

ORIGINAL

In the
Supreme Court of Ohio

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

REPLY BRIEF OF DEFENDANT-APPELLANT STATE OF OHIO

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INTRODUCTION

All agree that Plaintiff David Bundy violated the statute for which he was charged (failure to register as a sex offender), and that he escaped liability only because this Court invalidated the law that required him to register. Rather than a dispute of facts, this case asks a simple statutory-interpretation question: When it passed the wrongful-imprisonment statute, R.C. 2743.48, did the General Assembly intend to compensate defendants like Bundy who were released from prison not because they were actually innocent but because the statute under which they were convicted was found unconstitutional? The State's Opening Brief showed (at 11-22) that ordinary principles of statutory interpretation provide a clear answer: No. *First*, the relevant subsection's text compensates only those who did not "commit" "the charged offense" (i.e., did not undertake the actions that violated the specific statute in the indictment), rather than those who avoided criminal liability due to unconstitutional statutory application. *Second*, surrounding subsections confirm the General Assembly's focus on factual innocence. Subsection (A)(4) prevents defendants from receiving compensation merely because the crime they committed went uncharged; subsection (A)(2) prohibits recovery when a guilty plea was found unconstitutional. *Third*, the statute's central purpose—to weed out the factually innocent from those who merely avoided liability—points the same way. *Fourth*, the common-law background against which the wrongful-imprisonment statute was adopted prohibited compensation in these circumstances. *Fifth*, the out-of-state courts that have considered the same wrongful-imprisonment question agree with the State.

Bundy's Response Brief ignores the vast majority of these arguments—and the contrary arguments that Bundy does make lack merit. This Court should thus reverse the lower courts' determination that Bundy is eligible to receive wrongful-imprisonment compensation.

ARGUMENT

A. **Bundy's use of the void *ab initio* doctrine fails to show that the General Assembly intended to pay those whose convictions were vacated on constitutional grounds.**

Bundy's main argument (at 6-9) is that the wrongful-imprisonment statute incorporates the common-law void *ab initio* doctrine, under which courts found unconstitutional statutes to be as inoperative as if they had never been enacted. See *Norton v. Shelby County*, 118 U.S. 425, 442 (1886), *State v. Sheets*, 2007-Ohio-1799 ¶¶ 40-41 (12th Dist.) (Walsh, J., concurring); *State v. Marshall*, 60 Ohio App. 2d 371, 372-73 (1st Dist. 1979). Bundy is mistaken. The question here is not whether *this Court*, in common-law fashion, should incorporate the doctrine into the statute; the question is whether *the General Assembly* meant for it to apply there. Both the plain language of the statute and the common-law rules against which it was enacted illustrate that the General Assembly did *not* implicitly incorporate this doctrine.

Start with the language. If the General Assembly intended to provide compensation for claimants like Bundy, it would not have tied compensation eligibility to a showing that the claimant did not commit "the charged offense." R.C. 2743.48(A)(5). Instead, like New York, it would have included *express* language allowing compensation if the claimant showed, among other things, that "the statute, or application thereof, on which the accusatory instrument was based *violated the constitution.*" N.Y. Ct. Cl. Act § 8-b(3)(b)(ii)(D) (emphasis added). It is unlikely that the General Assembly would have *implicitly* intended to compensate claimants like Bundy based on the legalism that one of the General Assembly's own provisions "never existed. It wasn't just bad law, but it never was the law." Ape. Br. 6.

Furthermore, Bundy concedes (at 8) that "exceptions" to this rule have long existed. By 1986, when the General Assembly passed the wrongful-imprisonment statute, courts had repeatedly qualified the doctrine by noting that "the actual existence of a statute, prior to such a

[constitutional] determination, is an operative fact and may have consequences which cannot justly be ignored.” *Chicot Cnty. Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 374 (1940). And while Bundy claims (at 8-9) that none of the cited exceptions applies here, he overlooks the case law identified in the State’s Opening Brief (at 19-21). That case law showed that it was the *exception* to the rule, rather than the *rule* itself, that applied in the *most analogous* context—a tort suit for damages against a state officer. *See, e.g., Middleton v. Village of Bloomdale*, 1914 WL 1199, at *3 (6th Dist. May 15, 1914) (indicating that false-imprisonment action will not lie where officials “acted under a statute which was subsequently declared unconstitutional”); *Allen v. Holbrook*, 135 P.2d 242, 245 (Utah 1943) (same); *see generally White v. Ark. Capital Corp./Diamond State Ventures*, 226 S.W.3d 825, 831-32 (Ark. 2006) (rejecting use of doctrine to seek restitution against state officers and private parties). If anything, therefore, the common law shows that the doctrine should not apply here.

In 1986, moreover, this Court held that a criminal defendant could not use the void *ab initio* doctrine to raise a claim challenging the constitutionality of a statute for the first time on his direct appeal. *See State v. Awan*, 22 Ohio St. 3d 120, 121 (1986). The defendant argued that he could raise the claim because he challenged the trial court’s subject-matter jurisdiction under the void *ab initio* theory that an unconstitutional law is not a crime at all. *Id.* (citing *Ex Parte Siebold*, 100 U.S. 371, 376-77 (1879)). This Court refused to incorporate the doctrine, “conclud[ing] that [the defendant] [had] not complied with the orderly procedure of this state’s courts and, thereby, [had] forfeited his right to attack the constitutionality of the statute under which he [had] been penalized.” *Id.* If criminal defendants cannot rely on the void *ab initio* doctrine to raise forfeited claims even when their *liberty* could hang in the balance, certainly it

makes no sense to incorporate the doctrine when defendants merely seek *damages* after they have obtained that liberty.

For his part, Bundy identifies (at 7) just a single case, *Marshall*, that uses this doctrine in relationship to a conviction's collateral consequences. Rather than supporting Bundy's position, *Marshall* refutes it. There, the plaintiff sought to have his criminal record expunged as a first time offender under R.C. 2953.31, which prohibited expungement for anyone with more than one conviction. *See* 60 Ohio App. 2d at 371-72 ("The conviction of more than one offense, whether it be a misdemeanor or a felony, precludes favorable consideration under the expungement sections."). The trial court found the defendant ineligible because he had been convicted of misdemeanor loitering under a city ordinance that was later declared unconstitutional. *Id.*; *see Coates v. Cincinnati*, 402 U.S. 611, 616 (1971) (striking ordinance). The First District held that the plaintiff was eligible for expungement because, following invalidation of the ordinance, the loitering conviction no longer had any effect for purposes of the expunging statute. *Id.* at 373. That reasoning does not help Bundy.

No one disputes that Bundy's *conviction* went away when the law was invalidated. That is, after all, why he was released. And that is why, under the expunging statute, he might argue that he has no "conviction" for the failure-to-register offense. Under the wrongful-imprisonment statute, however, "conviction" and "offense" have distinct consequences. After all, *every* wrongful-imprisonment claimant must have had a *conviction* vacated, dismissed, or reversed. R.C. 2743.48(A)(4). But there is an additional requirement that Bundy cannot meet—that he did not commit *the charged offense*. R.C. 2743.48(A)(5). *Marshall* shows that these are separate requirements. The First District relied on Ohio Jurisprudence for the proposition that "[a]n *offense* created by an unconstitutional law is not a crime; a *conviction* under it is not merely

erroneous, but is illegal and void” *Marshall*, 60 Ohio App. 2d at 372-73 (quoting 10 Ohio Jurisprudence 2d 258, Constitutional Law 176 (emphasis added)). The treatise makes plain that an *offense* and a *conviction* are different things, and that the “offense” is the law on the statute books. By requiring claimants to show *both* that their convictions were reversed, *and* that they did not commit the charged offense, the General Assembly made clear that the wrongful-imprisonment statute requires claimants to prove that their convictions were overturned and that they factually did not commit the act (“offense”) on which the conviction was based.

B. Bundy has failed to distinguish *Dunbar*.

As the opening brief showed (at 22-23), *Dunbar v. State*, 136 Ohio St. 3d 181, 2013-Ohio-2163, removes all doubt that the void *ab initio* doctrine does not apply to the wrongful-imprisonment statute. In both that case and this one, a court vacated a conviction for constitutional reasons. In *Dunbar*, the conviction was vacated because it was based on an unconstitutional guilty plea. *Id.* ¶ 3. Here, the conviction was vacated because the law that required Bundy to register was struck down on separation-of-powers grounds. In both that case and this one, the plain terms of the wrongful-imprisonment statute prohibited compensation. In *Dunbar*, the claimant could not show that he “did not plead guilty to” the charged offense as required by R.C. 2743.48(A)(2). *Id.* ¶ 19. Here, Bundy cannot show that he did not “commit” “the charged offense” as required by R.C. 2743.48(A)(5).

Given these facts, in both *Dunbar* and in this case, the claimant invoked the void *ab initio* doctrine in an effort to bring himself within the wrongful-imprisonment statute. In *Dunbar*, the claimant argued that his vacated guilty plea “should not be considered when determining whether a person is a ‘wrongfully imprisoned individual’ because the vacated plea no longer has any legal effect at law.” *Id.* ¶ 17. This Court disagreed, finding that the void *ab initio* doctrine only applies when a court acts without subject-matter jurisdiction and that the plain language did

not treat a voided guilty plea as an exception to the ban on compensation for those who plead guilty. *Id.* ¶¶ 15-19. Here, Bundy argues that the unconstitutional statute is void *ab initio* and so should not be considered when determining whether he is wrongfully imprisoned. But the question whether a statute is unconstitutional does not raise a question going to the trial court's subject-matter jurisdiction, and so also does not trigger the void *ab initio* doctrine. *See Awan*, 22 Ohio St. 3d at 122. Instead, the plain language of the wrongful-imprisonment statute should be enforced as written and not engrafted with an implicit exception.

Bundy struggles (at 9-10) and ultimately fails to distinguish *Dunbar*. He argues that, while Dunbar pleaded guilty, he did not, and that Dunbar's *plea* was invalidated whereas the *statute* under which he was convicted was invalidated. True enough. But these factual differences do not help him. Bundy fails to recognize that both cases address whether the void *ab initio* doctrine has been incorporated into the wrongful-imprisonment statute. In *Dunbar*, this Court already established the answer to the question is "no." *See Dunbar*, 2013-Ohio-2163 ¶ 19 (there is "no exception for a person whose guilty plea is vacated on appeal" yet cannot satisfy the requirements of the statute). Thus, as the *void ab initio* doctrine provides the *only* grounds for Bundy's wrongful-imprisonment claim, he is ineligible for relief.

C. Bundy cannot fall back on the liberal-construction canon to support his view.

Bundy argues (at 7-8) that, at the least, the word "offense" in R.C. 2743.48(A)(5) is ambiguous and so triggers the liberal-construction canon. *See* R.C. 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."). But this Court has never relied on the liberal-construction canon when interpreting the wrongful-imprisonment statute. In *Mansaray v. State*, 138 Ohio St. 3d 277, 2014-Ohio-750, for example, the canon did not require the Court to provide compensation to individuals whose convictions were reversed for *any* error in procedure as

compared to post-sentencing errors. *Id.* ¶¶ 9-12. In *Dunbar*, the canon did not require the Court to provide compensation for those whose guilty pleas were found unconstitutional. 2013-Ohio-2163 ¶¶ 16-20. And in *Gover v. State*, 67 Ohio St. 3d 93, the canon did not require the Court to provide compensation for those who did not commit the *charged* offense but who did undertake actions that violated an *uncharged* offense. *Id.* at 95.

As with the foregoing, the canon does not apply here either. The statute is not ambiguous; it requires Bundy to show that he did not commit the “charged” offense, which is not disputed by any of the parties. Furthermore, the canon is designed to promote the statute’s “object,” R.C. 1.11, which here is to “actively separate those who were wrongfully imprisoned from those who have *merely avoided criminal liability.*” *Walden v. State*, 47 Ohio St. 3d 47, 52 (1989) (emphasis added). Bundy falls on the latter “avoidance” side of the rule. The General Assembly intended to *punish* those who failed to register as sex offenders, not to *compensate* them. The General Assembly may require sex offenders to register, and it may impose criminal liability for failure to do so. Here, Bundy was released from prison not because he could not be required to register, but because the General Assembly changed the timing of Bundy’s registration requirement in a way that impermissibly required the Attorney General to exercise judicial power. That it used an impermissible method to change the timing of Bundy’s registration does not somehow transform the legislature’s purpose from an intent to punish to an intent to compensate. To compensate Bundy would thus undermine—not promote—the wrongful-imprisonment statute’s object.

D. Bundy’s final textual and policy arguments lack merit.

Bundy concludes (at 10-11) with two arguments, one textual and one policy-based. As for the textual argument, Bundy asserts (at 10) that the State, by arguing that the claimant must show that he did not commit “the act for which he was convicted,” “attempts to change the

focus from whether an individual committed an ‘offense’ or ‘crime.’” The State does no such thing. The critical language does not ask whether an individual committed “an” offense or “a” crime as an academic matter, but whether the individual committed “the” *specific* offense charged in the indictment or information. R.C. 2743.48(A)(5). That this language focuses on a *particular* offense sitting *within* the statute books provides clear indication that the General Assembly was concerned with the practical question whether the defendant engaged in the factual conduct that made up the elements of that statute—not on the existential question whether the invalidated statute should be viewed as having ever “existed” within Ohio.

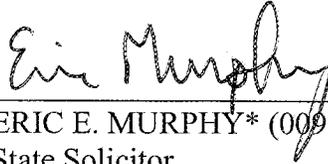
As for the policy argument, Bundy asserts (at 11) that the State’s reading could lead to “unjust” results, analogizing his efforts to get taxpayer dollars from the State to civil-rights leaders imprisoned for engaging in civil disobedience against segregation laws. But just because the State’s reading would bar recovery under the wrongful-imprisonment statute does not mean it would bar recovery as a general matter. If a State attempted to enforce its segregation laws today the plaintiff would likely be entitled to compensation under 42 U.S.C. 1983 for violating the Equal Protection Clause. *See Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). Regardless, this same policy argument did not carry the day in *Dunbar*. One could equally imagine scenarios in which defendants plead guilty so that they can bring immediate constitutional challenges to the unjust statutes under which they were convicted. *Cf. State v. Fitzpatrick*, 102 Ohio St. 3d 321, 2004-Ohio-3167 (recognizing that person can plead guilty and challenge statute). This Court determined that a guilty plea disqualifies wrongful-imprisonment compensation, and, in doing so, upheld the principal that policy arguments like Bundy’s “belong[] within the purview of the General Assembly.” *Dunbar*, 2013-Ohio-2163 ¶ 19. That is just as true here.

CONCLUSION

For these reasons, the Court should reverse the decision below and direct that judgment be entered in favor of the State.

Respectfully submitted,

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