

ORIGINAL

NO. 2012-0852

IN THE SUPREME COURT OF OHIO

APPEAL FROM
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO
NO. 96747

STATE OF OHIO

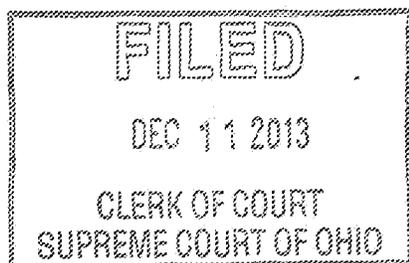
Plaintiff-Appellee

-vs-

ROMELL BROOM

Defendants-Appellant

**BRIEF OF PLAINTIFF-APPELLEE PURSUANT TO THIS COURT'S
OCTOBER 23, 2013 ORDER
(Capital Case-No Execution Date Scheduled)**



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LAW AND ARGUMENT

FIRST ISSUE: WHETHER THE PETITION SATISFIES ANY OF THE STATUTORY EXCEPTIONS FOR SUCCESSIVE PETITIONS ENUMERATED IN R.C. 2953.23(A)?

I. Summary of Argument

The trial court should not have entertained Broom's successive petition for postconviction relief as it failed to satisfy the requirements of R.C. 2953.23(A)(1). Broom's claim is not properly raised as a petition for postconviction relief. Therefore, the State respectfully requests this Honorable Court decline to accept jurisdiction.

II. Law and Analysis

The trial court lacked jurisdiction to consider Broom's successive petition. Ohio Revised Code 2953.23(A)(1) states:

(A) Whether a hearing is or is not held on a petition filed pursuant to section 2953.21 of the Revised Code, a court ***may not entertain*** a petition filed after the expiration of the period prescribed in division (A) of that section or a second petition or successive petitions for similar relief on behalf of a petitioner unless division (A)(1) or (2) of this section applies:

(1) Both of the following apply:

(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.***

(Emphasis Added).

Ohio's postconviction statute precludes a trial court from hearing an untimely or successive petition unless both of the above factors are met. Broom failed to do so.

First, the facts that support Broom's argument are not those contemplated by the postconviction statute. The "'facts' contemplated by R.C. 2953.23(A)(1)(a) are the historical facts of the case, which occurred up to and including the time of conviction." *State v. Turner*, 10th Dist. Franklin App. No. 06AP-876, 2007-Ohio-1468, ¶11 citing *State v. Czaplicki*, 2nd Dist. Montgomery App. No. 16589, 1998 WL 272034 (May 29, 1998). Broom relies on the failed attempt to insert an IV as the basis for his claim. While Broom did not learn of this fact September 15, 2009, he still fails to satisfy the requirement of R.C. 2953.23(A)(1)(a). The statute is meant to address constitutional errors that occurred during trial or sentencing. Despite Broom's attempt to shoehorn his argument into a sentencing error, it is clear that the fact he complains of relates not to the constitutionality of the underlying proceedings but rather to the State's preparations to carry out a lawful sentence. *State v. Broom*, 8th Dist. Cuyahoga App. No. 96747, 2012-Ohio-587, ¶20. Therefore, even though Broom was unaware of the facts to support his claim, those facts are not cognizable as a petition for postconviction relief and cannot serve as the basis for the trial court to entertain a successive petition for postconviction relief.

Second, Broom fails to satisfy R.C. 2953.23(b). That section, as it applies to this case, required Broom to show that "but for constitutional error at the sentencing hearing, no reasonable factfinder would have found the petitioner eligible for the death sentence." The failed attempt to obtain IV access would have had no bearing on the factfinder's decision to impose the death sentence. The method of execution is not a

mitigating factor that a factfinder would consider when making its decision. Broom claims that the error “was that the failure to anticipate that the death sentence...would be carried out in an unconstitutional manner.” (Appellant’s Brief, pg. 4). This is simply not the type of “error” that the postconviction statute was designed to address; no finder of fact is required to anticipate possible future unconstitutional actions when rendering its decision. Broom fails to satisfy the statute. His claim is simply not applicable to Ohio’s postconviction relief statute.

III. Conclusion

The trial court lacked jurisdiction to entertain Broom’s successive petition for postconviction relief. Broom’s claim does not qualify as the type of constitutional error that the postconviction statute seeks to address. Therefore, the State respectfully requests this Honorable Court decline to accept jurisdiction.

SECOND ISSUE: IF NO STATUTORY EXCEPTION APPLIES, WHETHER THE TRIAL COURT LACKED SUBJECT-MATTER JURISDICTION TO CONSIDER THE PETITION?

I. Summary of Argument

The trial court lacked subject-matter jurisdiction to consider Broom’s successive petition. Broom’s claim was not properly brought as a petition for postconviction relief and Broom failed to properly invoke the court’s jurisdiction as a declaratory judgment. Broom’s petition should have been denied and this Court should decline to accept jurisdiction.

II. Law and Analysis

Postconviction relief is not the proper avenue to address Broom’s claim. On September 18, 2009, Broom filed a 42 U.S.C. §1983 action in the U.S. District Court for

the Southern District of Ohio. On August 17, 2012, the district court held that Broom's "Fifth Amendment and Eighth Amendment no-multiple-attempts challenges [we]re not properly before this Court." *Broom v. Strickland*, S.D. Ohio No. 2:09-CV-823, 2010 WL 3447741 (Aug. 27, 201), at 7. On September 14, 2010, Broom re-filed his state habeas action in this Court, which this Court dismissed in November of 2009. On September 25, 2010, Broom filed in the trial court a "petition to vacate or set aside judgment and/or sentence, in part, or grant other appropriate relief, pursuant to ORC 2953.21 and 2953.23, and/or for declaratory relief under ORC 2721.01 et seq. and Civ. R. 57." The trial court substantively denied Broom's claims as a petition for post-conviction relief. However, as previously discussed, Broom's claim was not properly raised as a petition for post-conviction relief.

Broom claims that, if not properly a petition for post-conviction relief, that the trial court had subject-matter jurisdiction to entertain this claim as a declaratory judgment. Even if this were accurate, Broom failed to properly invoke the trial court's jurisdiction under R.C. 2721.02 et seq.

A declaratory judgment action cannot be used as a substitute for an appeal or as a collateral attack upon a conviction. 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." *Moore v. Mason*, 8th Dist. Cuyahoga No. 84821, 2004-Ohio-1188, ¶14 citing *Shannon v. Sequechi* (C.A.10, 1966), 365 F.2d 827, 829. A "declaratory judgment action is simply not part of the criminal appellate process." *Id.* citing *State v. Brooks* (1999), 133 Ohio App.3d 521, 525, 728 N.E.2d 1119. "Neither [R.C. 2701.02] nor Civ.R. 57 convert[s] a claimed error at law by a trial judge

acting as a judge in a criminal case into a justiciable controversy between the defendant and the judge subject to resolution by declaration * * * ." *Id.*

The vast majority of criminal matters cannot properly be raised as a declaratory judgment. Even if Broom's claim was unique enough to qualify for declaratory judgment, Broom failed to properly initiate that action. "Ohio's Declaratory Judgment Act, found in R.C. Chapter 2721, plainly 'contemplate[s] a distinct proceeding * * * initiated by the filing of a complaint.' Thus, '[a] 'motion' for a declaratory judgment is procedurally incorrect and inadequate to invoke the jurisdiction of [a] court pursuant to R.C. Chapter 2721." *State v. Braggs*, 1st Dist. Hamilton App. No. C-130073, 2013-Ohio-3364, ¶4 citing *Fuller v. German Motor Sales, Inc.*, 51 Ohio App.3d 101, 103, 554 N.E.2d 139 (1st Dist.1988). "Braggs sought declaratory relief declaratory relief by means of a motion filed in his criminal case. Therefore, he failed to invoke the jurisdiction conferred by the act." *Id.* Just as in *Braggs*, Broom filed a motion for declaratory relief in the trial court without properly initiating a civil proceeding. His failure to properly invoke the trial court's jurisdiction in declaratory judgment left the trial court without subject-matter jurisdiction to hear his claim.

Broom failed to satisfy R.C. 2953.23(A)(1) and he failed to otherwise properly invoke the trial court's subject-matter jurisdiction. Therefore, Broom's petition was properly denied and the trial court lacked jurisdiction to entertain his claim.

CONCLUSION

The trial court lacked subject-matter jurisdiction over Broom's claim. He does not satisfy the requirements of R.C. 2953.23(A)(1). Broom also did not properly raise his claim in any other matter which would have conferred subject-matter jurisdiction over

this issue. As Broom's petition was properly denied, the State respectfully requests this Honorable Court decline to accept jurisdiction over this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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