

IN THE SUPREME COURT OF OHIO

STATE OF OHIO ex rel. DOUGLAS)	CASE No. 2016-0686
PRADE)	
Relator,)	
)	
v.)	
)	ORIGINAL PETITION FOR THE
)	ISSUANCE OF WRIT OF PROHIBITION
)	
NINTH DISTRICT COURT OF)	
APPEALS, et al.)	
Respondents.)	

RESPONDENT HON. JUDGE CHRISTINE CROCE'S MOTION TO DISMISS

Mark A. Godsey (0074484)
Brian C. Howe (0086517)
THE OHIO INNOCENCE PROJECT
University of Cincinnati College of Law
P. O. Box 201140
Cincinnati, Ohio 45220-0040
Tel: 513-556-6805; Fax: 513-556-2391
markgodsey@gmail.com
brianchurchhowe@gmail.com
DAVID BOOTH ALDEN (0006143)*
* Counsel of Record
Lisa B. Gates (0040392)
Emmett E. Robinson (0088537)
Matthew R. Cushing (0092674)
JONES DAY
North Point, 901 Lakeside Ave.
Cleveland, Ohio 44114
Tel: 216-586-3939; Fax: 216-579-0212
dbalden@jonesday.com
lgates@jonesday.com
erobinson@jonesday.com
mcushing@jonesday.com
*Counsel for Relator,
Douglas Prade*

MICHAEL DEWINE (0009181)
Ohio Attorney General
TIFFANY L. CARWILE (0082522)*
*Counsel of Record
SARAH PIERCE (0087799)
Assistant Attorneys General
Constitutional Offices Section
30 E. Broad St., 16th Floor
Columbus, Ohio 43215
Tel: 614-466-2872; Fax: 614-728-7592
tiffany.carwile@ohioattorneygeneral.gov
sarah.pierce@ohioattorneygeneral.gov
*Counsel for Respondent,
Ninth District Court of Appeals*

Colleen Sims, Reg. No. 0069790
Heaven Dimartino, Reg. No. 0073423
Assistant Prosecuting Attorney
53 University Ave., 6th Floor
Akron, OH 44308
(330)643-8138 Telephone
simsc@prosecutor.summitoh.net
dimartino@prosecutor.summitoh.net
*Attorneys for Respondent
Hon. Judge Christine Croce*

Now comes the Respondent, Honorable Judge Christine Croce, through undersigned counsel, and respectfully moves the Court to grant this motion to dismiss Relator's petition for writ of prohibition for the reasons stated in the attached memorandum.

Respectfully submitted,

SHERRI BEVAN WALSH
Prosecuting Attorney

/s/ Colleen Sims
Colleen Sims, Reg. No. 0069790
Heaven Dimartino, Reg. No.
0073423
Assistant Prosecuting Attorney
53 University Ave., 6th Floor
Akron, OH 44308
(330)643-8138 Telephone
simsc@prosecutor.summitoh.net
dimartino@prosecutor.summitoh.net
Attorneys for Respondent
Hon. Judge Christine Croce

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MEMORANDUM

I. STATEMENT OF FACTS

On September 24, 1998, Mr. Prade was found guilty by a jury of all charges against him in CR 1998 02 0463. *State v. Prade*, 139 Ohio App.3d 676, 683, 745 N.E.2d 475, 480 (9th Dist. 2000). All of the convictions were affirmed. *Id.* at 700. Because Mr. Prade was found guilty of all charges and all convictions were affirmed, it is apparent that a motion for judgment of acquittal was not granted by the judge within fourteen days after the verdict.

Almost four years after all the convictions were affirmed, Mr. Prade filed his first application for post-conviction DNA testing. (See exhibit A attached to Relator's appendix, page two, first full paragraph). After additional DNA testing was performed, Mr. Prade filed a post-conviction relief petition. *State v. Prade*, 9th Dist. No. 26775, 2014-Ohio-1035, 9 N.E.3d 1072, appeal not allowed, 139 Ohio St.3d 1483, 2014-Ohio-3195, 12 N.E.3d 1229 (2014). The judge presiding over the court held hearings in October of 2012. (See Relator's exhibit A., page one, first paragraph). On January 29, 2013, the court issued its decision after the October hearings granting Prade's post conviction relief petition and, in the alternative, his motion for new trial anticipating an appeal of the decision. *Id.* at page 24, last full paragraph and page 25.

The Ninth District Court of Appeals found the trial court abused its discretion when it granted Prade's post conviction relief petition, "[g]iven the enormity of the evidence in support of Prade's guilt and the fact that the meaningfulness of the DNA exclusion results

is far from clear,...” *Prade* (2014) *supra* at ¶ 130. The court found that samples taken from the bite mark area produced dramatically different results which included no male profile, one male profile, and two male profiles. *Id. at* ¶ 113. Rather than excessively focusing on the new DNA evidence submitted during the hearings before the trial judge in October of 2012, the Court of Appeals did not ignore the evidence of Mr. Prade’s overbearing behavior towards Margo Prade before her murder. *Id. at* ¶¶121 and 122. This behavior caused Mr. Prade to be convicted of six counts of felony interception of wire, oral, or electronic communications and one count of possessing criminal tools. *Prade* (2000), *supra* at 683. As noted by Judge Hunter, these convictions were not to be affected by the new DNA testing. (See Relator’s exhibit A, page four, footnote 1).

After the 2014 decision reversing the trial court’s granting of the post conviction relief motion, the state sought appeal of the trial court’s attempt to grant a new trial which was granted in the alternative. (See exhibit B of Relator’s appendix). In considering this appeal the appellate court “previously determined, the trial court’s conditional order is not sufficient to constitute a final judgment or order that the State may appeal pursuant to R.C.§2945.67.” *Id.* At page 2, second full paragraph., citing *Goering v. Schille*, 1st Dist. No. C-110525, 2012-Ohio-3330. After the August 2014 decision, Mr. Prade’s motion for new trial was considered by Respondent Judge Christine Croce through testimony and exhibits from a November 2015 hearing, and through transcripts and exhibits from October 2012. (See exhibit C, first paragraph of Relator’s appendix). Respondent Croce denied the motion for new trial on March 11, 2016. *Id.* at page 18. On April 7, 2016, Relator filed a notice of appeal. (See exhibit D, attached to Relator’s appendix).

II. LAW AND ARGUMENT

A. Standards for Granting a Writ of Prohibition and Granting a Motion to Dismiss

In order for a writ of prohibition to issue, the Relator must prove that (1) the lower court is about to exercise judicial authority, (2) the exercise of authority is not authorized by law, and (3) the Relator possesses no other adequate remedy in the ordinary course of law if the writ of prohibition is denied. *State ex rel. Jones v. Suster*, 84 Ohio St.3d 70, 74, 1998-Ohio-275, 701 N.E.2d 1002, 1006 (1998), citing *State ex rel. Keenan v. Calabrese* (1994), 69 Ohio St.3d 176, 178, 631 N.E.2d 119, 121. A writ of prohibition “prevents an inferior court from exceeding its jurisdiction.” *State ex rel. Corn v. Russo*, 2001-Ohio-15, 90 Ohio St. 3d 551, 554, 740 N.E.2d 265, 268, citing *State ex rel. Barton v. Butler Cty. Bd. of Elections* (1988), 39 Ohio St.3d 291, 530 N.E.2d 871. Prohibition tests and determines “solely and only” the subject matter jurisdiction of the inferior tribunal. *State ex rel. Staton, v. Common Pleas Court* (1965), 5 Ohio St.2d 17, 21, 34 O.O.2d 10, 13, 213 N.E.2d 164,167; *State ex rel. Eaton Corp. v. Lancaster*, 40 Ohio St.3d 404, 409-10, 534 N.E.2d 46, 52 (1988) on reh'g, 44 Ohio St.3d 106, 541 N.E.2d 64 (1989).

A motion to dismiss a writ of prohibition complaint, as with any other complaint, rests on the pleadings themselves. *State ex rel. Jones at 79*. The complaint, in this matter, does not sufficiently state that Relator is entitled to the writ requested.

B. Standard for Granting a Motion to Dismiss When Lack of Subject Matter Jurisdiction is the Basis for the Writ

As stated in Ohio Constitution, Article IV, Section 4(B), “[t]he courts of common pleas and divisions thereof shall have such original jurisdiction over all justiciable matters...” If a court possess subject matter jurisdiction, then the court has the power to hear and decide the matter before it. *State ex rel. Florence v. Zitter*, 106 Ohio St.3d 87, 91, 2005-Ohio-3804, 831 N.E.2d 1003, 1008-09, ¶ 23 (2005).

Unless jurisdiction is patently and unambiguously lacking, a court “having general subject-matter jurisdiction can determine its own jurisdiction, and a party challenging that jurisdiction has an adequate remedy in the ordinary course of law by appeal.” *State ex rel. Scott v. Cleveland*, 112 Ohio St.3d 324, 326, 2006-Ohio-6573, 859 N.E.2d 923, 926, ¶ 16 (2006), citing *State ex rel. Estate of Hards v. Klammer*, 110 Ohio St.3d 104, 2006-Ohio-3670, 850 N.E.2d 1197, ¶ 10. See also *State ex rel. Cleveland Elec. Illum. Co. v. Cuyahoga Cty. Court of Common Pleas* (2000), 88 Ohio St.3d 447, 449–450, 727 N.E.2d 900. “Absent a patent and unambiguous lack of jurisdiction, a court having general subject-matter jurisdiction can determine its own jurisdiction, and a party challenging the court's jurisdiction has an adequate remedy by way of appeal.” *State ex rel. Lipinski v. Cuyahoga Cty. Court of Common Pleas, Prob. Div.*, 74 Ohio St.3d 19, 22, 1995-Ohio-96, 655 N.E.2d 1303, 1306 (1995), citing *State ex rel. Enyart v. O’Neill* (1995), 71 Ohio St.3d 655, 656, 646 N.E.2d 1110, 1112. Based on the cases above, if the Relator does not prove that the Respondent Croce patently and unambiguously lacked jurisdiction when she issued her March 11, 2016, decision, the writ should be dismissed. See *Clark v. Connor*, 82 Ohio St.3d 309, 315, 1998-Ohio-385, 695 N.E.2d 751, 757 (1998). As discussed below, Relator is trying to argue Judge Hunter’s “Exoneration Order” was like granting a motion for judgment of acquittal. However, the Relator

cannot directly argue this point because such a motion must be made or extended within fourteen days after the jury was discharged per Crim. R. 29(C). The January 29, 2013, decision was also made without proof of actual innocence.

C. Relator Douglas Prade Never Set Forth Clear and Convincing Evidence of His Actual Innocence

A motion of post conviction relief per R.C. § 2953.21 (A)(2) shall not be filed later than three hundred sixty-five days after the date on which the trial transcript is filed in the court of appeals. In our case the transcripts were filed prior to the convictions being affirmed in 2000. A post-conviction motion, filed as early as 2004, is clearly untimely. However, Under R.C. § 2953.23(A)(2) a person can file an untimely motion for post conviction relief if “DNA testing was performed under sections 2953.71 to 2953.81 of the Revised Code or under former §2953.82 of the Revised Code and analyzed in the context of and upon consideration of all available admissible evidence related to the inmate's case as described in division (D) of §2953.74 of the Revised Code, and the results of the DNA testing establish, by clear and convincing evidence, actual innocence of that felony offense...” Under R.C. § 2953.23 a trial court is not allowed to entertain a post conviction motion unless the petitioner was unavoidably prevented from discovery of the facts which are now the basis for relief, and the petitioner shows by clear and convincing evidence of actual innocence. Giving the statutory words plain and ordinary meaning, this statute sets limits on when a trial court is permitted to even consider such an untimely filed motion. *State ex rel. Gareau v. Stillman*, 18 Ohio St.2d 63, 64, 247 N.E.2d 461, 462 (1969). The diverse results of the DNA taken from samples next to each other proved nothing, let alone actual innocence. When a post conviction motion is

filed, the court shall determine whether there are substantive grounds before a hearing is to be held. *State v. Calhoun*, 86 Ohio St.3d 279, 283, 1999-Ohio-102, 714 N.E.2d 905, 910 (1999). The petitioner, Douglas Prade never set forth clear and convincing evidence of his actual innocence. *Prade* (2014) supra. The diverse DNA results were insufficient for the judge to truly entertain the motion for post conviction relief.

D. Judge Hunter’s Decision Was Neither a Final Verdict Nor an “Exoneration Order”

Relator refuses to concede that Judge Hunter’s Decision Granting Post Conviction Relief is allowed to be appealed by statute. Under “R.C.§ 2945.67(A) the state may, by leave of the appellate court, appeal any decision of a trial court in a criminal case which is adverse to the state except a final verdict.” *State v. Keeton*, 18 Ohio St.3d 379, 481 N.E.2d 629, 630 (1985). However, the state may appeal as a matter of right a judgment granting post-conviction relief. *State v. Matthews*, 81 Ohio St.3d 375, 378, 1998-Ohio-433, 691 N.E.2d 1041, 1043 (1998), *State v. Keeton*, at 380. R.C.§ 2945.67(A) gives the state the right to appeal the granting of post conviction relief. *State v. Noling*, 136 Ohio St.3d 163, 168, 2013-Ohio-1764, 992 N.E.2d 1095, 1101, ¶ 21 (2013). The state does not need to be granted leave to appeal the granting of a post conviction relief motion unlike the granting of a motion for new trial. *State v. Caulley*, 10th Dist. Franklin No. 12AP-100, 2012-Ohio-2649, ¶ 6, aff’d, 136 Ohio St.3d 325, 2013-Ohio-3673, 995 N.E.2d 227, ¶ 6 (2013).

Appeal of the granting of a motion for post conviction relief occurred as allowed by this statute. *See State v. Gondor*, 112 Ohio St.3d 377, 2006-Ohio-6679, 860 N.E.2d 77 (2006). The Relator attempts to argue, on page seven of his memorandum, subsection 2,

that R.C. § 2945.67(A) does not clearly authorize the state, as a matter of right to appeal the granting of a post conviction relief motion because later in the same section the statute states that the state cannot appeal a final verdict. There is no reason for the legislature to expressly and specifically allow such an appeal and then vaguely deny the right to appeal.

Relator has renamed Judge Hunter's January 29th decision an "exoneration order" in order to bolster his argument that the State had no right to appeal this decision. Cases found by counsel for Respondent Croce discussing exoneration, whether by means of dismissal or a not guilty finding, do not include the situation where a post conviction relief motion was awarded. See *State ex rel. Carter v. Saffold*, 8th Dist. Cuyahoga No. 100322, 2013-Ohio-5596, ¶ 5, *cause dismissed*, 138 Ohio St.3d 1442, 2014-Ohio-1030, 5 N.E.3d 661, ¶ 5 (2014) citing *State ex rel. Davis v. Cuyahoga Cty. Court of Common Pleas*, 127 Ohio St.3d 29, 2010-Ohio-4728, 936 N.E.2d 41; *State ex rel. Agosto v. Gallagher*, 8th Dist. Cuyahoga No. 96670, 2011-Ohio-4514; *State v. Robinson*, 8th Dist. Cuyahoga No. 90731, 2008-Ohio-5580.

Exoneration is mostly addressed in cases involving bail where a surety may be exonerated if they produce the body of the accused per R.C. § 2937.36. *State v. Lott*, 1st Dist. No. C-130543, 2014-Ohio-3404, 17 N.E.3d 1167, 1170, ¶ 9, citing *State v. Hughes*, 27 Ohio St.3d 19, 21, 501 N.E.2d 622, 624 (1986). See also *State v. Holmes*, 57 Ohio St.3d 11, 13, 564 N.E.2d 1066, 1068 (1991).

E. The Cases Cited by Relator Are Discernible from the Facts in this Case.

1. The Granting of a Motion for Judgment of Acquittal is Not Analogous to Granting Post Conviction Relief

The cases cited by the Relator in his memorandum are distinguishable from the facts in this case. In the following cases, the trial judges granted motions for judgment of acquittal right after the trials were over. *State v. Hampton*, 134 Ohio St.3d 447, 448, 2012-Ohio-5688, 983 N.E.2d 324, 326, ¶ 5 (2012), *State ex rel. Yates v. Court of Appeals for Montgomery Cty.*, 32 Ohio St.3d 30, 33, 512 N.E.2d 343, 345 (1987), *State ex rel. Yates v. Court of Appeals for Montgomery Cty.*, 32 Ohio St.3d 30, 512 N.E.2d 343 (1987). In *State v. Keeton*, supra, the state appealed with leave an evidentiary ruling after the judge directed a judgment of acquittal due to an insufficient chain of evidence at the close of the trial. Judgments of acquittal are final verdicts.

In our case there is no motion for judgment of acquittal and there cannot be one now. In *State v. Ross*, 128 Ohio St.3d 283, 288, 2010-Ohio-6282, 943 N.E.2d 992, 998, ¶ 21 (2010), this Court considered the question of whether the prosecutor can appeal the trial court's reconsideration of its denial of a timely motion for acquittal under Crim.R. 29(C). This Court found that given the express time constraints of Crim. R. 29, because the trial court did not expand the time during the 14 days after the jury was discharged, the Defendant could not afterwards renew the motion. *Id.* at ¶ 39.

2. Other Cases cited by Relator that Are Not Directly Applicable to the Facts in this Case

In *State ex rel. Mayer v. Henson*, 97 Ohio St.3d 276, 278, 2002-Ohio-6323, 779 N.E.2d 223, 224, ¶ 8 (2002), the trial judge tried to change a sentence given over 15 years prior via a nunc pro tunc order. This Court granted the prosecutor's writ of prohibition. *Id.* Respondent Croce agrees with the proposition that whether an order is appealable depends more on the type of relief sought, rather than how the order is labeled. *State v. Davidson*, 17 Ohio St.3d 132, 135, 477 N.E.2d 1141, 1144 (1985). This case supports Respondent Croce's contention that Judge Hunter's order granting a motion for post conviction relief is appealable by the State as a matter of right. R.C. § 2945.67(A). As stated above an untimely motion for post conviction relief can be heard if the results of the new DNA testing "establish, by clear and convincing evidence, actual innocence. R.C. § 2953.23(A)(2). Subsection B of this statute reiterates the legislature's intent that an award granting such relief is appealable. See *State v. Nichols*, 11 Ohio St.3d 40, 42, 463 N.E.2d 375, 377 (1984). The legislature must have anticipated a judge would find "actual innocence" when he or she granted an untimely motion for post conviction relief, and authorized the appeal of such a finding in the same statute.

In *State ex rel. McGinty v. Eighth Dist. Court of Appeals*, 142 Ohio St.3d 100 , 2015-Ohio-937, 28 N.E.3d 88 (2015), *reconsideration denied*, 142 Ohio St.3d 1469, 2015-Ohio-1896, 30 N.E.3d 976, ¶ 18 (2015), a judge was charged with kidnapping and assaulting his wife. The judge motioned to have the entire prosecutor's office disqualified and appealed the denial of his motion. *Id.* This Court found that the appellate

court patently and unambiguously lacked jurisdiction to hear the appeal of this interlocutory appeal. *Id.* at 104. This court referred to R.C. § 2505.02 in noting when an appeal of an interlocutory order is appropriate. *Id.* Per subsection (B)(3), an appeal is statutorily permitted of “[a]n order that vacates or sets aside a judgment. This case supports Respondent Croce’s position that the appeal of the January 29th order was permissible which also means her order on Relator’s motion for new trial was within her authority to decide.

In *State v. Fisher*, 35 Ohio St.3d 22, 517 N.E.2d 911 (1988), the trial judge erroneously granted shock probation. At the time shock probation was allowable under, R.C. § 2947.061, a statute that has since been repealed. Unlike in our case, there was no statute analogous to R.C. § 2945.67 which allows the state the opportunity to correct the error of the trial court. *Id.* at 23. Relator Croce concedes that the state must have leave to file an appeal of the granting of a motion for new trial, but if leave is given, the appellate court certainly has jurisdiction to decide the matter. *State ex rel. Steffen v. Court of Appeals, First Appellate Dist.*, 126 Ohio St.3d 405, 2010-Ohio-2430, 934 N.E.2d 906 (2010), *State v. Matthews*, 81 Ohio St.3d 375, 1998-Ohio-433, 691 N.E.2d 1041 (1998). The state subsequently attempted to appeal Judge Hunter’s alternative granting of a new trial. (Relator’s exhibit B). In our case, however, the appellate court found the conditional order did not constitute a true order. *Id.*

In *State v. Edmondson*, 92 Ohio St.3d 393, 2001-Ohio-210, 750 N.E.2d 587 (2001), a bench trial was held where the state conceded that the defendant would have been entitled to some government assistance if she had reported her employment, but because she hid her employment status, she should be found guilty of stealing the entire

amount. The trial judge only found her guilty of theft for the difference in benefits she received because of the lack of reporting. *Id.* at 395. The appellate court granted the state leave to appeal the judge's decision. *Id.* Although any decision reached on the appellate level would not affect the findings of the trial judge, the appellate court correctly certified the case to the Supreme Court because of a conflict with another appellate court. *Id.* at 396, citing *Whitelock v. Gilbane Bldg. Co.* (1993), 66 Ohio St.3d 594, 613 N.E.2d 1032, paragraph one of the syllabus. In *State v. Bistricky*, 51 Ohio St.3d 157, 555 N.E.2d 644 (1990), the Court found that the appellate court had discretion on whether to review substantive law rulings. The *Edmondson* and *Bistricky* cases concern a decision made by a judge at bench trials and not the granting of post conviction relief. The Court allowed the State to appeal an evidentiary ruling in *State v. Arnett*, 22 Ohio St.3d 186, 187, 489 N.E.2d 284, 285 (1986). In reviewing the above cases, the Relator is incorrect in arguing, on page 12 of his memorandum, that *Hampton, Bistricky, Yates,* and *Keeton* are "substantively identical" to this case.

III. CONCLUSION

WHEREFORE, it is respectfully requested that the Ohio Supreme Court dismiss the complaint for writ of prohibition for the reasons stated above.

Respectfully submitted,
SHERRI BEVAN WALSH
Prosecuting Attorney
/s/ Colleen Sims
Colleen Sims
Reg. No. 0069790
Heaven Dimartino, Reg. No.
0073423
Assistant Prosecuting Attorney
53 University Ave., 6th Floor
Akron, OH 44308
(330)643-8138 Telephone
(330)643-8708 Facsimile
simsc@prosecutor.summitoh.net
Attorneys for Respondent
Hon. Judge Christine Croce

PROOF OF SERVICE

I hereby certify that a copy of the foregoing was sent via regular U.S. Mail

Service to:

David Booth Alden* (Ohio Bar #6,143)
* Counsel of Record
JONES DAY
North Point, 901 Lakeside Avenue
Cleveland, Ohio 44114
Telephone: (216) 586-3939
Facsimile: (216) 579-0212
dbalden@jonesday.com
Counsel for Relator Douglas Prade

Mark A. Godsey (Ohio Bar #74,484)
Brian C. Howe (Ohio Bar #86,517)
THE OHIO INNOCENCE PROJECT
University of Cincinnati College of Law
P.O. Box 201140
Cincinnati, Ohio 45220-0040
Telephone: (513) 556-6805
Facsimile: (513) 556-2391
markgodsey@gmail.com
brianchurchhowe@gmail.com

MICHAEL DEWINE (0009181)
Ohio Attorney General
TIFFANY L. CARWILE (0082522)*
*Counsel of Record
SARAH PIERCE (0087799)
Assistant Attorneys General
Constitutional Offices Section
30 E. Broad St., 16th Floor
Columbus, Ohio 43215
Tel: 614-466-2872; Fax: 614-728-7592
tiffany.carwile@ohioattorneygeneral.gov
sarah.pierce@ohioattorneygeneral.gov
*Counsel for Respondent,
Ninth District Court of Appeals*

this Monday, June 06, 2016.

/s/ Colleen Sims
COLLEEN SIMS (0069790)
Assistant Prosecuting Attorney
Attorney for Respondent