

**COURT OF APPEALS OF OHIO**

**EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA**

WILLIE S. SMITH, :  
 :  
 Plaintiff-Appellant, :  
 : No. 112371  
 v. :  
 :  
 JUDGE STEVEN E. GALL, ET AL., :  
 :  
 Defendants-Appellees. :

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**JOURNAL ENTRY AND OPINION**

**JUDGMENT: AFFIRMED**  
**RELEASED AND JOURNALIZED: August 3, 2023**

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Civil Appeal from the Cuyahoga County Court of Common Pleas  
Case No. CV-22-964132

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***Appearances:***

Willie S. Smith, *pro se*.

Michael C. O'Malley, Cuyahoga County Prosecuting  
Attorney, and Matthew T. Fitzsimmons, IV, Assistant  
Prosecuting Attorney, *for appellees*.

EILEEN T. GALLAGHER, P.J.:

{¶ 1} Plaintiff-appellant, Willie S. Smith (“Smith”), acting *pro se*, appeals the dismissal of his complaint for declaratory relief. He raises the following assignment of error for review:

The trial court abused its discretion and violated Smith's due process rights under the Fourteenth Amendment to the United States Constitution, when it granted defendants' motion to dismiss.

{¶ 2} After careful review of the record and relevant case law, we affirm the trial court's judgment.

## **I. Procedural and Factual History**

### **A. Underlying Criminal Proceedings**

{¶ 3} This civil action derives from Smith's criminal convictions in Cuyahoga C.P. Nos. CR-95-323987-ZA and CR-95-325283-ZA.

{¶ 4} On June 5, 1995, Smith was named in a one-count indictment in Case No. CR-95-323987-ZA, charging him with kidnapping in violation of R.C. 2905.01. Subsequently, Smith was named in a three-count indictment in Case No. CR-95-325283-ZA, charging him with aggravated murder in violation of R.C. 2903.01(A), with a firearm specification and a felony murder specification; aggravated murder in violation of R.C. 2903.01(B), with a firearm specification and a felony murder specification; and having weapons while under disability in violation of R.C. 2923.13, with a firearm specification and a violence specification. The criminal indictments stemmed from the murder of Reginald Gary Lewis in April 1995.

{¶ 5} Ultimately, the two criminal cases were consolidated for trial and the charges were renumbered as follows: Count 1, kidnapping; Count 2, aggravated murder; Count 3, aggravated murder; and Count 4, having weapons while under disability.

{¶ 6} Following a jury trial, Smith was found guilty of kidnapping and aggravated murder as charged in Counts 1 and 3 of the renumbered indictment. With respect to Count 3, however, the jury found Smith not guilty of the accompanying firearm and felony murder specifications. Specifically, the jury concluded that (1) Smith “did not have a firearm on or about his person or under his control while committing the [aggravated murder offense],” and (2) Smith did not “commit [the aggravated murder offense] while he was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping and Smith was the principal offender in the aggravated murder or if not the principal offender, committed the aggravated murder with prior calculation or design.” Finally, Smith was found not guilty of aggravated murder and having weapons while under disability as charged in Counts 2 and 4 of the renumbered indictment.

{¶ 7} On October 24, 1995, the trial court sentenced Smith to life imprisonment for the aggravated murder and 10 to 25 years for kidnapping. The sentences were ordered to be served consecutively.

### **B. Postconviction Motions and Appeals**

{¶ 8} This court affirmed Smith’s convictions and sentence in *State v. Smith*, 8th Dist. Cuyahoga Nos. 69799, 70451, and 71643, 1997 Ohio App. LEXIS 4892 (Nov. 6, 1997) (“*Smith I*”). Relevant to this appeal, this court rejected Smith’s assertion that his convictions were against the manifest weight of the evidence and unsupported by the sufficiency of the evidence. Additionally, this court found no

merit to Smith's contention that "it was inconsistent for the jury to find him guilty of aggravated murder, but not to find him guilty of the firearm specification set forth in the indictment or guilty of the charge of having a weapon while under a disability."

This court explained its conclusion as follows:

In *State v. Perryman*, 49 Ohio St.2d 14, 358 N.E.2d 1040 (1976), vacated in part, the Ohio Supreme Court found that a finding on a specification cannot change the finding of guilt upon the principal charge. Also, the court stressed that one may be convicted of aggravated murder without a specification. *Id.* "Thus, the conviction of aggravated murder is not dependent upon findings for the specifications thereto. Specifications are considered after, and in addition to, the finding of guilt on the principal charge." *Id.* at 26.

As in *Perryman*, a finding upon a specification cannot change the finding of guilt as to the principal charge since specifications are considered only after, and in addition to, the finding of guilt upon the principal charge. Smith's conviction of aggravated murder may stand because it was not dependent upon the firearm specification. Furthermore, the jury's finding that Smith was not guilty of having a weapon while under a disability does not provide a sufficient basis for a new trial.

*Id.* at 26-27.

{¶ 9} While his direct appeal was pending, Smith filed a motion for a new trial, or in the alternative, a petition for postconviction relief pursuant to R.C. 2953.21. Smith claimed that he was entitled to a new trial pursuant to Crim.R. 33(A) because the state's key witness, William Marshall, had perjured himself at trial to conceal the fact that he had shot the victim. Finally, petitioner claimed that he was denied his constitutional rights to a fair trial and effective assistance of counsel because state witnesses lied under oath and his attorney did not present certain exculpatory evidence at his trial.

{¶ 10} In a journal entry dated October 23, 1996, the trial court denied the motion for leave to file a new trial motion and dismissed the petition for postconviction relief without an evidentiary hearing. The trial court concluded that it did not have jurisdiction to review the motion while Smith's direct appeal was pending. Alternatively, the trial court found the evidence attached to Smith's motion did not establish substantial grounds for postconviction relief.

{¶ 11} On appeal, this court agreed that the trial court had no jurisdiction while the appeal was pending. Nevertheless, this court determined that the credibility of the affidavits could not be determined without a hearing. Consequently, we reversed and remanded the matter to the trial court for a hearing on Smith's postconviction petition. *State v. Smith*, 8th Dist. Cuyahoga No. 75178, 1999 Ohio App. LEXIS 1575 (Apr. 8, 1999) ("*Smith II*").

{¶ 12} On January 3, 2000, pursuant to our remand, the trial court conducted a hearing to determine the credibility of the affidavits that Smith submitted. The trial court again denied Smith's motion for a new trial in a three-page opinion, finding that the affidavits and the witnesses' testimony were not credible.

{¶ 13} Smith appealed the trial court's denial of his petition for postconviction relief, arguing that the newly discovered evidence presented unresolved issues of fact for a jury. This court rejected Smith's position and affirmed the trial court's decision in *State v. Smith*, 8th Dist. Cuyahoga No. 78229, 2001 Ohio App. LEXIS 2076 (May 10, 2001) ("*Smith III*").

{¶ 14} On January 30, 2006, Smith filed a second motion for a new trial and a motion to disqualify the trial judge. On April 13, 2006, the trial court denied both motions, and Smith appealed. On July 6, 2006, this court sua sponte dismissed Smith's appeal.

{¶ 15} Thereafter, Smith filed a petition for habeas corpus relief in federal court, which was denied. *Smith v. Wilson*, N.D. Ohio No. 1:07 CV 3427, 2008 U.S. Dist. LEXIS 30907 (Apr. 15, 2008).

{¶ 16} On March 19, 2009, Smith filed a successive petition for postconviction relief seeking to dismiss the aggravated murder and kidnapping counts. On this occasion, Smith alleged that the indictment was defective and that he was denied the effective assistance of trial and appellate counsel. On June 1, 2009, the trial court denied the motion. This court affirmed the trial court's judgment, finding Smith's claims were untimely and barred by the doctrine of res judicata. *State v. Smith*, 8th Dist. Cuyahoga No. 93534, 2010-Ohio-1869, ¶ 19 ("*Smith IV*").

{¶ 17} On June 21, 2017, Smith filed a common law motion to correct void judgment. In the motion, Smith argued, among other things, that

the jury acquitted [him] of aggravated murder in [C]ount 3 when the jury made a unanimous factual finding beyond a reasonable doubt of "not guilty" on the felony-murder specifications attached to the aggravated murder and that [finding] negated one or more of the essential elements of the aggravated murder as charged in [C]ount 3.

The jury's resolution of the felony-murder specification, according to Smith, operated as an acquittal, and therefore, his conviction and sentence for aggravated murder was void. The trial court denied this motion, and Smith appealed.

{¶ 18} Again, this court rejected Smith's position on appeal and affirmed the trial court's judgment. *State v. Smith*, 8th Dist. Cuyahoga No. 106486, 2018-Ohio-2938 ("*Smith V*"). Relevant to the arguments posed in this appeal, this court reiterated its prior holding that "a finding upon a specification cannot change the finding of guilt as to the principal charge since specifications are considered only after, and in addition to, the finding of guilt upon the principal charge." *Id.* at ¶ 9, citing *Smith I*, 8th Dist. Cuyahoga Nos. 69799, 70451, and 71643, 1997 Ohio App. LEXIS 4892, at \*26 (Nov. 6, 1997). This court further found that Smith's reliance on the jury's finding of not guilty on the felony-murder specification was barred by the doctrine of res judicata, stating:

In Smith's initial direct appeal, he argued that the trial court erred in accepting inconsistent verdicts. Specifically, he contended that it was inconsistent for the jury to find him guilty of aggravated murder and not guilty of the corresponding firearm specification. This court affirmed Smith's conviction, holding that "a finding upon a specification cannot change the finding of guilt as to the principal charge since specifications are considered only after, and in addition to, the finding of guilt upon the principal charge." *State v. Smith*, 8th Dist. Cuyahoga Nos. 69799, 70451, and 71643, 1997 Ohio App. LEXIS 4892, \*26 (Nov. 6, 1997).

Here, Smith claims that he is not making a claim of inconsistent verdicts. Despite his attempt to characterize this argument so as to avoid res judicata, we find no meaningful difference between the arguments in his first assignment of error and those addressed by this court in 1997.

\* \* \*

Smith argues that because he was found not guilty of the felony murder specification, of which one of the elements was that the offense was committed contemporaneously with kidnapping, he was actually acquitted of aggravated murder. This requirement of contemporaneous commission was an essential element of aggravated murder. According to Smith, the finding of not guilty for the specification operates to negate that element in aggravated murder. Therefore, his first assignment of error alleges that one element of a specification for which he was found not guilty negates another element of an offense for which he was found guilty. This claim is clearly barred by *res judicata*.

*Id.* at ¶ 9-12.

{¶ 19} Undeterred by this court's prior judgments, Smith attempted to file a second or successive habeas petition in federal court, asserting that he was denied his constitutional rights (1) when the trial court imposed a sentence on a charge for which he was acquitted by the jury and (2) when the Ohio Court of Appeals failed to address a clear and unambiguous assignment of error regarding clearly established law on void sentences in Ohio. Ultimately, however, Smith's attempt to obtain an order authorizing a second or successive habeas petition was denied. *See In re Smith*, 6th Cir. No. 19-3409, 2019 U.S. App. LEXIS 31062 (Oct. 17, 2019); *In re Smith*, 6th Cir. No. 20-3917, 2021 U.S. App. LEXIS 3019 (Feb. 3, 2021).

### **C. Civil Complaint for Declaratory Judgment**

{¶ 20} On June 1, 2022, Smith filed a complaint for declaratory judgment against Cuyahoga County Common Pleas Judges Steven E. Gall and Timothy J. McGinty. The complaint alleged that the jury's verdict in 1995, finding him guilty of aggravated murder in violation of R.C. 2903.01(B), was inconsistent with the jury's



resolution of the felony-murder specification attached to the underlying count. Thus, Smith asserted that the trial judge erroneously “issued the sentencing journal entry and memorialized the jury verdict in which the jury specifically found plaintiff not guilty of each and every element and every crime for which plaintiff stood trial.”

The complaint sought the following relief:

1. A declaration that the sentencing journal entry is insufficient to find plaintiff criminally liable for the crimes for which he is incarcerated.
2. To permanently enjoin the Cuyahoga Court of Common Pleas from imposing [a] sentence for aggravated murder in Case Nos. CR-95-323987-ZA and CR-95-325283-ZA.
3. Such other and further legal and equitable relief as this court deems just, and proper.

**{¶ 21}** The complaint incorporated various documents, including (1) a copy of the October 6, 1995 sentencing journal entry, (2) a copy of the October 16, 2017 denial of Smith’s motion to correct void judgment, and (3) various affidavits of Smith.

**{¶ 22}** On August 12, 2022, the defendants filed a joint motion for leave to file a motion to dismiss pursuant to Civ.R. 12(B)(6), arguing that Smith’s complaint should be dismissed because (1) Smith failed to state a claim upon which relief could be granted, (2) Smith’s claims are barred by res judicata, and (3) defendants are absolutely immune from liability. The memorandum in support of the motion to dismiss was attached to the defendants’ motion for leave.

**{¶ 23}** On October 26, 2022, the trial court issued a journal entry granting the defendants leave to file a motion to dismiss. The court instructed Smith to file

any additional responses to the defendants' motion to dismiss within 14 days. In turn, the defendants were instructed to file any reply within 14 days of Smith's responses.

{¶ 24} After Smith failed to file a timely response to the defendants' motion to dismiss, the defendants filed a final reply brief in support of their motion on November 17, 2022. The reply reiterated the arguments previously posed in the defendants' motion to dismiss.

{¶ 25} On December 7, 2022, and December 19, 2022, Smith, acting pro se, filed separate objections to the defendants' motion to dismiss. In each motion, Smith generally argued that "a real justiciable controversy \* \* \* exists between the parties" because "there is a 'genuine dispute' in regards to what crime exactly [he] was found guilty of committing." Relying on the jury's finding of not guilty on renumbered Count 2 and the felony-murder specification attached to renumbered Count 3, Smith explained his interpretation of the jury's verdict as follows:

Specifically, [the defendants] claim Smith was found guilty of kidnapping. [However], the jury specifically eliminated any conviction for kidnapping when they found Smith not guilty of kidnapping in the felony-murder specification.

In addition, while [the defendants] claim Smith was found guilty of aggravated murder, the jury specifically found Smith not guilty of "each and every element" required to sustain a conviction for aggravated murder.

{¶ 26} On January 11, 2023, the trial court issued a judgment entry granting the defendants’ motion to dismiss pursuant to Civ.R. 12(B)(6).<sup>1</sup> In determining that Smith’s complaint failed to state a claim upon which relief could be granted, the trial court found, in relevant part, that (1) a declaratory judgment action could not be used as a substitute for an appeal or a collateral attack upon a conviction, (2) “no real controversy exists between Smith and the [defendants],” and (3) Smith’s claims are barred by the doctrine of res judicata.

{¶ 27} Smith now appeals from the trial court’s judgment.

## **II. Law and Analysis**

{¶ 28} In the sole assignment of error, Smith argues the trial court erred by dismissing his complaint for declaratory relief pursuant to Civ.R. 12(B)(6).

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

{¶ 29} A Civ.R. 12(B)(6) motion to dismiss for failure to state a claim tests the sufficiency of the complaint. *Antoon v. Cleveland Clinic Found.*, 8th Dist. Cuyahoga No. 101373, 2015-Ohio-421, ¶ 7. In resolving a Civ.R. 12(B)(6) motion, the court’s review is limited to the allegations contained in the complaint, along with any documents properly attached to or incorporated within the complaint. *Glazer v. Chase Home Fin. L.L.C.*, 8th Dist. Cuyahoga Nos. 99875 and 99736, 2013-Ohio-5589, ¶ 38. Additionally, a court is permitted to take judicial notice of appropriate

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<sup>1</sup> The trial court considered Smith’s December 7, 2022 and December 19, 2022 objections to the defendants’ motion to dismiss while acknowledging that the objections were filed “beyond the time schedule set by the court.”

matters in determining a Civ.R. 12(B)(6) motion without converting it to a motion for summary judgment. *State ex rel. Everhart v. McIntosh*, 115 Ohio St.3d 195, 2007-Ohio-4798, 874 N.E.2d 516, ¶ 10 (a court may take judicial notice of appropriate matters, including judicial opinions and public records accessible from the internet, in determining a Civ.R. 12(B)(6) motion); *see also Harper v. Weltman, Weinberg & Reis Co., L.P.A.*, 8th Dist. Cuyahoga No. 107439, 2019-Ohio-3093, ¶ 14.

**{¶ 30}** For a court to dismiss a complaint under Civ.R. 12(B)(6), it must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling the plaintiff to relief after all factual allegations of the complaint are presumed true and all reasonable inferences are made in the nonmoving party's favor. *Windsor Realty & Mgt., Inc. v. N.E. Ohio Regional Sewer Dist.*, 2016-Ohio-4865, 68 N.E.3d 327, ¶ 23 (8th Dist.), citing *O'Brien v. Univ. Community Tenants Union, Inc.*, 42 Ohio St.2d 242, 327 N.E.2d 753 (1975), syllabus. If there is a set of facts consistent with the plaintiff's complaint that would allow the plaintiff to recover, the court may not grant a defendant's motion to dismiss. *York v. Ohio State Hwy. Patrol*, 60 Ohio St.3d 143, 145, 573 N.E.2d 1063 (1991). A court may not dismiss a complaint under Civ.R. 12(B)(6) merely because it doubts the plaintiff will prevail. *Bono v. McCutcheon*, 159 Ohio App.3d 571, 2005-Ohio-299, 824 N.E.2d 1013, ¶ 8 (2d Dist.).

**{¶ 31}** An appellate court conducts a de novo review of a trial court's ruling on a Civ.R. 12(B)(6) motion to dismiss. *Perrysburg Twp. v. Rossford*, 103 Ohio St.3d 79, 2004-Ohio-4362, 814 N.E.2d 44, ¶ 5. Accordingly, we undertake an

independent analysis without deference to the trial court's decision. *Hendrickson v. Haven Place, Inc.*, 8th Dist. Cuyahoga No. 100816, 2014-Ohio-3726, ¶ 12.

### **B. Declaratory Judgment Actions**

**{¶ 32}** A declaratory judgment action is a civil action and “provides a remedy in addition to other legal and equitable remedies that may be available.” *Rehn v. INVCLE150, L.L.C.*, 8th Dist. Cuyahoga No. 111313, 2022-Ohio-4634, ¶ 42, quoting *Highland Tavern, L.L.C. v. DeWine*, 10th Dist. Franklin No. 21AP-176, 2021-Ohio-4067, ¶ 11, citing *Burge v. Ohio Atty. Gen.*, 10th Dist. Franklin No. 10AP-856, 2011-Ohio-3997, ¶ 7, citing *Victory Academy of Toledo v. Zelman*, 10th Dist. Franklin No. 07AP-1067, 2008-Ohio-3561, ¶ 8.

**{¶ 33}** The purpose of declaratory judgment under R.C. Chapter 2721, the Declaratory Judgments Act, “is to settle and afford relief from uncertainty and insecurity with respect to rights, status and other legal relations and it is to be liberally construed and administered.” *State ex rel. CannAscend Ohio L.L.C. v. Williams*, 10th Dist. Franklin No. 18AP-820, 2020-Ohio-359, ¶ 29, quoting *One Energy Ents., L.L.C. v. Ohio Dept. of Transp.*, 10th Dist. Franklin No. 17AP-829, 2019-Ohio-359, ¶ 30, citing *Swander Ditch Landowners' Assn. v. Joint Bd. of Huron & Seneca Cty. Commrs.*, 51 Ohio St.3d 131, 134, 554 N.E.2d 1324 (1990), citing *Radaszewski v. Keating*, 141 Ohio St. 489, 496, 49 N.E.2d 167 (1943).

**{¶ 34}** Generally, declaratory relief is available to a plaintiff who can show that (1) a real controversy exists between the parties, (2) the controversy is justiciable, and (3) speedy relief is necessary to preserve the rights of the parties.

*Haig v. Ohio State Bd. of Edn.*, 62 Ohio St.3d 507, 511, 584 N.E.2d 704 (1992); *Burger Brewing Co. v. Liquor Control Comm., Dept. of Liquor Control*, 34 Ohio St.2d 93, 97, 296 N.E.2d 261 (1973). Thus, “[a] trial court properly dismisses a declaratory judgment action when no real controversy or justiciable issue exists between the parties.” *Id.*, quoting *State v. Brooks*, 133 Ohio App.3d 521, 525, 728 N.E.2d 1119 (4th Dist.1999).

**{¶ 35}** With respect to the issues posed in this appeal, it is well settled that a declaratory judgment

cannot be used as a substitute for an appeal or as a collateral attack upon a conviction. Declaratory relief “does not provide a means whereby previous judgments by state or federal courts may be reexamined, nor is it a substitute for appeal or postconviction remedies.

*Moore v. Mason*, 8th Dist. Cuyahoga No. 84821, 2005-Ohio-1188, ¶ 16, quoting *Shannon v. Sequeechi*, 365 F.2d 827, 829 (10th Cir.1966).

**{¶ 36}** Indeed, the Ohio Supreme Court has likewise held:

For direct and collateral attacks alike, declaratory judgment is simply not a part of the criminal appellate or postconviction review process. *Wilson [v. Collins]*, 10th Dist. Franklin No. 10AP-511, 2010-Ohio-6538,] ¶ 9; [*State v. Brooks*, 133 Ohio App.3d 521, 525-526, 728 N.E.2d 1119 (4th Dist.1999),]; *Moore* at ¶ 14; *Gotel [v. Ganshiemer]*, 11th Dist. Ashtabula No. 2008-A-0070, 2009-Ohio-5423,] ¶ 44. Ohio’s Criminal Rules and statutes provide for the direct review of criminal judgments through appeal, and collateral attacks through postconviction petitions, habeas corpus, and motions to vacate. *Ohio Pyro, Inc. v. Ohio Dept. of Commerce*, 115 Ohio St.3d 375, 2007-Ohio-5024, 875 N.E.2d 550, ¶ 20. A declaratory-judgment action cannot be used as a substitute for any of these remedies. *Clark [v. Memolo]*, 85 U.S.App.D.C. 65, 174 F.2d 978, 981 (1949)]; *Shannon* at 829; *Wilson* at ¶ 9; *Moore* at ¶ 14; *Gotel* at ¶ 44; *Burge [v. Ohio Atty. Gen.]*, 10th Dist. Franklin No. 10AP-856, 2011-Ohio-3997,] ¶ 10.

*Lingo v. State*, 138 Ohio St.3d 427, 2014-Ohio-1052, 7 N.E.3d 1188, ¶ 44.

{¶ 37} Although posed as a challenge to the scope of the defendants’ exercise of judicial authority, Smith’s complaint for declaratory judgment seeks to vacate his convictions and sentence based on Smith’s erroneous belief that he was acquitted of all charges simply because the jury concluded that he did not act purposely, with prior calculation and design (Count 2), and was “not guilty” of the felony-murder specification attached to Count 3 of the renumbered indictment. On appeal, Smith reiterates his position that a real controversy exists between the parties because Judges McGinty and Gall interfered with the juror’s independent judgment and exceeded the scope of their judicial powers by entering, and subsequently upholding, “a finding of guilt and [sentence] for aggravated murder.” Smith summarizes his position as follows:

The facts of this case are not complicated. The trial court was faced with a situation where the accused was charged with aggravated murder under R.C. 2903.01(A)<sup>[2]</sup> and R.C. 2903.01(B).<sup>[3]</sup> As such, the state was required to prove the elements of purposely, and prior calculation and design; and failed to do so. Significantly, the not guilty

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<sup>2</sup> The version of R.C. 2903.01(A) in place at the time of Smith’s trial in 1995, stated as follows:

(A) No person shall purposely, and with prior calculation and design, cause the death of another.

<sup>3</sup> The version of R.C. 2903.01(B) in place at the time of Smith’s trial in 1995, stated as follows:

(B) No person shall purposely cause the death of another while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape.

verdicts were related to both R.C. 2903.01(A) and R.C. 2903.01(B), thus eliminating guilty on every charge.

Following that verdict, Defendant McGinty, was fully aware that he had no authority to impose a sentence for aggravated murder. However, defendant retired to his chambers and convinced himself otherwise – in direct contradiction of over one-hundred years of United States Supreme Court jurisprudence.

{¶ 38} Without fully addressing the inaccuracy of Smith’s recitation of the elements required to prove aggravated murder in violation of R.C. 2903.01(B) or the fallacy of Smith’s reliance on the jury’s finding of not guilty on the felony-murder specification, which is governed by R.C. 2929.04(A)(7) and permits, if proven, the imposition of the death penalty for an aggravated-murder conviction,<sup>4</sup> we find Smith is attempting to use a declaratory judgment action to collaterally attack his criminal convictions. Despite Smith’s protestations to the contrary, it is clear that the issues presented in Smith’s complaint amount to an attempt to relitigate postconviction motions or otherwise raise new errors of law that are alleged to have been committed by the trial judges appointed to oversee Smith’s criminal proceedings. As such, we find the complaint does not present a justiciable controversy capable of resolution by declaration under the declaratory judgment act. *See Bandy v. Cuyahoga Cty.*, 8th Dist. Cuyahoga No. 106635, 2018-Ohio-3679,

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<sup>4</sup> *See Smith I*, 8th Dist. Cuyahoga Nos. 69799, 70451, and 71643, 1997 Ohio App. LEXIS 4892, \* 26 (Nov. 6, 1997), citing *State v. Perryman*, 49 Ohio St.2d 14, 26, 358 N.E.2d 1040 (1976) (“[A]s indicated in R.C. 2929.03(A), one may be convicted of aggravated murder, the principal charge, without a specification. Thus, the conviction of aggravated murder is not dependent upon findings for the specifications thereto. Specifications are considered after, and in addition to, the finding of guilt on the principal charge.”). *See also State v. Mapes*, 19 Ohio St.3d 108, 113, 484 N.E.2d 140, 145 (1985). *See also* R.C. 2929.03(B)



¶ 10, quoting *Carter v. Walters*, 3d Dist. Paulding No. 11-88-24, 1990 Ohio App. LEXIS 1214, \*3 (Mar. 22, 1990) (“[T]he Declaratory Judgments Act [does not] convert a claimed error at law by a trial judge acting as a judge in a criminal case into a justiciable controversy between the defendant and the judge subject to resolution by declaration pursuant to the Act.”).

{¶ 39} “Moreover, it is a well-settled rule in Ohio that where judges possess jurisdiction over a controversy, they are not civilly liable for actions taken in their judicial capacity[ies] because they have absolute immunity.” *Moore v. Russo*, 8th Dist. Cuyahoga No. 105448, 2017-Ohio-9166, ¶ 17, citing *Metzenbaum v. Krantz*, 11th Dist. Portage No. 2002-P-0124, 2003-Ohio-6415, ¶ 8, quoting *State ex rel. Fisher v. Burkhardt*, 66 Ohio St.3d 189, 610 N.E.2d 999 (1993); see also *Kelly v. Whiting*, 17 Ohio St.3d 91, 477 N.E.2d 1123 (1985); *Wilson v. Neu*, 12 Ohio St.3d 102, 465 N.E.2d 854 (1984); and *Voll v. Steele*, 141 Ohio St. 293, 47 N.E.2d 991 (1943). Judicial immunity dissolves only under two circumstances: (1) if the judge has acted in a nonjudicial capacity, or (2) if the judge has performed judicial acts in the complete absence of all jurisdiction. *Id.*, citing *Triplett v. Connor*, 109 Fed. Appx. 94, 96 (6th Cir.2004).

{¶ 40} In this case, the relevant decisions of this court and the documents incorporated into Smith’s complaint establish that Judge Gall and Judge McGinty had jurisdiction over Smith’s criminal cases and acted within their judicial capacities when entering Smith’s judgment of conviction, imposing felony sentences, and entering judgments during postconviction proceedings. Under these circumstances,

we find the trial court correctly determined that the defendants “have judicial immunity, which removes this matter as having any justifiable or justiciable grounds for proceeding against Judge McGinty and /or Judge Gall.”

{¶ 41} Based on the foregoing, the trial court did not err in granting the defendants’ Civ.R. 12(B)(6) motion to dismiss. The sole assignment of error is overruled.

{¶ 42} Judgment affirmed.

It is ordered that appellees recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to 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.

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EILEEN T. GALLAGHER, PRESIDING JUDGE

MARY J. BOYLE, J., and  
MICHAEL JOHN RYAN, J., CONCUR