

ORIGINAL

IN THE SUPREME COURT OF OHIO

C.K.

Appellee,

v.

STATE OF OHIO

Appellant.

Case No. 14-0735

On Appeal From the Cuyahoga
County Court of Appeals,
Eighth Appellate District

Court of Appeals
Case No. 100193

BRIEF OF AMICUS CURIAE
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STATEMENT OF AMICUS INTEREST

The Ohio Prosecuting Attorneys Association has a significant interest in this appeal. Seventy-seven years ago, the Association was founded to support the elected county prosecutors of the State of Ohio. These prosecutors are responsible for pursuing truth and justice as well as promoting public safety. The Association advocates on behalf of these prosecutors in cases that impact the ability of law enforcement to investigate crimes and prosecutors to pursue prosecution of crimes. The Ohio Prosecuting Attorneys Association as amicus curiae submits this brief in support of the State of Ohio.

STATEMENT OF THE CASE AND FACTS

STATEMENT OF FACTS

Early Sunday morning, C.K. had a busted back door, a battered upstairs tenant and a dead body on his living room floor. His upstairs tenant, Valerie McNaughton, had spent the early morning hours of September 20, 2009, smoking crack in a motel. *State v. [C.K.]*, 195 Ohio App.3d 343, 2011-Ohio-4814, 959 N.E.2d 1097, (8th Dist.), ¶ 5-6. (Hereinafter *C.K. I*). Disagreements between druggies led Valerie to seek safety from her ex-boyfriend in C.K.'s home. *Id.* at ¶ 7.

Ex-boyfriend, Coleman, busted the back door of C.K.'s house and discovered C.K. and Valerie together. *Id.* at ¶ 8-9. A threat that the police were en route, caused Coleman to flee from the home. *Id.* Coleman returned but left again when he was unable to find Valerie. *C.K. v. State*, 8th Dist. No. 100193, 2014-Ohio-1243, ¶ 8, 15. (Hereinafter *C.K. II*). Time passed and Valerie re-entered C.K.'s home. *C.K. I*, 2011-Ohio-4814 at ¶ 10, 16. Coleman returned, found Valerie inside the home, yelled at

her to, “[G]ive him money, followed her into the living room, grabbed her by the hair, threw her to the ground, and began hitting her.” *Id.* at ¶ 10.

As Coleman was beating Valerie, C.K. fired two shots, hitting Coleman, who spun around and fell to the ground. *Id.* C.K. demanded Coleman stop beating Valerie, “[B]ut when Coleman reached behind his back for his gun, [C.K.] pulled out his revolver and shot Coleman.” *Id.* at ¶ 16. The reaction of Coleman’s twitching body on the ground caused C.K. to fire several more shots into Coleman’s body. *Id.*

PROCEDURAL HISTORY

On September 20, 2009, C.K. shot and killed Andre Coleman. *C.K. I*, 2011-Ohio-4814 at ¶ 16. C.K.’s first murder trial ended in a mistrial. *Id.* at ¶ 2. At his second murder trial, the jury found him guilty of murder and the accompanying firearm specification. *Id.* at ¶ 18. The trial court sentenced C.K. to consecutive prison terms of fifteen years to life for murder and three years for the firearm specification. *Id.*

A unanimous panel of the Eighth District Court of Appeals found C.K.’s tenth assignment of error dispositive and reversed his convictions as being against the manifest weight of the evidence. *Id.* at 19. The appellate court remanded the matter for a new trial noting, “[W]e are restrained by the standard of review under the manifest weight of the evidence and cannot discharge [C.K.]” *C.K. I*, 2011-Ohio-4841 at ¶ 31. This Court denied jurisdiction to hear the state’s appeal. 131 Ohio St.3d 1439, 2012-Ohio-331, 960 N.E.2d 988.

On remand, the state dismissed C.K.’s criminal case without prejudice and C.K. filed a successful application to seal all official records. *C.K. II*, 2014-Ohio-1243

at ¶ 14. C.K. also filed a wrongful imprisonment action under R.C. 2743.48, on June 1, 2012. *Id.* at ¶ 15. Each side filed a motion for summary judgment.

The state argued C.K. could not satisfy either R.C. 2743.48(A)(4) or (5). (State's Summary Judgment Motion). Attached in support of the state's motion was an affidavit from one of the assistant prosecuting attorneys assigned to C.K.'s case. The affidavit provided in relevant part, "On or about February 28, 2012 the Cuyahoga County Prosecutor's Office elected to dismiss Plaintiff's criminal case, State v. [C.K.], Case No. CR-09-529206, which remains open, without prejudice to re-filing/re-indicting, given the lack of statutory limitations under R.C. 2901.13(A)(2)." *Id.*

C.K. argued he was not subject to re-prosecution based on the Eighth District's determination as a matter of law that he had established the three elements of the affirmative defense of self-defense. (C.K.'s Summary Judgment Motion). He claimed actual innocence and asserted that any future prosecution would be barred by an application of the law-of-the-case doctrine. *Id.*

The matter proceeded to a hearing on the parties' cross motions for summary judgment. (July 2, 2013, Entry). The trial court found, "[T]hat the mere possibility of being reindicted and retried precludes [C.]K. from being found to have been wrongfully imprisoned pursuant to R.C. 2743.48(A), having failed to satisfy R.C. 2743.48(A)(4)." (July 2, 2013, Entry). The court granted summary judgment in favor of the state, denied C.K.'s motion for summary judgment and dismissed his claims against the state with prejudice. *Id.* C.K. appealed to the Eighth District Court of Appeals.

Relying on *LeFever v. State*, 10th Dist. No. 12 AP-1034, 2013-Ohio-4606, the Eighth District reversed the trial court's decision finding:

The trial court's granting of summary judgment for the state based solely on the fourth prong is erroneous. Under the unique circumstances of this case, there is a factual question as to whether C.K. satisfies the fourth prong. Additional evidentiary inquiry is necessary to determine whether another criminal proceeding in connection with his prior murder conviction "can be brought, or will be brought" against C.K., in other words, whether reindicting or retrying him is both legally permissible and factually supportable. *C.K. II*, 2014-Ohio-1243 at ¶ 35.

On July 23, 2014, this Court accepted jurisdiction to review the state's appeal.

ARGUMENT

Amicus Argument in Support of Appellant's First Proposition of Law: A claimant who is the subject of an open criminal case involving an offense for which there is no statute of limitations cannot satisfy R.C. 2743.48(A)(4).

A wrongfully imprisoned individual, is an individual who can satisfy divisions (A)(1) through (5) of R.C. 2743.48. At issue in this appeal is the following portion of R.C. 2743.48(A)(4), "[N]o criminal proceeding * * * can be brought, or will be brought by any prosecuting attorney * * * against the individual for any act associated with that conviction." The parties argued in summary judgment over what a claimant seeking status as a wrongfully imprisoned individual was required to prove in order to satisfy the above quoted statutory language. The trial court embraced the state's argument that C.K. was unable to satisfy the statutory language because murder does not have a statute of limitations allowing the state to retry him at anytime. (July 2, 2013, Entry). On appeal, the Eighth District reversed finding, "[T]he trial court's interpretation of the statute is too narrow." *C.K. II*, 2014-Ohio-1243 at ¶ 24.

The Eighth District's decision is erroneous. First, the trial court did not employ statutory construction in resolving the dispute between the parties. The statute was applied not construed. Rather the appellate court based its decision on the inappropriate inquiry into legislative intent. Second, determining that R.C. 2743.48(A)(4), means criminal proceedings are still factually supportable and legally permissible following reversal, shifted the evidentiary burden onto the state. This appellate interpretation of the statute also invades the prosecutor's discretion in deciding whether to prosecute an individual. Once again, this Court must reverse a decision of the Eighth District regarding one of the R.C. 2743.48(A) factors.

Inappropriate Inquiry Into Legislative Intent

Without first determining that the language contained in R.C. 2743.48(A)(4), was unclear or ambiguous, the Eighth District faulted the trial court's interpretation of the statute and offered its own. *C.K. II*, 2014-Ohio-1243 at ¶¶ 25-27. "The first rule of statutory construction is that a statute which is clear is to be applied, not construed." *Vought Industries, Inc. v. Tracy*, 72 Ohio St.3d 261, 265, 648 N.E.2d 1364 (1995). "There is no authority under any rule of statutory construction to add to, enlarge, supply, expand, extend or improve the provisions of the statute to meet a situation not provided for." *State ex rel. Foster v. Evatt*, 144 Ohio St. 65, 56 N.E.2d 265 (1944), paragraph eight of the syllabus. The court's obligation is to apply the statute as written. *R.W. Sidley, Inc. v. Limbach*, 66 Ohio St.3d 256, 257, 611 N.E.2d 815 (1993).

The trial court applied R.C. 2743.48(A)(4), as written. A review of the July 2, 2013, journal entry reveals that the trial court relied on the plain language of the

statute. After the Eighth District vacated C.K.'s murder conviction as being against the manifest weight of the evidence, the trial court found the state's dismissal of the murder charge without prejudice, "[A]fforded the State the continued opportunity to reindict and retry [C.]K. at any time." (July 2, 2013 Entry). The court found, "[T]he mere possibility of being reindicted and retried precludes [C.]K. from being found to have been wrongfully imprisoned pursuant to R.C. 2743.48(A), having failed to satisfy R.C. 2743.48(A)(4)." (July 2, 2013, Entry).

The trial court did not rely on the rules of statutory construction to arrive at this decision. As the language of the statute at issue was clear, the court applied and did not construe R.C. 2743.48(A)(4). Accordingly, the Eighth District's statement, "[T]he trial court's interpretation of the statute is too narrow," misrepresented the trial court's decision making process in this case. After misrepresenting the trial court's decision as being based on statutory interpretation, the appellate court engaged in its own statutory construction analysis. *C.K. II*, 2014-Ohio-1243 at ¶ 26-27. Dissecting the words, "can" and "will" which are both found in the (A)(4), division of the statute without first addressing whether the statute at issue was unclear or unambiguous. *Id.*

As support for its statutory analysis, the Eighth District relied on the Tenth District's decision in *LeFever*, 2013-Ohio-4606. In *LeFever*, the Tenth District claimed to be applying division (A)(4), "[A]s it is written," but then provided, "The use of the phrase, 'no criminal proceedings * * * can * * * or will be brought' was *clearly intended by the General Assembly* to bar recovery to a claimant against whom criminal proceedings are still factually supportable and legally permissible following

reversal.” (Emphasis added) *Id.* at ¶ 26. The *LeFever* Court jumped directly to the General Assembly’s intent in enacting R.C. 27.4348(A)(4), as justification for its holding in the case. *Id.*

The analysis employed in *LeFever* and copied here by the Eighth District is contrary to *Dunbar v. State*, 136 Ohio St.3d 181, 2013-Ohio-2163, 992 N.E.2d 1111. *Dunbar* directed, “[A]mbiguity in a statute exists only if its language is susceptible of more than one reasonable interpretation.” *Id.*, 2013-Ohio-2163 at ¶ 16. Neither *LeFever* nor the Eighth District identified division (A)(4), as susceptible of more than one reasonable interpretation. The Association joins with the state in its position that R.C. 2743.48(A)(4), is not susceptible to more than one meaning because it contains clear and unambiguous language.

Dunbar further directed, “[I]nquiry into legislative intent, legislative history, public policy, the consequences of an interpretation, or any other factors identified in R.C. 1.49 is *inappropriate* absent an initial finding that the language of the statute is, itself, capable of bearing more than one meaning.” (Emphasis added) *Id.* Accordingly, *LeFever’s* analysis of what, “[W]as clearly intended by the General Assembly,” *LeFever*, 2013-Ohio-4606 at ¶ 26, was, “[I]nappropriate absent an initial finding that the language of the statute is, itself, capable of bearing more than one meaning.” *Dunbar*, 2013-Ohio-2163 at ¶ 16.

The Tenth District’s inappropriate inquiry into what, “[W]as clearly intended by the General Assembly,” resulted in a holding that R.C. 2743.48(A)(4), meant only claimants, “[A]gainst whom criminal proceedings are still factually supportable and legally permissible following reversal” may seek recovery. *LeFever*, 2013-Ohio-4606

at ¶ 26. The Eighth District adopted the Tenth District's holding based on this inappropriate inquiry into legislative intent as its own in the present case, "[W]e agree with the Tenth District's interpretation of the phrase in a recent wrongful imprisonment case." *C.K. II*, 2014-Ohio-1243 at ¶ 28. "We agree with the Tenth District, however, that the 'cannot/will not' inquiry contemplates not just whether another criminal proceeding associated with the prior conviction is legally permissible, but also whether such a criminal proceeding is factually supportable." *Id.* at ¶ 30.

Here, the Eighth District's decision employed statutory construction without first identifying that R.C. 2743.48(A)(4), was susceptible to more than one meaning. Moreover, the Eighth District adopted the reasoning and holding of the Tenth District which was based on an inappropriate inquiry into the legislative intent of R.C. 2743.48(A)(4). Once again, the Eighth District has erred in failing to apply the plain language of R.C. 2743.48(A). As the trial court properly applied and did not construe the language of the statute, the Association joins the state in asking this Court to reverse the opinion of the Eighth District and reinstate the decision of the trial court.

Shifting Evidentiary Burden Onto the State

After adopting the Tenth District's interpretation of R.C. 2743.48(A)(4), the Eighth District found, "Additional evidentiary inquiry is necessary to determine whether another criminal proceeding in connection with his prior murder conviction 'can be brought, or will be brought' against C.K., in other words, whether reindicting or retrying him is both legally permissible and factually supportable." *C.K. II*, 2014-Ohio-1243 at ¶ 35. Under the belief that the trial court's, "[N]arrow interpretation of

the statute prematurely concluded this wrongful imprisonment matter,” it appears that the appellate court was seeking a fuller “evidentiary inquiry” on remand. *Id.* at ¶ 43. Despite echoing the syllabus from *Doss v. State*, 135 Ohio St.3d 211, 2012-Ohio-5678, 985 N.E.2d 1229, the Eighth District interpreted R.C. 2743.48(A)(4), to shift the evidentiary burden to the state.

The Eighth District was looking for the state and not the claimant to present, “[E]vidence to show that bringing another criminal proceeding for murder against C.K. is factually supportable.” *Id.* at ¶ 34. Faulting the state for “only” submitting an affidavit by an assistant prosecuting attorney that “merely” stated that the case remained open given the lack of a statute of limitations on murder. *Id.* at ¶ 34. Looking for state’s evidence, “[A]s to whether the prosecutor has discovered new evidence or interviewed new witnesses related to C.K.’s claim of self-defense” or “[S]worn testimony from the prosecutor that there is an ongoing investigation.” *Id.* After shifting the evidentiary burden onto the state, it is curious how the Eighth District expected C.K. to satisfy his burden of satisfying R.C. 2743.48(A)(4), by a preponderance of the evidence on remand. *C.K. II*, 2014-Ohio-1243 at ¶ 35.

Among the appellate court’s identified areas where the state’s evidence on the matter was allegedly lacking, the Association finds most egregious the, “[S]worn testimony from the prosecutor that there is an ongoing investigation.” *Id.* at ¶ 34. “Once a prosecutor has, in the exercise of his discretion, determined that he will or will not prosecute a particular case, he has no continuing ‘duty’ either to prosecute or to revisit his determination.” See *Pengov v. White*, 146 Ohio App.3d 402, 406, 766 N.E.2d 228 (9th Dist.2001). Suggesting a County Prosecutor is required to discuss,

let alone, provide sworn testimony regarding the status of a criminal investigation or his decision whether to indict and prosecute an individual is improper. Requiring this type of sworn testimony from a County Prosecutor to satisfy an interpretation of R.C. 2743.48(A)(4), “[T]hat bringing another criminal proceeding for murder against C.K. is factually supportable” is error. “[T]he decision whether to prosecute is discretionary, and not generally subject to judicial review.” *State ex rel. Master v. Cleveland*, 75 Ohio St.3d 23, 27, 661 N.E.2d 180 (1996).

Also troubling, the appellate court’s dismissal of the affidavit attached to the state’s motion for summary judgment, “[T]he state only submitted an affidavit by an assistant prosecutor, who stated merely that the case ‘remains open * * * given the lack of statutory limitations’ for a murder offense.” (Emphasis original) *C.K. II*, 2014-Ohio-1243 at ¶ 34. Contrary to the above description, the complete affidavit statement was, “On or about February 28, 2012 the Cuyahoga County Prosecutor’s Office elected to dismiss Plaintiff’s criminal case, *State v. [C.K.]*, Case No. CR-09-529206, which remains open, without prejudice to re-filing/re-indicting, given the lack of statutory limitations under R.C. 2901.13(A)(2).” (State’s Summary Judgment Motion).

The legislature provided for the position of an assistant prosecuting attorney. R.C. 309.06, 309.08; *State ex re. Will v. Taylor*, 16 Ohio Dec. 66, 1905 WL 835 (July 8, 1905). “These assistant prosecuting attorneys have no functions different from that of the prosecuting attorney himself and their powers are not equal to his. * * * They are subordinate to him and as to any question of policy to be pursued they have no voice as against the will of the prosecuting attorney.” *Id.* Therefore,

statements contained in the affidavit of, “[O]ne of the Assistant Prosecuting Attorneys assigned to prosecute the criminal case regarding the Plaintiff [C.K.], in State v. [C.K.], Case No. Cr-09-529206,” were statements representing the office of that County Prosecutor. The fact that an assistant rather than the elected prosecutor provided the affidavit attached to the state’s summary judgment should not have diminished the evidentiary value of the affidavit in these proceedings. The Association joins the state in its position that when the state elects to dismiss a charge without prejudice, the charge has no statute of limitations and the case remains open, the state may re-indict and re-try the charge at anytime in the future.

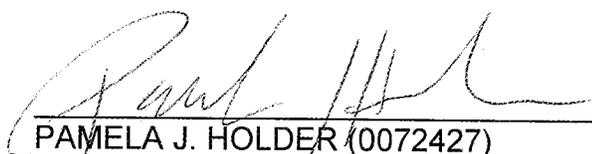
The Eighth District’s interpretation of R.C. 2743.48(A)(4), shifted the evidentiary burden onto the state and improperly invaded the discretion of the prosecutor’s in deciding whether to prosecute. This decision was erroneous and must be reversed.

CONCLUSION

A claimant who is the subject of an open criminal case involving an offense for which there is no statute of limitations cannot satisfy R.C. 2743.48(A)(4). The trial court followed the plain language of the statute and granted summary judgment to the state because C.K. cannot satisfy R.C. 2743.48(A)(4), by a preponderance of the evidence. The trial court’s decision was correct and should be reinstated. Accordingly, reversal of the Eighth District Court of Appeals’ opinion in this case is warranted.

Respectfully submitted,

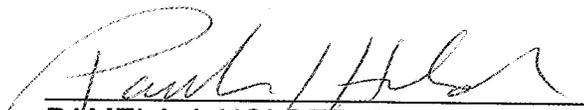
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Amicus Brief has been sent by ordinary U.S. mail to William Eadie at Spangenberg, Shibley & Liber LLP, 1001 Lakeside Avenue East, Suite 1700 and Brian Gutkoski at 1200 Ontario Street, Eighth Floor, Cleveland, Ohio 44113, this 6th day of October 2014.



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