

{¶ 1} This matter is before the court on remand from the Supreme Court of Ohio, *James v. State*, 139 Ohio St. 3d 1401, 2014-Ohio-2245, 9 N.E.3d 1060. Petitioner-appellant Omar K. James initiated this civil action for wrongful incarceration in 2009. In 2013, the trial court sustained a motion for summary judgment, dismissing the action. We reversed. *James v. State*, 2d Dist. Clark No. 2013-CA-28, 2014-Ohio-140. The Supreme Court of Ohio accepted an appeal, our judgment was reversed, and this cause was remanded to us for application of *Mansaray v. State*, 138 Ohio St. 3d 277, 2014-Ohio-0750, 6 N.E.3d 35. Therefore, the sole issue before this court is whether James is a “wrongfully imprisoned individual” for purposes of the wrongful incarceration statute, R.C. 2743.48(A), as construed in *Mansaray*.

I. The Course of Proceedings

{¶ 2} The pertinent facts and procedural history were recited in our first decision, as follows:

In 1996, James was indicted on one count of Possession of Crack Cocaine in an amount greater than twenty-five grams, a first degree felony in violation of R.C. 2925.11; one count of Carrying a Concealed Weapon, a fourth-degree felony in violation of R.C. 2923.12; one count of Having Weapons While Under Disability, a fifth degree felony in violation of R.C. 2923.13; and one count of Possession of Cocaine in an amount exceeding five grams, but less than twenty-five grams, a fourth-degree felony in violation of R.C. 2925.11(C)(4). All of the counts in the indictment related to events that transpired on Sept. 7, 1996.

In June 1997, James was tried on the four counts in the indictment. A jury found him guilty of Having Weapons While Under Disability. The jury could not reach a verdict on the remaining three counts of the indictment. James was sentenced to a prison term of twelve months. He did not appeal from his conviction and served his prison term.

A second trial on the remaining three counts of the indictment commenced in June 1998. On the first day of trial, James told the trial court that he wanted to represent himself. The jury trial proceeded with James representing himself. The jury returned guilty verdicts on the remaining three counts, and the trial court sentenced James to thirteen years in prison. James appealed; we affirmed. *State v. James*, 2d Dist. Clark No. 98-CA-54, 1999 WL 76815 (Feb. 19, 1999). James then sought to appeal to the Supreme Court of Ohio, which declined to hear the appeal. *State v. James*, 86 Ohio St. 3d 1414, 711 N.E.2d 1010 (1999).

James subsequently sought a writ of habeas corpus in the United States District Court for the Southern District of Ohio, challenging the three felony convictions that resulted from the second trial. In June 2005, the United States District Court granted James a conditional writ of habeas corpus. *James v. Brigano*, 201 F. Supp. 2d 810 (S.D. Ohio 2002). The State appealed. In November 2006, the United States Court of Appeals for the Sixth Circuit affirmed the district court's decision insofar as it held that James did not knowingly and intelligently waive his right to counsel at trial. *James v. Brigano*, 470 F. 3d 636, 644 (6th Cir. 2006). The District Court

then ordered the State to retry James on or before October 27, 2008. *James v. Brigano*, S.D. Ohio No. 3:00CV00491, 2008 WL2949411 (July 30, 2008). The State failed to retry James by this deadline.

James thereafter moved in the court of common pleas to dismiss the remaining three counts of the indictment, with prejudice. In August 2009, the trial court sustained the motion and dismissed the remaining counts of the indictment, with prejudice.

In September 2009, James brought this action in the court of common pleas, alleging that he was a “wrongfully imprisoned individual” pursuant to R.C. 2743.48(A). James and the State both moved for summary judgment. The trial court overruled James’s motion and granted the State’s motion, dismissing the action.

James v. State, 2014-Ohio-140, ¶ 3-8.

{¶ 3} In our first decision we sustained James’s sole assignment of error, concluding that the trial court should have rendered summary judgment in his favor, because James had satisfied all five elements of the wrongful incarceration statute, R.C. 2743.48(A)(1) through (5). *Id.* at ¶ 24. The Supreme Court of Ohio accepted the State’s appeal, reversed, and remanded the cause to us for disposition in light of its holding in *Mansaray v. State*, 138 Ohio St. 3d. 277, based on a different interpretation of the factor found in R.C. 2743.48(A)(5). The Supreme Court held that to meet the requirement in R.C. 2743.48(A)(5), the error in procedure must have occurred after the defendant is sentenced and imprisoned. *Id.* at ¶ 12. Therefore, we will incorporate our judgment from the first appeal on the factors required by R.C. 2743.48(A)(1) through(4), and reexamine

the issue of whether James has presented sufficient evidence to meet the requirement set forth in R.C. 2743.48 (A)(5).

II. James Established by the Preponderance of the Evidence that a Procedural Error Occurred after his Sentencing and Imprisonment

{¶ 4} R.C. 2743.48(A)(5) requires a petitioner, seeking compensation as a “wrongfully imprisoned individual” to prove that “[s]ubsequent to sentencing and during or subsequent to imprisonment, an error in procedure resulted in [his] release***.” In our first decision, we found that James met the requirements of this section of the statute by presenting sufficient evidence proving that he was released from prison, subsequent to his trial and sentencing, when the federal court granted his habeas corpus petition based on an error that occurred during his trial. The Supreme Court of Ohio in *Mansaray, supra*, held that to meet the requirements of R.C. 2743.48(A)(5), the petitioner must prove that a procedural error occurred after sentencing, not during trial. James now argues that he has met the requirements of the statute by showing two different procedural errors that occurred after his sentencing and imprisonment.

{¶ 5} First, James argues that a procedural error was established when his habeas petition was granted on the basis of ineffective assistance of counsel during the appeal of his conviction, not during the jury trial. However, the federal court did not grant the habeas relief upon a finding of ineffective assistance of appellate counsel. *James v. Brigano*, 470 F. 3d 636, 644 (6th Cir. 2006). The Sixth Circuit decision specifically found that the ineffective assistance of appellate counsel was not “procedurally defaulted” because the claim was addressed on its merits, and rejected, in our decision on James’s

App. R. 26 motion to re-open his appeal. Our decision on James's direct appeal from his conviction, *State v. James*, 2d Dist. Clark No. 98-CA-54, 1999 WL 76815 (Feb. 19, 1999), confirms that the defective waiver of the right to counsel issue was not initially addressed, but we did address the waiver issue as part of the ineffective assistance of counsel argument in our decision denying the App. R. 26 motion. The Sixth Circuit decision affirming the grant of the habeas petition was based on a constitutional claim that James's waiver of trial counsel was not made knowingly, intelligently and voluntarily. *James v. Brigano*, 470 F. 3d at 636, 644 (6th Cir. 2006).

{¶ 6} Secondly, James argues that a procedural error occurred, after sentencing and imprisonment, when the federal court directed the trial court to retry James within a set period of time, but the trial court failed to reschedule the trial in a timely manner, which led directly to a dismissal of the charges, with prejudice, and James's release from prison. These facts were addressed in our first decision in this case, as part of the proof required to meet the requirement of R.C. 2743.48(A)(4), and are not in dispute. We agree that the timing and scheduling of a trial is a procedural matter, and a court's failure to schedule a trial within the time frame set by statute, rule or as directed by a remand would constitute an error in procedure within the meaning of R.C. 2743.48(A)(5).

{¶ 7} Applying the rule of law established by the Supreme Court of Ohio in *Mansaray*, we conclude that the alleged procedural error regarding a defective waiver of the right to counsel is insufficient to meet the requirements of R.C. 2743.48(A)(5), because the error occurred at the time of trial, not after sentencing and imprisonment. Thus, the only error which may qualify as a procedural error for the purposes of meeting the requirements of R.C. 2743.48(A)(5), is the State's failure to retry James before the

deadline established by the federal court.

{¶ 8} The “error in procedure” requirement was deemed satisfied in a claim brought under the wrongful incarceration statute when a conviction was reversed because of a speedy trial violation in *Nelson v. State*, 5th Dist. Tuscarawas No. 2006-AP-0061, 2007-Ohio-6274. Nelson was charged with attempted murder, and the court erroneously instructed the jury that felonious assault was a lesser included offense of attempt to commit murder. *State v. Nelson*, 122 Ohio App. 3d 309, 701 N.E.2d 747 (5th Dist. 1996). After the jury found Nelson not guilty of attempted murder but guilty of felonious assault, his conviction was vacated on appeal. *Id.* Thereafter, Nelson was indicted on two counts of felonious assault, and convicted after entering a plea of no contest to one count of felonious assault, but the conviction was reversed on appeal. *State v. Nelson*, 5th Dist. Tuscarawas No. 2001AP-02-16, 2001 WL 1913811 (Sept. 27, 2001). The court found that since Nelson had remained incarcerated from the time of his initial indictment, through the appeal process and up to the day of his plea, he had been incarcerated more than 500 days, which was well in excess of the 270 day limit set forth in the Speedy Trial Act, R.C. 2945.71. *Id.* Nelson then proceeded with a civil suit, and was successful in obtaining a declaration that he was a wrongfully incarcerated person pursuant to R.C. 2743.48. *Nelson v. State*, 183 Ohio App. 3d 83, 2009-Ohio-3231, 915 N.E.2d 729 (10th Dist.). Following the two step process set up in the wrongfully incarcerated statute, Nelson then pursued his claim in the Court of Claims of Ohio, a trial was commenced on April 6, 2011, and Nelson was awarded \$249,627.99, which included an award of attorney fees in the sum of \$101,132.66.¹

¹ <http://cases.ohiocourtsofclaims.gov/cgi->

{¶ 9} In the case before us, the trial court was directed by the federal court to retry James within a set period of time, pursuant to the Speedy Trial Act. The State did not dispute that the re-trial was not scheduled before the deadline. The trial court's "Entry and Order of Dismissal, with Prejudice," filed August 26, 2009 states:

This matter is before the Court on Defendant's Motion to Dismiss with prejudice. After originally issuing a Writ of Habeas Corpus on July 29, 2005, the United States District Court for the Southern District of Ohio entered a Decision and Order on July 30, 2008, ordering the State to retry the Defendant "on or before Oct. 27, 2008."

Although the State unsuccessfully appealed the July 29, 2005 order granting the writ, cited as *James v. Brigano*, (6th Cir. 2006) 470 F. 3d 636, it did not appeal the July 30, 2008 order ordering a retrial by Oct. 27, 2008.

Because there is no pending appeal and the State did not retry the Defendant within the federally mandated time as stated above, it is the ORDER of this Court that the above titled case be and is hereby DISMISSED WITH PREJUDICE and terminated from the docket of this Court.

{¶ 10} We find that the State's failure to retry the case prior to the deadline was a procedural error that occurred after sentencing and imprisonment, within the meaning of R.C. 2743.48(A)(5). Therefore, James has established all five requirements of the wrongful incarceration statute, and should now be able to proceed with his claim in the Court of Claims of Ohio.

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III. Conclusion

{¶ 11} Upon reconsideration of James's sole assignment of error, in accordance with the remand from the Supreme Court of Ohio, that assignment of error is sustained, the judgment of the trial court is Reversed, and this cause is Remanded for the trial court to enter summary judgment in James's favor.

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FROELICH, P.J., and DONOVAN, J., concur.

Copies mailed to:

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