

ORIGINAL

IN THE SUPREME COURT OF OHIO

DAVID BUNDY

Plaintiff-Appellee

vs.

STATE OF OHIO

Defendant-Appellant

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Case No. 2014-0189

On Appeal from the Montgomery
County Court of Appeals,
Second Appellate District

Court of Appeals
Case No. 25665

MEMORANDUM IN OPPOSITION TO JURISDICTION
OF APPELLEE, DAVID BUNDY

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WHY LEAVE TO APPEAL SHOULD NOT BE GRANTED

The State of Ohio provided three reasons why this is a matter of public or great general interest in order for this Court should grant leave of appeal. The first is based upon a conflict.

The State alleges that a conflict exists between the Second District's opinion in *Bundy and Haddad v. Department of Rehabilitation and Corrections, et. al.* 2002-Ohio-2813 (10th dist.).

The cases are easily distinguishable.

In *Haddad*, Haddad had been given a nine month prison sentence for attempted aggravated assault. While in prison he allegedly committed an assault. The Department of Rehabilitation and Corrections (DRC) added 90 additional days to his prison sentence pursuant to R.C. 2967.11, the "bad time" statute. That statute was subsequently held unconstitutional after he had served the additional 90 days. Haddad claimed the he was wrongfully imprisoned for 94 days premised upon the bad time statue being unconstitutional. The Tenth District correctly concluded that the fact that the bad time statute was found unconstitutional does not mean he did not commit the offense of assault. As such, he could not demonstrate he did not commit the offense of assault and therefore was not wrongfully imprisoned.

The distinguishing factor is the statute that gave the DRC the ability to extend this prison term for a crime in prison was found unconstitutional, not the offense that he was alleged to have committed. *Bundy*, however, did not commit a crime, he had no legal obligation to report on March 14, 2008.

The State also cites *Dunbar v. State*, 136 Ohio St.3d 181, 2013-Ohio-2163, as at odds with the Second District's opinion. However, the basis for the reversal in *Dunbar* was that each of the three defendants in the above-cited cases pleaded guilty to the charges of failure to verify.

Bundy did not plead guilty to the offense of Failure to Verify.

The States second reason is that *Bundy* decision contradicts the actual innocence requirement. Bundy had the legal obligation to report on October 7, 2007 and he did. The Attorney General's order from him to report March 14, 2008 was unconstitutional and a nullity. His omission, not reporting, is not and never was a crime. His next lawful report date was October 7, 2008.

Finally, the State of Ohio claims the Second District's Decision radically expands the class of people who can recover as a wrongfully imprisoned individual. As Judge Hall noted, "Bundy's case is unusual." Bundy's situation is unique; it was a "crime" of omission coupled with an unconstitutional statute. In most situations, the defendant committed an "act." That act is usually subject to multiple other criminal statutes, typically the lesser included offenses. Crimes of omission are few and far between. The Bundy decision radically expands nothing.

STATEMENT OF THE CASE AND FACTS

Plaintiff, David Bundy ("Bundy"), was a sexual offender required to register his address with the Sheriff of Montgomery County on a yearly basis, pursuant to "Megan's Law". Between 2003 and October 2007, Mr. Bundy registered as required every year on his registration date, October 7th.

On October 17, 2007 he received notification that his next reporting date was October 7, 2008.

On November 28, 2007, Mr. Bundy received a letter from the Ohio Attorney General notifying him of a change in the law requiring sexual offender reclassification. This change was pursuant to the Ohio Adam Walsh Act (AWA) which authorized the state attorney general to

reclassify sex offenders who had already been classified by judges under a previous version of the law, "Megan's Law."

Based on the new law, Mr. Bundy was now required to register every 180 days for 25 years. Under this law, his first registration date was now March 14, 2008.

He failed to register on March 14, 2008, pursuant to the new law.

Bundy was charged with a third degree felony by an indictment in this County on May 15, 2008 in case number 2008 CR 1321. He was charged by indictment with a violation of R.C. 2950.05 (failure to verify). Mr. Bundy was found guilty of failure to verify, (F-3) after a bench trial on October 23, 2008 and was sentenced to three years of mandatory imprisonment. He arrived at the Department of Rehabilitation and Corrections on October 24, 2008.

That decision was appealed to the Second District Court of Appeal and affirmed. See, *State v. Bundy*, 2008 Ohio 5395. On November 29, 2009, it was appealed to the Supreme Court of Ohio, Case No. 2009-2135.

On June 3, 2010 the opinion of *State v. Bodyke (2010)*, Ohio St. 3d 266 was issued, holding R.C. 2950.031 and 2950.032, which require the reclassification of sex offenders who have already been classified by Court order under the former law, unconstitutional.

On September 10, 2010, the Supreme Court of Ohio reversed Mr. Bundy's conviction in 2009-2135 in accordance with their decision in *Bodyke*.

On September 21, 2010, the charges against Mr. Bundy were dismissed by the Montgomery County Prosecutor's Office and he was subsequently released from prison.

On June 2, 2011, Plaintiff initiated the instant civil action, seeking a declaratory judgment that he is a wrongfully imprisoned person entitled to pursue an action for civil damages pursuant to Ohio R.C. § 2743.48. In its answer filed on July 19, 2011, Defendant asserted various

affirmative defenses, including, inter alia, that the Ohio Supreme Court's interpretation of Section 2743.48 "prohibits a finding that Plaintiff was a wrongfully imprisoned individual."

Consistent with that affirmative defense, the parties' cross-motions for summary judgment and the accompanying memoranda largely focus on the statutory language of R.C. § 2743.48, and whether its requirement that "no criminal proceeding" can be brought "for any act associated with" the purported wrongful conviction precludes Plaintiff from recovery.

The trial court sustained Plaintiff motion for summary judgment and overruled the Defendants. The State of Ohio appealed to the Second District Court of Appeal which affirmed the trial court.

The States notice of appeal and memorandum in support of jurisdiction were filed with this Court on February 3, 2014.

ARGUMENT

Response to the State of Ohio's Proposition of Law:

The State's proposition of law is wholly unworkable. It requires that the Claimant show "that he did not commit the acts (not verifying his address) for which he was convicted." That would require Bundy prove that he *did* verify. This Court, however, held that statute requiring him to verify unconstitutional, as a result he had no obligation to do so and reversed his conviction.

- A. **"R.C. 2743.48 (A)(5) requires a wrongfully imprisoned claimant to prove affirmative that he was factually innocent of the crime for which he was convicted."**

R.C. 2743.48 (A)(5) states,

Subsequent to sentencing and during or subsequent to imprisonment, an error in procedure resulted in the individual's release, or it was determined by a court of common pleas that the offense of which the individual was found guilty, including all lesser-included offenses, either was not committed by the individual or was not committed by any person."

In *Gover v. Ohio* (1993), 67 Ohio St.3d 93, the court held that claimants seeking compensation for wrongful imprisonment must prove that *at the time of the incident* for which they were initially charged, they were not engaging in any *other criminal conduct arising out of the incident* for which they were initially charged.

The offense was a nullity. On March 14, 2008, no crime was committed, there were no lesser included offense and no one else committed the non-existent crime. There was no “incident”. The order that he was to report on March 14, 2008 was *void ab initio*. *Norton v. Shelby County* (1886), 118 U.S. 425, 442. Therefore, it has been demonstrated that Bundy was factually innocent of the crime for which he was convicted.

B. “The mere invalidation of a criminal statute as unconstitutional does not by itself mean the clamant is factually innocent of the crime for which he was convicted.”

An unconstitutional criminal statute is *void ab initio*. “An offence created by [an unconstitutional law],” the Court has held, “is not a crime.” *Ex parte Siebold*, 100 U. S. 371, 376 (1880). “A conviction under [such a law] is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment.” *Id.*, at 376–377.

The rule in Ohio has long been that when a statute is held to have been unconstitutional as of its enactment, that statute is void ab initio. *City of Middletown v. Ferguson* (1986), 25 Ohio St. 3d 71 “An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed.” *Norton v. Shelby County* (1886), 118 U.S. 425, 442. Accord *Ex Parte Siebold* (1879), 100 U.S. 371, 376; *Chicago, I. & L. Ry. Co. v. Hackett* (1913), 228 U.S. 559, 566.

The State cites *Perlstein v. Wolk*, 844 N.E.2d 923 (Ill. 2006) as an abandonment of the

strict application of the void ab initio doctrine. That case involved statute of limitations in legal malpractice cases. The court in *Perlstein* specifically stated that the strict application of the void ab initio doctrine was appropriate in criminal cases.

A constitutionally repugnant enactment suddenly cuts off rights that are guaranteed to every citizen (Ill. Const.1970, art. I, § 1 ('All men * * * have certain inherent and inalienable rights')), and instantaneously perverts the duties owed to those citizens. To hold that a judicial decision that declares a statute unconstitutional is not retroactive would forever prevent those injured under the unconstitutional legislative act from receiving a remedy for the deprivation of a guaranteed right. This would clearly offend all sense of due process under both the Federal and State Constitutions. [Citations.] Along with these considerations, we note that this court has expressly held that a defendant cannot be prosecuted under an unconstitutional act." *People v. Gersch*, 135 Ill.2d 384, 399, 142 Ill.Dec. 767, 553 N.E.2d 281 (1990). *Perlstein*, at 927.

The actually holding in *Perlstein v. Wolk* is as follows:

We do not, however, abandon the *Norton* rule. In cases such as *Gersch*, where a defendant's constitutionally guaranteed rights are in need of vindication, strict application of the void *ab initio* doctrine is appropriate. In other cases, however, where no such rights are at stake, other equitable and practical factors are appropriate for consideration by this court. The issue is not so much a matter of applying or not applying the void *ab initio* doctrine, as it is determining whether a particular set of circumstances justifies a court's exercise of its equitable powers to ameliorate the doctrine's sometimes harsh results. Consideration of the circumstances in this case leads us to conclude that plaintiffs' complaint should be allowed to proceed. (emphasis added). *Perlstein*, at 932.

The State's fear of penalizing prosecutors and judges for doing their duty in good faith is unfounded. The wrongfully imprisoned individual statute imposes no liability on public officers.

Reliance upon *Allen v. Holbrook*, 103 Utah 319, 135 P.2d 242 (Utah 1943), is misplaced. That case is about the good faith reliance upon a search warrants and the exclusion of evidence.

In State v. Vill. Of Garden City, 265 P.2d 328 (Idaho 1953) the legislature passed a law which allowed some forms of gambling. Relying upon that law the defendants opened gambling houses in Garden City. The law was later found to be unconstitutional and the defendant's were

penalized. The court reversed the penalties, stating:

While it has often been stated in general terms that an unconstitutional statute confers no rights, creates no liability, and affords no protection, there are many well recognized exceptions to this general rule. An unconstitutional law should not be applied to work a hardship or impose a liability on one who has acted in good faith and relied on the validity of a statute before the courts have declared it invalid. *Allen v. Holbrook*, 103 Utah 319, 135 P.2d 242. An unconstitutional act has been held to protect citizens dealing with public officers under its provision up to the time it is declared unconstitutional. *Provident Land Corp. v. Provident Irrig. Dist.*, Cal. App., 94 P.2d 83; *Shafford v. Brown*, 49 Wash. 307, 95 P. 270; *Gordon v. Conner*, 183 Okl. 82, 80 P.2d 322, 118 A.L.R. 783. *Vill. Of Garden City* at 335.

In other words, the *private citizen* may rely upon the validity of a statute.

The Second District properly concluded that Bundy's conviction was a nullity.

C. "The courts improperly gave preclusive effect to this courts determination that the reclassification provisions of the Adam Walsh Act were unconstitutional."

Relying upon *Warden v. State*, 47 Ohio St. 3d. 47, the State specifically objects to the "preclusive effect" of it's the Second District's holding and the trial court's for that matter.

Warden held "where a person claiming compensation for wrongful imprisonment has presented an affirmative defense of self-defense at his criminal trial, and has obtained a judgment of acquittal, that judgment is not to be given preclusive effect in a proceeding under R.C. 2305.02." That judgment is not to be given preclusive effect in a proceeding because it is unknown whether or not the acquittal is a result of a successful affirmative defense or that the State just failed to prove its case. The former would qualify for wrongful imprisoned individual status, the latter would not.

The State claims Bundy "undeniably committed the crime for which [he] was charged," which simply is not true. Bundy could not have "committed" the felony offense of failure to

verify because that offense itself was a nullity. He had no duty to report to the Sheriff's Office on March 14, 2008 and not showing up was not a crime.

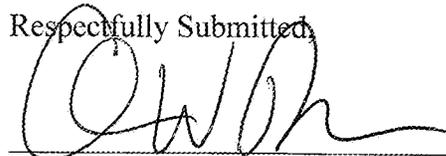
The State also asserts Bundy did not "show affirmatively that the underlying crime 'either was not committed by [him] or was not committed by any person.'" In light of the reversal of his case, no crime was committed by Bundy or anyone else on March 14, 2008.

Whether one calls it a "preclusive effect" or logic, the Second District Court of Appeals was correct in finding R.C. 2743.48 (A)(5) satisfied.

CONCLUSION

The Second District Court of Appeals properly decided this matter. Because there is not an error of law or fact committed below and this case does not raise matters of public or great general interest, nor is it in conflict with any other appellate district, Bundy respectfully requests that this Court decline jurisdiction and dismiss this appeal.

Respectfully Submitted,



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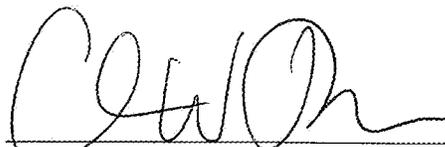
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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served this 25th day of February, 2014 upon the following: State of Ohio, by and through his attorney, Eric F. Murphy, 30 E. Broad Street, 17^h Floor, Columbus, Ohio 43215 by regular US mail and e-mail.



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