

201-7005

GENERAL
COURT

FILED
JAN 18 2022

OFFICE OF THE CLERK
SUPREME COURT OF OHIO

IN THE

SUPREME COURT OF THE UNITED STATES

ADAM M. DEVORE — PETITIONER
(Your Name)

vs.

Kenneth BLACK, WARDEN — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Supreme Court of Ohio
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

ADAM M. DEVORE
(Your Name)

1001 Olivesburg Rd.; P.O. Box 8107
(Address)

MANSFIELD, Ohio 44901
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

If an indictment alleges an offense occurring at the county of Ashland in the State of Ohio, can jurisdiction over the offense be lost if the location of the offense is changed post-appeal to "different locations." i.e., could the offense have been committed within Ohio if the location is "different"? And does such a change violate the due process clause of the Fourteenth Amendment? And whether all Ohioans will be denied their Fourteenth Amendment rights when the Ohio Supreme Court failed to address the Court of Appeals erroneous dismissal on R.C.2969.25 grounds turning an application into a civil action against the State?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

Kenneth Black, Warden: 1001 Olivesburg Rd., Richland Corr. Inst., Mansfield, Ohio 44901

All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

TABLE OF AUTHORITIES CITED

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APPENDIX F

IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix B to the petition and is

reported at 2021-Ohio-3153; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

The opinion of the Fifth District Court of Appeals court appears at Appendix C to the petition and is

reported at 2021-Ohio-198; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

JURISDICTION

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was _____.

No petition for rehearing was timely filed in my case.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

For cases from **state courts**:

The date on which the highest state court decided my case was 9/15/2021. A copy of that decision appears at Appendix B.

A timely petition for rehearing was thereafter denied on the following date: 11/23/2021, and a copy of the order denying rehearing appears at Appendix A.

An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fourteenth Amendment, Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article IV, Section 4:

The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

STATEMENT OF THE CASE

In February 2018, DeVore was convicted in the Ashland County Common Pleas Court of abduction and domestic violence and sentenced to consecutive 36-month prison terms. The Fifth District affirmed his conviction. See *State v. DeVore*, 5th Dist. [Ashland No. 18-COA-011, 2018-Ohio-4189, ¶ 108.

Following the affirmation of his convictions, DeVore filed an application to reopen his appeal under App.R.26(B). One of DeVore's proposed assignments of error in the application was that abduction and domestic violence are allied offenses of similar import and, therefore, he should not have been sentenced for both. See R.C.2941.25(A). The court of appeals denied DeVore's application, determining that DeVore "committed separate and distinct crimes and the offenses were separated by time and occurred in different locations." The court of appeals therefore held that DeVore's appellate counsel was not ineffective for failing to raise an allied-offenses argument. See R.C.2941.25 (B) (a defendant may be convicted of offenses of the same similar kind if they were committed "separately or with a separate animus as to each").

On November 30, 2020, DeVore filed a complaint for a writ of habeas corpus in the Fifth District, case No. 2020-CA-0074, reported at DeVore v. Black, 2021-Ohio-198, requesting his immediate release from prison. Citing the "separated by time and occurred in different locations" language included in the court of appeals' judgment denying his App.R. 26(B) application for reopening, DeVore alleged that his conviction for domestic violence was necessarily for conduct that occurred at a time and place different from that alleged in the indictment for the offense. DeVore accordingly argued that his domestic-violence conviction was void and that he is entitled to immediate release because he had already served the full 36-month prison

prison term relating to his abduction conviction.

Black filed a motion to dismiss DeVore's complaint under Civ.R. 12(B)(6). DeVore opposed the motion. The court of appeals granted Black's motion and dismissed the complaint. 2021-Ohio-198, ¶ 12. In their analysis, the court of appeals held that DeVore failed to comply with R.C.2969.25(A) when he did not include an appeal to the Ohio Supreme Court from his application to reopen direct appeal for the ineffective assistance of appellate counsel (App.R.26(B)) in his affidavit of prior civil actions. The court of appeals also denied that there was any language separating DeVores offenses by time and location within the App.R.26(B) judgment entry and, in fact, claimed the United States Northern District Court separated the offenses in spite of the fact that no judgment has been rendered by the U.S. District Court separating offenses. Regardless, the court of appeals then stated that because no court has separated the offenses by time and location that DeVore's complaint failed to state a claim for which relief can be granted. Id. at ¶¶ 4-12.

On appeal to the Ohio Supreme Court, case no. 2021-0199, reported at *DeVore v. Black*, Slip Opinion No. 2021-Ohio-3153, that court ignored all of DeVore's propositions of law and did not address the court of appeals' fraudulent denial of their own previous App.R. 26(B) judgment, did not address the "different location" only the date of the alleged offenses, and misconstrued DeVore's jurisdictional claim as an indictment issue. Id at ¶¶ 8-10. The Ohio Supreme Court also ignored the court of appeals dismissal on R.C. 2969.25(A) grounds leaving in place a holding that; proceedings provided by rule or statute that operate "civil in nature" are civil actions against a government entity or employee, or a political subdivision or employee of a political subdivision. Id. at ¶¶ 11-27 (Kennedy, J., concurring in judgment

only).

DeVore now Petitions this court to grant a writ of certiorari.

REASONS FOR GRANTING THE PETITION

PREAMBLE

This court has tackled the issue of subject matter jurisdiction before. However, this court has not tackled the issue of whether subject matter jurisdiction over an alleged offense can be lost in a criminal matter if a court of appeals ambiguously changes the location of an alleged offense to "different location" after a direct appeal.

What also makes this issue, and case, unique is the holdings of Ohio courts that the petitioner had an adequate remedy by way of direct appeal to correct an error created in a post-appeal appellate proceeding. Such a holding presents a legal impossibility -- just as it is a legal and factual impossibility in the underlying criminal case for the alleged offense to have occurred in a "different location" from the other alleged offense.

And lastly, why did the majority of the Ohio Supreme Court ignore the Fifth District Court of Appeal's dismissal on the grounds that an appeal from an Ohio Appellate Rule 26(B) Application is an appeal from an original civil action? Such a creation of bad law, in petitioner's name, that has the potential to negatively effect every criminal litigant in the State of Ohio should not be allowed to stand.

ARGUMENT

A. A change in the location of an offense goes to the subject matter jurisdiction of a court not the sufficiency of an indictment:

The "locus of the crime" establishes a trial court's subject matter jurisdiction. Harris v. Warden, London Corr. Inst., 2017 U.S. Dist. LEXIS 132508 at [*24], citing Lynch v. Wilson, 2008 U.S. Dist. LEXIS 107176. In Ohio, trial courts are vested with subject matter jurisdiction through Ohio

Revised Codes 2901.11 and 2931.03. These statutes provide that:

"(A) A person is subject to criminal prosecution and punishment in this state if any of the following occurs:

(1) The person commits an offense under the laws of this state, any element of which takes place in this state." R.C.2901.11; and "The court of common pleas has original jurisdiction of all crimes and offenses, except in cases of minor offenses the exclusive jurisdiction of which is vested in courts inferior to the court of common pleas." R.C.2931.03.

In Ohio, unless waived and prosecuted by information, jurisdiction over a felony offense is invoked by the proper return of an indictment by a grand jury of the county which it serves. Click v. Eckle, 174 Ohio St. 88; Lynch, supra, at [*39]. "Due process requires that the court which assumes to determine the rights of parties shall have jurisdiction." Standard Oil Co. v. Missouri 224 U.S. 270.

Petitioner was indicted for the offenses of abduction and domestic violence which were said to have occurred in Ashland County, Ohio. It is thus axiomatic that when the Ohio Fifth District Court of Appeals ambiguously held that the offenses occurred in "different locations" then subject matter jurisdiction over one of those offenses was lost, i.e., divested from the Ashland County Court of Common Pleas. This is especially so where the State's entire case in the underlying criminal matter rested upon an alleged middle of the night assault at a residence located at 194 Sharon Avenue, in the City of Ashland, County of Ashland, in the State of Ohio. A "different location" thus places one of the offenses in a location other than Ohio and other than Ashland County which no court in Ohio could exercise jurisdiction or have venue. Accordingly, petitioner raised a jurisdictional claim not an attack upon the sufficiency of his indictment as the courts of Ohio held

and stated a claim for which relief should be granted. Dismissal under Civil Rule 12(B)(6) was error.

Even more concerning is the Ohio courts holdings that claim petitioner has an adequate remedy by direct appeal to correct an error created by an appellate court after direct appeal. Such an illogical holding is a legal impossibility inasmuch as it places the cart before the horse. "Impossible conditions cannot be performed *** because no man can be obligated to perform an impossibility." Jacksonville M., P.R. & N. Co. v. Hooper, 160 U.S. 514.

In Ohio, objections to an indictment must be made prior to trial. Ohio Criminal Rule 12(C)(2) states:

"(C) Prior to trial, any party may raise by motion any defense, objections, evidentiary issues, or request that is capable of determination without the trial of the general issue. The following must be raised before trial: ***

(2) Defenses and objections based on defects in the indictment, information, or complaint (other than failure to show jurisdiction in the court or to charge an offense, which objections shall be noticed by the court at any time during the pendency of the proceeding)."

Here no objections could be made to the indictment prior to trial on the grounds that one of the offenses did not occur in Ohio because the indictment clearly stated such as to all counts. The trial court likewise instructed the jury prior to deliberations that the offenses charged allegedly occurred in Ashland County, Ohio, so there was no basis for an objection to the jury instruction on the grounds that the jury was likely to confuse an issue of fact or that there was a lack of jurisdiction.

The only time an objection could be made to the location of an offense here was long after direct appeal when the appellate court ambiguously separated the offenses by time and location in a collateral appellate proceeding -- which objection goes to the jurisdiction of the trial court. To

hold that petitioner should have raised an issue on appeal that was not yet even an issue defines absurdity and is a legal impossibility; the issue is not the sufficiency of the indictment but the appellate court changing the location of an offense.

Accordingly, petitioner had no adequate remedy in the ordinary course of law.

To the extent that the Fifth District Court of Appeals held that petitioner failed to comply with a statutory prerequisite of filing a state habeas petition, R.C.2969.25, and thus warranted dismissal, such went ignored by the majority of the Ohio Supreme Court. (See justice Kennedy's concurring opinion).

Petitioner specifically appealed the appellate court's R.C.2969.25 ground for dismissal in his first proposition of law. However, on review, the Ohio Supreme Court chose to forgo the proposition and addressed the merits -- which is what R.C.2969.25 specifically precludes.

Because the merits were addressed rendering dismissal on R.C.2969.25 grounds possibly moot; petitioner's request for review here does not lie with his personal interest of liberty, but serves to protect every criminal litigant or their counsel in the State of Ohio from the application of case law that turns a run of the mill application to an appellate court into a civil action. The rights to due process guaranteed by the Fourteenth Amendment, and the separation of powers of a republican government, Article IV, Section 4 of the U.S. Constitution do not allow such a holding, especially where the Ohio Legislature has defined an "action," R.C.2307.01, and that definition in no way resembles an application to reopen direct appeal under Ohio Appellate Rule 26(B). And it appears that Ohio's courts are creating a judicial process of futility, especially to those challenging criminal

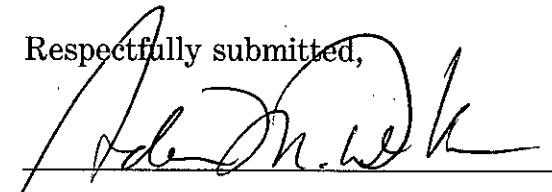
judgments. The Ohio Legislature never intended for previously filed motions and applications or an appeal therefrom to be a prior civil action subject to R.C.2969.25, and when the Fifth District Court of Appeals held as much and the Ohio Supreme Court affirmed the courts were legislating from the bench. R.C.2969.25 only applies to civil actions or appeals of civil actions against a government entity, employee, political subdivision, or an employee of a political subdivision, it was never intended to apply to an appeal from an application under Ohio Appellate Rule 26(B).

As justice Kennedy warned in her opinion, this holding of the court will have consequences not intended by the legislature and will be maliciously exploited by Ohio's prosecutors in any proceeding that operates "civil in nature" but is not necessarily a civil action. This court needs to grant this writ to protect all Ohioans.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Ade M. W. K.", is written over a horizontal line.

Date: January 9, 2022