

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

Duane Hill,	:	
Plaintiff-Appellee,	:	
v.	:	No. 12AP-635 (C.P.C. No. 11CVC-08-10039)
State of Ohio,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

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D E C I S I O N

Rendered on May 14, 2013

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*The Owen Firm, LLC, and Benjamin A. Tracy*, for appellee.

*Michael DeWine*, Attorney General, and *Debra Gorrell Wehrle*, for appellant.

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APPEAL from the Franklin County Court of Common Pleas.

DORRIAN, J.

{¶ 1} Defendant-appellant, State of Ohio (the "state"), appeals from a summary judgment of the Franklin County Court of Common Pleas adjudicating plaintiff-appellee, Duane Hill ("Hill"), to be a wrongfully imprisoned individual as defined in R.C. 2743.48. For the reasons that follow, we find that the trial court correctly interpreted and applied the text of R.C. 2743.48, as amended in 2003. We therefore affirm.

**I. Facts and Case History**

{¶ 2} Hill commenced the current action by filing a complaint naming the state as defendant and seeking an order declaring that he was a wrongfully imprisoned individual. Obtaining such an order is the first step toward recovering compensation for wrongful imprisonment from the state under Ohio's wrongful imprisonment statutes. *See* R.C. 2743.48(B) and (E); *Doss v. State*, \_\_\_\_\_ Ohio St.3d \_\_\_\_\_, 2012-Ohio-5678, ¶ 10.

{¶ 3} The parties filed cross-motions for summary judgment with attached evidentiary materials. The pleadings and evidence established the following: (1) on February 4, 2010, a grand jury of the Richland County Court of Common Pleas indicted Hill and charged him with five drug-related felonies that occurred on December 19, 2009, including drug trafficking and possession of cocaine; (2) Hill filed a motion to suppress evidence of a rock-like substance obtained from his person on December 19, 2009 by an officer of the Mansfield Police Department, asserting that the substance had been obtained through an illegal search and seizure; (3) the trial court denied Hill's motion to suppress; (4) Hill thereafter pled no contest and was convicted of the crimes alleged in the indictment and was sentenced to 18 months in prison; (5) on appeal, the Fifth District Court of Appeals concluded that the trial court erred in not granting Hill's motion to suppress the state's evidence, reversed Hill's conviction, and remanded the criminal case to the trial court for further proceedings;<sup>1</sup> (6) the county prosecutor thereafter filed a motion to dismiss Hill's criminal case based on the appellate court's decision and because "[w]ithout the evidence from the search, the State would be unable to prove the matter beyond a reasonable doubt"; (7) on May 9, 2011, the trial court dismissed the criminal case against Hill "without prejudice," and Hill was released from custody. Based on these undisputed facts, Hill alleged that he had been wrongfully imprisoned for 318 days.

{¶ 4} The Franklin County Court of Common Pleas granted summary judgment to Hill, finding that he had met all of the criteria set forth in R.C. 2743.48(A). That statute provides, as follows:

As used in this section and section 2743.49 of the Revised Code, a "wrongfully imprisoned individual" means an individual who satisfies each of the following:

(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

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<sup>1</sup> The decision of the Fifth District Court of Appeals reversing Hill's conviction is *State v. Hill*, 194 Ohio App.3d 93, 2011-Ohio-2019 (5th Dist.). The facts surrounding Hill's search are recounted in that decision at ¶ 2-4.

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.

{¶ 5} The state timely appealed, asserting the following two assignments of error:

[1.] The trial court committed reversible error by declaring Appellee/Appellee a Wrongfully Imprisoned individual even though he failed to satisfy the statutory criteria.

[2.] The trial court committed reversible error by attempting to utilize the civil Wrongful Imprisonment Statute of R.C. § 2743.48 as a punitive/deterrent mechanism against law enforcement.

## **II. Legal Analysis**

### **A. Standard of Review**

{¶ 6} Summary judgment is appropriate where "the moving party demonstrates that (1) there is no genuine issue of material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made." *Capella III, L.L.C. v. Wilcox*, 190 Ohio App.3d 133, 2010-Ohio-4746, ¶ 16 (10th Dist.), citing *Gilbert v. Summit Cty.*, 104 Ohio St.3d 660, 2004-Ohio-7108, ¶ 6.

{¶ 7} As this court stated in *Brown v. Dept. of Rehab. & Corr.*, 10th Dist. No. 10AP-790, 2011-Ohio-3652, ¶ 16:

[A] party seeking summary judgment bears the burden of informing the trial court of the basis for the motion and identifying portions of the record demonstrating an absence of genuine issues of material fact as to the essential elements of the nonmoving party's claims. *Dresher v. Burt*, 75 Ohio St.3d 280, 293 [1996]. Thereafter, the burden shifts to the non-moving party to show why summary judgment is inappropriate. Civ.R. 56(E). If the non-movant fails to respond, or fails to support its response with evidence of the kind required by Civ.R. 56(C), the court may enter summary judgment in favor of the moving party. *Snyder v. Ford Motor Co.*, 3d Dist. No. 1-05-41, 2005-Ohio-6415, ¶ 11; Civ.R. 56(E).

{¶ 8} Moreover, "appellate review of summary-judgment motions is de novo." *Capella III*, citing *Andersen v. Highland House Co.*, 93 Ohio St.3d 547, 548 (2001). "De novo appellate review means that the court of appeals independently reviews the record and affords no deference to the trial court's decision." (Internal citations omitted.) *Holt v. State*, 10th Dist. No. 10AP-214, 2010-Ohio-6529, ¶ 9.

### **B. History of Ohio's Wrongful Imprisonment Statute, R.C. 2743.48**

{¶ 9} The determinative issue in this case is whether Hill met all five statutory criteria of R.C. 2743.48(A) warranting his adjudication as a wrongfully imprisoned individual. The parties to this appeal disagree as to the proper interpretation of R.C. 2743.48(A) and, in considering their arguments, we find it useful to examine the development of that provision since its initial enactment in 1986.

{¶ 10} Prior to 1986, a person who had been wrongfully imprisoned in Ohio could receive compensation for that wrongful imprisonment only if the General Assembly enacted a law specifically providing for payment of compensation to that named individual, i.e., enactment of "*ad hoc* moral claims legislation." *Walden v. State*, 47 Ohio St.3d 47, 49 (1989). In 1986, however, the General Assembly enacted R.C. 2305.02 and 2743.48 " 'to authorize civil actions against the state, for specified monetary amounts, in the Court of Claims by certain wrongfully imprisoned individuals.' " *Id.*, quoting Sub.H.B. No. 609. In *Walden*, the Supreme Court of Ohio described the new two-step process established by the General Assembly, as follows:

In the first step, the claimant must bring an action in the court of common pleas to secure a determination that he is a wrongfully imprisoned individual entitled to compensation. As relevant here, a "wrongfully imprisoned individual" was defined in former R.C. 2743.48(A) as one who satisfied four criteria:

"(1) He was charged with a violation of a section of the Revised Code by an indictment or information prior to, or on or after, the effective date of this section [September 24, 1986], and the violation charged was an aggravated felony or felony.

"(2) He was found guilty of the particular charge or a lesser-included offense \* \* \* and the offense of which he was found guilty was an aggravated felony or felony.

"(3) He was sentenced to an indefinite or definite term of imprisonment in a state penal or reformatory institution for the offense of which he was found guilty.

"(4) Subsequent to his sentencing and during or subsequent to his imprisonment, it was determined by a court of common pleas that the offense of which he was found guilty, including all lesser-included offenses, either was not committed by him or was not committed by any person."

R.C. 2305.02 grants exclusive jurisdiction to the court of common pleas "to hear and determine an action or proceeding that is commenced by an individual \* \* \* that seeks a determination by the court that the offense of which he was found guilty, including all lesser-included offenses, either was not committed by him or was not committed by any person." Once the claimant secures this determination, R.C. 2743.48(D) provides that he "has and may file a civil action against the state, in the court of claims, to recover a sum of money \* \* \*" in an amount fixed by R.C. 2743.48(E).

*Id.* (Fn. deleted.)

{¶ 11} In December 1988, the General Assembly enacted Am.H.B. No. 623, which, inter alia, added language to subsection (A)(2) of R.C. 2743.48 to establish that only individuals who "did not plead guilty to" the charge of which they had been found guilty could be deemed wrongfully imprisoned individuals. That same 1988 amendment added the criterion now codified as R.C. 2743.48(A)(4), i.e.:

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.

{¶ 12} As a result of the enactment of Am.H.B. No. 623, the four criteria in R.C. 2743.48(A), as quoted by the court in *Walden*, were renumbered, with R.C. 2743.48(A)(4) now being codified as (A)(5) of the statute. But, both before and after the 1988 amendment and until 2003, a wrongful-imprisonment compensation claimant ("WI claimant") was required to prove that he did not commit the offense of which he was found guilty or that no other person committed the offense. *See Ellis v. State*, 64 Ohio St.3d 391, 393 (1992) ("Under both R.C. 2305.02 and former 2743.48(A)(4), now 2743.48(A)(5), in order to secure a declaration of wrongful imprisonment, the petitioner must demonstrate that the 'offense of which he was found guilty, including all lesser-included offenses, either was not committed by him or was not committed by any person.' ") Courts have interpreted this text as requiring proof of "actual innocence." *See, e.g., Doss*, 2012-Ohio-5678, ¶ 12; *Nelson v. Ohio*, 183 Ohio App.3d 83, 2009-Ohio-3231, ¶ 13-14 (10th Dist.).

{¶ 13} In December 2002 and effective April 9, 2003, however, the 124th General Assembly enacted Sub.S.B. No. 149 and changed subsection (A)(5) of R.C. 2743.48 to read, as follows:

[A] "wrongfully imprisoned individual" means an individual who satisfies each of the following:

\* \* \*

(5) Subsequent to sentencing and during or subsequent to his imprisonment, *an error in procedure resulted in the individual's release*, or it was determined by a court of common pleas that the offense of which the individual was found guilty, including all lesser-included offenses, either was not committed by the individual or was not committed by any person.

(Emphasis added to indicate relevant text added by S.B. No. 149.)

{¶ 14} In analyzing the amended text, the Ohio Legislative Service Commission observed that the General Assembly had thereby provided an "alternative to the condition" that a WI claimant either had not committed the offense of which he had been charged or that the offense had not been committed by any other person, i.e., that the WI claimant was, in fact, innocent. Ohio Legislative Service Commission Final Bill Analysis of 2002 Sub.S.B. No. 149, found at <http://lsc.state.oh.us/analyses/fnla124.nsf/All%20Bills%20and%20Resolutions/2558EFFB4897BAAC85256CAA005F47A7> (accessed May 14, 2013).

{¶ 15} As a result of the statutory amendment, a WI claimant could satisfy (A)(5) by proving that "an error in procedure resulted in the individual's release." *Id.*

{¶ 16} This court has previously recognized that the "revised statute thus provides an alternative to the actual-innocence requirement: the person seeking wrongful-imprisonment status need establish only that an error in procedure resulted in his or her release." *Nelson*, 2009-Ohio-3231, ¶ 14. Similarly, the Fifth District Court of Appeals has acknowledged that "[R.C. 2743.48(A)(5)] was amended, effective April 9, 2003, to allow a person \* \* \* who could not establish his or her actual innocence, but who could establish that an error in procedure resulted in his or her release to file a complaint against the state of Ohio seeking a declaration that he or she had been wrongfully imprisoned." *Nelson v. State*, 5th Dist. No. 2006 AP 0061, 2007-Ohio-6274, ¶ 30 (holding that a WI claimant had satisfied R.C. 2743.48(A)(5) where the claimant's conviction had been reversed because it was obtained in violation of the speedy-trial statutes, R.C. 2945.71 et seq., a procedural error of the trial court).

{¶ 17} More recently, the Supreme Court of Ohio acknowledged that R.C. 2743.48(A)(5) may be fulfilled in either of two ways: a WI claimant may prove either that "(1) subsequent to sentencing and during or subsequent to imprisonment, 'an error in procedure resulted in the individual's release' or (2) the charged offense (and any lesser included offense) was not committed by the individual or no crime was committed at all (actual innocence.) R.C. 2743.48(A)(5)." *Doss* at ¶ 12. *See also Griffith v. Cleveland*, 128 Ohio St.3d 35, 2010-Ohio-4905, ¶ 21 (noting that "[e]ven though [Sub.S.B. No. 149] expanded the criteria by which a claimant could establish that he or she is a

*wrongfully imprisoned individual*, nothing in the act indicates a change to the established two-step process." (Emphasis added.).

{¶ 18} Accordingly, pursuant to the express text of subsection (A)(5) of R.C. 2743.48 as in effect at all times relevant to Hill's wrongful-imprisonment compensation case, Hill was required to prove *either* that "an error in procedure resulted in [his] release" from prison, *or* that he had "not committed the charged offense," *or* that the "charged offense was not committed by any other person."

{¶ 19} Accordingly, if Hill satisfied the "error in procedure" alternative provided to WI claimants in 2003, he was not required to prove his actual innocence as a requisite to adjudication as a wrongfully imprisoned individual.

### **C. Analysis of State's First Assignment of Error**

{¶ 20} In its first assignment of error, the state posits that the trial court erred in declaring Hill a wrongfully imprisoned individual because Hill failed to satisfy the statutory criteria of R.C. 2743.48(A). The state does not contest that Hill satisfied the criteria established in R.C. 2743.48(A)(1) and (3). Having reviewed the record, we find that Hill did establish those two criteria, as he demonstrated both that he was charged through indictment with felonies and also that he was sentenced to a definite term of imprisonment in a state correctional institution based on having been found guilty of those felonies. The state argues, however, that Hill failed to satisfy the criteria established in subsections (A)(2), (4), and (5) of the statute. We discuss each of those subsections separately.

#### **R.C. 2743.48(A)(2) – Absence of Guilty Plea**

{¶ 21} The state first argues that Hill did not satisfy R.C. 2743.48(A)(2). That provision requires that a claimant seeking adjudication as a wrongfully imprisoned individual prove that he "did not plead guilty" to the felony or felonies with which he was charged. The state acknowledges that Hill pled "no contest" but notes that Hill acknowledged in his plea hearing that he understood that a no-contest plea acts as an admission of the facts alleged against him by the state. The state contends that Hill's acknowledgment of the facts as alleged in the indictment satisfies subsection (A)(2), particularly as the trial court advised Hill that, if he pled no contest, he would be found guilty and sentenced without a trial.

{¶ 22} We easily dispose of this argument. It is well-established that a "plea of no contest is *not an admission of defendant's guilt*, but is an admission of the truth of the facts alleged in the indictment, information, or complaint, and the plea or admission shall not be used against the defendant in any subsequent civil or criminal proceeding." (Emphasis added.) Crim.R. 11(B)(2); *accord Columbus v. Good*, 10th Dist. No. 91AP-175 (Aug. 22, 1991) ("In entering a plea of no contest, a defendant does not admit guilt for the offense but, rather, admits the truth of the facts alleged in the indictment or complaint."). As the trial court in this case correctly observed, the plain language of Crim.R. 11 is clear: a plea of no contest does not equate to a guilty plea. The General Assembly could easily have provided that claimants who had entered no-contest pleas as well as guilty pleas would be barred from wrongful-imprisonment compensation. It did not.

{¶ 23} We therefore reject, as did the trial court, the state's argument that Hill had failed to prove the criterion of R.C. 2743.48(A)(2) that he had not pled guilty to the criminal charges against him.

**R.C. 2743.48(A)(4) – Potential Further Criminal Proceedings for Acts Associated with the Reversed Conviction**

{¶ 24} The state next argues that Hill did not satisfy R.C. 2743.48(A)(4), which provides that a WI claimant whose conviction was reversed on appeal must also prove that "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." The state again emphasizes that Hill admitted the facts charged against him relative to his possession of drugs on December 19, 2009 and argues that Ohio courts have repeatedly found that the policy underlying the wrongful-imprisonment statute precludes the compensation of people who are not innocent.

{¶ 25} We note initially that, to the extent a WI claimant must establish actual innocence of the crime of which he was convicted, that requirement is not based on subsection (A)(4) of R.C. 2743.48 but, rather, on subsection (5), which references proof that the underlying crime either "was not committed by the individual or was not committed by any person." The state nevertheless argues that Hill's acknowledgment of the facts contained in the indictment, through his plea of no contest (entered after the trial

court erroneously denied his motion to suppress), is nevertheless relevant to the criterion stated in R.C. 2743.48(A)(4), i.e., that no criminal proceeding is pending, can be brought, or will be brought, against him for any act associated with that conviction. In support, the state cites to the decision of the Supreme Court of Ohio in *Gover v. State*, 67 Ohio St.3d 93 (1993), and its progeny.

{¶ 26} In *Gover*, the Supreme Court specifically interpreted subsection (4) of R.C. 2743.48, as in effect in 1993. *Gover*, the WI claimant, had been charged and convicted of the crime of safecracking based on his conduct on September 13, 1988. On that date, *Gover* was arrested after a police officer observed him emptying his pockets of coins, costume jewelry, and other items that had earlier been part of a restaurant display that apparently resembled, but was not, a safe. *See State v. Gover*, 67 Ohio App.3d 384 (1st. Dist.1990). The restaurant's general manager had previously observed *Gover* in the restaurant moving in a crouched position and exiting the restaurant with bulging pockets. On appeal, the court of appeals reversed the conviction as the state could not prove the existence of an actual safe or vault. Accordingly, the state had not proven all elements of the crime of safecracking of which *Gover* had been convicted, and the court of appeals reversed that conviction.

{¶ 27} *Gover* subsequently filed an action seeking adjudication as a wrongfully imprisoned individual. The Supreme Court acknowledged that *Gover* had not committed the offense of safecracking with respect to his conduct on September 13, 1988, but opined that *Gover* "was nevertheless committing other criminal offenses," *Gover v. State* at 96, and suggested that the prosecutor might have charged him with burglary, rather than safecracking. The Supreme Court remanded the wrongful-imprisonment case to the civil trial court for it to determine whether *Gover* had committed offenses other than safecracking on the date of the alleged criminal conduct.<sup>2</sup> In an opinion written by Justice

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<sup>2</sup> There is a discrepancy within the Supreme Court's *Gover v. State* opinion as to the relevant dates of the offense alleged of *Gover*. In the final paragraph of its opinion, the court instructed the trial court to consider "whether [*Gover*] committed other offenses on September 18, 1988." *Id.* at 96. In two other places in the opinion, however, the Supreme Court states that the incident underlying *Gover*'s conviction occurred on September 13, 1988. Moreover, the decision of the First District Court of Appeals states that the date of the incident was September 13, 1988. *State v. Gover*, 67 Ohio App.3d 384 (1st Dist.1990). The date September 18 does not otherwise appear in either the decision of the court of appeals or the Supreme Court. We therefore assume that the reference to September 18 in the final paragraph of the Supreme Court's opinion was erroneous, and that the court's instruction to the trial court was for it to consider on remand

Pfeifer, the Supreme Court explained that subsection (4) is "intended to filter out those claimants [for compensation] who have had their convictions reversed, but were committing a different offense at the time that they were engaging in the activity for which they were initially charged." *Id.* at 95. Similarly, consistent with the statute as then in effect, the court concluded that "[w]hen the General Assembly enacted Ohio's wrongful imprisonment legislation, it 'intended that the court of common pleas actively separate those who were wrongfully imprisoned from those who have *merely avoided criminal liability.*' " (Emphasis added.) *Id.*, citing *Walden* at 47 Ohio St.3d 52. These observations were made in 1993, prior to the 2003 amendment to R.C. 2743.48(A)(5) and at a time when a WI claimant was required to prove actual innocence.

{¶ 28} In the case before us, the state argues that Hill, by pleading no contest, admitted that he was in possession of crack cocaine and that he therefore "merely avoided criminal liability" based on application of the exclusionary rule. The state relies on the Supreme Court's statements in *Gover* and Hill's plea of no contest after the trial court denied his motion to suppress. It argues that Hill may not be deemed to be a wrongfully imprisoned individual because his lack of actual innocence on December 19, 2009 precludes a finding that Hill satisfied subsection (A)(4) of R.C. 2743.48.

{¶ 29} In making this argument, the state seeks to graft the innocence component of subsection (5) of R.C. 2743.48(A) into subsection (4) based on *Gover*'s description of the overarching purpose of the wrongful-imprisonment statute as in effect in 1993. But, as discussed earlier in this decision, and as recognized by the Supreme Court of Ohio in *Doss*, the General Assembly in enacting Sub.S.B.No. 149 in 2002 effected a substantive change to the statutory wrongful-imprisonment compensation scheme. It "expanded the criteria by which a claimant could establish that he or she is a wrongfully imprisoned individual." *Griffith*, 2010-Ohio-4905, ¶ 21. After that statutory change, a released prisoner may establish his status as a wrongfully imprisoned individual without proving his innocence if he can instead establish that he was released as the result of an error in procedure. *See Griffith* at ¶ 29 (describing the addition of the "error in procedure" provision of R.C.

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whether *Gover*, on September 13, 1988, rather than September 18, 1988, committed any criminal offense other than safecracking.

2743.48(A)(5) as establishing an "alternative" to the determination whether the claimant "committed the offense").

{¶ 30} In determining whether Hill established the R.C. 2743.48(A)(4) criterion, we must apply the current text of that provision, rather than decide the case based on observations made in *Gover* concerning the pre-2003 version of the statute. That is, we must determine whether Hill proved by a preponderance of the evidence<sup>3</sup> that "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" and not whether Hill's release from prison represented merely the avoidance of criminal liability. In short, comments in *Gover* based on the text of a prior version of R.C. 2743.48(A) simply cannot prevail over contradictory text in the current version of the statute.

{¶ 31} Hill provided evidence that the Richland County prosecutor formally represented to the court in its motion to dismiss the criminal case against him that "without the evidence from the search [i.e., the crack cocaine], the State would be unable to prove the matter beyond a reasonable doubt." This acknowledgement appears, on its face, to satisfy the statutory criterion of subsection (A)(4) that "no criminal proceeding \* \* \* can [or will] be brought" by the former prosecutor against Hill for "any act associated with that conviction."

{¶ 32} The state posits two theories, however, as to why we should find that Hill failed to meet the criterion in subsection (A)(4). It first contends that Hill admitted through his no-contest plea that he had cocaine on his person on December 19, 2009 and observes that the criminal case was dismissed "without prejudice." The state thus suggests a possibility that a county or city prosecutor might yet re-file charges against Hill based on his conduct on that date. Secondly, the state observes that Hill tested positive for marijuana at the time of his sentencing hearing in May 2010, suggesting that Hill might be prosecuted for offenses involving marijuana possession or use at that later time. It contends that Hill's marijuana use approximately five months after the December 19, 2009

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<sup>3</sup> The Supreme Court of Ohio has established that "[i]n a proceeding under R.C. 2305.02, the claimant bears the burden of proving his innocence by a preponderance of the evidence." *Walden* at paragraph three of the syllabus.

incident is an "act associated with" his reversed conviction and, therefore, within the scope of R.C. 2743.48(A)(4).

{¶ 33} In considering the first of the state's two contentions, we must determine whether Hill proved that no other prosecutor can, or will, bring a criminal proceeding against him based on his having crack cocaine on his person on December 19, 2009. As noted above, Hill did prove that the Richland County prosecutor who had initially prosecuted him did not intend to retry him. But, arguably, Hill did not prove that no other legal officer, such as a municipal law director, would not prosecute him for his December 19, 2009 acts.

{¶ 34} It is true that a technical reading of R.C. 2743.48(A)(4) would require a WI claimant to establish that no further criminal proceedings can, or will, be brought by a county or city prosecutor, even if that hypothetical future criminal prosecution would necessarily be unsuccessful. But it would defeat the purpose of R.C. 2743.48(A) to interpret the statute in that way. No wrongful- imprisonment claimant could ever satisfy the criterion if the provision imposes a requirement on a WI claimant to prove that no city or county prosecutor will thereafter file new charges based on the same facts as involved in the reversed conviction. This is because it is not possible to prove that a future event will not happen. A claimant can establish, however, that successful prosecution of new charges, if filed, would necessarily be legally precluded.

{¶ 35} We conclude, on this de novo review, that Hill did establish that no other prosecutor "can or will" prosecute Hill based on offenses involving his possession of crack cocaine on December 19, 2009. We base that conclusion on the same circumstance identified by the Richland County prosecutor in seeking dismissal of the indictment—because it was suppressed by the court of appeals no prosecutor could introduce evidence identifying the substance as cocaine that Hill had on his person when arrested and, without that evidence, no prosecutor could successfully prove that Hill committed drug offenses. No allegations were made that appellant violated laws other than the drug-related offenses and, reading the facts of the case as available to us, we do not discern, nor has the state suggested, that Hill might yet be charged with committing criminal offenses other than drug-related offenses on December 19, 2009. The facts in Hill's case are thus distinguishable from the facts in *Gover*.

{¶ 36} The state's second proffered basis for finding that Hill failed to meet the criterion in R.C. 2743.48 is its suggestion that Hill's admitted use of marijuana in 2010 was an "act associated with his reversed conviction," as that phrase is used in subsection (A)(4).

{¶ 37} In interpreting R.C. 2743.48(A)(4), the Supreme Court observed in *Gover* that "[c]laimants seeking compensation for wrongful imprisonment must prove that *at the time of the incident for which they were initially charged*, they were not engaging in any other criminal conduct arising out of the incident for which they were initially charged." (Emphasis added.) *Gover v. State* at 93. The court did not suggest in any way that conduct divorced in time from the events underlying the safecracking charge could be considered an act associated with the safecracking charge. Accordingly, nothing in *Gover* supports the state's contention that a WI claimant's alleged criminal conduct on subsequent dates constituted other acts "associated with" the reversed conviction, even if those subsequent acts were of a similar nature to that involved in the reversed conviction. The statute simply does not include text precluding payment of wrongful-imprisonment compensation to someone who may have engaged in separate criminal conduct at a time after his original alleged crime but prior to his conviction of the earlier alleged crime.

{¶ 38} We therefore reject the state's argument that the fact that Hill tested positive for marijuana in May 2010, shortly before he was sentenced and approximately five months after his arrest, precludes a finding that Hill satisfied R.C. 2743.48(A)(4). Assuming, arguendo, that a prosecution against Hill based on his positive marijuana drug test might yet occur, that prosecution would not be based on acts "associated with" the alleged criminal offense that occurred on December 19, 2009.

{¶ 39} Accordingly, we reject the state's argument that Hill failed to satisfy the criterion in R.C. 2743.48(A)(4), because he tested positive for marijuana in May 2010.

**R.C. 2743.48(A)(5) – Release as the Result of an "Error in Procedure"**

{¶ 40} The General Assembly amended subsection (A)(5) of R.C. 2743.48 in 2003 to provide that a wrongful-imprisonment claimant must prove either that "an error in procedure resulted in the individual's release, or it was determined \* \* \* that the charged offense, including all lesser-included offenses, either was not committed by the individual or was not committed by any person." As discussed earlier, and consistent with the

amended statutory text, "[t]he revised statute thus provides an alternative to the actual-innocence requirement: the person seeking wrongful-imprisonment status need establish only that an error in procedure resulted in his or her release." *Nelson*, 2009-Ohio-3231, ¶ 14.

{¶ 41} In this case, therefore, we must more specifically address and interpret the term "error in procedure" as used in R.C. 2743.48(A)(5). The state argues that the General Assembly intended to include only *structural* error within the scope of the provision. It defines structural error for this purpose as meaning only procedural error that prompts an appellate court to order an immediate release from prison, rather than ordering reversal and remand for further proceedings. It contends that the General Assembly did not intend that subsection (A)(5) would be established every time an appellate court reverses a conviction on evidentiary grounds and remands the case for further proceedings.

{¶ 42} We agree with the state that the General Assembly did not intend that every reversal and remand of a criminal conviction based on evidentiary error satisfy subsection (A)(5) of R.C. 2743.48. But we reach that conclusion based on the text of the statute itself. An individual relying on the procedural-error prong of R.C. 2743.48(A)(5) must establish more than that his or her conviction was reversed and the case remanded. This is due, however, not to the "error in procedure" language of the statute but, rather, due to the language that modifies that phrase—only errors in procedure that *resulted in the individual's release* satisfy subsection (A)(5).

{¶ 43} In this case, Hill did not establish the (A)(5) criterion simply by demonstrating that his conviction was reversed and remanded. Hill's case was not one where remand could have produced a successful prosecution on retrial despite evidentiary error in the first trial. Rather, he established that his conviction was reversed and remanded based on the appellate court's discernment of procedural error that effectively precluded successful prosecution of the charged offenses on remand. Indeed, the prosecutor expressly observed on remand that the state could not successfully retry Hill since it could not introduce evidence of the cocaine found on Hill's person as the result of what the court of appeals had found to be an unconstitutional search and seizure. Thus, there was a direct causal relationship between the procedural error of the police in

obtaining the critical evidence against Hill and the ultimate dismissal of the criminal charges against him.

{¶ 44} Our analysis is consistent with that of the trial court in this case, which observed that, only in cases where the procedural error "vitiates the basis for all criminal liability," would an error in procedure result in the individual's release. (July 18, 2012 Decision, at 13.) In addressing the issue of the meaning of the phrase "error in procedure," the trial court used the definitions of "procedure" found in *Black's Law Dictionary* (9th Ed.2009), that is, "a specific method or course of action" or "the judicial rule or manner for carrying on a civil lawsuit or criminal prosecution." (July 18, 2012 Decision, at 13, citing *Black's Law Dictionary* (9th Ed.2009), at 1323.) It also referenced Black's definition of "criminal procedure" as "[t]he rules governing the mechanisms under which crimes are investigated, prosecuted, adjudicated and punished. *It includes the protection of accused persons' constitutional rights.*" (Emphasis added.) *Black's Law Dictionary*, at 431. The trial court concluded that the procedural error in Hill's case was not a mere technical violation. Rather, "the procedural errors made in [Hill's] case rest upon a complete disregard for one's personal rights guaranteed by the Bill of Rights in the United States Constitution and Ohio Constitution." (July 18, 2012 Decision, at 15.) The trial court in this case found that both the police officer and the trial court in the criminal case had thus committed procedural errors, observing that the court of appeals "reversed [Hill's] conviction due to the errors in procedure made by Officer Kaufman and the trial court's factual analysis when ruling on the motion to suppress." (July 18, 2012 Decision, at 16.)

{¶ 45} We acknowledge that the text of the statute provides no express direction as to whether the General Assembly meant to include errors in procedure committed by law enforcement officers prior to the criminal prosecution itself, as opposed to procedural errors by an officer of the court, such as a prosecutor or trial judge. In the final analysis, however, we are constrained to look to the text of the statute itself. In 2003 when the General Assembly amended the statute, it could have expressly included modifiers limiting the term "procedural error." But it did not limit "procedural error" to include only structural error or to exclude procedural errors committed prior to the litigation of the

criminal case.<sup>4</sup> *Accord Walden* at 47 Ohio St.3d 49 (where, in interpreting the wrongful-imprisonment statute, the court observed that "[t]he General Assembly, had it wanted to do so, knew how to specify a 'clear and convincing' standard, but did not," and therefore refused to find that the statute requires clear and convincing proof). Similarly, we lack the authority to rewrite the statute to limit the term "procedural error" to only structural error.

{¶ 46} Rather, courts construing the Revised Code are required to interpret words in statutes according to rules of grammar and common usage unless they have a particular or technical meaning. *Id.* at 49. Accordingly, we interpret the phrase "procedural error" according to its common usage. In the absence of contradictory legislative clarification or limitation of the term "procedural error," we find that the procedural error committed here that ultimately resulted in the Hill's release from prison falls within the scope of R.C. 2743.48(A)(5). It is not relevant whether that release occurs by direct and immediate order of an appellate court or by order of a trial court after reversal and remand by an appellate court.

{¶ 47} Our holding is consistent with precedent established by the Eighth District Court of Appeals in *Mansaray v. State*, 8th Dist. No. 98171, 2012-Ohio-3376.<sup>5</sup> In that case, as in the case before us, an individual had been convicted of drug offenses based on evidence obtained by police in violation of the Fourth Amendment. The court held that "the trial court's denial of Mansaray's motion to suppress, which was subsequently found

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<sup>4</sup> Although not relied upon by the state, we note that the initial phrase of R.C. 2743.48(A)(5) provides that "[s]ubsequent to sentencing and during or subsequent to imprisonment" (emphasis added), an error in procedure resulted in the prisoner's release or a trial court determined that the claimant was actually innocent. The text emphasized above existed in the statute prior to the 2003 amendment, and we do not believe that this modifying language relates to the timing of the commission of errors of procedure. We are unaware of any procedural error that could conceivably result in a convict's release from prison if the error occurred after conviction and sentencing. To read the phrase as including only post-sentencing procedural errors would render the amendment meaningless. *Accord Mansaray v. State*, 8th Dist. No. 98171, 2012-Ohio-3376, at ¶ 15.

Rather, we believe that the "subsequent to sentencing" phrase modifies the timing of the convict's release, i.e., it mandates that the individual be released from prison subsequent to sentencing, based on an error of procedure that occurred before sentencing.

We further note that the Legislative Service Commission in its Final Bill Analysis of Sub.S.B. No. 149, described the bill as including a new provision that "an error in procedure resulted in the individual's release as an alternative to the condition that subsequent to sentencing and during or subsequent to imprisonment it was determined by the court of common pleas that the offense of which the individual was found guilty was not committed by the individual or by any other person."

<sup>5</sup> On January 23, 2013, the Supreme Court of Ohio accepted the state's appeal of the Eighth District's decision in *Mansaray*. That appeal is currently pending as case No. 2012-1727. See [http://www.sconet.state.oh.us/pdf\\_viewer/pdf\\_viewer.aspx?pdf=194148.pdf](http://www.sconet.state.oh.us/pdf_viewer/pdf_viewer.aspx?pdf=194148.pdf) (accessed May 14, 2013).

to be improper, constitutes an error in procedure under R.C. 2743.48(A)(5)." *Id.* at ¶ 17. It observed that R.C. 1.47(B) provides that "[i]n enacting a statute, it is presumed that \* \* \* [t]he entire statute is intended to be effective" and that R.C. 1.42 provides that "[w]ords and phrases shall be read in context and construed according to the rules of grammar and common usage." *Id.* at ¶ 14. Mansaray's wrongful imprisonment complaint thus stated a claim that he should be adjudicated a wrongfully imprisoned individual.

{¶ 48} Similarly, we have recognized that a prosecutor's violation of *Brady v. Maryland*, 373 U.S. 83 (1963), in failing to disclose possibly exculpatory evidence to the defendant, constituted an error in procedure for purposes of R.C. 2743.48(A)(5). *Larkins v. State*, 10th Dist. No. 09AP-140, 2009-Ohio-3242, ¶ 10.

{¶ 49} We acknowledge the counterintuitive nature of our holding. We are not unsympathetic to the policy arguments presented by the state. Certainly, a case for paying wrongful-imprisonment compensation is more compelling where the claimant can prove his or her factual innocence. Moreover, both courts and legal commentators have identified as the traditional purpose of wrongful-imprisonment statutes the facilitation of financial compensation to those who are factually innocent. *See* 53 A.L.R. 6th 305 (2010), *Construction and Application of State Statutes Providing Compensation for Wrongful Conviction and Incarceration* (observing that "[a]t a minimum most statutes require some proof of innocence in addition to compliance with statutory rules and restrictions"); *see also* Mostaghel, *Wrongfully Incarcerated, Randomly Compensated—How to Fund Wrongful-Conviction Compensation Statutes*, 44 Ind.L.Rev. 503, 521 (2011) ("One consistent aspect of compensation statutes is that innocence will not be considered established if reversal occurred merely because of procedural or jurisdictional errors," citing *Walden*); Faridi, Hoffman, and Montuora, *Undoing Time: A Proposal for Compensation for Wrongful Imprisonment of Innocent Individuals*, 34 W.New Eng.L.Rev. 1, 23 (2012) ("compensation is not for individuals who are unable to prove their innocence in fact"); Mckneelen, *"Oh Lord Won't You Buy Me a Mercedes Benz?": A Comparison of State Wrongful Conviction Compensation Statutes*, St.Mary'sL.Rev. & Soc. Just 185, 192, 195-97 (2013) (observing that 27 states and the District of Columbia have enacted wrongful-compensation statutes and that many states specify additional eligibility requirements other than being innocent). But compare Kahn, *Presumed Guilty Until*

*Proven Innocent: The Burden of Proof in Wrongful Conviction Claims under State Compensation Statutes*, 44 U.Mich.J.L.Reform 123, 138 (2010).

{¶ 50} One legal commentator has, however, rejected the suggestion that "convictions rendered wrongful by errors unrelated to innocence are less important, or that they can or should be discounted as based on 'technicalities' [as] [s]uch errors and violations of rights are tremendously significant and legitimate for different reasons." Findley, *Defining Innocence*, 74 AlbanyL.Rev. 1157, 1185 (2010-11). Had the trial court correctly ruled on Hill's motion to suppress, Hill undoubtedly would not have changed his not-guilty plea to one of no contest and would never have been found guilty of the drug crimes of which he was accused. Hill was, therefore, in a generic sense, wrongfully imprisoned. His incarceration was the result of procedural error of either the arresting law enforcement officer, the trial court, or both. Ultimately, his release occurred as a direct result of judicial recognition of that procedural error.

{¶ 51} It is not our role, however, to weigh competing policy considerations. Nor may we decide this case based on what we think the General Assembly meant to do, despite contradictory statutory text, or should do. Rather, we are required to construe and interpret the law as it is written. In doing so, we find that the General Assembly in 2002 changed Ohio's statutory framework to establish as Ohio's policy that wrongful-imprisonment compensation is warranted where an individual's release from prison results from the recognition of reversible procedural error that precludes further successful prosecution, regardless of guilt or innocence. We can discern no other purpose of the General Assembly in enacting the 2002 amendment to the wrongful-imprisonment statute than to allow individuals in Hill's posture to be recognized as falling within the classification of "wrongfully imprisoned individual."

{¶ 52} We therefore overrule the state's first assignment of error.

#### **D. Analysis of State's Second Assignment of Error**

{¶ 53} In its second assignment of error, the state contends that "[t]he trial court committed reversible error by attempting to utilize the civil Wrongful Imprisonment Statute of R.C. § 2743.48 as a punitive/deterrent mechanism against law enforcement." It takes issue with the following concluding comments of the trial court in its written decision:

Plaintiff's case is one where a reversal by a Court of Appeals removes the entire basis for alleging criminal liability. Even if the Court's decision today minimally expands the pool of individuals who could be declared a "wrongfully imprisoned individual," to hold otherwise has the potential of legitimizing illegal and unconstitutional conduct. The procedural safeguards for the Fourth Amendment exist to ensure that one's right to privacy is protected and that citizens are free from unreasonable intrusion by the police. The wrongful imprisonment statute exists, not only to compensate individuals who are innocent, but also to ensure that constitutional protections are not mere words. It serves as an incentive for police and courts alike to safeguard an individual's rights."

(July 18, 2012 Decision and Entry, at 18.)

{¶ 54} The state argues that there is no evidence or other reason to believe that the General Assembly enacted the wrongful-imprisonment compensation statutes in order to deter improper police conduct. But assuming, arguendo, that the state is correct that the General Assembly did not expressly have as a purpose for amending the statute the deterrence of improper police conduct, "reviewing courts are not authorized to reverse a correct judgment on the basis that some or all of the lower court's reasons are erroneous." *Ritchie v. Ohio Adult Parole Auth.*, 10th Dist. No. 05AP-1019, 2006-Ohio-1210, ¶ 24, citing *State ex rel. McGrath v. Ohio Adult Parole Auth.*, 100 Ohio St.3d 72, 2003-Ohio-5062, ¶ 8. The trial court's inclusion of the commentary quoted above does not, therefore, constitute reversible error.

{¶ 55} Rather, we have considered de novo whether Hill satisfied the five statutory criteria set forth in R.C. 2743.48(A), thereby warranting his adjudication on summary judgment as a wrongfully imprisoned individual. We have found, as did the trial court, that Hill did satisfy those criteria. The portion of the trial court's decision of which the state complains, whether reasonable or not, has not affected our de novo review of the trial court's grant of summary judgment to Hill.

{¶ 56} Accordingly, we overrule the state's second assignment of error.

### **III. Disposition**

{¶ 57} There is no genuine issue of material fact, reasonable minds can only find that Hill met the criteria of R.C. 2743.48(A), and Hill is therefore entitled as a matter of

law to summary judgment adjudicating him a wrongfully imprisoned individual. Having overruled both of the state's assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

*Judgment affirmed.*

KLATT, P.J., and SADLER, J., concur.

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