v. Payne*, 114 Ohio St. 3d 502, 2007-Ohio-4642 ¶ 27. Because the trial court had jurisdiction over Dunbar’s criminal action, his plea and judgment of conviction are not void. They simply were overturned.

This is not the first time a party has cried void in an attempt to escape the clear consequences of an earlier adjudication. Three examples from this Court will suffice. First, in *Pratts v. Hurley*, a habeas petitioner claimed that his conviction and sentence were void because state law required a three-judge panel to hear the case, and instead a single judge accepted his guilty plea and entered judgment. 102 Ohio St. 3d 81, 2004-Ohio-1980 ¶ 2. The Court held that the error “d[id] not constitute a lack of subject-matter jurisdiction that render[ed] the trial court’s judgment void ab initio.” *Id.* syll. Second, in *Miller v. Nelson-Miller*, one of the parties to a divorce argued that the divorce decree was void because it lacked a valid trial-court signature. 2012-Ohio-2845 ¶ 5. Wrong again: Because the trial court “properly ha[d] jurisdiction over the subject matter and the parties,” noncompliance with the signature requirement “render[ed] the judgment voidable and not void.” *Id.* syll. Finally, consider *In re J.J.*, where a party in a custody dispute argued for the first time on appeal that the custody determination was void because a magistrate had no authority to transfer the proceeding to a visiting judge. 111 Ohio St. 3d 205, 2006-Ohio-5484 ¶ 6. Once more, because the trial court had jurisdiction, the improper transfer “render[ed] the judgment voidable, not void.” *Id.* ¶ 15. The Court has heard tales of voidness

before, and we know how this one ends: Dunbar's plea has been set aside, but—because the criminal court had jurisdiction over his case—it is not void.

At the end of the day, Dunbar promotes a reading of R.C. 2743.48 that comports neither with the statute's plain text nor with ordinary tools of statutory construction. His allegations of statutory ambiguity and voidness add nothing. In the absence of any good reason to create an "implicit" exception to the statute, the Court should reject his atextual interpretation.

CONCLUSION

For these reasons and those stated in the State of Ohio's opening brief, the Court should reverse the judgment below.

Respectfully submitted,

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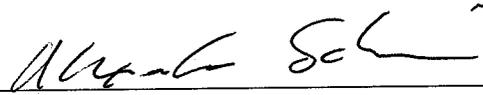
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I certify that a copy of the foregoing Reply Brief of Defendant-Appellant State of Ohio was served by U.S. mail this 5th day of November, 2012, upon the following counsel:

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