

In the Supreme Court of Ohio

State of Ohio,

Plaintiff,

v.

Jeffrey Wogenstahl,

Defendant.

Case No. 1995-0042

Regular Calendar

This Is A Capital Case.

**DEFENDANT'S MOTION TO REOPEN HIS DIRECT APPEAL
TO CHALLENGE THE CONSTITUTIONALITY OF
OHIO REVISED CODE §2901.11(D) AS WRITTEN IN 1991**

Execution Date: April 17, 2019

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Defendant Jeffrey Wogenstahl moves this Court to reopen his direct appeal for good cause shown to vacate his conviction and sentence pursuant to Ohio Revised Code §2901.11(D) because the version of the statute in effect at the time of Wogenstahl’s trial violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution as well as the Ohio Constitution’s Due Course of Law Clause. Or, in the alternative, Wogenstahl moves this Court to reopen his direct appeal for good cause shown and to allow for further briefing on this issue. Wogenstahl further moves this Court to vacate his pending execution date of April 17, 2019.

A supporting memorandum follows.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. Introduction: As Written in 1991, Ohio Revised Code §2901.11(D) Violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution and was Unconstitutional.

When state law creates a mandatory presumption that relieves the State of its burden of proof of an element of an offense, that law violates the Due Process Clause. *Francis v. Franklin*, 471 U.S. 307, 314 (1985). As written in 1991, R.C. §2901.11(D) did just that, and, therefore, it violated the Fourteenth Amendment to the United States Constitution. Because this Court relied on this unconstitutional subsection of Ohio's jurisdiction statute to find jurisdiction over the homicide offense in this case, Wogenstahl's conviction and resultant death sentence are void for lack of jurisdiction. This Court should vacate Wogenstahl's current execution date, reopen his direct appeal, and vacate his conviction and sentence for the aggravated murder of Amber Garrett. Or in the alternative, this Court should reopen his direct appeal and allow for further briefing.

II. Statement of the Case.

On September 1, 1992, Wogenstahl was indicted in a three count indictment. Count One was aggravated murder with death penalty specifications. Counts Two and Three charged Wogenstahl with kidnapping and aggravated burglary. On March 15, 1993, the trial court sentenced Jeffrey Wogenstahl to death on the first count of his indictment and to fifteen to twenty-five years on both the second and third counts of the indictment, all of which were to be served consecutively. On direct appeal, this Court affirmed his convictions and capital sentence. *State v. Wogenstahl*, 1st Dist. Hamilton No. C-930222, 1994 WL 686898; *State v. Wogenstahl*, 75 Ohio St.3d 344, 1996-Ohio-219, 662 N.E.2d 311 (1996).

On October 9, 2015, Wogenstahl filed a Motion to Vacate His Execution Date and to Reopen His Direct Appeal in this Court. This Court granted the Motion and reopened Wogenstahl's direct appeal on May 4, 2016. *State v. Wogenstahl*, 145 Ohio St.3d 1455, 2016-

Ohio-2807, 49 N.E.3d 318 (2016). After briefing and oral argument, this Court affirmed Wogenstahl’s conviction and sentence. *See State v. Wogenstahl*, 150 Ohio St.3d 571 (2017).

This Court’s decision was based upon the jurisdiction statute as it was in 1991. At that time, jurisdiction to prosecute an aggravated murder charge was established only if the State proved beyond a reasonable doubt that “either the act that causes death, or the physical contact that caused death, or the death itself” occurred in Ohio. R.C. §2901.11(B). In this case, this Court found that the State has not, and cannot, establish that the death itself, or any act that caused the death, or the physical contact that caused the death occurred in Ohio. *See Wogenstahl*, 150 Ohio St.3d at 581 (“We find that it cannot be determined whether Amber was murdered in Ohio or Indiana.”). Despite this fact—that the State could not definitively prove where each element of the homicide offense took place—this Court determined that the State of Ohio still had jurisdiction to prosecute Wogenstahl for this homicide offense based upon Subsection D of Ohio’s 1991 statute. The version of R.C. §2901.11(D) at issue in this case provided:

When an offense is committed under the laws of this state, and it appears beyond a reasonable doubt that the offense or any element thereof took place either in Ohio or in another jurisdiction or jurisdictions, but it cannot reasonably be determined in which it took place, ***such offense or element is conclusively presumed to have taken place in this state*** for purposes of this section.

Am.Sub.H.B. No. 511, 134 Ohio Laws, Part II, 1866, 1893 (emphasis added). Thus, this Court found, “under R.C. §2901.11(D), the offense is conclusively presumed to have taken place in Ohio. Accordingly, we hold that Ohio had jurisdiction over the aggravated-murder charge.” *Wogenstahl*, 150 Ohio St.3d at 581.

III. Legal Standard to Grant this Motion.

The United States Supreme Court has previously determined that a conclusive (or mandatory) presumption violates the Due Process Clause of the Fourteenth Amendment if it “relieve[s] the State of the burden of persuasion on an element of an offense.” *Francis v. Franklin*, 471 U.S. 307, 314 (1985); *see also Patterson v. New York*, 432 U.S. 197, 215 (1977) (“[A] State must prove every ingredient of an offense beyond a reasonable doubt and...*may not shift the burden of proof to the defendant by presuming that ingredient upon proof of the other elements of the offense.*”) (emphasis added).

Therefore, for Wogenstahl to show that the statute was unconstitutional both on its face and as applied to his case, he must prove (1) that the statute created a conclusive (or mandatory) presumption and (2) that the mandatory presumption relieved the state of its burden of proof as to an element of the offense. *See id.*; *see also Sandstrom v. Montana*, 442 U.S. 510, 523-24 (1979) (“A conclusive presumption in this case would conflict with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime.”).

IV. Ohio Revised Code §2901.11(D) created a Mandatory Presumption that Relieved the State of Proving an Element of the Offense Beyond a Reasonable Doubt.

As Justice French explained in Wogenstahl’s previous appeal, “There is at least a colorable argument that the conclusive presumption of jurisdiction in R.C. §2901.11(D) violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution.” *Wogenstahl*, 150 Ohio St.3d at 583 (French, J., concurring). Wogenstahl submits that this is more than a colorable argument and requests relief from his unconstitutional death sentence.

A. The language in Ohio Revised Code §2901.11(D), as written in 1991, created a Mandatory Presumption.

The “conclusive presumption” at issue here is a mandatory presumption that “removes the presumed element from the case once the state has proved the predicate facts giving rise to the presumption.” *Francis*, 471 U.S. at 314, fn. 2; *see also Wogenstahl*, 150 Ohio St.3d at 583 (French, J., concurring) (“By its plain terms, R.C. 2901.11(D) creates a mandatory presumption of jurisdiction: the jurisdiction of the Ohio courts is ‘conclusively’ presumed.”). Once this Court determined in *Wogenstahl*’s previous appeal that it could not determine where the elements of the homicide offense took place, that element was removed from the case; this Court was then *required* to presume that Ohio had jurisdiction. Thus, the presumption created by R.C. §2901.11(D) is mandatory, and not permissive.

B. Jurisdiction is an Element of the Offense, Which the State Bears the Burden to Prove Beyond a Reasonable Doubt.

The only remaining inquiry is whether the conclusive presumption here relieves the State of having to prove an element of the offense, i.e. jurisdiction. *Wogenstahl*, 150 Ohio St.3d at 583 (French, J., concurring) (“It appears, then, that R.C. 2901.11(D) violates the rule of *Francis* and *Sandstrom* if jurisdiction is an element of the offense that the state bears the burden of proving....”). *Wogenstahl* argues that jurisdiction is an essential element of the offense, and thus, the statute was unconstitutional.

As Justice French noted in her concurrence in *Wogenstahl*’s previous appeal (*see Wogenstahl*, 150 Ohio St.3d at 581), this Court has not directly addressed the question of whether jurisdiction is an element of the offense. As Justice French pointed out though, this Court has “held that venue is an element of the crime that the state must prove beyond a reasonable doubt.” *Id.*; *citing State v. Hampton*, 134 Ohio St.3d 447, 2012-Ohio-5688, 983 N.E.2d 324, ¶ 1-2, 22. Given

that jurisdiction is a prerequisite to venue, failing to require that the State also prove jurisdiction as an element of the offense would make little sense.

Moreover, Ohio intermediate appellate courts have found that in order for the trial court to exercise jurisdiction, the State had to prove jurisdiction beyond a reasonable doubt as an element of the offense. As the Tenth District Court of Appeals has explained:

The general rule is that if a defendant properly asserts the defense of lack of jurisdiction, the plaintiff has the burden of establishing the court's jurisdiction. *In criminal cases in common pleas court, the court's jurisdiction must be proved beyond a reasonable doubt as an element of the offense* because the validity of any judgment depends upon the court having obtained jurisdiction. This statement is consistent with Crim.R. 12(B)(2), which deems an indictment which fails to establish the jurisdiction of the court void on its face and open to challenge at any time.

State v. Neguse, 71 Ohio App.3d 596, 602, 594 N.E.2d 1116 (10th Dist. 1991) (emphasis added).

Jurisdiction “*is an element* which the State must prove in order to convict an individual of a crime and is ‘an essential element of the crime.’” *State v. Wooldridge*, 2nd Dist. No. 18086, 2000 Ohio App. LEXIS 4639 (Oct. 6, 2000) (emphasis added).

Wogenstahl asks that this Court find jurisdiction to be an element of the offense that the State must prove beyond a reasonable doubt. Failing to hold that jurisdiction is an element of the offense would be a blatant violation of Wogenstahl's constitutional right to due process. *See* U.S. Const. Amend. XIV and Ohio Const. Art. 1, Section 16. Wogenstahl had protected life, liberty, and property interests in not being tried in the State of Ohio without the State first proving beyond a reasonable doubt that the act that caused the victim's death, the physical contact that caused her death, or the death itself occurred in Ohio. These interests are protected as rights under the substantive and procedural elements of the Due Process Clause of the Fourteenth Amendment.

Or, in the alternative, this Court should reopen Wogenstahl's direct appeal so that the parties may fully brief the merits of whether or not jurisdiction is an element of the offense.

V. Jurisdiction can Never be Waived.

Jurisdiction is the crux of a court's power to adjudicate the merits of a case, can never be waived, and may be challenged at any time. *United States v. Cotton*, 535 U.S. 625, 630, 122 S.Ct. 1781 (2002) (“subject matter jurisdiction, because it involves a court's power to hear a case, can never be forfeited or waived.”); *National Wildlife Federation v. United States*, 626 F.2d 917, 924 n.13 (D.C. Cir. 1980) (purported waiver of lack of jurisdiction “necessarily ineffective”). Further, the parties cannot confer jurisdiction on courts where it does not exist. *Kontrick v. Ryan*, 540 U.S. 443, 457 (2004).

Similarly, this Court has held that jurisdiction cannot be forfeited and may be raised at any time. *Rogers v. State*, 87 Ohio St. 308, 101 N.S. 143 (1913), paragraph one of the syllabus; *State v. Wilson*, 73 Ohio St.3d 40, 46, 652 N.E.2d 196 (1995); *State v. Mbodji*, 129 Ohio St.3d 325, 2011-Ohio-2880, 951 N.E.2d 1025 (2011). Criminal Rule 12(G) provides that a defendant who fails to raise one or more defenses waives only those defenses or objections that must be raised before trial, and expressly exempts jurisdictional challenges from the defenses or objections that must be waived prior to trial. In *Wilson*, the seventeen-year-old defendant was tried and convicted in common pleas court without being properly bound over from juvenile court. *Wilson*, 73 Ohio St.3d at 44. Twelve years after his conviction, Wilson filed a motion to vacate his conviction because the juvenile court had not relinquished its jurisdiction. This Court held that jurisdiction could never be waived and that the judgment against Wilson was *void ab initio*. *Id.* This Court concluded, “[a] party's failure to challenge a court's subject matter jurisdiction cannot be used, in effect, to bestow jurisdiction on a court where there is none.” *Id.* at 46. Thus, Wogenstahl has not waived any challenge to the trial court's lack of jurisdiction over the homicide offense in this case due to the unconstitutionality of R.C. §2901.11(D).

VI. Conclusion.

The trial court lacked jurisdiction to convict and sentence Wogenstahl to death. The version of R.C. §2901.11(D) in effect at the time of Wogenstahl's trial created a mandatory presumption of jurisdiction which violated the Due Process Clause of the Fourteenth Amendment of the United States Constitution as well as the Ohio Constitution's Due Course of Law Clause.

Wogenstahl respectfully moves this Court to reopen his appeal for good cause shown, and to vacate his conviction and sentence for the aggravated murder of Amber Garrett. Or, in the alternative, Wogenstahl moves this Court to reopen his appeal to allow for further briefing on the issue of whether R.C. §2901.11(D) created an unconstitutional mandatory presumption of jurisdiction, and/or to determine whether jurisdiction is an element of the offense of aggravated murder. Wogenstahl further requests that this Court vacate his execution date of April 17, 2019.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **DEFENDANT’S MOTION TO REOPEN HIS DIRECT APPEAL TO CHALLENGE THE CONSTITUTIONALITY OF OHIO REVISED CODE §2901.11(D) AS WRITTEN IN 1991** was sent via regular U.S. Mail to Philip Cummings, Assistant Hamilton County Prosecutor, 230 East Ninth Street, Suite 4000, Cincinnati, Ohio 45202 on this 10th day of August, 2018.

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