

[Cite as *Moore v. State*, 2019-Ohio-700.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 107114

DEMETRIUS MOORE

PLAINTIFF-APPELLANT

vs.

STATE OF OHIO

DEFENDANT-APPELLEE

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-18-891383

BEFORE: Kilbane, A.J., Laster Mays, J., and Keough, J.

RELEASED AND JOURNALIZED: February 28, 2019

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MARY EILEEN KILBANE, A.J.:

{¶1} Plaintiff-appellant, Demetrius Moore ("Moore"), appeals from the trial court's decisions denying his motion for relief from judgment and granting defendant-appellee, the state of Ohio's ("State") motion for judgment on the pleadings on Moore's complaint for wrongful imprisonment. For the reasons set forth below, we are constrained to affirm.

{¶2} In August 2011, Moore pled guilty to having a weapon while under disability and two counts of drug trafficking. The trial court sentenced Moore to a total of four years in prison.

From the record, it appears that Moore was released from prison in January 2015.

{¶3} In December 2016, the State moved to vacate Moore's convictions and sentence because of the police misconduct of the officers involved in the case. Three East Cleveland

police officers were convicted in federal court of charges relating to police misconduct, including conspiracy and making false statements. In its motion, the State explained:

The Cuyahoga County Prosecutor has conducted an internal review of this case, which was originally presented to the Cuyahoga County Prosecutor's Office by [three East Cleveland police officers, who] were convicted in the United States District Court for the Northern District of Ohio on charges relating to police misconduct, including conspiracy and making false statements. Due to the now known conduct of these former officers in past cases, the County Prosecutor no longer has confidence in [Moore's] conviction. Based on the internal review, the County Prosecutor has concluded that the integrity of the conviction is now in question.

In order to further justice, the Cuyahoga County Prosecutor, through his undersigned assistant, respectfully moves this Honorable Court to vacate [Moore's] conviction and sentence, allow [Moore] to move to vacate his guilty plea, and allow the State to dismiss this case. The State will not re-try [Moore].

{¶4} The trial court granted the State's motion in July 2017, vacated Moore's guilty plea, and dismissed the case with prejudice. The court ordered as follows:

the plea is hereby withdrawn, the conviction and sentence are vacated and the case is dismissed with prejudice. All monies paid by [Moore] to the court or any agency of the court, including without limitation fines, court costs, and supervision fees (CRS or CCS) are hereby ordered to be refunded to [Moore]. The parties have agreed that the proceedings conducted this day are done without prejudice to [Moore's] rights to pursue further remedies that may be available by law, either in a separate action or, as appropriate, via post-judgment pleadings in this case. * * * Further, [the] state has represented that it has no objection to sealing of these proceedings should such a motion be made by [Moore].

{¶5} Approximately five months later, Moore brought forth the instant action, seeking a declaration that he was a wrongfully imprisoned individual as defined by Ohio's wrongful imprisonment statute — R.C. 2743.48(A). Moore alleged that his conviction was vacated and dismissed with prejudice because it was determined that he "did not commit the subject offenses and was convicted due to gross misconduct of East Cleveland, Ohio Police Officers who planted incrimination evidence against [him]."

{¶6} The State responded by filing an answer, which it amended, and a motion for judgment on the pleadings under Civ.R. 12(C). In its motion for judgment on the pleadings, the State argued that Moore is barred from wrongful imprisonment compensation because he pled guilty to the offenses in the underlying case. Moore opposed the State's motion, and argued for the first time that R.C. 2743.48(A)(2) is unconstitutional on its face. The trial court granted the State's motion, finding that R.C. 2743.48 does not have an exception for a guilty plea that is later vacated. The court additionally found that Moore's constitutional argument was not properly before the court because it was not pled in his complaint. Rather, it was raised for the first time in his opposition to the State's motion for judgment on the pleadings. Moore then filed a motion for relief from judgment under Civ.R. 60(B), arguing that the trial court declined to address a legitimate constitutional concern because of a pleading technicality, and sought to amend his complaint. The State opposed. The trial court denied Moore's motion, finding that he "did have an opportunity to respond to the State's motion and filed a brief in opposition raising issues that were not addressed in [his] complaint. [Moore] never moved for leave to amend his complaint."

{¶7} Moore now appeals, raising the following two assignments of error for review.

Assignment of Error One

The trial court erred in dismissing Moore's complaint with prejudice without affording Moore an opportunity to amend his complaint, and erred in overruling Moore's motion for relief from judgment. (Trial court ruling dated March 28, 2018 granting motion for judgment on the pleadings; trial court ruling dated April 13, 2018 overruling motion for relief from judgment).

Assignment of Error Two

The trial court erred in not finding that Moore made a prima facie showing that [R.C.] 2743.48(A)(2) is not constitutional. (Trial court ruling dated March 28, 2018 granting motion for judgment on the pleadings.)

{¶8} In the first assignment of error, Moore argues the trial court erred in dismissing his complaint without affording him the opportunity to amend his complaint.

{¶9} Civ.R. 15(A) provides that a

party may amend its pleading once as a matter of course within twenty-eight days after serving it or, if the pleading is one to which a responsive pleading is required within twenty-eight days after service of a responsive pleading or twenty-eight days after service of a motion under Civ.R. 12(B), (E), or (F), whichever is earlier.

The decision of whether to grant a motion for leave to amend a pleading is within the discretion of the trial court. *Turner v. Cent. Local School Dist.*, 85 Ohio St.3d 95, 99, 1999-Ohio-207, 706 N.E.2d 1261, citing *Wilmington Steel Prods., Inc. v. Cleveland Elec. Illum. Co.*, 60 Ohio St.3d 120, 573 N.E.2d 622 (1991). We will not overturn a trial court's ruling on a motion for leave to amend a pleading without first determining that the court abused its discretion. *Id.*

{¶10} Here, Moore did not seek to amend his complaint until after the trial court already granted the State's motion for judgment on the pleadings. Moore did so by filing a Civ.R. 60(B) motion. He argued the trial court declined to address a legitimate constitutional concern because of a pleading technicality and sought to amend his complaint. The trial court denied Moore's motion, finding that he "did have an opportunity to respond to the State's motion and filed a brief in opposition raising issues that were not addressed in [his] complaint. [Moore] never moved for leave to amend his complaint."

{¶11} Moore filed his complaint on January 10, 2018. The State filed its answer and also filed a motion for judgment on the pleadings on February 26, 2018. The trial court granted the State's motion on March 28, 2018. Moore did not seek to amend his complaint until he filed his motion for relief from judgment, on April 10, 2018, which was after the trial court dismissed his case and was more than 28 days after the State filed its responsive pleading. Based on these

circumstances, we cannot say the trial court abused its discretion when it denied Moore's motion for relief from judgment.

{¶12} Having found that the trial court did not abuse its discretion, we next address the State's motion for judgment on the pleadings. Appellate review of the trial court's ruling on a Civ.R. 12(C) motion for judgment on the pleadings is de novo. *Skoda Minotti Co. v. Novak, Pavlik & Deliberato, L.L.P.*, 8th Dist. Cuyahoga No. 101964, 2015-Ohio-2043, ¶ 10, citing *Coleman v. Beachwood*, 8th Dist. Cuyahoga No. 92399, 2009-Ohio-5560, ¶ 15. Civ.R. 12(C) provides that: "[a]fter the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings."

{¶13} The determination of a motion for judgment on the pleadings is restricted solely to the allegations in the pleadings and any writings attached to the pleadings. *Peterson v. Teodosio*, 34 Ohio St.2d 161, 166, 297 N.E.2d 113 (1973). Dismissal is appropriate under Civ.R. 12(C) when, after construing all material allegations in the complaint, along with all reasonable inferences drawn therefrom in favor of the nonmoving party, the court finds that the plaintiff can prove no set of facts in support of its claim that would entitle it to relief. *State ex rel. Midwest Pride IV, Inc. v. Pontious*, 75 Ohio St.3d 565, 570, 1996-Ohio-459, 664 N.E.2d 931.

{¶14} The Ohio Revised Code provides a two-step process where "a person claiming wrongful imprisonment may sue the state for damages incurred due to the alleged wrongful imprisonment." *State ex rel. Jones v. Suster*, 84 Ohio St.3d 70, 72, 1998-Ohio-275, 701 N.E.2d 1002, citing *Walden v. State*, 47 Ohio St.3d 47, 547 N.E.2d 962 (1989). The first action, in the common pleas court, seeks a preliminary factual determination of wrongful imprisonment. *Id.* The second action, in the Court of Claims, provides for damages. *Id.*

{¶15} The claimant must establish the five factors under R.C. 2743.48(A) by a preponderance of the evidence before he or she can be declared a wrongfully imprisoned individual. *Dunbar v. State*, 136 Ohio St.3d 181, 2013-Ohio-2163, 992 N.E.2d 1111, ¶ 11, citing *Doss v. State*, 135 Ohio St.3d 211, 2012-Ohio-5678, 985 N.E.2d 1229. Under R.C. 2743.48(A), a “wrongfully imprisoned individual” is an individual who establishes each of the following requirements:

- (1) The individual was charged with a violation of a section of the Revised Code by an indictment or information, and the violation charged was an aggravated felony or felony.
- (2) The individual was found guilty of, but did not plead guilty to, the particular charge or a lesser-included offense by the court or jury involved, and the offense of which the individual was found guilty was an aggravated felony or felony.
- (3) The individual was sentenced to an indefinite or definite term of imprisonment in a state correctional institution for the offense of which the individual was found guilty.
- (4) The individual’s conviction was vacated, dismissed, or reversed on appeal, the prosecuting attorney in the case cannot or will not seek any further appeal of right or upon leave of court, and no criminal proceeding is pending, can be brought, or will be brought by any prosecuting attorney, city director of law, village solicitor, or other chief legal officer of a municipal corporation against the individual for any act associated with that conviction.
- (5) Subsequent to sentencing and during or subsequent to imprisonment, an error in procedure resulted in the individual’s release, or it was determined by the court of common pleas in the county where the underlying criminal action was initiated that the charged offense, including all lesser-included offenses, either was not committed by the individual or was not committed by any person.

{¶16} In *Dunbar*, the Ohio Supreme Court addressed a situation where a defendant pursued a wrongful imprisonment claim after his guilty plea was vacated on appeal because of errors in the plea advisement. *Dunbar* moved the trial court to declare him a wrongfully imprisoned person under R.C. 2743.48. The court granted *Dunbar*’s motion for summary judgment and declared him a wrongfully imprisoned individual. The State appealed and this

court affirmed the trial court's judgment. The State then appealed to the Ohio Supreme Court.

The issue on appeal to the Ohio Supreme Court was

whether a guilty plea to a felony prevents a claimant from qualifying as a "wrongfully imprisoned individual" for purposes of pursuing damages against the state of Ohio in the Court of Claims when the guilty plea is subsequently vacated on appeal.

Id. at ¶ 1.

{¶17} The Ohio Supreme Court found that it does. *Id.* The *Dunbar* court reasoned that

[u]nder the plain language of R.C. 2743.48(A)(2), a person who has pled guilty to an offense is not eligible to be declared a wrongfully imprisoned individual. We are to presume that all guilty pleas, even those that are later vacated, are included because the statute itself provides no exception for a person whose guilty plea is vacated on appeal and is otherwise able to satisfy the remaining requirements of R.C. 2743.48(A). The General Assembly has created exceptions for individuals whose guilty pleas have been vacated in other instances. For example, R.C. 2961.02(B) bars individuals who plead guilty to certain disqualifying felony offenses from holding public office; but an exception allows them to hold office if the "plea * * * is reversed, expunged, or annulled" or if they receive a full pardon.

R.C. 2961.02(C). No similar exception, however, appears in the wrongful-imprisonment statute. As *Dunbar* basically acknowledges, we would be required to create one. But this is an exception that belongs within the purview of the General Assembly.

Dunbar argues that giving legal effect to a vacated guilty plea in this one context would undermine consistency in our jurisprudence and would be contrary to the intent behind the wrongful-imprisonment statute. Although the vacated guilty plea no longer has any effect in *Dunbar*'s criminal case, the guilty plea nonetheless did occur and was entered on his behalf. The General Assembly created the claim for wrongful imprisonment and placed limitations upon the categories of persons who are eligible for compensation. One limitation is that the claimant cannot have pled guilty to the offense. Unfortunately for *Dunbar*, the General Assembly did not provide an exception for guilty pleas that are later vacated. We therefore hold that one who has been convicted of a felony on a plea of guilty that is subsequently vacated on appeal is not eligible to be declared a wrongfully imprisoned individual in order to pursue damages against the state of Ohio in the Court of Claims.

* * *

Based on the plain language of R.C. 2743.48, a person who pled guilty to an offense is not eligible to be declared a “wrongfully imprisoned individual” for that offense, even if the plea is later vacated on appeal.

Id. at ¶ 19-21.

{¶18} In the instant case, Moore pled guilty to criminal charges that were subsequently vacated after the State realized that the East Cleveland police officers fabricated his charges. Indeed, more than five years after Moore pled guilty, the State moved to vacate his plea, representing to the court that “the County Prosecutor no longer ha[d] confidence in [Moore’s] conviction” because of the illegal activity of the police officers involved in his case. The State sought to vacate these convictions “in the interest of justice.” The State agreed that the vacation of Moore’s convictions was “conducted without prejudice to Moore’s rights to pursue further remedies that may be available by law[.]”

{¶19} Ironically, 14 months later, however, the State sought to have Moore’s wrongful imprisonment claim dismissed, arguing that his guilty plea bars a wrongful imprisonment claim. As in *Dunbar*, in the instant case, R.C. 2743.48 does not provide an exception for these egregious circumstances. While we cannot create one, this is an exception that belongs within the purview of the General Assembly.

{¶20} Unfortunately, the General Assembly has not yet provided an exception for guilty pleas that are later vacated due to police misconduct. The failure to provide legal relief to individuals who were wronged under these circumstances is contrary to the intent behind the wrongful imprisonment statute, especially when

[n]inety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas. The reality is that plea bargains have become so central to the administration of the criminal justice system * * * [b]ecause ours “is for the most part a system of pleas, not a system of trials[.]”

(Citations omitted.) *Missouri v. Frye*, 566 U.S. 134, 143, 132 S.Ct. 1399, 182 L.Ed.2d 379 (2012).

{¶21} However, we cannot ignore the limitations the General Assembly placed on the categories of persons who are eligible for compensation. One limitation is that the claimant cannot have pled guilty to the offense. As a result, we are bound to conclude that Moore is not eligible, at this time, to be declared a “wrongfully imprisoned individual,” and the trial court properly granted the State’s motion for judgment on the pleadings.

{¶22} The first assignment of error is overruled.

{¶23} In the second assignment of error, Moore argues the trial court erred in finding that he did not make a prima facie showing that R.C. 2743.48(A)(2) is unconstitutional. Moore argues that the distinction between persons who go to trial and are convicted and those who accept plea bargains, for the purposes of defining a “wrongfully imprisoned individual,” is facially arbitrary and in violation of his constitutional rights to equal protection and due process.

{¶24} We cannot address the merits of Moore’s arguments, however, because he did not properly challenge the constitutionality of R.C. 2743.48(A)(2) in the trial court. A review of the record reveals that he raised his constitutionality argument for the first time in his opposition to the State’s motion for judgment on the pleadings. The trial court could not decide the constitutionality of the statute and recognized this when it found that Moore’s constitutional argument was not properly before the court. The trial court stated, Moore “is attempting to add an additional argument not even stated directly in his complaint and not properly before this court.”

{¶25} “Issues that could have been raised and resolved in the trial court cannot be raised for the first time on appeal. * * * Therefore, issues not raised in the trial court are forfeited on

appeal.” *Miller v. Romanowski*, 8th Dist. Cuyahoga No. 100120, 2014-Ohio-1517, ¶ 35, citing *Thompson v. Preferred Risk Mut. Ins. Co.*, 32 Ohio St.3d 340, 513 N.E.2d 733 (1987); *Hous. Advocates, Inc. v. Am. Fire & Cas. Co.*, 8th Dist. Cuyahoga Nos. 86444 and 87305, 2006-Ohio-4880; *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, 873 N.E.2d 306. Having failed to properly assert these arguments below, Moore cannot now assert these arguments on appeal.¹

{¶26} Accordingly, the second assignment of error is overruled.

{¶27} Judgment is affirmed.

It is ordered that appellee recover of appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MARY EILEEN KILBANE, ADMINISTRATIVE JUDGE

ANITA LASTER MAYS, J., and
KATHLEEN ANN KEOUGH, J., CONCUR

¹To add insult to grievous injury, the State, in its appellate brief, moved for sanctions against Moore. This motion is denied.

