Supreme Court of Ohio Clerk of Court - Filed September 14, 2016 - Case No. 2016-0686

IN THE SUPREME COURT OF OHIO

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

MERIT BRIEF OF RESPONDENT JUDGE CHRISTINE CROCE

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STATEMENT OF FACTS

An agreed statement of facts (hereinafter "Agreed Facts") was filed in this matter on August 16, 2016, along with a joint submission of evidence, and are incorporated herein. The Agreed Facts include the Relator's filing of a petition for post conviction relief, or in the alternative, motion for new trial on July 2, 2012. (Agreed Facts at ¶11, and Joint Exhibit C). The petition sought post conviction relief under R.C. §2953.21(A)(1). (Joint Exhibit C, page 17, III. A). The petition was not attached to the original writ filed in this matter. In October of 2012, evidence was presented regarding the July 2nd petition. (Agreed Facts, ¶ 12). Mr. Prade's appearance at the multiple day hearing was waived. (Joint Exhibit F). Judge Hunter issued a decision on January 29, 2013, and the state filed notice of appeals with the Summit County Clerk of Courts and the Ninth District Court of Appeals that same day (Joint Exhibits I, J & K).

On the same day the Ninth District Court of Appeals issued their decision reversing Judge Hunter's Order, Mr. Prade filed a notice of appeal with this Court, Case No. 2014-0432. (Joint Exhibit N). See also *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). In his memorandum in support of jurisdiction filed on May 5, 2014, Proposition of Law No. 3, Mr. Prade, argued that the state did not have a right to appeal Judge Hunter's January 29th order. (Joint Exhibit O). This Court declined to accept review. (Joint Exhibit P).

LAW AND ARGUMENT

I. JUDGE CHRISTINE CROCE'S PROPOSITION OF LAW NO. 1:

The Appeal Of Judge Hunter's Decision, Filed January 29, 2013,Was Authorized By Statute.

A. Ohio Statutes are to be Read Consistently Whenever Possible

Statutes are to be interpreted in a manner that is not contradictory.

> When two statutory provisions are alleged to be in conflict, R.C. 1.51 requires us to construe them, where possible, to *give effect to both.*" (Emphasis sic.) *Gahanna–Jefferson Local School Dist. Bd. of Edn. v. Zaino,* 93 Ohio St.3d 231, 234, 754 N.E.2d 789 (2001). " 'Only where the conflict is deemed *irreconcilable* does R.C. 1.51 mandate that one provision shall prevail over the other.' " (Emphasis sic.) *Id.*, quoting *United Tel. Co. of Ohio v. Limbach,* 71 Ohio St.3d 369, 372, 643 N.E.2d 1129 (1994).

State ex rel. Data Trace Information Servs., L.L.C. v. Cuyahoga Cty. Fiscal Officer, 131 Ohio St.3d 255, 265, 2012-Ohio-753, 963 N.E.2d 1288, 1298, ¶ 48 (2012). As explained below, Relator cannot argue that the state's right to appeal the granting of a post conviction relief petition is contrary to R.C. §2945.67, R.C. §2953.21 and R.C. §2953.23.

1. 2945.67 - When Prosecutor May Appeal; When Public Defender to Oppose

The Ohio General Assembly enacted R.C. §2945.67 to "expand the prosecutor's ability to appeal adverse determinations of the trial court." *State ex rel. Yates v. Court of Appeals for Montgomery Cty*., 32 Ohio St.3d 30, 35, 512 N.E.2d 343, 347 (1987), *State v. Hughes*, 41 Ohio St.2d 208, 211, 324 N.E.2d 731, 733 (1975). R.C. §2945.67 grants "an absolute right of appeal" to the state in four situations, including the granting of a post conviction relief petition. *State v. Fisher*, 35 Ohio St.3d 22, 24, 517 N.E.2d 911, 913 (1988).

In reading R.C. §2945.67(A), a judge's decision to dismiss all or part of an indictment, grant a motion to suppress evidence, grant a motion to return seized property, or grant post conviction relief is not a final verdict. These types of decisions are specifically listed as being appealable by the state. It would be an absurd reading of the statute to believe that the General Assembly specifically conferred upon the state the right to appeal the granting of a post relief petition and then in the same sentence prohibit or limit such a right so that the right is rendered meaningless or disingenuous. Statutes must be construed "to avoid such unreasonable or absurd results." *United Tel. Credit Union v. Roberts*, 115 Ohio St.3d 464, 468, 2007-Ohio-5247, 875 N.E.2d 927, 931, ¶ 10 (2007), citing *State ex rel. Asti v. Ohio Dept. of Youth Servs.*, 107 Ohio St.3d 262, 2005-Ohio-6432, 838 N.E.2d 658, ¶ 28.

The following are considered final criminal verdicts that cannot be appealed per R.C. §2945.67. A judgment of acquittal is a final verdict within the meaning of R.C. §2945.67(A) and cannot be appealed. *State v. Keeton*, 18 Ohio St.3d 379, 381, 481 N.E.2d 629, 631 (1985). The findings of a court directly following a no contest plea are a final verdict. *State v. Coy*, 3rd Dist. Defiance No. 4-83-12, 1984 WL 7998, *2 (Apr. 2, 1984). Neither of these scenarios is applicable to the facts of this matter.

2. 2953.21 - Petition for Post Conviction Relief

Under R.C. §2953.21 an action for post conviction relief is a civil proceeding. *State v. Nichols*, 11 Ohio St.3d 40, 42, 463 N.E.2d 375, 377 (1984), citing *State v. Milanovich* (1975), 42 Ohio St.2d 46, 49, 325 N.E.2d 540 [71 O.O.2d 26]. R.C. §2953.21(G) states in

part "[i]f the trial court's order granting the petition is reversed on appeal" and there was a pending appeal that was remanded, the trial court shall be notified and the appeal will be reinstated. Subsection (G) further states, in part, "the appellate court reversing the order granting the petition shall notify the appellate court in which the direct appeal of the case was pending at the time of the remand of the reversal and remand of the trial court's order." In reading this statute, it is clear that the appellate court is authorized to remand the trial court's order. Reading this statute consistently with R.C. §2945.67, reveals that the state has a right to seek reversal of the trial court's order granting post conviction relief. R.C. §2953.21(G) anticipates the state's right to appeal the granting of a post conviction relief petition and the appellate court's right to remand the matter so that orders stemming from the grant of post conviction relief can be modified in a manner consistent with the appellate court's order.

In *State v. Gondor*, 112 Ohio St.3d 377, 382, 2006-Ohio-6679, 860 N.E.2d 77, 82, ¶ 19 (2006), the trial court conducted an eight day post conviction relief hearing. The trial court vacated Defendant Gondor's murder conviction based on ineffective assistance of counsel. *Id.* at 386. The court of appeals conducted a de novo review and reversed the trial court's decision. *Id.* Courts construe the post conviction relief statute narrowly. *Id.* citing *State v. Steffen* (1994), 70 Ohio St.3d 399, 410, 639 N.E.2d 67. This means that the appellate court is to give deference to the trial court's findings. *Id.* This does not mean the appellate court lacks the authority to overturn the trial court's findings. This holding foresees the appellate court having the right to review the trial court's decision to grant a post conviction relief petition. The petitioner has no rights beyond those spelled out in

R .C. §2953.21. *State v. Campbell*, Franklin App. No. 03AP-147, 2003-Ohio-6305, at ¶ 13, *State v. Calhoun*, 86 Ohio St.3d 279, 281, 714 N.E.2d 905, 909 (1999). This statute clearly does not allow the petitioner stop an appeal and review of the granting of a post conviction relief petition.

3. R.C. 2953.23 - Second Or Successive Petitions; Order; Appeal

R.C. §2953.23(B) states "[a]n order awarding or denying relief sought in a petition filed pursuant to section 2953.21 of the Revised Code is a final judgment and may be appealed pursuant to Chapter 2953. of the Revised Code." The key words being 'awarding or denying' which plainly give the state the right to appeal in either case. *State v. Brenneman*, 36 Ohio St.2d 45, 59, 303 N.E.2d 873, 881 (1973) (Justice Corrigan's dissenting opinion). In Judge Hunter's order filed on January 29, 2013, she awarded relief after a proceeding which is a collateral civil attack on a criminal conviction. (See Sec. B, *infra*). The state had a right to appeal this collateral civil attack. Further, subsection .23(B) does not say a "final verdict", but a "final judgment."

4. When Considering the Three Statutes, the State's Right to Appeal is Clear

In light of the above-referenced statutes that directly address the state's right to appeal the granting of a post conviction relief petition, the mandate to read statutes consistently whenever possible and the requirement to give plain and ordinary meaning to words in a statute, the state lawfully appealed Judge Hunter's January 29th decision. R.C. §2953.21(G) anticipates, and R.C. §2953.23(B) directly authorizes the state's right to appeal the granting of a post conviction relief petition. Further the plain and ordinary meaning of the words in R.C. §2945.67 allowed the state to appeal. See *State ex rel.*

Gareau v. Stillman, 18 Ohio St.2d 63, 64, 247 N.E.2d 461, 462 (1969). Since the state's appeal of the January 29th decision was authorized by statute, the proceedings subsequent to the order have properly proceeded. (Agreed Facts ¶¶ 16-28).

Relator puts forth a treatise discussing the interpretation of statutes in a general sense. This treatise is not specific to this state. (Relator's brief, pg. 22). In Ohio, if there is any ambiguity in a statute, the intent of the General Assembly is to be considered. *Sheet Metal Workers' Internatl. Assn., Local Union No. 33 v. Gene's Refrig., Heating & Air Conditioning, Inc.*, 122 Ohio St.3d 248, 253, 2009-Ohio-2747, 910 N.E.2d 444, 450, ¶ 29 (2009) citing *Harris v. Van Hoose* (1990), 49 Ohio St.3d 24, 26, 550 N.E.2d 461. Courts are tasked with looking at the language of the statute, the circumstances under which the statute was enacted, and the consequences of a particular construction when determining the intention of the legislature. R.C. §1.49(B)(E); *Cleveland Mobile Radio Sales, Inc. v. Verizon Wireless*, 113 Ohio St.3d 394, 2007-Ohio-2203, 865 N.E.2d 1275, ¶ 12. As stated in A.1 of this brief, the purpose of the General Assembly in enacting R.C. §2945.67 was to expand or enlarge the state's statutory right of appeal. Not for mere dicta or guidance in future cases, but to directly address the entire matter stemming from the granting of a petition for post conviction relief.

B. A Post Conviction Hearing is not a Criminal Proceeding

A post conviction proceeding is a collateral **civil** attack on a criminal judgment. (bold type added). *State v. Kinley*, 136 Ohio App.3d 1, 7, 735 N.E.2d 921, 926 (2nd Dist.1999) citing *State v. Steffen* (1994), 70 Ohio St.3d 399, 410, 639 N.E.2d 67, 75-76. The Ohio Rules of Appellate Procedure as applicable to civil actions govern post conviction relief

proceedings. *State v. Bissantz*, 30 Ohio St.3d 120, 121, 507 N.E.2d 1117, 1118 (1987); *State v. Nichols*, 11 Ohio St.3d 40, 463 N.E.2d 375 (1984), paragraph 2 of the syllabus. Post conviction relief has been historically considered quasi-civil in Ohio. *Nichols* at 42. It follows that because post conviction relief proceedings are civil, that the aggrieved party to this civil proceeding would have the right to appeal Judge Hunter's findings that Mr. Prade was actually innocent. *Id.* Relator's brief does not address the civil nature of post conviction relief proceedings and is attempting to categorize the hearing that can follow a post conviction relief petition as purely a criminal matter. (Bottom of page 11 and top of page 12 of Relator's brief). Relator does not acknowledge the civil nature of the post conviction relief proceedings because it supports Respondent Judge Croce's position that the appellate review and her subsequent review of this matter follow from the state's lawful notice of appeal filed on January 29, 2013.

Further, Judge Hunter's order expressly anticipated an appeal would be sought by the state. (Joint Exhibit I, pg. 25). A court speaks through its journal entries. *State ex rel. Worcester v. Donnellon*, 49 Ohio St.3d 117, 118, 551 N.E.2d 183, 184 (1990). The January 29th journal entry addresses an appeal and possible reversal. Judge Hunter would not have anticipated an appeal and possible reversal if there was a belief that such an appeal was unlawful.

The post conviction statute does not provide the same entitlements to a defendant as he would have in a criminal proceeding. There is no state or a federal constitutional right to representation in a post conviction proceeding. *State v. Crowder*, 60 Ohio St.3d 151, 152, 573 N.E.2d 652, 653–54 (1991), citing *Pennsylvania v. Finley* (1987), 481 U.S. 551, 107 S.Ct. 1990, 95 L.Ed.2d 539. The post conviction statute provides no right to

funding or appointment of expert witnesses or assistance in a post-conviction petition. *State v. Davis*, 5th Dist. Licking No. 2008-CA-16, 2008-Ohio-6841, ¶¶ 28-29, citing *State v. Tolliver*, Franklin App. No. 04AP-591, 2005-Ohio-989, at ¶ 25, *State v. Smith* (2000), Ninth Dist.App. 98CA-007169, *State v. Hooks* (1998), Second Dist.App. No. CA 16978, and *State v. Conway*, Franklin App. No. 05AP550, 2006-Ohio-6219 at ¶ 15. The trial court has a limited ability to weigh the evidence proffered in support of the petition. *State v. Williams*, 11th Dist. No. 2004-T-0136, 165 Ohio App.3d 594, 601, 2006-Ohio-617, 847 N.E.2d 495, 499, ¶ 22. See also *Williams v. Mitchell*, N.D.Ohio No. 1:09 CV 2246, 2012 WL 4505774, *12 (Sept. 28, 2012), *vacated and remanded*, 792 F.3d 606 (6th Cir.2015) (reversed and remanded on other grounds). Mr. Prade's presence at the evidentiary hearing in October 2012 was not considered necessary. (Joint Exhibit F). The right to be present at the October 2012 hearing was not a fundamental right where the defendant had to waive personally before the court. See *State v. Pasqualone,* 121 Ohio St.3d 186, 192, 2009-Ohio-315, 903 N.E.2d 270, 275, ¶ 23 (2009). The fact that Mr. Prade did not have to waive his right of appearance personally before the Court, as he would have had to do before a criminal trial, further supports the point that post conviction relief proceedings are not analogous to stages of a criminal proceeding. See Crim. R. 43.

C. Cases Cited by the Relator that do not relate to Post Conviction Relief Appeals

The cases cited by the Relator do not change the fact that R.C. §2945.67 expressly authorizes the right of the state to appeal from decisions that award post conviction relief. This authorization is acknowledged by at least two other statutes. Relator's brief cites

many cases that hold the state cannot appeal the granting of a judgment of acquittal by the trial judge pursuant to Crim. R. 29(C). See *State ex rel. Yates v. Court of Appeals for Montgomery* Cty., 32 Ohio St.3d 30, 32 (1987), *State v. Hampton*, 134 Ohio St.3d 447, 2012-Ohio-5688, 983 N.E.2d 324, ¶ 25; *State v. Keeton*, 18 Ohio St.3d 379, 481 N.E.2d 629 (1985). As stated in Respondent Croce's motion to dismiss, Crim. R. 29 has the express time constraints of 14 days after the jury was discharged, the Defendant could not afterwards renew the motion. *State v. Ross*, 128 Ohio St.3d 283, 288, 2010-Ohio-6282, 943 N.E.2d 992, 998, ¶ 39 (2010). This matter is not about appealing the granting of a motion for judgment of acquittal. Neither the *Edmondson*, nor *Bistricky* cases cited by the Relator concern the granting of post conviction relief, but are appeals of decisions made by judges at bench trials, thus the right to appeal the state possesses under R.C. §2945.67(A) is unaffected by these cases.

In the case of *State ex rel. Ford v. Ruehlman*, 2016-Ohio-3529, ¶¶ 1 and 68 (Ohio), a judge acted to shield an attorney's assets from creditors and clearly exceeded his statutory authority per R.C. §2329.021 et seq. In *State ex rel. Lomaz v. Court of Common Pleas of Portage Cty.*, 36 Ohio St.3d 209, 211 (1988), this court found that "C.P.Sup.R. 2 is the 'sole authority' for transfers of judges from one division to another," other than assignments by the Chief Justice of this Court. In *State ex rel. Steffen v. Court of Appeals*, First Appellate Dist., 126 Ohio St.3d 405, 2010-Ohio-2430, 934 N.E.2d 906, the state failed to get leave for appeal the granting of a new trial. In the Prade matter, it was determined that leave to appeal Judge Hunter's conditional order granting a new trial was not a final appealable order (See Appendix B, filed in this matter by Relator, on May 4, 2016).

Both the state and defense submitted stipulated facts to the judge in a bench trial in *State v. Fraternal Order of Eagles Aerie 0337 Buckeye*, 58 OhioSt.3d 166, 569 N.E.2d 478 (1991). This court found that the trial court improperly abolished the states right to appeal a motion to suppress. *Id.* As stated in R.C. §2945.67(A), the state is permitted to exercise its right to appeal the granting of a motion to suppress or a petition for post conviction relief.

Relator next tries to argue juvenile cases, which can be dismissed by the judge pursuant to Juv. R. 29(F)(2)(d), are analogous to this matter. In *In re D.R.*, 8th Dist. Cuyahoga Nos. 100034 & 100035, 2014-Ohio-832, the child was found delinquent for aggravated burglary, but had been shot during the commission of the act and was wheelchair bound because of the injuries. Because of the extent of the injuries, the Judge utilized the above referenced juvenile rule to dismiss the matter. The judge in the case of *In re N.I.*, 8th Dist. No. 95085, 191 Ohio App.3d 97, 99, 2010-Ohio-5791, 944 N.E.2d 1214, 1216, ¶ 4, felt there was sufficient evidence presented at a dispositional hearing to mitigate the child's conduct and dismissed the case. This specific rule, Juv. R. 29(F)(2)(d), applicable in juvenile proceedings only, effectively stands as an acquittal. *Id. at ¶ 13.* As stated above, the state does not have the right to appeal the granting of an acquittal after trial, however, the state is statutorily permitted to appeal and seek reversal and remand of the granting of a post conviction relief petition.

II. JUDGE CHRISTINE CROCE'S PROPOSITION OF LAW NO. 2:

Because The Appeal Of Judge Hunter's Grant Of Post Conviction Relief Is Authorized By Statute, Relator Is Not Entitled To A Writ.

A. The Issue of a Final Verdict Has Previously Been Before by this Court

An appeal as of right shall be taken by filing a notice of appeal. Ohio App. R. 3. (Joint Exhibits J and K). Relator acknowledges that the state was allowed to appeal the granting of the post conviction relief petition as guidance in future actions, but that the finding of actual innocence by Judge Hunter, which flowed from the granting of post conviction relief petition filed by Relator cannot be appealed even if erroneous. (Relator's brief, pgs. 17-18). However, Relator has previously argued that the courts lacked jurisdiction to reverse Judge Hunter's January 29th decision and this Court declined review of the matter. (Joint Exhibit O, memorandum pg. 13, and Joint Exhibit P). This Court chose not to accept appeal of the matter although subject matter jurisdiction can be raised by this Court sua sponte. *State v. Noling*, 136 Ohio St.3d 163, 165, 2013-Ohio-1764, 992 N.E.2d 1095, 1098, ¶ 10 (2013), citing *State v. Lomax,* 96 Ohio St.3d 318, 2002-Ohio-4453, 774 N.E.2d 249, ¶ 17." On the day jurisdiction was rejected by this Court, Respondent Judge Croce set this case for status. (Agreed Facts ¶¶21 & 22). The Relator should not now succeed in the granting of a writ.

B. Relator Fails to Show the Exercise of Authority by Respondent Judge Croce was not Authorized by Law

Relator fails to prove the 2nd requirement of a writ of prohibition. Mr. Prade cannot show the exercise of authority by Respondents is not authorized by law. *State ex rel. Jones v. Suster*, 84 Ohio St.3d 70, 74, 1998-Ohio-275, 701 N.E.2d 1002, 1006 (1998). A writ of prohibition is not meant to usurp the appellate process. *State ex rel. Sparto v. Juvenile Court of Darke Cty.*, 153 Ohio St. 64, 90 N.E.2d 598 (1950). Great caution should be used in granting such a writ. Id. citing *France v. Celebrezze*, (8th Dist.)

C.A. No. 98147, 2012-Ohio-2072. Because Relator has failed to show the exercise of authority by either Respondent is not authorized by law the writ must fail.

III. CONCLUSION

Relator's brief assumes that Judge Hunter entered a 'final verdict' fully equivalent to a judgment of acquittal. This assumption, however, is not supported by multiple statutes. WHEREFORE, it is respectfully requested that the Ohio Supreme Court dismiss this matter and allow the pending appeal, Ninth District Case No. 28193, to proceed. (Agreed Facts, ¶29).

Respectfully submitted,
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