

IN THE SUPREME COURT OF OHIO

STATE ex rel. JAMIE SUWALSKI,

Relator-Appellee,

-vs-

JUDGE ROBERT W. PEELER,

Respondent-Appellant.

:

:

:

Case No. 2020-0755

**On Appeal from the Warren County
Court of Appeals, 12th Appellate District**

**MERIT BRIEF OF INTERVENOR-APPELLANT ROY
EWING**

Christopher Pagan #0062751
1501 First Avenue
Middletown, Ohio 45044
(513) 424-1823 - Telephone
(513) 424-3135 – Facsimile
cpagan@repperpagan.com

COUNSEL FOR INTERVENOR-
APPELLANT

Michael T. Gmoser #0002132
Butler County Prosecutor
Michael Greer #0074352
Assistant Prosecuting Attorney
315 High Street, 11th Floor
Hamilton, Ohio 45011
(513) 887-3474 -Telephone
(513) 887-3489 – Facsimile
greerjm@butlercountyohio.org

COUNSEL FOR RESPONDENT-
APPELLANT

Elizabeth Wells #0087750
Ohio Crime Victim Justice Center
3976 North Hampton Drive
Powell, Ohio 43065
(614) 848-8500 – Telephone
(614) 848-8501 - Fax
ewell@ocvjc.org

COUNSEL FOR RELATOR-APPELLEE

Micaela Deming #0085802
O/B/O Ohio Domestic Violence Network
P.O. Box 176
Bluffton, Ohio 45817
(614) 742-7902 - Telephone
mdemingesq@gmail.com

COUNSEL FOR RELATOR-APPELLEE

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	III
STATEMENT OF FACT	1
ARGUMENT	2
PROPOSITION OF LAW I: Art. I, § 10a(B) requires a victim to seek specific relief in the trial court before petitioning the appellate court for an extraordinary writ.....	2
PROPOSITION OF LAW II A victim’s right must be asserted in a § 10a(B) proceeding that i) involves the criminal offense or ii) where the victim’s rights are implicated. A right is viable if enumerated in § 10a(A) or a statute. Before the victim can pursue extraordinary relief, she must have asserted a viable claim in a qualifying § 10a(B) proceeding below.....	3
PROPOSITION OF LAW III Res judicata bars a prohibition claim when a trial court restores a defendant’s firearm rights, that judgment becomes final, the victim appeared at the civil firearm-restoration hearing but failed to intervene in the case, and the prohibition claim is a collateral attack on the final judgment.....	6
PROPOSITION OF LAW IV Prohibition does not lie where a victim has an adequate legal remedy through intervention in the civil firearm-restoration proceeding. And it does not lie where the trial court had subject-matter jurisdiction under R.C. 2923.14 to relieve a firearm disability—but the victim disputes whether this authority extends to DV convictions.....	9
CONCLUSION.....	12
CERTIFICATE OF SERVICE	12
APPENDIX	Appx. Page
Notice of Appeal to the Ohio Supreme Court (15 June 2020).....	2
Opinion of the Warren County Court of Appeals (8 June 2020).....	12

Judgment Entry of the Warren County Court of Appeals (8 June 2020).....	1
Decision of the Warren County Court of Common Pleas (29 April 2019).....	4
Oh. Const. Art I, §10a.....	2

TABLE OF AUTHORITIES

Page

CASES:

Bank of Am. v. Kutcha, 141 Ohio St.3d 75, 2014-Ohio-4275.....7

Brown v. State, 6th Dist. L-18-1044, 2019-Ohio-4376.....7

City of Cleveland v. State, 157 Ohio St.3d 330, 2019-Ohio-3820.....2,4,7

Denton v. Bedinghaus, 1st Dist. C-000819, 2002-Ohio-32737

Ex'r's of Long's Estate v. State, 21 Ohio App. 412 (1926)4

Fort Bend Cty. v. Davis, 139 S.Ct. 1843 (2019).....3

Hoogerheide v. IRS, 637 F.3d 634 (6th Cir. 2011)3

Howell v. Richardson, 45 Ohio St.3d 365 (1989).....8

In re Reed, 3rd Dist. 9-14-44, 2015-Ohio-2742.....8

Manrique v. United States, 137 S.Ct. 1266 (2017).....3

State v. Cole, 2 Ohio St.3d 112 (1982)8

State ex rel. Claugus Family Farm, L.P. v. Seventh Dist. Court of Appeals, 145 Ohio St.3d 180, 2016-Ohio-178.....8

State ex rel. Denton v. Bedinghaus, 98 Ohio St.3d 298, 2003-Ohio-8618

State ex rel. Matasy v. Morley, 25 Ohio St.3d 22 (1986)6

State ex rel. Schachter v. Ohio Pub. Emps. Retirement Bd., 121 Ohio St.3d 526, 2009-Ohio-1704.....8

State ex rel. Tubbs Jones, Pros. Atty. v. Suster, 84 Ohio St.3d 70 (1998).....8

United States v. Williams, W.D. TN No. 2:17-cr-20002-5, 2020 U.S. Dist. LEXIS 82587 (30 April 2020).....3

CONSTITUTIONAL PROVISION, STATUTES, AND RULES:

Civ.R. 248

R.C. 2305.018

R.C. 2923.14 passim

R.C. Chapter 2930.....4

Art. I, § 10a(A) and (B)2,3,4,5,6

Art. IV, § 4(B).....8

18 U.S.C. § 921(a)(33)(B)(ii)8,11

18 U.S.C. § 922(g)(9)5

FACTS AND PROCEDURAL POSTURE

Ewing was convicted of domestic violence [DV]. [9 December 2019, stipulated facts, ¶3.] The criminal court sentenced him to jail, fines, and probation. [Id. ¶4.] Ewing successfully completed his sentence. [Id. ¶8.]

Ewing then filed a civil petition under R.C. 2923.14 to restore his firearm rights. [Id. ¶9, Ex. A.] Federal law imposed a disability on those rights unless removed. The State notified the victim of the firearm-restoration hearing; she attended it and consulted with the prosecutor; she made an unsworn statement that shielded her from any cross-examination; and the trial court considered the victim's statement in deciding the case. [Id. ¶11.] Ewing testified he was a retired Dayton police officer, successfully completed the DV sentence, had no other record, and that the firearm disability impaired his private security business, his federal firearm license, and his ability to possess a firearm for self-protection. [Id. ¶12.]

The State and undersigned stipulated that R.C. 2923.14 could relieve a federal firearm disability—relying on uncodified law from § 3 of 2011 HB 54. [Id. ¶10.] The trial court accepted the stipulation. And it granted Ewing's petition to restore his firearm rights. [Id. ¶13, Ex. B.]

The judgment restoring Ewing's firearm rights became final when no appeal was filed. [Id. ¶14.]

After final judgment, the victim filed a prohibition claim in the 12th District. The 12th District issued the writ, reasoning that the trial court lacked the legal authority to remove the federal firearm disability.

This timely appeal follows. [15 June 2020, notice of appeal.]

ARGUMENT

I

The victim's prohibition claim was unauthorized by Marsy's Law.

PROPOSITION OF LAW I

Art. I, § 10a(B) requires a victim to seek specific relief in the trial court before petitioning the appellate court for an extraordinary writ.

Marsy's Law orders the process under which a victim's claim is adjudicated. The victim must first assert a viable claim to the trial court. "If the relief sought is denied, the victim or the victim's lawful representative may [then] petition the court of appeals for the applicable district, which shall promptly consider and decide the petition." Art. I, § 10a(B).

The victim failed to exhaust her present claim in the trial court. She failed to seek relief on the basis the trial court lacked jurisdiction to restore Ewing's firearm rights, or that the firearm-restoration statute was inapplicable to DV offenders. She instead offered an unsworn statement about the DV case and opposed Ewing's request on the merits. The victim's present claim challenging jurisdiction was made in the 12th District in the first instance and only after the judgment restoring Ewing's rights became final.

Ewing objected to the victim's failure to present and exhaust her jurisdiction claim. [27 January 2020, intervenor's brief.] The 12th District declined to address this specific objection, limiting its analysis to whether the victim possessed standing. As a matter of constitutional law, this court reviews Ewing's arguments de novo. *City of Cleveland v. State*, 157 Ohio St.3d 330, 2019-Ohio-3820, ¶¶15-26.

The Marsy's Law provision requiring trial-court exhaustion is a mandatory claim-processing rule. This is a common way to order an adjudication. For example, an employee must file an EEOC charge before filing a Title VII claim in federal court. *Fort*

Bend Cty. v. Davis, ___ U.S. ___, 139 S.Ct. 1843 (2019). A taxpayer must seek relief from the IRS before asserting a court claim for unlawful tax collections. *Hoogerheide v. IRS*, 637 F.3d 634 (6th Cir. 2011). And a prisoner must seek release from the Bureau of Prisons before petitioning for compassionate release with the sentencing court. *United States v. Williams*, W.D. TN No. 2:17-cr-20002-5, 2020 U.S. Dist. LEXIS 82587 (30 April 2020).

Because claim-processing rules are common, the consequences for non-compliance are settled. With non-compliance and a timely objection, the claim is dismissed because a claim-processing rule is “unalterable.” *Manrique v. United States*, ___ U.S. ___, 137 S.Ct. 1266, 1272 (2017). And so it must be here. The victim failed to seek relief in the trial court on the grounds pressed here. Those claims went unexhausted and were raised in the prohibition case in the first instance. So the unalterable, claim-processing provision from Marsy’s Law was violated—requiring dismissal. *Id.*

PROPOSITION OF LAW II

A victim’s right must be asserted in a § 10a(B) proceeding that i) involves the criminal offense or ii) where the victim’s rights are implicated. A right is viable if enumerated in § 10a(A) or a statute. Before the victim can pursue extraordinary relief, she must have asserted a viable claim in a qualifying § 10a(B) proceeding below.

In the DV case, the criminal court sentenced Ewing to jail, a fine, and probation. He completed the sentence without incident. A firearm ban was not part of his sentence—it was a federal collateral disability. Ewing filed a civil petition under the firearm-restoration statute to remove his collateral disability. R.C. 2923.14.

At the firearm-restoration hearing, there were no victim-rights arguments. And Marsy’s Law was followed by the prosecutor and trial court. The victim was notified of the hearing; she attended it and consulted with the prosecutor; she made an unsworn

statement that shielded her from any cross-examination; and her statement was received and considered by the trial court in adjudicating Ewing's petition. Art. I, § 10a(A). In prohibition, the victim likewise fails to present a victim-rights argument. She instead claims the trial court patently and unambiguously lacked jurisdiction to restore Ewing's firearm rights.

Ewing objected in the appellate court because jurisdiction and statutory construction are not viable victim's rights, and a civil firearm-restoration hearing to remove a federal disability is not a §10a(B) proceeding for victim's rights. [27 January 2020, intervenor's brief.] The 12th District declined to address these objections, limiting its analysis to whether the victim possessed standing. As a matter of constitutional law, this court reviews Ewing's arguments de novo. *City of Cleveland v. State*, 157 Ohio St.3d 330, 2019-Ohio-3820, ¶¶15-26.

Jurisdiction is not a viable victim's right. *Ex'r's of Long's Estate v. State*, 21 Ohio App. 412, 415 (1926). It instead concerns the power of a court to act. *Id.* Proper jurisdiction is not listed as a victim's right in Marsy's Law or any statute. Art. I, § 10a(A); R.C. Chapter 2930. In federal practice, where any person can sue for the violation of a constitutional right under § 1983, the lack of jurisdiction is not an actionable claim. And that is no accident. Rights are personal; but jurisdiction is institutional.

The scope of the firearm-restoration statute is not a viable victim's right. R.C. 2923.14. It instead concerns legislative intent and the public policy surrounding firearm possession and use. Neither Marsy's Law nor a victim-rights statute confer on the victim a right to litigate statutory construction. Art. I, § 10a(A); R.C. Chapter 2930.

What is more, the rights-restoration statute creates a civil proceeding. R.C. 2923.14(E). Ewing was the petitioner, paid the court costs, and the clerk placed the case on the civil docket. Marsy's Law provides for two proceedings to assert a victim's right—but neither includes a civil firearm-restoration proceeding to remove a collateral disability. The first Marsy's Law proceeding is one that 'involves the criminal offense.' Art. I, § 10a(B). And the second is one that 'implicates the victim's rights. Id.

Here, the victim's prohibition claim lacked a prerequisite because a civil firearm-restoration hearing under R.C. 2923.14 to remove a federal disability is not a qualifying § 10a(B) proceeding for victim's rights.

A civil firearm-restoration proceeding under R.C. 2923.14 to remove a DV disability does not 'involve the criminal offense.' Art. I, § 10a(B). It is civil rather than criminal, unrelated to the DV elements or sentence, and concerns the federal collateral disability under 18 U.S.C. § 922(g)(9). An expansive reading of 'proceeding *involving the criminal offense*' would create unintended mischief. Thus, if Ewing were disciplined by the Dayton police for his DV conviction, the victim could claim a right under Marsy's Law to make arguments in Ewing's arbitration proceedings. Or if Ewing lost an occupational license for his DV conviction, the victim could make arguments in the administrative proceeding before the licensing body. Under the victim's theory, these examples could lead to a mandamus action to compel the arbitrator to impose an employment sanction, or to a prohibition action if the victim believed the licensor lacked authority to forgo a license suspension. This court must resist the victim's theory. A Marsy's Law 'proceeding involving the criminal offense' connotes a criminal case under the criminal rules—not a separate civil case about a collateral disability.

A civil firearm-restoration proceeding under R.C. 2923.14 to remove a DV disability does not ‘implicate the victim’s rights.’¹ Art. I, § 10a(B). Instead, it determined Ewing’s constitutional firearm rights and the removal of a collateral disability unrelated to his DV sentence. And even if victim’s rights were implicated in the proceeding, Marsy’s Law was followed in the trial court. The victim was notified, attended the hearing, consulted with the prosecutor, and made an unsworn statement that the trial court considered in adjudicating the petition. Art. I, § 10a(A). In her prohibition claim, the victim does not argue these Marsy’s Law rights. She instead presents a new claim, unrelated to enumerated victim’s rights, that the trial court patently lacked jurisdiction to restore Ewing’s firearm rights.

III

The victim’s prohibition claim was procedurally barred.

PROPOSITION OF LAW III

Res judicata bars a prohibition claim when a trial court restores a defendant’s firearm rights, that judgment becomes final, the victim appeared at the civil firearm-restoration hearing but failed to intervene in the case, and the prohibition claim is a collateral attack on the final judgment.

The victim appeared at the civil firearm-restoration hearing and made an unsworn statement about the DV facts. She declined to intervene. The trial court granted Ewing’s application to restore his firearm rights and the judgment became final when there was no appeal. After final judgment, the victim sought a writ of prohibition to collaterally attack the final judgment.

¹ By demanding the proceeding *implicate the victim’s rights*, Marsy’s Law conforms to settled standing law. The victim can assert her rights in a proceeding about her rights. But a holding allowing the victim to make claims after the criminal case is completed in a civil proceeding about the defendant’s lost rights would upend standing rules. The court must construe a ‘§ 10a(B) proceeding’ with standing rules and principles in mind. *State ex rel. Matasy v. Morley*, 25 Ohio St.3d 22, 23 (1986).

Ewing raised res judicata as a procedural bar to the victim's prohibition claim. [27 January 2020, intervenor's brief.] The 12th District declined to address this specific objection, limiting its analysis to whether the victim possessed standing. This court reviews Ewing's arguments de novo. *City of Cleveland v. State*, 157 Ohio St.3d 330, 2019-Ohio-3820, ¶¶15-26.

Res judicata acts as a procedural bar in extraordinary writ cases. *Denton v. Bedinghaus*, 1st Dist. C-000819, 2002-Ohio3273, ¶¶12-18. It contains four elements: 1) there was a prior, valid judgment on the merits, 2) the second action involved the same parties, or persons in privity with those parties, as the first action, 3) this action raises claims that could have been litigated in the first action, and 4) both actions arise out of the same transaction or occurrence. *Brown v. State*, 6th Dist. L-18-1044, 2019-Ohio-4376, ¶20.

A prior, valid judgment on the merits concerns the trial court's subject-matter jurisdiction to hear and determine the presented claim. *Bank of Am. v. Kutcha*, 141 Ohio St.3d 75, 2014-Ohio—4275, ¶19. It does not concern a litigant's standing or the merits. *Id.*; *Brown v. State*, Sixth Dist. L-18-1044, 2019-Ohio-4376, ¶26. Subject-matter jurisdiction is analytically separate from standing or the merits. It is error to deny subject-matter jurisdiction on the theory that the litigant lacks standing or cannot prove the merits. When a court erroneously adjudicates a claim it may hear, there was subject-matter jurisdiction but the judgment is voidable. *Kutcha*, ¶19. When it lacks power to hear and adjudicate the claim in the first place, subject-matter jurisdiction is absent and the judgment is void. *Brown*, ¶26.

A common pleas court is endowed with original jurisdiction over justiciable matters as provided by law. Art. IV, § 4(B); R.C. 2305.01. The General Assembly enacted R.C. 2923.14(A)(1) to authorize the common pleas court to hear and adjudicate a civil application to restore gun rights. In uncodified language from § 3 of 2011 House Bill 54, the General Assembly expressed its intent for R.C. 2923.14 to remove gun disabilities imposed under federal law. And in 18 U.S.C. § 921(a)(33)(B)(ii), Congress empowered the states to remove a federal gun disability under state law.

The first res-judicata element is satisfied. The trial court issued a prior, valid judgment restoring Ewing's firearm rights. R.C. 2305.01 and 2923.14(A)(1) empowered the trial court to hear and decide this claim.

The second res-judicata element is satisfied. There is privity between the victim, the State, and Judge Peeler. Each participated in the first action and shared an interest in ensuring that Ewing was eligible under R.C. 2923.14 for relief. *State ex rel. Schachter v. Ohio Pub. Emps. Retirement Bd.*, 121 Ohio St.3d 526, 2009-Ohio-1704, ¶¶31-39. And R.C. 2923.14 establishes a civil proceeding. R.C. 2923.14(E); *In re Reed*, 3rd Dist. 9-14-44, 2015-Ohio-2742, ¶9 (“By its very language, R.C. 2923.14 is civil in nature.”) Civ.R. 24 authorizes an interested person to intervene in a civil case. Privity extends to “*** those that could have entered the proceedings but did not avail themselves of the opportunity.” *Howell v. Richardson*, 45 Ohio St.3d 365, 367 (1989). The victim could have intervened but did not. The victim therefore had privity with the State and Judge Peeler, so she is bound by the prior, valid judgment from the R.C. 2923.14 civil proceeding.

The third res-judicata element is satisfied. The victim had a chance to intervene below under Civ.R. 24, and to then elicit evidence and argue that Ewing's disability made him ineligible for restoration under R.C. 2923.14(D)(3) and federal law. But she did not.

The fourth and final res-judicata element is satisfied. The R.C. 2923.14 proceeding, like this prohibition case, arose from Ewing's DV conviction and the federal and state law that governed his eligibility for firearm restoration.

Marsy's Law has not supplanted res judicata as a procedural bar. And it has not supplanted the policies behind res judicata. Those policies are the litigation of issues at the earliest opportunity, the finality of judgments, and the discouragement of collateral attacks upon final judgments. Criminal defendants are subject to res judicata as a procedural bar for constitutional claims. *State v. Cole*, 2 Ohio St.3d 112 (1982), syllabus. Crime victims should operate under the same rules—not advantaged ones.

IV

The prohibition claim fails on the merits.

PROPOSITION OF LAW IV

Prohibition does not lie where a victim has an adequate legal remedy through intervention in the civil firearm-restoration proceeding. And it does not lie where the trial court had subject-matter jurisdiction under R.C. 2923.14 to relieve a firearm disability—but the victim disputes whether this authority extends to DV convictions.

This court reviews de novo the 12th District's judgment issuing a writ of prohibition.

Prohibition is disfavored and limited to extraordinary circumstances. It is thus unavailable if the petitioner has an adequate remedy in the ordinary course of law. *State ex rel. Claugus Family Farm, L.P. v. Seventh Dist. Court of Appeals*, 145 Ohio St.3d 180, 2016-Ohio-178, ¶¶37-38. Ewing argued available legal remedies below, but the 12th District failed to address the point. [27 January 2020, intervenor's brief.]

The firearm-restoration proceeding is a civil action. R.C. 2923.14(E). The victim had a legal right to request intervention in the civil proceeding to litigate her issues. Civ.R. 24. And she had a legal right to appeal an adverse ruling on intervention. The victim failed to pursue intervention. She instead offered an unsworn statement about the DV case and opposed Ewing's request on the merits.

Intervention and an appeal from an order denying intervention are adequate legal remedies that bar prohibition. Thus, prohibition was unavailable to a relative that posted bond for the defendant, where the bond was applied to the defendant's child-support arrearage, because the relative could intervene in the child-support case to challenge payment. *State ex rel. Denton v. Bedinghaus*, 98 Ohio St.3d 298, 2003-Ohio-861, ¶28. And prohibition was unavailable to landowners that failed to intervene in an appeal that tolled their mineral lease with an energy developer and injured title. *State ex rel. Claugus Family Farm, L.P. v. Seventh Dist. Court of Appeals*, 145 Ohio St.3d 180, 2016-Ohio-178, ¶¶37-38.

The victim sat on available legal rights. So she cannot be saved or rewarded with extraordinary relief. In contrast, Ewing intervened in this prohibition case because his constitutional firearm rights were jeopardized by the victim's suit against the judge. The victim gambled at the firearm-restoration hearing by not intervening, lost her bet, and prohibition cannot serve as her hedge.

Prohibition is also unavailable when the trial court has debatable jurisdiction in the case. A patent and unambiguous lack of jurisdiction is required. *State ex rel. Tubbs Jones, Pros. Atty. v. Suster*, 84 Ohio St.3d 70, 74 (1998). Ewing argued debatable

jurisdiction below, but the 12th District failed to address the point. [27 January 2020, intervenor's brief.]

The General Assembly conferred subject-matter jurisdiction on the trial court to restore firearm rights. R.C. 2305.01 and 2923.14(E). This is undisputed. What is at issue is whether the remedy extends to DV offenders. This concerns the reach of R.C. 2923.14 and jurisdiction over the case—not the trial court's power to hear and adjudicate the claim in the first place. A routine dispute about statutory scope is no lawless exercise of power. Prohibition, as an extraordinary writ, would be trivialized if applied here. Under the victim's theory, litigation about the statutory eligibility for OVI driving privileges, judicial release, and sealing could be litigated in prohibition courts—rather than at trial and direct appeal.

There is a debatable basis to conclude R.C. 2923.14 reaches a DV offender. It is a remedial statute and fails to list DV as an ineligible offense. R.C. 2923.14(A)(2). Congress authorized the states to undo a federal firearm disability under its own law. 18 U.S.C. § 921(a)(33)(B)(ii). In response, the General Assembly, in the context of a bill liberalizing Ohio's firearm rights, expressed its intent for R.C. 2923.14 to remove a federal disability. § 3 of 2011 House Bill 54. With these provisions in mind, the undersigned and prosecutor stipulated at Ewing's hearing that his DV disability was eligible for relief. And the trial court accepted the stipulation.

The 12th District and victim contend otherwise. But a patent and unambiguous lack of jurisdiction is required for prohibition. And that is missing when lawyers can reasonably disagree about whether the firearm-restoration statute could reach the DV disability.

CONCLUSION

This court must reverse the 12th District's judgment issuing a writ of prohibition. The victim's prohibition claim was unauthorized by Marsy's Law. It was procedurally barred by res judicata. And it fails on the merits because the victim had an adequate remedy at law and the trial court had debatable jurisdiction to afford Ewing relief from his federal disability.

To the court, this merit brief is

Respectfully submitted,

/s/Christopher J. Pagan
Christopher Pagan
Supreme Court #0062751
1501 First Avenue
Middletown, Ohio 45044
513-424-1823 – telephone
513-424-3135 – facsimile
Email: cpagan@repperpagan.com

COUNSEL FOR INTERVENOR-APPELLANT

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was delivered via regular U.S. Mail to Michael Greer, Assistant Butler County Prosecuting Attorney, 315 High Street, 11th Floor, Hamilton, Ohio 45012; Elizabeth Wells, Ohio Crime Victim Justice Center, 3976 North Hampton Drive, Powell, Ohio 43065 and Micaela Deming, O/B/O Ohio Domestic Violence Network, P. O. Box 176, Bluffton, Ohio 45817 on 24 August 2020.

/s/Christopher J. Pagan
Christopher J. Pagan

IN THE SUPREME COURT OF OHIO

STATE OF OHIO EX REL.,
JAMIE SUWALSKI, :

Relator-Appellee, :

-vs- :

JUDGE ROBERT W. PEELER, :

Respondent-Appellant. :

On appeal from the
Warren County Court of Appeals,
Twelfth Appellate District
Court of Appeals Case No. CA2019-05-053

Supreme Court Case No. _____

NOTICE OF APPEAL OF INTERVENOR-APPELLANT ROY EWING

Christopher Pagan (Counsel of Record for Intervenor)
Supreme Court #0062751
1501 First Avenue
Middletown, Ohio 45044
(513) 424-1823 – Telephone
(513) 424-3135 – Facsimile
cpagan@repperpagan.com

COUNSEL FOR INTERVENOR-APPELLANT

Elizabeth Wells (0087750)
Ohio Crime Victim Justice Center
3976 North Hampton Drive
Powell, Ohio 43065
(614) 848-8500 – Telephone
(614) 848-8501 - Fax
ewell@ocvjc.org
COUNSEL FOR RELATOR-APPELLEE

Michael Greer (0084352)
Butler County Prosecutor's Office
P O Box 515
Hamilton, Ohio 45012
(513) 887-3474 - Telephone
(513) 887-3489 - Fax
greerjm@butlercountyohio.org
**COUNSEL FOR RESPONDENT-
APPELLANT**

Micaela Deming (0085802)
O/B/O Ohio Domestic Violence Network
P O box 176
Bluffton Ohio 45817
(614) 742-7902 – Telephone
mdemingesq@gmail.com
COUNSEL FOR RELATOR-APPELLEE

NOTICE OF APPEAL

Now comes Roy Ewing, Intervenor-Appellant, and hereby gives Notice of Appeal to the Supreme Court of Ohio from the judgment of the Warren County Court of Appeals, Twelfth Appellate District, entered in Court of Appeals Case No. CA2019-05-053 on 8 June 2020.

This case originated in the Warren County Court of Appeals.

Respectfully submitted,

By: /s Christopher J. Pagan
Christopher Pagan

COUNSEL FOR INTERVENOR,
ROY EWING

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was delivered by electronic mail to Elizabeth Well, Ohio Crime Victim Justice Center, 3976 North Hampton Drive, Powell, Ohio 43065 (ewell@ocvjc.org); Micaela Deming, Ohio Domestic Violence Network, P O Box 176, Bluffton, Ohio 45817 (mdemingesq@gmail.com); and Michael Greer, Assistant Butler County Prosecuting Attorney, P O Box 515, Hamilton, Ohio 45012(greerjm@butlercountyohio.org) on 15 June 2020.

/s Christopher J. Pagan
Christopher J. Pagan

✓

IN THE COURT OF APPEALS
COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
WARREN COUNTY FILED

WARREN COUNTY

JUN - 8 2020

James L. Spach, Clerk
LEBANON OHIO

STATE OF OHIO EX REL.,
JAMIE SUWALSKI,

Relator,

- vs -

JUDGE ROBERT W. PEELER,

Respondent.

CASE NO. CA2019-05-053

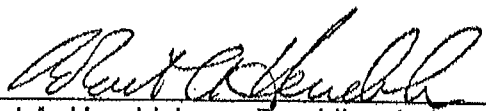
JUDGMENT ENTRY

The matter is before the court on a petition for a writ of prohibition filed by relator, Jamie Suwalski.

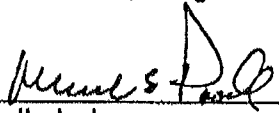
Upon due consideration of the foregoing, and pursuant to the Opinion issued the same date as this Judgment Entry, Relator is hereby granted a writ of prohibition.

Costs to be taxed to respondent.

cc: Kirsten Brandt
Christopher J. Pagen
Michael Greer
Micaela Deming
Elizabeth Wells
WB 6-8-20


Robert A. Hendrickson, Presiding Judge


Stephen W. Powell, Judge


Mike Powell, Judge

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
WARREN COUNTY

COURT OF APPEALS
WARREN COUNTY
FILED
JUN - 8 2020
James L. Speth, Clerk
LEBANON OHIO

STATE OF OHIO EX REL.,
JAMIE SUWALSKI,

Relator,

- vs -

JUDGE ROBERT W. PEELER,

Respondent.

CASE NO. CA2019-05-053

OPINION
6/8/2020

ORIGINAL ACTION FOR PROHIBITION

✓ Ohio Crime Victim Justice Center, Elizabeth Well, 3976 North Hampton Drive, Powell, Ohio 43065, for relator

✓ Ohio Domestic Violence Network, Micaela Deming, P.O. Box 176, Bluffton, Ohio 45817, for relator

✓ Michael Greer, Government Services Center, 315 High Street, 11th Floor, Hamilton, Ohio 45011, for respondent

✓ Repper, Pagan, Cook, Ltd., Christopher J. Pagan, 1501 First Avenue, Middletown, Ohio 45044, for intervenor

S. POWELL, J.

{¶ 1} This case involves a review of a petition for a writ of prohibition filed by relator, Jamie Suwalski. Suwalski filed her petition with this court on May 28, 2019. After being

Warren CA2019-05-053

granted an extension, respondent, the Honorable Robert W. Peeler with the Warren County Court of Common Pleas, filed an answer to Suwalski's petition on August 14, 2019. On August 29, 2019, Suwalski's ex-husband, Roy Ewing, who this court permitted to intervene in this case on August 5, 2019, also filed an answer to Suwalski's petition.

{¶ 2} On December 9, 2019, the parties filed a joint stipulated statement of facts. Shortly thereafter, on December 13, 2019, Suwalski filed a brief in support of her petition. To this, Ewing filed a response brief on January 27, 2020 with Judge Peeler filing his own response brief on February 12, 2020. Suwalski then filed a reply brief on February 21, 2020. This case was originally scheduled to be submitted to the court following oral argument. However, due to the impact of the COVID-19 pandemic, this matter was instead submitted to the court without oral argument on May 4, 2020.

{¶ 3} The matter now properly before this court, Suwalski seeks a writ of prohibition to prevent Judge Peeler from relieving Ewing of the federal firearms disability imposed upon him under 18 U.S.C. 922(g)(9). Pursuant to that statute, it is unlawful for any person "who has been convicted in any court of a misdemeanor crime of domestic violence" to ship, transport, possess, or receive "any firearm or ammunition" in or affecting commerce.¹ For the reasons outlined below, Suwalski's petition is hereby granted as Judge Peeler does not have the judicial power under Ohio law, specifically R.C. 2923.14, to relieve Ewing of the federal firearms disability imposed upon him under 18 U.S.C. 922(g)(9).²

Facts and Procedural History

1. As discussed more fully below, Ewing was convicted of domestic violence in violation of R.C. 2919.25(A). There is no dispute that Ewing's misdemeanor domestic violence conviction qualifies as a "misdemeanor crime of domestic violence" subject to a federal firearms disability imposed under 18 U.S.C. 922(g)(9).

2. This case does not address whether Judge Peeler had the judicial power to relieve Ewing of any state firearms disability imposed under R.C. 2923.13(A)(1) thru (5) resulting from his misdemeanor domestic violence conviction. For a discussion on that issue, see this court's decision in *Terry v. Ohio*, 12th Dist. Clermont No. CA2016-11-078, 2017-Ohio-7805.

{¶ 4} On April 7, 2017, Ewing was found guilty of domestic violence in violation of R.C. 2919.25(A), a first-degree misdemeanor. There is no dispute that Suwalski was the victim of this domestic violence incident. After being found guilty, Ewing was sentenced to serve 20 days in jail, with ten of those days suspended, placed on one year of nonreporting probation, and ordered to pay a fine. Ewing then appealed.

{¶ 5} In support of his appeal, Ewing argued that the trial court erred when it prohibited him from cross-examining Suwalski about an alleged "safecracking" incident. This, according to Ewing, would have revealed Suwalski's motive to lie in order to get him out of their house so that she could gain leverage over him in their upcoming divorce. Finding no merit to Ewing's claim, this court affirmed Ewing's conviction in *State v. Ewing*, 12th Dist. Warren Nos. CA2017-05-062 and CA2017-05-063, 2018-Ohio-451. The Ohio Supreme Court thereafter declined review. *06/06/2018 Case Announcements #2*, 2018-Ohio-2155.

{¶ 6} On February 5, 2019, Ewing filed an application for relief from the federal firearms disability imposed upon him under 18 U.S.C. 922(g)(9).³ Ewing filed his application under R.C. 2923.14(A), which provides that "any person who is prohibited from acquiring, having, carrying, or using firearms may apply to the court of common pleas in the county in which the person resides for relief from such prohibition." Ewing supported his application by noting the fact that "his community-control terms were fully discharged; and he has not recidivated." Ewing also noted that he "is a retired police officer with training and experience with the responsible use and handling of a firearm." Therefore, because there was "ample

3. In 1996, Congress enacted 18 U.S.C. 922(g)(9) after recognizing that existing "felon-in-possession laws" were not "keeping firearms out of the hands of domestic abusers, because 'many people who engage in serious spousal or child abuse ultimately are not charged with or convicted of felonies.'" *United States v. Hayes*, 555 U.S. 415, 426, 129 S.Ct. 1079 (2009), quoting 142 Cong. Rec. 22985 (1996) (statement of Sen. Lautenberg). "By extending the federal firearm prohibition to persons convicted of 'misdemeanor crime[s] of domestic violence,' proponents of [18 U.S.C. 922(g)(9)] sought to 'close this dangerous loophole.'" *Id.*, quoting 142 Cong. Rec. at 22986.

evidence of rehabilitation" exhibited by his "upstanding behavior" following his conviction for misdemeanor domestic violence, Ewing requested "his firearm rights" be restored so that he could "resume his private security business and to engage in outdoor recreational sport of hunting with his friends and family."

{¶ 7} On April 23, 2019, Judge Peeler held a hearing on Ewing's application. Ewing testified at this hearing. As part of his testimony, Ewing claimed that the federal firearms disability imposed upon him under 18 U.S.C. 922(g)(9) had negatively impacted his private security business, his federal firearms license, as well as his ability to possess a firearm for personal protection. Suwalski did not testify at this hearing. Suwalski, however, did provide Judge Peeler with a statement noting her opposition to Ewing's application. Suwalski's statement also restated the facts underlying Ewing's misdemeanor domestic violence conviction. As this court stated in *Ewing*, the facts underlying Ewing's conviction are as follows:

On January 14, 2017, [Suwalski] called 9-1-1 after an argument with [Ewing] escalated and became physical. The responding police officers talked to [Ewing] and [Suwalski] separately. [Suwalski] was upset and her eyes were a little bit puffy and watery. [Suwalski] told one officer that [Ewing] grabbed her by the throat several times, grabbed her by the hair, and shoved her hard enough that she hit a back door, hit her head, and landed on the floor. The officer observed red marks on [Suwalski's] neck and found a lump of curly hair on the laundry room floor, just outside the office where the argument mostly took place.

Id., 2018-Ohio-451 at ¶ 2.

{¶ 8} On April 29, 2019, Judge Peeler issued a decision granting Ewing's application. Judge Peeler issued his decision based on the language found in R.C. 2923.14(D). That statute provides that, upon hearing, an applicant who is prohibited from acquiring, having, carrying, or using firearms may be entitled to relief from that prohibition if all of the following apply:

(1) One of the following applies:

(a) If the disability is based upon an indictment, a conviction, or an adjudication, the applicant has been fully discharged from imprisonment, community control, post-release control, and parole, or, if the applicant is under indictment, has been released on bail or recognizance.

(b) If the disability is based upon a factor other than an indictment, a conviction, or an adjudication, that factor no longer is applicable to the applicant.

(2) The applicant has led a law-abiding life since discharge or release, and appears likely to continue to do so.

(3) The applicant is not otherwise prohibited by law from acquiring, having, or using firearms.

{¶ 9} Judge Peeler explained his decision to grant Ewing's application as follows:

The record in this case establishes that [Ewing] had no criminal record prior to the 2017 conviction[] and has led a law-abiding life since the 2017 conviction[]. [Ewing] has been fully discharged from his 2017 sentence of incarceration and non-reporting probation. No evidence was admitted at the hearing that [Ewing] had any probation infractions or acted inappropriately while on probation. There is nothing to indicate that [Ewing] would not continue to live a law-abiding life, whether his application is granted or not. Further, the State concedes [Ewing] is not otherwise prohibited by law from acquiring, having, or using a firearm.

While the victim of [Ewing's] past criminal conduct certainly has trepidations regarding [Ewing's] ability to possess firearms, the record reveals no evidence that [Ewing] is a risk to Ms. Suwalski or any other person. Ms. Suwalski admitted that she has not seen [Ewing] since their divorce was finalized approximately one year ago.

Suwalski's Standing to Petition this Court for a Writ of Prohibition

{¶ 10} Effective February 5, 2018, Article I, Section 10a of the Ohio Constitution, commonly referred to as Marsy's Law, expanded the rights afforded to crime victims like Suwalski. *State v. Lee*, 12th Dist. Warren No. CA2018-11-134, 2019-Ohio-4725, ¶ 12 ("Marsy's Law defines the term 'victim' as 'a person against whom the criminal offense or

delinquent act is committed or who is directly and proximately harmed by the commission of the offense or act"); *State v. Jones*, 1st Dist. Hamilton No. C-190039, 2020-Ohio-81, ¶ 9 ("on February 5, 2018, the amendment to Article I, Section 10a of the Ohio Constitution, known as Marsy's Law, became effective"); *State ex rel. S.L. v. Rucker*, 1st Dist. Hamilton No. C-190248, 2020-Ohio-584, ¶ 3 ("Marsy's Law is an amendment to the Ohio Constitution that expands the rights afforded to victims of crimes").

{¶ 11} The expanded rights afforded to crime victims include those set forth in Article I, Section 10a(B), which states:

The victim, the attorney for the government upon request of the victim, or the victim's other lawful representative, in any proceeding involving the criminal offense or delinquent act against the victim or in which the victim's rights are implicated, may assert the rights enumerated in this section and any other right afforded to the victim by law. If the relief sought is denied, the victim or the victim's lawful representative may petition the court of appeals for the applicable district, which shall promptly consider and decide the petition.

{¶ 12} Thus, by its terms, Marsy's Law authorizes Suwalski to petition this court for a writ of prohibition under these circumstances. See *Rucker* ("[u]nder Marsy's Law, the victim also has the right to 'petition' a court of appeals if the victim's rights are 'implicated' in a criminal proceeding); see, e.g., *State ex rel. Howery v. Powers*, 12th Dist. Butler No. CA2019-03-045, 2020-Ohio-2767, ¶ 14, 20 (remedy for a crime victim who was not provided for full and timely restitution as provided under Marsy's Law was to petition this court for a writ of mandamus directing the trial court judge to reopen sentencing "to allow relator to enforce her constitutional right of restitution"). This holds true even though Suwalski neither appealed from Judge Peeler's decision directly nor intervened in the action below. "The right a victim may have to 'petition' an appellate court is not equivalent to that of a party with a right to appeal." *State v. Hughes*, 8th Dist. Cuyahoga No. 107697, 2019-Ohio-1000, ¶ 16. Therefore, in accordance with Marsy's Law, specifically, Article 1, Section 10(a)(B) of

the Ohio Constitution, Suwalski has standing to petition this court for a writ of prohibition to prevent Judge Peeler from relieving Ewing of the federal firearms disability imposed upon him under 18 U.S.C. 922(g)(9).

Suwalski's Petition for a Writ of Prohibition

{¶ 13} "Prohibition is an extraordinary writ issued by a higher court to a lower court to restrain the unauthorized exercise of judicial power." *State ex rel. Cincinnati Enquirer v. Oda*, 12th Dist. Warren No. CA2017-08-130, 2018-Ohio-704, 10, citing *State ex rel. Daily Reporter v. Court of Common Pleas of Franklin Cty.*, 56 Ohio St.3d 145 (1990). "Three elements are necessary for a writ of prohibition to issue: the exercise of judicial or quasi-judicial power, the lack of legal authority for the exercise of that power, and the lack of an adequate remedy in the ordinary course of law." *State ex rel. Barney v. Union Cty. Bd. of Elections*, Slip Opinion No. 2019-Ohio-4277, ¶ 11, citing *State ex rel. Tam O'Shanter Co. v. Stark Cty. Bd. of Elections*, 151 Ohio St.3d 134, 2017-Ohio-8167, ¶ 14. Suwalski bears the burden to demonstrate that she is entitled to the requested writ. *Roberts v. Winkler*, 176 Ohio App.3d 685, 2008-Ohio-2843, ¶ 11 (1st Dist.). Therefore, for the writ to issue, Suwalski must establish that: (1) Judge Peeler is about to exercise or has exercised his judicial power, (2) Judge Peeler's exercise of his judicial power was not authorized by law, and (3) denial of the writ will cause injury for which she would lack an adequate remedy in the ordinary course of law. *State ex rel. City of Cleveland v. Russo*, 156 Ohio St.3d 449, 2019-Ohio-1595, ¶ 8, citing *State ex rel. Elder v. Camplse*, 144 Ohio St.3d 89, 2015-Ohio-3628, ¶ 13.

{¶ 14} Because the first and third elements are clearly satisfied, the only real issue to be decided is whether a state court judge in Ohio, like Judge Peeler, has the judicial power under Ohio law, specifically R.C. 2923.14, to relieve a person of a federal firearms disability imposed under 18 U.S.C. 922(g)(9). Based on this court's research, it appears

that this issue has not previously been addressed by any appellate court in Ohio.⁴ This is true even before Marsy's Law came into effect. Therefore, because there is no Ohio case law to refer to for guidance, Judge Peeler has instead cited to the Illinois Supreme Court's decision in *Coram v. Illinois*, 2013 IL 113867.

{¶ 15} In *Coram*, the Illinois Supreme Court determined that its state court judges had the judicial power under then existing Illinois law to "override a federal [firearms] disability, reasoning that a state's ability to restore firearm rights was necessarily implied by Congress." *Johnson v. Illinois Dept. of State Police*, 2020 IL 124213, ¶ 14, citing *Coram* at ¶ 69 ("[g]iven the broad powers Congress has given the states to restore rights and grant relief from federally imposed firearms disabilities, we believe the power to grant relief, or restore rights, to those who have lost them as a result of state misdemeanor convictions is necessarily implied"). This is because, based on the law in effect at that time, "nothing prevented the trial court from granting relief from the federal firearms disability." *People v. Love*, 2020 IL App (1st) 171437-U, ¶ 17, citing *Coram* at ¶ 9.

{¶ 16} The law applied by the Illinois Supreme Court in *Coram*, however, has since been amended. The current law, 430 ILCS 65/10(c), now provides:

(c) Any person prohibited from possessing a firearm under Sections 24-1.1 or 24-3.1 of the Criminal Code of 2012 or acquiring a Firearm Owner's Identification Card under Section 8 of this Act may apply to the Director of State Police or petition the circuit court in the county where the petitioner resides, whichever is applicable in accordance with subsection (a) of this Section, requesting relief from such prohibition and the Director or court may grant such relief if it is established by the applicant to the court's or Director's satisfaction that:

(0.05) when in the circuit court, the State's Attorney has been served with a written copy of the petition at least 30 days before

4. We note that the Summit County Court of Common Pleas has issued a decision relieving an applicant of a federal firearms disability imposed upon him under 18 U.S.C. 922(g)(9). However, besides citing to the general procedures outlined in R.C. 2923.14, the common pleas court offered no other authority that would allow it to grant the applicant's requested relief. See *Perkins v. Summit County*, Summit C.P. No. CV 2012-04-2199, 2012 Ohio Misc. LEXIS 3171 (Sept. 12, 2012).

any such hearing in the circuit court and at the hearing the State's Attorney was afforded an opportunity to present evidence and object to the petition;

(1) the applicant has not been convicted of a forcible felony under the laws of this State or any other jurisdiction within 20 years of the applicant's application for a Firearm Owner's Identification Card, or at least 20 years have passed since the end of any period of imprisonment imposed in relation to that conviction;

(2) the circumstances regarding a criminal conviction, where applicable, the applicant's criminal history and his reputation are such that the applicant will not be likely to act in a manner dangerous to public safety;

(3) granting relief would not be contrary to the public interest; and

(4) *granting relief would not be contrary to federal law.*

{¶ 17} Most significant is the language found in 430 ILCS 65/10(c)(4), which, as the plain language of the statute indicates, strips Illinois state court judges of their judicial power to relieve a person of a federal firearms disability where such relief would be contrary to federal law. The effect of this statute precludes Illinois judges from relieving a person from a federal firearms disability that was imposed upon that person under 18 U.S.C. 922(g)(9). This holds true *unless* the underlying misdemeanor domestic violence conviction is excluded from consideration under 18 U.S.C. 921(a)(33)(B)(ii). Or, as stated more simply by the Illinois Supreme Court in *Johnson*:

[18 U.S.C. 921(a)(33)(B)(ii)] defines a "conviction" in such a way as to exclude from its purview a misdemeanor crime of domestic violence where, as a matter of state law, "the conviction has been expunged or set aside" or where the misdemeanor was "an offense for which the person has been pardoned or has had civil rights restored (if the law of the applicable jurisdiction provides for the loss of civil rights under such an offense) unless the pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms."

Id., 2020 IL 124213 at ¶ 23.

whose civil rights were never taken away." *United States v. Bridges*, 696 F.3d 474, 475 (6th Cir.2012), citing *Logan v. United States*, 552 U.S. 23, 37, 128 S. Ct. 475 (2007). Therefore, because Ewing cannot satisfy any of the four mechanisms of relief from the federal firearms disability imposed upon him under 18 U.S.C. 922(g)(9), Ewing is prohibited by law, albeit federal law, from acquiring, having, or using firearms.

{¶ 21} As noted above, an applicant in Ewing's position cannot be granted relief under R.C. 2923.14 unless and until the applicant "is not otherwise prohibited by law from acquiring, having, or using firearms." R.C. 2923.14(D)(3). Accordingly, because Ewing is prohibited by law from acquiring, having or using firearms, Judge Peeler does not have the judicial power under Ohio law, specifically R.C. 2923.14, to relieve Ewing of the federal firearms disability imposed upon him under 18 U.S.C. 922(g)(9) as a result of his misdemeanor domestic violence conviction.

{¶ 22} In so holding, we note Ewing's argument claiming the General Assembly has expressed its intent that R.C. 2923.14 should "extend to gun disabilities imposed under federal law." To support this claim, Ewing refers this court to the uncodified language found in 2011 H.B. No. 54, Section 3, which provides:

It is the intent of the General Assembly in amending section 2923.14 of the Revised Code to apply the amendments to that section retroactively to any restoration of rights granted previously to any applicant under section 2923.14 of the Revised Code or under any previous version of that section. The General Assembly is explicitly making this amendment to clarify that relief from a weapons disability granted under section 2923.14 of the Revised Code restores a person's civil firearm rights to such an extent that the uniform federal ban on possessing any firearms at all, 18 U.S.C. 922(g)(1), does not apply to that person, in correlation with the U.S. Supreme Court's interpretation of 18 U.S.C. 921(a)(20) in *Caron v. U.S.* (1998), 524 U.S. 308.

{¶ 23} However, by its terms, the uncodified language found in 2011 H.B. No. 54, Section 3, refers only to a federal firearms disability imposed under 18 U.S.C. 922(g)(1).

Unlike a federal firearms disability imposed under 18 U.S.C. 922(g)(9), a federal firearms disability imposed under 18 U.S.C. 922(g)(1) makes it unlawful for any person who has "been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year" to ship, transport, possess, or receive "any firearm or ammunition" in or affecting commerce. Ewing's federal firearms disability was not imposed under 18 U.S.C. 922(g)(1). Ewing's federal firearms disability was instead imposed under 18 U.S.C. 922(g)(9). Therefore, while the General Assembly may have expressed its intent that the procedures outlined in R.C. 2923.14 should apply to a federal firearms disability imposed under 18 U.S.C. 922(g)(1), the same cannot be said as it relates to a disability imposed under 18 U.S.C. 922(g)(9).

Conclusion

{¶ 24} After considering the arguments advanced by both parties herein, Suwalski's petition for a writ of prohibition is hereby granted as Judge Peeler does not have the judicial power under Ohio law, specifically R.C. 2923.14, to relieve Ewing of the federal firearms disability imposed upon him under 18 U.S.C. 922(g)(9).

{¶ 25} Writ granted.

HENDRICKSON, P.J., and M. POWELL, J., concur.

CC: Kirsten Brandt
 Christopher Pagan
 Michael Breer
 Micaela Deming
 Elizabeth Wells
 W 6-8-20



**STATE OF OHIO, WARREN COUNTY
COMMON PLEAS COURT
GENERAL DIVISION**

* **CASE NO. 19MS000287**
* **JUDGE ROBERT W. PEELER**

IN RE:

ROY EWING

*
* **DECISION AND ENTRY**
* **GRANTING APPLICANT'S**
* **REQUEST FOR RELIEF FROM**
* **FIREARMS DISABILITY**
*

This matter came before the Court on April 23, 2019 for hearing pursuant to R.C. 2923.14(D) regarding the application of Roy Ewing (the "Applicant") for relief from a firearms disability.

FACTS AND PROCEDURAL HISTORY

In 2017, the Applicant was found guilty in the Warren County Court of domestic violence and violating a temporary protection order, both misdemeanors, under case numbers 2017CRB000035 and 2017CRB000039. He was sentenced to 10 days in jail, one year of non-reporting probation, and a fine. The Applicant has satisfied all such requirements of his 2017 sentence, and has since led a law abiding life.

On February 5, 2019, the Applicant filed his application for relief from a firearms disability pursuant to R.C. 2923.14. the Applicant alleges he is fit for relief because his community control terms were fully discharged and he has not recidivated.

As to why he seeks relief from the firearms disability, the Applicant testified he is a retired detective in the City of Dayton and has had experience with people whom he considers to be dangerous. Thus, he wishes to carry a weapon for his own personal safety. In addition, the Applicant operates a security company that requires him to go into some "seedy areas" in order to install security systems. He wishes to carry a weapon for his own safety and the safety of his employees in these dangerous areas. Finally, the Applicant testified he is a hunter and would like the ability to hunt again with his family and friends.

The State presented a statement from the victim and ex-wife of the Applicant's crimes, Jamie Suwalski. Ms. Suwalski stated that, in January 2017, the Applicant grabbed her by the neck several times, leaving visible red marks around her neck, and pulled out large clumps of her hair. No firearm was used in the commission of the offenses, nor was there any history of a threat via firearm. Police officers arrested the Applicant that

same day. The following day, the Applicant violated a protection order issued to protect Ms. Suwalski by calling her on the phone. Ms. Suwalski explained she is afraid of the Applicant, suffers from nightmares and anxiety due to his conduct, and does not wish the Applicant to be able to possess a firearm.

STANDARD OF REVIEW

Pursuant to R.C. 2923.13(A), unless relieved from disability under operation of law or legal process, no person shall knowingly acquire, have, carry, or use any firearm or dangerous ordnance, if any of the following apply:

- (1) The person is a fugitive from justice.
- (2) The person is under indictment for or has been convicted of any felony offense of violence or has been adjudicated a delinquent child for the commission of an offense that, if committed by an adult, would have been a felony offense of violence.¹
- (3) The person is under indictment for or has been convicted of any felony offense involving the illegal possession, use, sale, administration, distribution, or trafficking in any drug of abuse or has been adjudicated a delinquent child for the commission of an offense that, if committed by an adult, would have been a felony offense involving the illegal possession, use, sale, administration, distribution, or trafficking in any drug of abuse.
- (4) The person is drug dependent, in danger of drug dependence, or a chronic alcoholic.
- (5) The person is under adjudication of mental incompetence, has been adjudicated as a mental defective, has been committed to a mental institution, has been found by a court to be a mentally ill person subject to court order, or is an involuntary patient other than one who is a patient only for purposes of observation. As used in this division, "mentally ill person subject to court order" and "patient" have the same meanings as in section 5122.01 of the Revised Code.

R.C. 2923.14(D) states that, after a hearing, the court may grant an applicant relief from a firearm disability if any of the following apply:

- (1) The applicant has been fully discharged from imprisonment, probation, and parole, or, if he is under indictment, has been released on bail or recognizance;

¹ The Court notes the Applicant was convicted of a violation of R.C. 2919.24, but that this offense is not a "felony offense of violence" as set forth in R.C. 2923.13(A) and R.C. 2901.01(A)(9)(a).

- (2) The applicant has led a law-abiding life since his discharge or release, and appears likely to continue to do so; or
- (3) The applicant is not otherwise prohibited by law from acquiring, having, or using firearms.

See In re Hensley, 12th Dist. Warren No. CA2003-01-004, 154 Ohio App.3d 210, 2003-Ohio-4619. However, an applicant who meets the elements of R.C. 2923.14(D) is not guaranteed relief from the firearms disability. Granting the application is discretionary, as indicated by the legislature's use of the term "may" instead of "shall" in the statute. *In re Childress*, 8th Dist. Cuyahoga No. 103043, 2016-Ohio-814, ¶ 15.

ANALYSIS

The record in this case establishes that the Applicant had no criminal record prior to the 2017 convictions and has led a law-abiding life since the 2017 convictions. He has been fully discharged from his 2017 sentence of incarceration and non-reporting probation. No evidence was admitted at the hearing that the Applicant had any probation infractions or acted inappropriately while on probation. There is nothing to indicate that the Applicant would not continue to live a law-abiding life, whether his application is granted or not. Further, the State concedes the Applicant is not otherwise prohibited by law from acquiring, having, or using a firearm.

While the victim of the Applicant's past criminal conduct certainly has trepidations regarding the Applicant's ability to possess firearms, the record reveals no evidence that the Applicant is a risk to Ms. Suwalski or any other person. Ms. Suwalski admitted that she has not seen the Applicant since their divorce was finalized approximately one year ago.

CONCLUSION

Based upon a thorough review of the record in this case, the arguments of the parties, and the requisite case law, the Court finds the Applicant's application for relief from a firearms disability well taken and the same is hereby **GRANTED**.

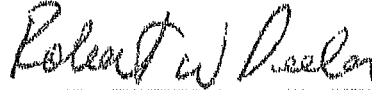
Therefore, it is hereby the **ORDER** of this Court that the Applicant be restored to all civil firearm rights to the extent enjoyed by any citizen, subject to the following conditions:

1. This restoration applies only with respect to the Warren County Court convictions referenced above.
2. This restoration only applies to firearms lawfully acquired, possessed, carried, or used by the Applicant.
3. This restoration is automatically void upon commission by the Applicant of any offense set forth in R.C. 2923.13(A)(2) or (3), or upon

the Applicant becoming one of the class of persons named in R.C.
2923.13(A)(1), (4), or (5).

This restoration may be revoked by the Court at any time for good cause shown and
upon notice to the Applicant.

IT IS SO ORDERED.



JUDGE ROBERT W. PEELER
Warren County Common Pleas Court

Dist: Warren County Assistant Prosecuting Attorney Stephen Knippen, Esq.
Christopher J. Pagan, Esq., *counsel for Applicant*

Oh. Const. Art. I, § 10a

Current through 2018 Ohio Issue 1

Page's Ohio Revised Code Annotated > CONSTITUTION OF THE STATE OF OHIO > Article I BILL OF RIGHTS

§ 10a Rights of victims of crime.

(A) To secure for victims justice and due process throughout the criminal and juvenile justice systems, a victim shall have the following rights, which shall be protected in a manner no less vigorous than the rights afforded to the accused:

- (1) to be treated with fairness and respect for the victim's safety, dignity and privacy;
- (2) upon request, to reasonable and timely notice of all public proceedings involving the criminal offense or delinquent act against the victim, and to be present at all such proceedings;
- (3) to be heard in any public proceeding involving release, plea, sentencing, disposition, or parole, or in any public proceeding in which a right of the victim is implicated; (4) to reasonable protection from the accused or any person acting on behalf of the accused;
- (4) to reasonable protection from the accused or any person acting on behalf of the accused;
- (5) upon request, to reasonable notice of any release or escape of the accused;
- (6) except as authorized by section 10 of Article I of this constitution, to refuse an interview, deposition, or other discovery request made by the accused or any person acting on behalf of the accused;
- (7) to full and timely restitution from the person who committed the criminal offense or delinquent act against the victim;
- (8) to proceedings free from unreasonable delay and a prompt conclusion of the case;
- (9) upon request, to confer with the attorney for the government; and
- (10) to be informed, in writing, of all rights enumerated in this section.

(B) The victim, the attorney for the government upon request of the victim, or the victim's other lawful representative, in any proceeding involving the criminal offense or delinquent act against the victim or in which the victim's rights are implicated, may assert the rights enumerated in this section and any other right afforded to the victim by law. If the relief sought is denied, the victim or the victim's lawful representative may petition the court of appeals for the applicable district, which shall promptly consider and decide the petition.

(C) This section does not create any cause of action for damages or compensation against the state, any political subdivision of the state, any officer, employee, or agent of the state or of any political subdivision, or any officer of the court.

(D) As used in this section, "victim" means a person against whom the criminal offense or delinquent act is committed or who is directly and proximately harmed by the commission of the offense or act. The

term "victim" does not include the accused or a person whom the court finds would not act in the best interests of a deceased, incompetent, minor, or incapacitated victim.

(E) All provisions of this section shall be self-executing and severable, and shall supersede all conflicting state laws.

(F) This section shall take effect ninety days after the election at which it was approved.

History

Adopted November 8, 1994; amended by Ballot Issue 1 on November 7, 2017, effective Feb. 5, 2018.

Annotations

Notes to Decisions

Authority.

Restitution

Right to be present

Standing

Vacation of convictions

Writ of prohibition.

“Victim”

Authority.

Alleged victim in a domestic-violence prosecution was entitled to a writ of prohibition restraining a former municipal court judge from enforcing an order for defendant and defendant’s counsel to access the victim’s residence because the trial judge was not authorized to force a non-party—such as the victim—to allow a criminal defendant to access the non-party’s private residence and the victim had no adequate remedy at law. State ex rel. S.L. v. Judge, Mun. Ct., Hamilton Cty., 2020-Ohio-584, 2020 Ohio App. LEXIS 593 (Ohio Ct. App., Hamilton County 2020).

Restitution

There was no genuine issue of material fact that relator had satisfied her burden of showing the first and second prongs for mandamus: a clear legal right to restitution, and a clear legal duty on the judge’s part to provide it; relator presented evidence that she sustained economic loss due to defendant’s criminal acts, and the issue of restitution was in dispute at the time of the sentencing hearing, but no restitution was granted and