

IN THE SUPREME COURT OF OHIO

BYRON E. YAMBRISAK,	:	
	:	Case No. 2017-1401
Appellant,	:	
	:	
v.	:	
	:	
STATE OF OHIO,	:	
	:	
Appellee.	:	

APPELLEE STATE OF OHIO'S
MEMORANDUM IN OPPOSITION OF JURISDICTION

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STATEMENT OF THE CASE

Leave to appeal should not be granted in this case. The focal point of Appellant Byron Yambrisak's (hereinafter, Appellant) argument regarding jurisdiction is, in reality, a disguised request for a factual determination. Indeed, the true crux of Appellant's argument is that the Fifth District Court of Appeals failed to make a factual determination regarding Appellant's motivation in a potential charge for Ethnic Intimidation under R.C. 2927.12. Regardless of the factual determinations made or not made by the Fifth District Court of Appeals, Appellant is unable to establish the necessary requirements for jurisdiction in this Court. Three conditions must be met in order to certify a conflict to this Court. First, the certifying court must find that its judgment is in conflict with the judgment of a court of appeals of another district and the asserted conflict must be on the same question. Next, the conflict must concern a rule of law and not the particular facts of a given case. Finally, the journal entry or opinion of the certifying court must clearly set forth the rule of law which the certifying court contends is in conflict with the judgment on the same question by other district courts of appeals. Appellant cannot establish any of conditions to properly satisfy the jurisdictional requirement for this Court.

This case does not raise an important issue of law. Appellant is simply seeking to question the factual findings made by the trial court when it refused to declare him a wrongfully imprisoned individual. Each argument presented by Appellant focuses on factual findings he would like overturned. To establish jurisdiction, Appellant must display that there is some important issue of law, and he has failed to do so here.

Furthermore, Appellant's statute of limitations argument must fail because the statute of limitations for Ethnic Intimidation did not lapse until July 15, 2017. The relevant conduct occurred on July 15, 2011, and carried a six-year (6) statute of limitations. The initial suit for

wrongful imprisonment was filed with the Richland County Court of Clerk on May 26, 2015. At the inception of the original suit, the statute of limitations for a potential charge had not lapsed. Importantly, this means that at the inception of Appellant's original claim, a charge for Ethnic Intimidation was plausible. Additionally, Appellant filed his appeal with the Fifth District Court of Appeals on January 20, 2017, and subsequently filed his appellate brief on March 20, 2017. At the initiation of the appeal, the statute of limitations had not yet lapsed because it did not lapse until July 15, 2017. While the decision of the Fifth District arrived after the statute of limitations, on August 21, 2017, the argument is still without merit. At this point, a charge for Ethnic Intimidation may no longer be brought, but it may have been brought at the inception of the initial wrongful imprisonment claim and the Fifth District appellate case.

The language of R.C. 2743.48(A)(4) includes two separate requirements. First, the conviction must have been vacated, dismissed, or reversed on appeal. This is an undisputed point in the litigation as the Fifth District vacated and reversed the decision of the trial court. Second, no criminal proceeding is pending, can be brought, or will be brought against the individual for any act associated with that conviction. Until July 15, 2017, a plausible charge for Ethnic Intimidation may have been brought based on the acts associated with Appellant's conviction. The likelihood of success on such a charge is irrelevant because the language does not contemplate success but rather the potential for such a charge.

Concerning plausibility, this Court, in *Bundy*, held that a claimant must show that he did not commit the acts that formed the basis of his criminal charge. The fact that the Fifth District, in the criminal appeal, reversed and ordered an acquittal for Appellant, does not satisfy the "actual innocence" requirement under R.C. 2743.48(A)(5). Here, Appellant admits to the

conduct that formed the basis of his criminal conviction. With such an admission, Appellant cannot make a showing of actual innocence.

Finally, neither the United States Constitution, nor the Ohio Constitution, prevents prosecution based on the language used by Appellant. This Court, following precedent in the United States Supreme Court, previously determined that an Ethnic Intimidation statute is constitutional so long as it includes a motive or intent component. While a successful charge requires a factual finding, such a finding is not necessary in this case because the wrongful imprisonment statute only contemplates the plausibility of a potential charge. Appellant unsuccessfully asked the lower courts in this matter to play the role of a criminal jury, and failed. Now, he requests this Court to do the same thing. However, a factual finding is not necessary to determine whether or not a charge for ethnic intimidation could have been brought against Appellant at the outset of his wrongful imprisonment suit.

STATEMENT OF FACTS

The Fifth District Court of Appeal's Findings of Facts, as accepted by the trial court, set forth the following factual background of the criminal case:

In the late morning of July 15, 2011, Detective Pat Smith of the Richland County Sheriff's Department was called to MedCentral Hospital to investigate a child victim of rape. Detective Smith was in plain clothes and driving an unmarked vehicle; however she did have her service revolver holstered on her right hip. She left the hospital a few minutes before 1:00 p.m. Detective Smith testified that she had parked her unmarked vehicle in the parking lot located on Glessner Avenue, across from the hospital. As she prepared to cross the street at the pedestrian crosswalk, a small green vehicle sped through the crosswalk.

Detective Smith crossed at the crosswalk towards the parking lot. As she approached her vehicle, Detective Smith was hailed by an old acquaintance, Vernessa Bond, who happened to be parked near Detective Smith's vehicle. The two engaged in a casual conversation. While the two conversed, the little green vehicle drove by again. The male passenger began yelling racial slurs towards Detective Smith and Ms. Bond, both of whom are African-American. The verbal

tirade included phrases such as “I hate you, you fucking nigger. You black bitch, I’m going to fuck you up.”

The vehicle proceeded on towards Glessner Avenue as the two women continued their conversation. The vehicle returned and stopped on Lind Avenue, close to where the women were parked. The occupant began yelling racial slurs again this time including, “Do you like talking to young girls about sex? Do you like talking to prostitutes about sex? I hate you, you fucking nigger, I’m going to fuck you up.” Detective Smith took two steps towards the vehicle to see if she could identify the occupant. Detective Smith then testified that she yelled, “I know who you are, Byron Yambrisak, you need to be on your way.” The vehicle

immediately sped away. Detective Smith immediately called dispatch on her cell phone to report the incident, prior to returning to her vehicle.

State v. Yambrisak, 2013 WL 1400953, 2013-Ohio-1406, No. 2012-CA-50, ¶¶ 2-5, (CA, 5th Dist., Richland, April 5, 2013). Appellant was convicted by a jury for one count of retaliation and one count of intimidation. *Yambrisak v. State of Ohio*, 2017-Ohio-7310 ¶ 2, 2017 Ohio App. LEXIS 3611 (5th Dist. 2017)(August 21, 2017).

Ultimately the Fifth District, although acknowledging that Appellant did “not deny that he made these statements or that he directed them to Detective Smith” determined that in order for the state to have met its burden of proof, it had to demonstrate that “the threat is itself unlawful because it violates a predicate offense.” *Id.*, *Yambrisak*, ¶¶ 31, 32. Accordingly, the Fifth District found that Appellant’s words did not satisfy the elements of the crimes for which he was charged as they were too “unequivocal unconditional, not immediate, and not specific enough to convey to Detective Smith that he was retaliating” against her or that he was “attempting to influence, intimidate, or hinder her in the discharge of her duty” for events that occurred two years earlier in 2009. *Id.*, ¶¶ 39–41. However, the reversal and remand for insufficiency of evidence reasons is not an automatic precursor to a wrongful imprisonment declaration. *Doss v. State*, 135 Ohio St.3d 211 ¶22 (2012).

Additionally, the Fifth District set forth relevant factual background for this matter:

On May 15, 2015, Appellant filed a complaint for declaration of wrongful imprisonment, pursuant to R.C. 2743.48(A). . . On June 6, 2016, the trial court denied both motions for summary judgment, finding a material issue of fact remained as to whether Appellant was ‘engaging in any other criminal conduct during the incident giving rise to the original indictment.’ The matter proceeded to civil hearing/bench trial on September 23, 2016. The trial court considered the transcripts of the original trial and the evidentiary hearing of September 23, 2016. Via Decision of January 5, 2017 and Judgment Entry of February 21, 2017, the trial court denied Appellant’s request for declaration of wrongful imprisonment

finding Appellant failed to prove he was not involved in any other criminal conduct on July 15, 2011.

Yambrisak v. State of Ohio, 2017-Ohio-7310 ¶¶ 5-7, 2017 Ohio App. LEXIS 3611 (5th Dist. 2017) (August 21, 2017).

The Fifth District determined that “Appellant has not demonstrated the State cannot or will not bring additional charges as a result of the conduct, pursuant to prong four of the wrongful imprisonment statute, R.C 2743.48.” Additionally, the appellate court agreed with the trial court’s finding that the Appellant could have been or would have been “charged with ethnic intimidation for his conduct toward Detective Smith, in violation of R.C. 2927.12.” *Id.* at ¶ 20. “Ethnic intimidation is a fifth degree felony with a six year statute of limitations. Therefore, the statute of limitations had not yet run as of the date of the trial court’s decision.” *Id.* at ¶ 21.

Subsequent to the Fifth District’s decision, Appellant filed his notice of appeal on October 5, 2017. The record is devoid of any order or judgment entry from the Fifth District certifying that their judgment is in conflict with other courts of appeal. Additionally, Appellant has not requested that the Fifth District certify a conflict of its decision.

ARGUMENT

Proposition of Law No. 1:

Whether Appellant appropriately followed the procedural steps necessary to establish jurisdiction in this Court when: (1) The Fifth District Court of Appeals has not certified a conflict of law with other courts of appeals on the same question; and (2) the pertinent questions in Appellant’s appeal are factually based.

As an initial matter, certification of a conflict is governed by Section 3(B)(4), Article IV of the Ohio Constitution, which reads as follows:

Whenever the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by

any other courts of appeals of the state, the judges shall certify the record of the case to the supreme court for review and final determination.

Ohio Const., Sec. 3(B)(4), Art. IV. *See also, Whitelock v. Gilbane Bldg. Co.*, 66 Ohio St.3d 594, 613 N.E.2d 1032 (1993), *syllabus, rehearing denied by, Whitelock v. Cleveland Clinic Found.*, 67 Ohio St.3d 1420 616 N.E.2d 504 (1993); App.R. 25; and S.Ct.Prac.R. IV.

Three conditions must be met before and during the certification of a case to the Supreme Court of Ohio. The *Whitelock* court instructed:

First, the certifying court must find that its judgment is in conflict with the judgment of a court of appeals of another district and the asserted conflict *must* be ‘upon the same question.’ Second, the alleged conflict must be on a rule of law--not facts. Third, the journal entry or opinion of the certifying court must clearly set forth that rule of law which the certifying court contends is in conflict with the judgment on the same question by other district courts of appeals.

Whitelock, 66 Ohio St.3d at 596.

App.R. 25 states, in pertinent part:

A motion to certify a conflict under Article IV, Section 3(B)(4) of the Ohio Constitution shall be made in writing before the judgment or order of the court has been approved by the court and filed by the court with the clerk for journalization or within ten days after the announcement of the court’s decision, whichever is the later. The filing of a motion to certify a conflict does not extend the time for filing a notice of appeal. A motion under this rule shall specify the issue proposed for certification and shall cite the judgment or judgments alleged to be in conflict with the judgment of the court in which the motion is filed.

In the instant matter, Appellant has failed to file any such motion to certify as required by the appellate rules. While a timely appeal was filed in this Court, a significant prerequisite to establishing jurisdiction in this Court has not been satisfied. This procedural error should result in denial of Appellant’s attempt to establish jurisdiction in this Court.

Proposition of Law No. 2:

Whether the Fifth District Court of Appeals appropriately upheld the decision of the trial court in finding that a charge for Ethnic Intimidation could be brought

when: (1) the statute of limitations had not run at the initiation of Appellant's wrongful imprisonment suit; (2) the trial court made a factual finding that a charge for Ethnic Intimidation was colorable; and (3) Appellant failed to prove he was not engaged in criminal conduct.

I. The Fifth District appropriately upheld the decision of the trial court because the statute of limitations had not lapsed at the initiation of the wrongful imprisonment suit.

Appellant's claim must fail because when he initially filed suit in the Richland County Court of Common Pleas, the statute of limitations for a potential charge of Ethnic Intimidation had not yet lapsed. As noted by the appellate court below, "Ethnic intimidation is a fifth degree felony with a six year statute of limitations. Therefore, the statute of limitations had not yet run as of the date of the trial court's decision." *Yambrisak*, 2017-Ohio-7310 at ¶ 21. While the statute of limitations has now lapsed, the controlling date is at the time of the initiation of the wrongful imprisonment suit. As noted in Appellant's Brief, "[t]he statute of limitations for Ethnic Intimidation (R.C. 2927.12) ran on July 15, 2017." Appellant's Brief, p. 7-8. Appellant filed his complaint for wrongful imprisonment in the Richland County Court of Common on May 15, 2015, two years before the statute of limitations had lapsed. When the Appellant appealed the trial court decision on March 20, 2017, the statute of limitations still had not yet lapsed. Any argument regarding the statute of limitations is without merit because it did not lapse until after the Fifth District had rendered its decision.

Appellant argues that the Fifth District's decision conflicts with this Court's decision in *C.K. v. State*, 2015-Ohio-3421 (2015), based on a footnote stating uncertainty about the applicability of this Court's decision in all cases where the statute of limitations is in question. The Fifth District did not forsake precedent established by this Court in *C.K.* Rather, the Fifth District mirrored the precedent established in *C.K.* when it held that Appellant could not satisfy

R.C. 2743.48(A)(4) because the statute of limitations had not yet lapsed. Accordingly, there is no conflict with this Court or any other appellate court within Ohio.

II. The Fifth District appropriately upheld the trial court's factual determination that Appellant could not satisfy R.C. 2743.48(A)(4) and (5) because a colorable charge for Ethnic Intimidation existed.

A wrongfully imprisoned individual is defined as R.C. § 2743.48(A) as an individual who satisfies 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 prior to, or on or after September 24, 1986, 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 a court of common pleas that the offense of which the individual was found guilty, including all lesser-included offenses, either as committed by the individual or was not committed by any person.

R.C. 2743.48(A). The claimant must satisfy all five of the elements contained within the statute. This case concerns the eligibility criteria for wrongfully imprisonment claims. The General Assembly has created a cause of action only for claimants who are blameless. As this Court has explained, the core principle of the wrongful-imprisonment statute is to "separate those who

were wrongfully imprisoned from those who have merely avoided criminal liability.” *Walden v. State*, 47 Ohio St. 3d 47, 52 (1989).

The Ethnic Intimidation statute provides, “No person shall violate section 2903.21 (aggravated menacing), 2903.22 (menacing), 2909.06 (criminal damaging or endangering), or 2909.07 (criminal mischief), or division (A)(3), (4), or (5) of section 2917.21 (telecommunications harassment) of the Revised Code by reason of the race, color, religion, or national origin of another person or group of persons.”

At issue herein is Appellant’s failure to prove by a preponderance of the evidence that he can satisfy the fourth and fifth set of criteria of the wrongful imprisonment statute of R.C. 2743.48(A). The Supreme Court has long recognized the qualitative differences between civil and criminal proceedings, which militate against giving criminal judgments preclusive effect in subsequent civil proceedings. *Id.*; *Doss v. State*, 135 Ohio St.3d 211 ¶22 (2012).

The Supreme Court in *Doss*, maintained its earlier *Walden* holding by establishing that:

“not every person who is released from prison because of a successful appeal is entitled to compensation. The legislature set forth a procedure for claimants like Doss to follow in R.C. 2743.48, so that the common pleas court could actively **separate demonstrably innocent persons** who have been wrongfully imprisoned **from persons who have merely avoided criminal liability**. We hold that one who claims to be a “wrongfully imprisoned individual” under R.C. 2743.48 must prove all of the factors in R.C. 2743.48(A) by a preponderance of the evidence before seeking compensation from the state for wrongful imprisonment. **We also hold that a trial court adjudicating proof of innocence pursuant to R.C. 2743.48(A)(5) may not find that a claimant has been wrongfully imprisoned based solely on an appellate court judgment vacating a felony conviction due to insufficient evidence and discharging the prisoner without a remand for a new trial.**”

Doss at ¶22. The trial court determined, and the Appellate court upheld, that a plausible charge for Ethnic Intimidation may have been brought against Appellant because of his conduct on July 15, 2011. Appellant cannot establish that he could not have been charged with Ethnic

Intimidation when he initially filed suit in the trial court. Moreover, this is not a matter of great public importance. There is no overwhelming public concern hinging upon whether this Court upholds Appellant's failure to factually disprove a charge for Ethnic Intimidation was plausible at the time of the filing of the initial suit.

III. The Fifth District appropriately upheld the decision of the trial court because the Appellant failed to prove he was not engaged in criminal conduct as required by R.C. 2743.48.

In *Bundy v. State*, 143 Ohio St.3d 237, 242 (2015), the Supreme Court looked beyond the appellate court's reversal to find that a wrongful imprisonment claim may succeed only if the claimant shows, under the actual-innocence requirement, that he did not commit the acts for which he was convicted. (*Id.*, p. 240). Although the civil trial court in this matter was focused on whether Appellant could establish he was not engaged in additional criminal conduct, it is worth pointing out that notwithstanding his inability to satisfy the fourth set of criteria in R.C. 2743.48(A)(4), Appellant, in addition would not have been able to satisfy the statutory criteria of R.C. 2743.48(A)(5). This element would require him to show that he did not commit the criminal acts of the crime for which he was convicted or that it was not committed by any person. Here, it is undisputed that Appellant drove erratically close to pedestrian Detective Smith and racially threatened her. Just because the threats did not reach a level of a predicate offense does not negate the fact that he committed the acts which formed the basis of his conviction and thus bars his ability to satisfy R.C. 2743.48(A)(5), making him ineligible to be declared wrongfully imprisoned.

IV. A charge of Ethnic Intimidation is not unconstitutional.

The United States Supreme Court and this Court have each determined that criminal statutes for Ethnic Intimidation are constitutional so long as the statutes contain a "motive"

element. Specifically, the U. S. Supreme Court in *Wisconsin v. Mitchell* (1993), 113 S.Ct. 2194, held that ethnic intimidation statutes are constitutional when they include motive or intent elements. Following this precedent, this Court held in *State v. Wyant* (1994), 68 Ohio St.3d 162, Ohio's Ethnic Intimidation statute was constitutional under the United States and Ohio Constitutions. In the context of this case, it is only relevant that a charge for Ethnic Intimidation is constitutional and plausible.

Here, the Fifth District upheld the trial court's decision that a charge for Ethnic Intimidation was plausible. The likelihood of success on the merits is irrelevant because of the language in R.C. 2743.48(A)(4). The statute only requires that a criminal proceeding "can be brought" by an authority with the potential to prosecute. Until July 15, 2017, a colorable charge for Ethnic Intimidation may have been brought. It is unnecessary to contemplate the potential for success on the merits for an Ethnic Intimidation charge because it must only be plausible.

Appellant argues that this Court must settle a perceived conflict about requirements for Ethnic Intimidation. The alleged conflict cannot be resolved in the instant case as it is more appropriate in a criminal case. In the present case, it is not necessary to address evidence required to successfully convict an individual of Ethnic Intimidation. Additionally, Appellant's free speech has not been infringed upon. To date, a charge for Ethnic Intimidation has not been brought against Appellant. Moreover, Appellant's argument that his free speech rights are infringed upon is moot because the U. S. Supreme Court and this Court have established that such charges are constitutional. *See Mitchell, supra; see also, Wyant, supra.* The Fifth District did not err in upholding the trial court's decision that a charge for Ethnic Intimidation may have been brought at the initiation of Appellant's wrongful imprisonment suit.

CONCLUSION

This Court should decline jurisdiction in this discretionary appeal because the appropriate procedural steps have not been satisfied. Additionally, this case does not involve an important question of law. Rather, this case concerns factual determinations that Appellant is dissatisfied with. Importantly, the Fifth District's decision does not conflict with any other appellate courts in Ohio. The holding of the Fifth District follows binding precedent of this Court. Appellant failed to establish that a charge of Ethnic Intimidation may have been brought at the initiation of his wrongful imprisonment suit or that he was not engaged in criminal conduct. The fact that Appellant escaped criminal liability does not equate to actual innocence. Finally, Appellant's constitutional challenges must fail because this Court and the U.S. Supreme Court have held that criminal statutes for Ethnic Intimidation are constitutional so long as they contain a motive or intent element, and the Ohio Ethnic Intimidation statute does.

For the foregoing reasons, the State of Ohio, as Appellee in this matter, respectfully requests that this Court reject Appellant's request for jurisdiction in this Court and refuse full consideration on the merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the *Appellee State of Ohio's Memorandum in Opposition of Jurisdiction* was sent by regular U. S. Mail and electronic message this 6th day of November, 2017, to: Terry H. Gilbert, Esq. and Jacqueline Greene, Esq., Friedman & Gilbert, 55 Public Square, Suite 1055, Cleveland, Ohio 44113-1901.

/s/ Byron D. Turner

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