

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,)	CASE NO.: 12-0852
)	
Plaintiff-Appellee,)	On Appeal from the Court of Appeals of
vs.)	Ohio, Eighth Appellate District,
)	Cuyahoga County
)	
ROMELL BROOM,)	
)	Court of Appeals Case No. 96747
Defendant-Appellant.)	
)	

**BRIEF OF APPELLANT ROMELL BROOM
IN COMPLIANCE WITH THIS COURT'S ORDER OF OCTOBER 23, 2013**

(This is a Death Penalty Case - No Execution Date Is Set)

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ARGUMENT

This Court ordered on October 23, 2013 that Appellant submit a brief on two jurisdictional questions by November 22, 2013. Pursuant to that order, Broom timely submits the following.

QUESTION ONE

DOES BROOM'S PETITION SATISFY ANY OF THE STATUTORY EXCEPTIONS FOR SUCCESSIVE POSTCONVICTION PETITIONS ENUMERATED IN OHIO REV. CODE §2953.23(A)?

A postconviction petition may be considered under Ohio Rev. Code §2953.23(A) when both of the following requirements are met:

(a) Either the petitioner shows that the petitioner was unavoidably prevented from discovery of the facts upon which the petitioner must rely to present the claim for relief, or, subsequent to the period prescribed in division (A)(2) of section 2953.21 of the Revised Code or to the filing of an earlier petition, the United States Supreme Court recognized a new federal or state right that applies retroactively to persons in the petitioner's situation, and the petition asserts a claim based on that right.

(b) The petitioner shows by clear and convincing evidence that, but for constitutional error at trial, no reasonable factfinder would have found the petitioner guilty of the offense of which the petitioner was convicted or, if the claim challenges a sentence of death that, but for constitutional error at the sentencing hearing, no reasonable factfinder would have found the petitioner eligible for the death sentence.

Ohio Rev. Code §2953.23(A)(1)(a) and (b). The circumstances of Broom's case meet these requirements.

A. Broom could not have discovered the facts upon which he had to rely before the State attempted to execute him on September 15, 2009.

When Romell Broom was sentenced to death on October 16, 1985, Ohio's method of execution was electrocution. At that time, Ohio Rev. Code § 2949.22 said: "A death sentence

must be executed by causing a current of electricity, of sufficient intensity to cause death, to pass through the body of the convict.”

Since November 21, 2001, Ohio Rev. Code §2949.22(A) has required that “a death sentence shall be executed by causing the application to the person, upon whom the sentence was imposed, of a lethal injection of a drug or combination of drugs of sufficient dosage to quickly and painlessly cause death.” This change from electrocution to lethal injection was intended to be a humanitarian act that would make executions less of a physical and psychological ordeal.

It was not until September 15, 2009, when the State of Ohio unsuccessfully attempted to put him to death and a second execution attempt was scheduled for a week later (all as detailed in Broom’s petition and/or request for declaratory relief filed in the trial court on September 15, 2010), that Broom discovered not only that Ohio’s execution procedure is not the humane process the legislature intended but also that the State wants Broom to be subjected to that process more than once. No other death sentenced prisoner has survived a lethal injection execution attempt. Broom could not have anticipated that he would face the situation he does now. For all purposes relevant to Ohio’s postconviction statute, Broom was, until September 15, 2009, “unavoidably prevented from discovery of the facts upon which [he] must rely to present [his] claim[s] for relief.” His petition thus satisfies Ohio Rev. Code §2953.23(A)(1)(a).

B. But for constitutional error at sentencing, the trial court would not have found Broom eligible for the death penalty.

The trial court erred when it sentenced Broom to an unconstitutional punishment. Though the unconstitutional nature of the punishment was not apparent at the time, the trial court as the authority through which the sentence was to be imposed was prohibited from issuing a sentencing order that would be implemented in a cruel and unusual fashion and/or in violation of the prohibition against double jeopardy.

The trial court failed to anticipate that the executive branch (through the Ohio Department of Rehabilitation and Correction) would apply the penalty prescribed by the trial court in a way that is inconsistent with the court's sentencing order, the state and federal prohibitions against cruel and unusual punishments (Eighth and Fourteenth Amendments to the United States Constitution; Article I, Sec. 9, Ohio Constitution), the state and federal prohibitions against double jeopardy (Fifth and Fourteenth Amendments to the United States Constitution; Art. I, Sec. 10, Ohio Constitution), and the legislative intent that lethal injection executions be more humane than electrocution had been and that death be caused "quickly and painlessly." Ohio Rev. Code §2949.22(A).

A death sentence is imposed in Ohio only through the authority of the court of common pleas. Ohio Rev. Code §2929.03. When a jury recommends death, the death sentence itself may only be imposed when the trial judge, after reviewing the evidence, reports, statement of the offender, and arguments of counsel, has found beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating factors. Ohio Rev. Code §2929.03(D)(3).

The relevant question under Ohio Rev. Code §2953.23(A)(1)(b) in the unique and unprecedented circumstances of Broom's case is would any reasonable finder of fact have found Broom "eligible for the death sentence" if he or she had known that it would subject Broom to more than one execution attempt. The answer must be "no." Evolving standards of decency and the prohibition against double jeopardy dictate that no reasonable factfinder would recommend or impose such a sentence.

And just as any other sentence or order that runs afoul of the constitution is error, even if the factfinder does not intend this consequence, so too is a sentencing recommendation or order that ultimately violates the constitution error. The error then, was that the failure to anticipate

that the death sentence recommended by the jury and ordered by the trial court would be carried out in an unconstitutional manner.

The trial court has subject matter jurisdiction over such errors. There is no doubt that the trial court has jurisdiction to insure that its orders are carried out in a constitutional manner. State ex rel. Pfeiffer v. Common Pleas Court of Lorain County, 13 Ohio St. 2d 133 (1968); Hale v. State, 55 Ohio St. 2d 210 (1896). “The power and duty of the judiciary to determine the constitutionality and, therefore, the validity of the acts of the other branches of government have been firmly established as an essential feature of the Ohio system of separation of powers.” State ex rel. Ohio Acad. of Trial Lawyers v. Sheward, 86 Ohio St. 3d 451, 462 (1999). This must be particularly so when the act at issue is one based on the trial court’s own order, and even more so when that order is a sentence of death. Death is different and requires greater reliability. See, e.g., Gardner v. Florida, 430 U.S. 349, 357 (1977) (plurality opinion); Lockett v. Ohio, 438 U.S. 586, 605 (1978); Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (plurality opinion). This case presents the circumstance in which the error arose from the trial court’s sentence but the error was not an intended or contemplated consequence of the trial court’s sentencing order and did not first come to light until many years had passed and indeed until the day the trial court’s sentence was supposed to be carried out. This trial decision, as the source of the authority through which the State seeks to kill Broom, is the error that serves as the basis of Broom’s claim for postconviction relief. In short, Broom’s death sentence was issued by the trial court. Although the trial court, like Broom, could not have known that the State of Ohio would botch the execution and then seek to subject Broom to a second execution attempt, that situation is now threatened. If the sentence issued by the trial court permits or is used to carry out multiple execution attempts, it is cruel and unusual and/or violates double jeopardy, and thus is

unconstitutional and in violation of Ohio and federal law. This sentencing error is reviewable under the terms of Ohio Rev. Code §2953.23(A).

Moreover, the exercise of jurisdiction over Broom's petition – as both lower courts did without any hesitation, and as the State itself has never once questioned – is fully consistent with the general purpose and manifest intent of Ohio's postconviction statute, thus confirming its propriety. That purpose is "to provide judicial review of the allegations raised in a prisoner's petition, in order to provide a remedy for violation of constitutional rights." State v. Lester, 41 Ohio St. 2d 51, 56 (1975). And, because the postconviction statute – or, at the very least, the specific provision of that statute pertinent to this Court's questions – is remedial in nature, the statute must be liberally construed to promote its purpose. See, e.g., Wellston Iron Furnace Co. v. Rinehart, 108 Ohio St. 117, syllabus ¶ 1 (1923) ("All statutes relating to procedure are remedial in their nature and should be liberally construed and applied to effect their respective purposes."); State v. Goist, 2003 Ohio 3549, ¶¶ 14-16 (Ohio App. July 3, 2003). See also Ohio Rev. Code §1.11 ("Remedial laws and all proceedings under them shall be liberally construed in order to promote their object and assist the parties in obtaining justice.").

These settled principles are unmistakably extensions of the Latin legal maxim and common law doctrine *ubi jus ibi remedium* ("where there is a right, there must be a remedy"). See also Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803) ("The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.").

Broom's constitutional rights were violated by the State in carrying out his court-ordered sentence of death on September 15, 2009, and in making him subject to that sentence a second

time after what he has already once been through. For these violations of Broom's vested legal rights, there must be a remedy. In Ohio, a postconviction petition under Ohio Rev. Code §§2953.21 *et seq.*, and specifically §2953.23, provides such a remedy; it provides "judicial review of the allegations raised in [Broom's] petition, in order to provide a remedy for violation of [his] constitutional rights." *Lester*, 41 Ohio St. 2d at 56. Broom's petition fully set forth the alleged constitutional violations, he demanded a remedy, and the lower state courts did not blink in adjudicating his claims. Neither should this Court.

QUESTION TWO

IF NO OHIO REV. CODE §2953.23(A) STATUTORY EXCEPTION APPLIES, DID THE TRIAL COURT HAVE SUBJECT MATTER JURISDICTION TO CONSIDER BROOM'S PETITION?

In addition to seeking review under Ohio's postconviction law, Broom sought relief under the Declaratory Judgment Act. Even if the trial court was without jurisdiction under Ohio Rev. Code 2953.23(A), it had subject matter jurisdiction to decide Broom's petition under Ohio's Declaratory Judgment Act. Ohio's declaratory judgment statute, §2721.03, provides:

Subject to division (B) of section 2721.02 of the Revised Code, any person . . . whose rights, status, or other legal relations are affected by a constitutional provision, statute, [or] rule . . . may have determined any question of construction or validity arising under the . . . constitutional provision, statute, [or] rule . . . and obtain a declaration of rights, status, or other legal relations under it.

All of the prerequisites for declaratory relief are present in Broom's case: (1) a real controversy exists between the parties; (2) the controversy is justiciable in character; and (3) the situation requires prompt relief to preserve the rights of the parties. *See, e.g., Burger Brewing Co. v. Liquor Control Comm.*, 34 Ohio St. 2d 93, 97 (1973); *Buckeye Quality Care Centers, Inc. v. Fletcher*, 48 Ohio App. 3d 150, 154 (1988).

There is a real controversy between the parties. The State of Ohio, having tried once and failed, seeks another opportunity to try to kill Broom. Broom says that the State is prohibited from trying again to kill him because a second attempt, successful or not, would violate the Ohio and United States Constitutions and undermine the legislative intent underlying current Ohio Rev. Code § 2949.22(A). The action the State proposes to take and the consequences to Broom of those actions are so serious, it is difficult to imagine a controversy more real between any parties.

The controversy is justiciable. The case presents a clear legal question: do the state and/or federal constitutions and/or Ohio law prevent the State from going forward with a second execution attempt on Broom? This is exactly the type of question that this Court has recognized Ohio courts have “the power and the duty” to address. State ex rel. Ohio Acad. of Trial Lawyers v. Sheward, 86 Ohio St. 3d at 462.

The situation requires prompt relief. Broom remains on Ohio’s death row and lives with the threat of another execution day all the time. It is well recognized that “justice delayed is justice denied.” Broom had already been through most of the terrifying execution process that is encompassed within every execution. The law does not permit him to be put through that process again. The prompt relief of assuring him that no second attempt will take place is essential.

The trial court denied Broom declaratory relief. (Exhibit D to Broom’s Amended Memo. in Support of Jurisdiction, Tr. Opinion, p. 5.) The Cuyahoga County Court of Appeals found that “Because his request for declaratory relief seeks the same remedy advanced through his petition for postconviction relief, we find that any declaratory relief sought was duplicative and,

therefore, improper.” (Exhibit A to Broom’s Amended Memo. in Support of Jurisdiction, Ct. App. Opinion, 2012-Ohio-587, ¶11).

It is generally recognized that “a declaratory judgment action . . . cannot be used as a substitute for an appeal or as a collateral attack upon a [criminal] conviction,” that declaratory relief “does not provide a means whereby previous judgments by state or federal courts may be reexamined, nor is it a substitute for appeal or post conviction remedies,” and that a declaratory judgment is “not part of the criminal appellate process.” Moore v. Mason, 2005 Ohio 1188, ¶14 (Ohio App. Mar. 17, 2005) (citing cases). See also Jackson v. Bartec, Inc., 2010 Ohio 5558, ¶37 (Ohio App. Nov. 16, 2010), *aff’d sub nom.*, 132 Ohio St. 3d 167 (2012).

These restrictions upon declaratory judgments do not arise in this case. Broom is not seeking to appeal his criminal judgment or his original death sentence. And in his request for declaratory relief, Broom does not claim that the trial court made an error of law during his trial by failing to anticipate that the death sentence it ordered would be carried out piecemeal and/or in multiple attempts. Rather, Broom claims that, because of the failed execution attempt on September 15, 2009 (*i.e.*, events which occurred long after his conviction and sentence were final and during the course of carrying out the court’s sentence), he has already been subjected to the State’s execution process and may not therefore be required to face it again. This is not an attack on the conviction and original sentence. It is instead an effort to have the courts declare that any further attempt by the State of Ohio to execute Broom violates the constitution, and that the relevant constitutional provisions and Ohio Rev. Code §2949.22(A) mean what they say.

Broom’s claims are analogous to those made by an offender claiming that his sentence has been served or is subject to reduction, or that his parole has expired. These types of claims, like Broom’s, are squarely within the province of the declaratory judgment statute. See, e.g.,

State ex rel. Mora v. Wilkinson, 105 Ohio St. 3d 272, 274 (2005); State ex rel. Yonkings v. Ohio DRC, 1993 Ohio App. LEXIS 5212 (1993), aff'd, 69 Ohio St. 3d 70 (1994); Hattie v. Anderson, 68 Ohio St. 3d 232, 235 (1994); State v. Laney, 2011 Ohio 135 (Ohio App. Jan. 14, 2011); McGrath v. Ohio Adult Parole Auth., 2004 Ohio 6114 (Ohio App. Nov. 18, 2004).

The Cuyahoga County Court of Appeals said that because Broom sought declaratory relief in the alternative to his request for postconviction relief, declaratory relief was not appropriate. The court treated postconviction as the proper vehicle for Broom's claims throughout its opinion. 2012-Ohio-587, ¶11 and *passim*. However, the claim Broom pursues is highly unusual, indeed unprecedented, and the path to judicial review perhaps not as clearly defined as in more frequently arising circumstances. The fact that Broom pursued relief under two different procedural theories and expressly did so both as additional and "alternative" theories (see Petition at ¶¶ 6, 86, 92, 101), does not in any way preclude his use of either. Pleading in the alternative is clearly permissible, and does not in any way impair Broom's entitlement to relief under either procedural vehicle. See, e.g., Ohio R. Civ. P. 8(E)(2) ("A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as he has regardless of consistency and whether based on legal or equitable grounds. All statements shall be made subject to the obligations set forth in Rule 11.").

Finally, the declaratory judgment statute is "remedial and shall be liberally construed and administered." Ohio Rev. Code §2721.13. See also Swander Ditch Landowners' Ass'n v. Joint

Bd. of Huron & Seneca County Comm'rs, 51 Ohio St. 3d 131, 134 (1990). "The existence of another adequate remedy [e.g., under the post-conviction statute] does not preclude a judgment for declaratory relief in cases where it is appropriate." Ohio R. Civ. P. 57.

Broom's case is easily an appropriate case. He meets all of the requirements for declaratory relief. Article IV, Sec. 4(B), of the Ohio Constitution provides the courts of common pleas with original jurisdiction over all justiciable matters as may be provided by law, and Ohio Rev. Code §2721.03. provides such courts with jurisdiction to entertain declaratory judgment actions. The lower courts thus had, at the very least, subject matter jurisdiction to entertain Broom's petition under the declaratory judgment statute, even if this Court were to conclude (contrary to both lower courts and without being asked to do so by the State) that such lower courts may not have had jurisdiction under Ohio Rev. Code §2953.21 *et seq.* and in particular §2953.23(A).

CONCLUSION

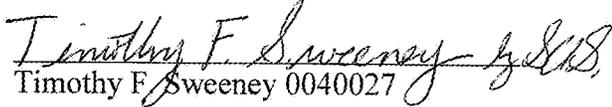
WHEREFORE, for all of these reasons, and in the interest of justice, Appellant Romell Broom respectfully requests that this Court exercise jurisdiction and reverse. This case involves substantial constitutional questions. The lower courts' decisions dismissing Broom's postconviction petition and denying him declaratory relief were error. Broom is entitled to an order that the State may not seek to execute him again by any means or methods. Alternatively, this Court should remand the case to the trial court for full discovery and an evidentiary hearing on the claims presented in Broom's postconviction petition and/or request for declaratory relief.

Respectfully Submitted,



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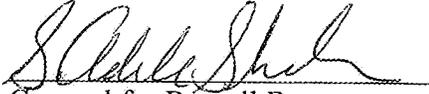

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief was served by regular U.S. Mail, first-class postage pre-paid on Timothy J. McGinty, Cuyahoga County Prosecutor, and T. Allan Regas and Katherine Mullin, Assistant Prosecuting Attorneys, 1200 Ontario Street, 8th Floor, Cleveland, OH 44113, this 21st day of November, 2013.


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