ORIGINAL

IN THE SUPREME COURT OF OHIO

DAVID BUNDY	:	
Plaintiff-Appellee	:	Case No. 2014-0189
vs.	:	On Appeal from the Montgomery County Court of Appeals, Second Appellate District
STATE OF OHIO	:	
Defendant-Appellant	:	Court of Appeals Case No. 25665
	:	

MERIT BRIEF OF PLAINTIFF-APPELLEE, DAVID BUNDY

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INTRODUCTION

Plaintiff, David Bundy ("Bundy"), has pursued a claim of wrongful imprisonment under R.C. 2743.48(A) based upon his conviction for Failure to Verify on October 23, 2008. The conviction was ultimately reversed based upon the holding of *State v. Bodyke (2010)*, Ohio St. 3d 266. Bundy was released from prison prior to the completion of his sentence.

The issue at hand is whether or not Bundy satisfied R.C. 2743.48(A)(5). Until now, both the Montgomery County Common Pleas Court and the Second District Court of Appeals has unanimously concluded he had.

The State's contention is that a conviction that is reversed due to the unconstitutional criminal statute does not satisfy subsection (A)(5). Bundy's position is, an unconstitutional criminal statute which is the basis for the conviction, is *void ab initio.*

STATEMENT OF THE CASE AND FACTS

Appellee David 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. *Bundy v. State*, 2013-Ohio-5619 at ¶2.

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." *Bundy* at ¶3.

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. *Id.*

He failed to register on March 14, 2008, pursuant to the new law. *Bundy* at ¶4.

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. *Bundy* at ¶4.

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 R.C. 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. See, *Decision, Order and Entry Granting Plaintiffs Motion for Summary Judgment.* The State of Ohio appealed to the Second District Court of Appeal which affirmed the trial court.

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

ARGUMENT

Appellee David Bundy's Proposition of Law:

> When a person is convicted and imprisoned solely based upon a statute which is later found to be unconstitutional, the unconstitutional statute is not an "offense" for the purposes of R.C. 2743.48, because no crime was committed.

"The Ohio Revised Code provides a two-step process whereby a person claiming wrongful imprisonment may sue the State for damages incurred due to the alleged wrongful imprisonment." *State ex rel. Jones v. Suster*, 84 Ohio St.3d 70, 72, 1998-Ohio-275, 701 N.E.2d 1002,citing *Walden v. State* (1989), 47 Ohio St.3d 47, 547. N.E.2d 962. The first action, in the common pleas court, seeks a preliminary factual determination of wrongful imprisonment. Id. The second action, in the Court of Claims, provides for damages. Id.

A "wrongfully imprisoned individual" is defined in R.C. 2743.48(A) as an individual who satisfies each of the following requirements:

"(1) The individual was charged with a violation of a section of the Revised Code by an indictment or information prior to, or on or after, September 24, 1986, and the violation charged was an aggravated felony or felony.

"(2) The individual was found guilty of, but did not plead guilty to, the particular charge or a lesser-included offense by the court or jury involved, and the offense of which the individual was found guilty was an aggravated felony or felony.

"(3) The individual was sentenced to an indefinite or definite term of imprisonment in a state correctional institution for the offense of which the individual was found guilty.

"(4) The individual's conviction was vacated or was dismissed, or reversed on appeal, 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 by any prosecuting attorney, city director of law, village solicitor, or other chief legal officer of a municipal corporation against the individual for any act associated with that conviction.

"(5) Subsequent to sentencing and during or subsequent to imprisonment, an error in procedure resulted in the individual's release, or it was determined by the court of common pleas in the county where the underlying criminal action was initiated that the charged offense, including all lesser-included offenses, either was not committed by the individual or was not committed by any person." R.C. 2743.48 (A).

In the case at hand the State only challenges and sought review on the fifth factor, R.C. 2743.48 (A)(5). It claims that on March 14, 2008, the date of the alleged act or omission, that

Bundy violated the law as it was understood at the time. Their position is, that was the law at the time and this Court's decision in *State v. Bodyke,* 126 Ohio St.3d 266, 2010-Ohio-3753, is irrelevant to his conduct at the time. The fact that statute was unconstitutional, as applied to Bundy, and his conduct was not illegal does not meet the requirement set forth in subsection (A)(5).

For the forgoing reasons, the State of Ohio is mistaken.

1. Appellee, David Bundy, has met the criteria set forth in R.C. 2743.48 (A)(5), that the charged offense, including all lesser-included offenses, either was not committed by the individual or was not committed by any person.

A. The plain text of R.C. 2743.48 is unambiguous and the four corners of the statute support the findings of the trial court and the Second District Court of Appeals.

> The Legislature will be presumed to have intended to make no limitations to a statute in which it has included by general language many subjects, persons or entities, without limitation. It is a general rule that courts, in the interpretation of a statute, may not take, strike or read anything out of a statute, or delete, subtract or omit anything there from. To the contrary, it is a cardinal rule of statutory construction that significance and effect should if possible be accorded every word, phrase, sentence and part of an act. *Wachendorf v. Shaver*, 149 Ohio St. 231, 237, 78 N.E.2d 370 (1948).

Because we can look at the plain meaning of the words and sentences, an "inquiry into legislative intent, legislative history, public policy, the consequences of an interpretation, or any other factors identified in R.C. 1.49 is inappropriate..." See *Fairborn v. DeDomenico*, 114 Ohio App.3d 590, 593, 683 N.E.2d 820 (2d Dist.1996).

The relevant portion of R.C. 2743.48 (A) states:

> (5) Subsequent to sentencing and during or subsequent to imprisonment, an error in procedure resulted in the individual's release, or it was determined by the court of common pleas in the county where the underlying criminal action was initiated that *the charged offense, including all lesser-included offenses, either was not committed by the individual or was not committed by any person.* R.C. 2743.48 (A)(5). (Emphasis added.)

Under this subsection, Bundy must prove "the charged offense, including all lesser-included offenses, either was not committed by the individual or was not committed by any person." "Offense" is defined as "a violation of the law; a crime." *Blacks Law Dictionary* (9th Ed.2009).

This Court held that R.C.2950.031 and R.C. 2950.032, which required the reclassification of sexual offenders already classified by order under the former law, were unconstitutional. As a result Bundy's conviction was vacated and he was released from prison. The "offense" was based upon those sections that were held unconstitutional.

> Constitutionally infirm legislation is void ab initio. *City of Middletown v. Ferguson (1986), 25 Ohio St.3d 71, 80, 25 Ohio B. 125, 495 N.E.2d 380.* Where *** legislation is unconstitutional at the time of its passage, it is "void from its inception." Id. "[A]n unconstitutional law must be treated as having no effect whatsoever from the date of its enactment." Id. The Ohio Supreme Court has expressed this fundamental proposition stating, "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." Id.; quoting *Norton v. Shelby County (1886), 118 U.S. 425, 442, 6 S.Ct. 1121, 30 L. Ed. 178.* Accord *Primes v. Tyler (1975), 43 Ohio St.2d 195, 196-197, 331 N.E.2d 723.*[1]
>
> Consequently, a decision overruling a former statute as being unconstitutional is retrospective in its operation, "and the effect is not that the former was bad law, but that it never was the law." *Roberts v. Treasurer, 147 Ohio App.3d 403, 2001 Ohio 8867, P20, 770 N.E.2d 1085*, citing *Peerless Elec. Co. v. Bowers (1955), 164 Ohio St. 209, 210, 129 N.E.2d 467*

State v. Sheets 2007-Ohio-1799; 2007 Ohio App. LEXIS 1648, concurring opinion, at ¶40 and ¶41.

The statute upon which Bundy's arrest, conviction and imprisonment were based never existed. It wasn't just bad law, but it never was the law. Applying this legal precedent to the case at hand makes Bundy's omission on March 14, 2008, an innocent omission---actual

[1] The *Norton* Rule. Named after *Norton v. Shelby County (1886), 118 U.S. 425, 442, 6 S.Ct. 1121, 30 L. Ed. 178.*

innocence. Bundy has repeatedly over the years demonstrated that the "charged offense" was not committed by him or any other person because it was *never* law.

This issue is analogous to the issue presented in *State v. Marshall*, 60 Ohio App.2d 371 (1979). In *Marshall*, the defendant had been convicted of a felony drug charge and while awaiting disposition was arrested and convicted under a local loitering ordinance. After his release from prison, the loitering ordinance was found to be unconstitutional. At the appropriate time he petitioned the court to have his record expunged pursuant to R.C. 2953.31, alleging the he was a first time offender. The trial court did not agree that he was a first offender and denied his motion. He appealed.

The Hamilton County Court of Appeals found that he was a first time offender, relying upon 10 Ohio Jurisprudence 2d 258, Constitutional Law, Section 176:

> Effect in Criminal Cases. The general principle, that legal effect should not be given to unconstitutional laws, is applied to criminal enactments which are violation of the Constitution. An offense created by an unconstitutional law is not a crime; a conviction under it is not merely erroneous, but is illegal and void and cannot be legal cause of imprisonment

The court further opined that any ambiguity in the word "offense" in R.C. 2953.31 is resolved by R.C. 1.11 which requires such laws as the expungement section are remedial and should be liberally construed. *Id.* at 373. Since the loitering was not an offense, the court reversed the trial court's judgment.

The same holds true in the case at hand, Bundy committed no offense and R.C. 2743.48 (A)(5) was satisfied.

In the event any ambiguity in the word "offense" as used in R.C. 2743.48, it must by liberally construed to promote justice. Just as to court in Marshall did. R.C. 1.11 states, "Remedial laws and all proceedings under them shall be liberally construed in order to promote

their object and assist the parties in obtaining justice. The rule of the common law that statutes in derogation of the common law must be strictly construed has no application to remedial laws; but this section does not require a liberal construction of laws affecting personal liberty, relating to amercement, or of a penal nature."

It was written expressly to right a wrong. The remedy for wrongful imprisonment is compensation, determined by the Court of Claims. R.C. 2743.48(D). The means for access to that remedy is R.C. 2743.48(A).

B. *Norton v. Shelby Cnty.*, 118 U.S. 425 (1886) has not been overruled and is still the cornerstone precedent in matters involving unconstitutional statutes.

Although old, *Norton v. Shelby Cnty.*, 118 U.S. 425, 442 (1886) is not merely "maxim" or "legalism" from days gone by at the State suggests. It is still very important in the analysis of the effect of an unconstitutional statute. See, *Primes v. Tyler* (1975),43 Ohio St. 2d 195; 331 N.E.2d 723; 1975 Ohio LEXIS 561; 72 Ohio Op. 2d 112. (If the guest statute is unconstitutional, it "* * * 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. See also *State v. Marshall*, 60 Ohio App.2d 371 (1979); *State v. Sheets* 2007-Ohio-1799; 2007 Ohio App. LEXIS 1648.

What has occurred though is some exceptions to the rule have been recognized. "The Ohio Supreme Court has carved out exceptions to this rule: in those instances in which a court expressly indicates that its decision is only to apply prospectively, see *Lakeside Ave. L.P. v. Cuyahoga Cty. Bd. of Revision* (1999), 85 Ohio St. 3d 125, 127, 707 N.E.2d 472; State ex rel. Bosch v. Indus. Comm. (1982), 1 Ohio St. 3d 94, 98, 438 N.E.2d 415; or in those cases in which contractual rights have arisen or a party has acquired vested rights under prior law. See *Peerless*

Elec. Co. v. Bowers (1955), 164 Ohio St. 209, 210; see, also, *Cartwright v. The Maryland Ins.* Group (1995), 101 Ohio App. 3d 439, 443, 655 N.E.2d 827; *King v. Safeco Ins. Co.* (1990), 66 Ohio App. 3d 157, 161-163, 583 N.E.2d 1051." *Roberts v. Treasurer*, 147 Ohio App. 3d 403 at 411; 2001-Ohio-8867.

> "In Peerless Elec. Co. v. Bowers (1955), 164 Ohio St. 209, 57 O.O. 411, 129 N.E.2d 467, we held that a decision of this court overruling a previous decision is to be applied retrospectively *with an exception for contractual or vested rights that have arisen under the previous decision.* This reasoning applies with similar force when the court's decision strikes down a statute as unconstitutional."
> *Wendell v. Ameritrust Co.* 69 Ohio St, 3d 74, 1994 Ohio 511. (Emphasis added.)

Far from being a vestige of a yesteryear, the *Norton* Rule is alive and relevant to this case.

C. ***Dunbar v. State*** **is of little relevance to the issue at hand.**

The State of Ohio presents to the Court *State v. Dunbar*, 136 Ohio St.3d 181, 2013-Ohio-2163 as notable and important to the disposition of this matter. The State over estimates *Dunbar's* relevance.

In *Dunbar* the question before the Court was "[w]hether a guilty plea to a felony prevents a claimant from qualifying as a "wrongfully imprisoned individual" for purposes of pursuing damages against the State of Ohio in the Court of Claims when the guilty plea is subsequently vacated on appeal?" *Dunbar*, at ¶1. The Court held that even though the guilty plea was vacated, it was still a guilty plea for the purposes of the wrongful imprisonment designation.

Bundy is distinguishable in two important aspects. First, *Dunbar's* holding is irrelevant. Bundy did not plead guilty; he was convicted following a bench trial. Second, the void or voidable issue in *Dunbar* was relative to vacated guilty pleas, not unconstitutional statutes.

The Court noted this as a preliminary matter, "we must address the contention that Dunbar's guilty plea is void and therefore has no legal consequence. The Eighth District stated, "Without knowledge that the court might impose a prison sentence, Dunbar's plea was not entered knowingly, voluntarily, and intelligently, was void, and therefore, does not preclude his wrongful imprisonment claim." *Dunbar III*, 2012-Ohio-707, at ¶17. The basis for vacating Dunbar's plea was the trial court's failure to advise him that it could deviate from the recommended sentence of community control and impose a prison term. Id. at ¶15

The fact of the matter is Dunbar pled guilty, the statute specifically and in very plain language excludes individuals from the wrongful imprisonment statute who plead guilty. "Unfortunately for Dunbar, the General Assembly did not provide an exception for guilty pleas that are later vacated." *Dunbar* at ¶20. Bundy does not have this problem, he was convicted at trial.

D. The State's proposition of law substantially changes wrongful imprisonment statute to a point the legislature never intended.

The State's Proposition of Law:

> "A wrongful-imprisonment claim may succeed only if the claimant shows, under the actual-innocence requirement, that he did not commit the acts for which he was convicted. That requirement is not met if a claimant's conviction was set aside solely because a predicate criminal statute was invalidated as unconstitutional."

The State's proposition of law substantially changes wrongful imprisonment statute. It attempts to change the focus from whether an individual committed an "offense" or "crime" to whether he committed "act for which he was convicted." Had the legislature wanted the statute to be read or interpreted that way, it would have included the phrase, "act for which he was convicted", but it did not. From that, one can surmise that the legislature's focus was whether or

not an offense or crime was committed by the individual. Had the legislature intended to exclude individuals in Bundy's situation from being classified as wrongfully imprisoned individual, it would have worded the R.C. 2743.48 (A)(5) exactly as the State's proposition of law is worded, it did not. From that we can concluded, it did not intend to exclude a wrongfully imprisoned individual "solely because a predicate criminal statute was invalidated as unconstitutional."

Additionally, the State's proposition of law would lead to some very unjust results. For example, hypothetically, if someone was sent to prison for violating segregation laws in the 1950's for going someplace or doing something reserved exclusively for whites, that person would have no remedy under the State's Proposition of Law once those law were ruled unconstitutional. Because that person did in fact commit the act for which he was convicted; whether that act be not giving up her seat or assisting a African American buy a house in a "white's only" section of town. By no means do I suggest this case or the Appellee remotely resemble civil rights in the 1950's or the people who challenged the segregation law, but in the future there is bound to be a person imprisoned for an innocent act that was unconstitutionally criminalized. The State's interpretation of R.C. 2743.48 (A)(5) and Proposition of Law would bar them from recovery this statute.

CONCLUSION

For these reasons, the Court should AFFIRM the Second District Court of Appeals.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served this 28th day of August, 2014 upon the following: State of Ohio, by and through his attorney, Eric F. Murphy, 30 E. Broad Street, 17h Floor, Columbus, Ohio 43215 by regular US mail and e-mail.

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