ORIGINAL

In the
Supreme Court of Ohio

DALE JOHNSTON,	:	Case No. 14-0530
	:	
Plaintiff-Appellant,	:	On Appeal from the
	:	Franklin County
v.	:	Court of Appeals,
	:	Tenth Appellate District
STATE OF OHIO,	:	
	:	Court of Appeals
Defendant-Appellee.	:	Case No. 12-AP-01022
	:	

MEMORANDUM OPPOSING JURISDICTION OF DEFENDANT-APPELLEE STATE OF OHIO

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INTRODUCTION

This wrongful imprisonment case does not warrant review because the court below correctly held that Appellant Dale Johnston could not benefit from the 2003 amendments to the governing statute and because alternative grounds support the judgment below. Johnston filed a wrongful imprisonment action in 1990, after the court of appeals reversed his aggravated murder convictions. This action failed because Johnston could not produce evidence that he was actually innocent of the crime. In 2003, the General Assembly amended the wrongful imprisonment statute to allow recovery by some claimants who could establish that they were released from prison as a result of errors in procedure. The Tenth District held that these amendments did not entitle Johnston to recovery. That decision does not warrant further review for two principal reasons.

First, this Court's decision in *Mansaray v. State*, 138 Ohio St. 3d 277, 2014-Ohio-750, independently forecloses any opportunity for Johnston to recover as a wrongfully imprisoned individual, even if the Tenth District's decision otherwise deserved review. The court of appeals did not discuss *Mansaray* because this Court's decision preceded the Tenth District's judgment in this case by 22 days. *Mansaray* eliminates any hope for Johnston to recover as a wrongfully imprisoned individual, however, because it held that errors in procedure do not entitle a claimant to recover when the alleged error occurs prior to sentencing.

Even if one were to set aside the question as to whether the 2003 procedural error amendment revived Appellant's case, the procedural error Appellant argues that occurred in his case was previously denounced by this Court on March 5, 2014 in *Mansaray v. State,* 2014-Ohio-0750. Disregarding the March, 2014 decision in *Mansaray,* Appellant, on April 7, 2014 sought jurisdiction with this Court which would ostensibly allow him to pursue a wrongful

imprisonment claim for purported presentencing trial court errors, to wit: admission of testimonial evidence and withholding of evidence contrary to *Brady v. Maryland,* 373 U.S. 83 (1963). (Mem. Sup. Juris., p. 6).

In *Mansaray*, this Court established that "[t]he plain and ordinary meaning of the language in the statute – 'Subsequent to sentencing and during or subsequent to imprisonment, an error in procedure resulted in the individual's release' is clear and unambiguous." *Mansaray,* ¶ 8. In addition this Court noted that "[n]othing in the statute indicates that the General Assembly intended to open the state to liability for wrongful imprisonment claims when a conviction is reversed based on a procedural error that occurred prior to sentencing." *Mansaray,* ¶ 10. In conclusion, this Court determined that "the error in procedure must have occurred subsequent to sentencing and during or subsequent to imprisonment." *Mansaray,* ¶ 11. The Supreme Court found that should they hold in the opposite, that all presentencing trial errors constituted procedural error, this would essentially "swallow the actual-innocence part of the provision, rendering it superfluous", which the Court determined would be "an absurd result." Id. at ¶ 11.

Accordingly, even if the procedural error amendment applied to Appellant's claims, he is barred from ever being declared wrongfully imprisoned, given *Mansaray*'s clear rule.

Second, the General Assembly's 2003 amendments adding the procedural error element of the wrongful imprisonment statute cannot benefit Johnston, because he already brought a claim related to his 1983 criminal convictions. As he acknowledges (Mem. Sup. Juris., p. 2), Johnston brought an unsuccessful wrongful imprisonment action soon after he was released from prison. He contends the addition of the "error in procedure" prong in 2003 gives him a second bite at the apple. That contention lacks merit.

Nothing in the text of the 2003 amendments indicates that the Legislature intended to allow claimants like Johnston to relitigate their unsuccessful wrongful imprisonment actions. According to the uncodified language, which courts are to honor, as long as the language is not ambiguous, (*Maynard v. Eaton Corp.*, 119 Ohio St.3d 443, 2008-Ohio-4542, ¶ 7) the General Assembly limited the reach of the 2003 procedural error amendment.

In the Section Notes of the wrongful imprisonment statute, the General Assembly clearly noted that the 2003 amendments "apply to civil actions for wrongful imprisonment in the Court of Claims commenced on or after the effective date of this act [2003], or commenced prior to <u>and pending</u> on the effective date of this act [2003]." Sub. S.B. 149, 124th General Assembly, Section 3 (effective April 9, 2003). Thus, the General Assembly clearly and unambiguously limits the statute's reach to a specific class of cases—those that were filed in the Court of Claims: (1) before the statute was amended; or (2) those that were still pending there when the amendments took effect in 2003.

The General Assembly's language is clear when correlated with the mandatory process of wrongful imprisonment actions. The Supreme Court of Ohio has established that wrongful imprisonment claimants must follow a two-step process to obtain relief. First, "the claimant must bring an action in the court of common pleas to secure a determination that he or she is a wrongfully imprisoned individual entitled to compensation." *Griffith v. City of Cleveland*, 128 Ohio St.3d 35, 2010-Ohio-4905, ¶30. Second, "the claimant must file a civil action against the state, in the Court of Claims, to recover a sum of money." Id. Consequently, a wrongful imprisonment case does not proceed to the Court of Claims until *after* a court of common pleas determines that the individual was wrongfully imprisoned, and the only question for review at that point is how much money the wrongfully imprisoned individual is entitled to recover.

The Tenth District, applying the wrongful imprisonment statute of R.C. 2743.48 as written and as the General Assembly specifically noted, correctly found that Section 3 of S.B. No. 149, "indicates the 2003 amendments to R.C. 2743.48 are applicable to actions commenced in the Court of Claims after April 9, 2003 or are still pending in the Court of Claims on April 9, 2003." (Opinion, ¶ 27). The Tenth District also correctly refused to allow Johnston to relitigate the issue of whether he was a "wrongfully imprisoned individual" within the meaning of R.C. 2743.48.

Johnston makes a single argument in response. He believes (Mem. Sup. Juris., p. 8-11) that the Tenth District misapplied the law of retroactivity to these particular facts. But whether termed "retroactivity," "claim preclusion," "*res judicata*," or anything else, the key principle is the same: Johnston could not benefit from the 2003 amendments because he had previously brought an unsuccessful wrongful imprisonment action. The Tenth District correctly recognized that principle and denied relief.

For these reasons, the Court should deny review.

STATEMENT OF THE CASE AND FACTS

The State of Ohio has enacted a narrow waiver of its sovereign immunity, allowing wrongfully imprisoned individuals to recover compensation from the State if they meet the requirements under R.C. 2743.48. This statute sets forth a two-step process. First, a common pleas court must determine—and issue a declaratory judgment—that a claimant is a wrongfully imprisoned individual. R.C. 2743.48(A). Once declared wrongfully imprisoned, the claimant can then seek damages from the State in the Court of Claims. R.C. 2743.48(D).

As part of the first stage—the declaratory stage—claimants bear the burden of proving several eligibility criteria. In this Court's words, this process "separate[s] those who were

wrongfully imprisoned from those who have merely avoided criminal liability." *Walden v. State*, 47 Ohio St.3d 47, 52, 547 N.E.2d 962 (1989).

A. After the Ohio Court of Appeals reversed his aggravated murder convictions, Johnston unsuccessfully brought an action to be declared a "wrongfully imprisoned individual."

Appellant was indicted on September 19, 1983, for the October 4, 1982 Aggravated Murders of his step-daughter Margaret Annette Cooper-Johnston and her boyfriend Todd Schultz (R. 42-43, Amended Complaint, ¶ 23, referencing R. 29, Exhibit E–*State v. Johnston,* 39 Ohio St.3d 48). On January 11, 1984, the criminal trial of *State of Ohio v. Dale N. Johnston,* Case No. 83-CR-54 commenced in the Court of Common Pleas, Hocking County, Ohio before a three (3) judge panel with the Hon. James E. Stillwell presiding. (R., Id.).

On August 6, 1986, the Court of Appeals of Ohio, Fourth Appellate District, Hocking County in two separate decisions, premised on separate criminal appeals taken by Appellant, reversed and remanded the case for a new trial. (R. 24, Amended Complaint; R. 26, Exhibit B, *State v. Johnston,* 4th Dist. No. 412, 1986 Ohio App. LEXIS 8159, at *1 (Aug. 6, 1986)).

On October 5, 1988, the Ohio Supreme Court in *State v. Johnston,* 39 Ohio St. 3d 48 (1988), (R. 24, Amended Complaint; R. 29 Exhibit E), consolidated the aforementioned appeals and affirmed in part, modified in part and reversed in part the Fourth District's holdings." (R., Id. at pp. 5, 8, 9, and 12).

On May 19, 1989, the case *State v. Johnston*, Case No. 89CR2214 was transferred to Franklin County Court of Common Pleas, Ohio, for retrial. (R. 24, Amended Complaint, ¶ 40). On July 17, 1989, and during pre-trial hearings, the presiding court denied Appellant's motion to exclude the pre-hypnotic testimony of Steve Rine, subject to the issue of credibility as to his memory of pre-hypnotic statements and sustained Appellant's motion to suppress his statements

made on October 21st and 22nd of 1983. (R. 24, Amended Complaint, ¶ 41; R. 30-31, Exhibits F and G).

On July 17, 1989, the Hocking County Prosecutor appealed Judge Gillie's decision to suppress the information and evidence obtained by law enforcement on October 21st and 22nd of 1983 to the Tenth District Court of Appeals. (R. 24, Amended Complaint, ¶ 42). The Tenth District in *State v. Johnston*, 10th Dist. No. 89AP-849, 64 Ohio App. 3d 238 (May 10, 1990), affirmed the trial court's suppression ruling. (R. 24, ¶ 43).

On May 10, 1990, the Hocking County Prosecuting attorney filed a *nolle prosequi* in the criminal case, Case No. 89CR2214. (R. 24, Amended Complaint; R. 33, Exhibit I).

On December 14, 1990, Appellant filed a civil complaint alleging Wrongful Imprisonment in violation of R.C. 2743.48, with the Franklin County Clerk of Court, Ohio in Case No. 90 CV 009801. On July 8, 1991, Judge James O'Grady transferred the matter to Hocking County Court of Common Pleas and the case was reassigned to Judge Richard B. McQuade, Jr. in Case No. 91-CIV-186. On August 9, 1993, Judge McQuade filed a final appealable order dismissing Appellant's Complaint for failure to prove by a preponderance of the evidence that he did not commit the murders of Margaret Annette Cooper-Johnston and Todd Schultz. (R. 24, Amended Complaint, ¶ 46; R. 34, Exhibit J).

Within the Court's August 9, 1993 decision, Judge McQuade set forth detailed findings of fact (based on sworn testimony set forth in the criminal trial transcript) regarding Appellant's failure to sustain his burden of proof:

> Annette's relationship with her step-father was troubled. [Appellee] was sexually attracted to her. He admitted that he had a sexual conduct with her a few years before. One witness testified that [Appellee] admitted he masturbated in front of her. He took and possessed nude photos of Annette. He described Annette's body to the police in minute detail, including a small mole at the base

> of her spine and small little pimples on each of her breasts. In furtherance of [Appellee]'s sexual attraction to Annette, he and the family engaged in nudism.
>
> In August,1982, Annette and the plaintiff stayed alone overnight at the Ohio State Fair. Immediately upon her return, she gathered up her belongings and moved to the Schultz residence. [Appellee]'s reaction was to padlock her bedroom door, refuse her the use of a Buick Skylark given to her as a high school graduation gift, sue her boyfriend [Todd Schultz] in Small Claims Court for non-payment of a debt, call Annette's dentist stating he would not be further responsible for her care and ask Annette's employer to fire her.
>
> [Appellee]'s relationship with Todd Shultz was poor, because, says [Appellee], he found Annette and Todd changing into swimming attire in each other's presence. There is compelling evidence however, that [Appellee] was hostile to another young man who paid attention to Annette. . When John Jones dated Annette in 1979 and 1980, [Appellee] repeatedly telephoned Jones threatening his life and threatening castration if Annette became pregnant.
>
> Immediately after Annette's disappearance, [Appellee] repeatedly demanded the return of her personal items, including papers, diaries and notes. These actions are consistent with a plan to destroy any evidence in Annette's belongings of her relationship with plaintiff".
>
> And what of the missing knife and pistol? Plaintiff's denials aside, it is almost certain that he often carried a hunting knife and pistol.
>
> There is other troubling evidence. The plastic feed bag with blood found by the tracks is like the feed bags used by [Appellee]. Head hair like Annette's was found on a blanket removed from [Appellee]'s strip mine. The polyester fibers found on his vest were like the fibers found on the feed bag and the fibers removed from the green blanket and the quilt. [Appellee] claims the quilt and blanket were part of junk his son hauled from a neighboring town.

(R. 24, Amended Complaint; R. 34, Exhibit J—August 9, 2003 Decision and Entry in the initial wrongful imprisonment action, 91-CIV-186).

In so rendering, Judge McQuade determined that Johnston failed to prove by a preponderance of the evidence that he did not commit the murders and was thus barred from recovering under the wrongful imprisonment statute.

B. When Johnston brought a second wrongful imprisonment action, the court of appeals held that the 2003 Procedural Error Amendment to the Wrongful Imprisonment statute of R.C. 2743.48 does not allow Johnston to relitigate the issue of whether he is a "wrongfully imprisoned individual."

In 2003, the General Assembly amended R.C. 2743.48 to allow a claimant who otherwise satisfies the statutory requirements to recover if "[s]ubsequent to sentencing and during or

subsequent to imprisonment, an error in procedure resulted in the individual's release." R.C. 2743.48(A)(5). Johnston then brought a new wrongful imprisonment action under the amended statute. The trial court granted summary judgment to Johnston.

The Tenth District reversed. *See Johnston v. State*, No. 12AP-1022, 2014-Ohio-1452 ("App. Op."). The court rejected Johnston's argument that "the 2003 amendments create a new cause of action available to any qualified individual who has not recovered under prior law." *Id.* ¶21. It therefore held that Johnston could not benefit from the 2003 amendments to the wrongful imprisonment statute.

After the Tenth District entered judgment, this Court decided *Mansaray v. State*, 138 Ohio St. 3d 277, 2014-Ohio-750. That case held that a wrongful imprisonment claimant who is seeking to establish that an error in procedure resulted in his release must show that the error in procedure "occurred subsequent to sentencing and during or subsequent to imprisonment." *Id.* syl. Appellants seeks wrongful imprisonment eligibility under claims of *presentencing* trial court errors regarding the inadmissibility of testimonial evidence and the withholding of evidence contrary to *Brady v. Maryland,* 373 U.S. 83 (1963). (Mem. Sup. Juris., p. 6).

THIS CASE IS NOT OF PUBLIC OR GREAT GENERAL INTEREST

For three reasons, this case is not of public or great general interest. *First*, the Court's decision in *Mansaray* forecloses any possibility that Johnston could recover in the end. Even if he could establish that the decision below were wrong, the fact that his alleged error in procedure did not occur "subsequent to sentencing and during or subsequent to imprisonment" means he cannot establish that he is a "wrongfully imprisoned individual." *Mansaray*, 2014-Ohio-750, syl. Moreover, the State raised four assignments of error that the Tenth District did not consider, in light of its decision on Assignment of Error Two. *See* App. Op. ¶¶ 10, 30. That means that any

decision on Johnston's Proposition of Law would amount to an advisory opinion because it could not change the ultimate outcome of this case.

Second, Johnston already unsuccessfully brought a wrongful imprisonment action arising out of his criminal convictions. This case seeks a do-over. Longstanding precedent bars claimants from litigating issues that arise out of the same transaction or occurrence as a previous action, when there is a valid, final judgment in the first action. *See, e.g.*, *Grava v. Parkman Twp.*, 73 Ohio St. 3d 379, syl. (1995). Johnston does not challenge that precedent in his Memorandum in Support of Jurisdiction. Instead, he argues that the 2003 amendments to R.C. 2743.48 were an invitation to relitigate his earlier case. On this score, his arguments amount to challenging the application of established law to his particular facts, which is not a basis for review in this Court.

Third, the question Johnston presents is of limited and diminishing importance. The General Assembly amended R.C. 2743.48 to add the "error in procedure" language eleven years ago. With each year that passes, the group of claimants who brought an unsuccessful action before the amendments gets smaller. Even at this point, Johnston may be the only person who has ever brought an unsuccessful action before the amendments and brought a new action after the amendments. Proving the point, Johnston fails to identify a single case in the lower courts that presents the issue of whether the 2003 amendments allow claimants to relitigate unsuccessful wrongful imprisonment actions. A one-of-a-kind claim can hardly be characterized as being of great general interest.

ARGUMENT

Defendant-Appellee State of Ohio's Proposition of Law No. I:

> *When a defendant seeks a declaration that he is a wrongfully imprisoned individual and seeks to satisfy R.C. 2743.48(A)(5) by proving that an error in procedure resulted in his*

release, the error in procedure must have occurred subsequent to sentencing and during or subsequent to imprisonment.

Shortly after the Tenth District entered judgment, this Court decided *Mansaray v. State*, 138 Ohio St. 3d 277, 2014-Ohio-750. In *Mansaray*, the Court held that a claimant who is seeking to establish that he is a "wrongfully imprisoned individual" by proving that an error in procedure resulted in his release must establish that the error in procedure "occurred subsequent to sentencing and during or subsequent to imprisonment." *Id.* syl. The claimant's criminal conviction had been reversed due to a Fourth Amendment violation. *Id.* ¶ 3. The Court held that the "clear and unambiguous" text of the "error in procedure" amendment barred recovery because the alleged error did not occur subsequent to sentencing and during or subsequent to imprisonment. *Id.* ¶ 8.

Mansaray resolves this case. Johnston's convictions were overturned due to evidentiary errors and a *Brady* error. *See* App. Op. ¶ 3. Those errors are *trial* errors, occurring prior to sentencing and prior to imprisonment. They therefore do not satisfy the statutory requirement that they occur "[s]ubsequent to sentencing and during or subsequent to imprisonment." R.C. 2743.48(A)(5); *see Mansaray*, 2014-Ohio-750 syl. Because *Mansaray* eliminates any argument that Johnston satisfies the requirement of R.C. 2743.48(A)(5)—and therefore any argument that Johnston is a "wrongfully imprisoned individual"—the Court should deny further review.

Defendant-Appellee State of Ohio's Proposition of Law No. II:

When a claimant has previously brought an unsuccessful wrongful imprisonment action, he cannot bring a second action based on the same underlying criminal proceedings.

Johnston is also barred from recovering in this wrongful imprisonment action because he already brought an unsuccessful wrongful imprisonment action related to his 1983 convictions. As Johnston notes (Mem. Sup. Juris., p. 2), he brought such an action shortly after his

convictions were reversed. In that action, he failed to establish that he was a wrongfully imprisoned individual. App. Op. ¶ 6.

Johnston challenges the judgment below on the belief that the 2003 amendments to R.C. 2743.48 allow him to relitigate the question of whether he is a wrongfully imprisoned individual. The court below correctly rejected that argument. It is well-established that a "valid, final judgment rendered upon the merits bars all subsequent actions based upon any claim arising out of the transaction or occurrence that was the subject matter of the previous action." *Grava v. Parkman Twp.*, 73 Ohio St. 3d 379, syl. (1995). This rule prohibits Johnston from relitigating the wrongful imprisonment question. First, there is a "valid, final judgment rendered upon the merits" of his earlier wrongful imprisonment action. Second, his new action "aris[es] out of the transaction or occurrence that was the subject matter of the previous action"—namely, his overturned criminal convictions. That suffices to bar this new action.

In response, Johnston argues (Mem. Sup. Juris., p. 8-11) that the Tenth District improperly found the 2003 amendments not to be retroactively applicable. Yet the particulars of retroactivity doctrine are not what is important here. Call it "retroactivity," call it "claim preclusion," call it "*res judicata*"—whatever the terminology, the principle is the same. The 2003 amendments to the wrongful imprisonment statute do not allow Johnston to relitigate the question whether he is a "wrongfully imprisoned individual."

* * *

For these reasons, this case does not deserve further review. Appellant's arguments do not sustain his claim that the 2003 procedural error amendments allow him to relitigate whether he is a "wrongfully imprisoned individual." Moreover, even if they do, under *Mansaray,* he cannot demonstrate procedural error, as the errors he argues all occurred presentencing.

CONCLUSION

Accordingly, discretionary review should be denied.

Respectfully submitted,

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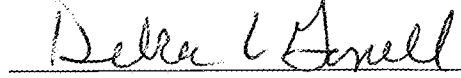

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Memorandum Opposing Jurisdiction of Defendant-Appellee State of Ohio was served by U.S. mail this 7th day of May, 2014 upon the following counsel:

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