NOT DESIGNATED FOR PUBLICATION

TREDELL SMITH, MINOR THROUGH TRELEAH SMITH	*	**NO. 2008-CA-1349**
	*	**COURT OF APPEAL**
VERSUS		
	*	**FOURTH CIRCUIT**
STATE OF LOUISIANA, ET AL.	*	**STATE OF LOUISIANA**

*** * * * * * ***

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2008-5120, DIVISION "D-16"
Honorable Lloyd J. Medley, Judge

* * * * * *

Charles R. Jones
Judge

* * * * * *

(Court composed of Judge Charles R. Jones, Judge Max N. Tobias, Jr., and Judge Edwin A. Lombard)

Treleah J. Smith
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IN PROPER PERSON, PLAINTIFF/APPELLANT

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AFFIRMED

The appellant, Trelah Smith for Tredell Smith, her minor son, appeals the decision and order of the district court which granted the State's peremptory exception of no cause of action and denied the appellant's application to the Innocence Compensation Fund for the Wrongfully Convicted and Imprisoned. We affirm.

New Orleans Police Department Officer Reynolds Rigney testified at trial that on September 10, 2006, he received information from Trelah Smith that her minor son Tredell Smith had been at her house and had argued with her boyfriend. He further testified that Ms. Smith told him that Tredell had left with some of his friends in a truck which belonged to his grandmother. He was also told by Ms. Smith that Tredell did not have a driver's license and that he did not have permission to use the truck. He testified that Ms. Smith further explained to him that Tredell was 15 years old and that she had seen a gun in her son's waistband.

Officer Rigney testified that Ms. Smith called him later that same evening to inform him that Tredell could be found under the Interstate 10 overpass in the 900 block of North Claiborne Avenue in New Orleans.

Officer Rigney went to that location and observed the subject truck in which several juveniles were sitting. He testified that as he approached the vehicle he saw Tredell sitting behind the wheel of the truck. Officer Rigney testified that when he ordered Tredell to exit the truck, Tredell kicked a gun that was on the floorboard, moving it to the officer's line of sight. Officer Rigney testified after handcuffing and searching Tredell, he found a bag of marijuana in Tredell's pocket as well as a machete hidden behind the driver's seat of the vehicle. On September 11, 2006, Tredell was charged with illegal possession of a handgun by a juvenile, illegal carrying of weapons, and possession of marijuana.

At the delinquency hearing in the juvenile court, Ms. Smith testified—as a witness for the State—that on the night of Tredell's arrest, he came to her home with a few friends. She testified that she was afraid of these particular friends. After some time, Tredell got into an altercation with her boyfriend and had taken off in her mother's truck without permission. Ms. Smith also testified that she went to the police station to notify them of Tredell's departure so that they could determine if he had a gun.

Mrs. Linda Reeves, Ms. Smith's mother and Tredell's maternal grandmother, testified that Tredell lived with her, but that she was in the hospital at the time of his arrest. She admitted that she allowed Tredell to use her truck in emergency situations even though he did not have a driver's license or learner's permit.

On December 19, 2006, Tredell was adjudicated a delinquent on all three counts. On January 18, 2007, the juvenile court committed Tredell to the Office of Youth Development (OYD) for six months on all three counts. His entire sentence

was suspended, with the exception of 90 days on the first count. The second and third counts of his sentence were to run concurrently.

Tredell was discharged on March 18, 2007, after serving 90 days in the detention center. Once his new counsel was enrolled in the case, an appeal was filed. On September 7, 2007, this Court vacated Tredell's adjudication for lack of sufficient evidence.[1]

Six weeks later, on October 23, 2007, Linda Reeves filed a petition for damages on behalf of her grandson in East Baton Rouge Parish asserting that under La. R.S. 15:572.8, he was entitled to compensation for the wrongful adjudication as a delinquent. The State filed exceptions through the Attorney General's office and the case was subsequently transferred to Orleans Parish. After the case was transferred to Orleans Parish, Trelah Smith was named as plaintiff on her minor son's behalf. Ms. Smith requested $3,750.00 in damages.

The district court dismissed Ms. Smith's suit by granting the State's peremptory exception of no cause of action due to her failure to attach a copy of the verdict of acquittal or an entry of an order of *nolle prosequi* or other action of the State declining to re-prosecute Tredell Smith. However, the district court also determined that Ms. Smith failed to comply with the second prong of the statute by proving factual innocence by clear and convincing evidence.

A motion for new trial was filed, but it was also denied by the district court. This appeal followed.

On appeal, the appellant does not specify a particular assignment of error. However, it can be inferred that she seeks review of the district court judgment which granted the state's peremptory exception of no cause of action.

DISCUSSION

In *Bernberg v. Strauss*, 2008-0488 (La.App. 4 Cir. 12/3/08), 999 So.2d 1184, this Court reiterated the standard of review for a peremptory exception of no cause of action as follows:

> We review a trial court's decision on an exception of no cause of action de novo "because the exception raises a question of law and the lower court's decision is based only on the sufficiency of the petition." *City of New Orleans v. Board of Comm'rs of Orleans Levee Dist.*, 93-0690, p. 28 (La. 7/5/94), 640 So.2d 237, 253. In doing so, we are confined to the allegations of the petition. No evidence can be introduced to support or to controvert an exception of no cause of action. La. C.C.P. art. 931. Rather, we must accept as true the well pleaded factual allegations set forth in the petition. Based thereon, our job is to determine "whether, on the face of the petition, the plaintiff is legally entitled to the relief sought." *Everything on Wheels Subaru v. Subaru South, Inc.*, 616 So.2d 1234, 1235 (La. 1993).
>
> A defendant's peremptory exception of no cause of action is designed to test the legal sufficiency of the plaintiff's petition. It poses the question "whether the law affords a remedy on the facts alleged in the pleading." *Id.* Louisiana has a system of fact pleading, and "[t]he mere conclusion of the pleader unsupported by facts does not set forth a cause or right of action." *Montalvo v. Sondes*, 93-2813, p. 6 (La. 5/23/94), 637 So.2d 127, 131. As we recently noted, "[i]t is insufficient to state a cause of action where the petition simply states legal or factual conclusions without setting forth facts that support the conclusions." *Bibbins v. City of New Orleans*, 02-1510, p. 5 (La.App. 4 Cir. 5/21/03), 848 So.2d 686, 691, *writ denied*, 03-1082 (La. 10/10/03), 855 So.2d 357.
>
> The exceptor has the burden of proving that the petition fails to state a cause of action. This burden serves the public policy of affording the plaintiff his day in court to present his case. "When it can reasonably do so, the court should maintain a petition against a peremptory exception so as to afford the litigant an opportunity to present his evidence." *Kuebler v. Martin*, 578 So.2d 113, 114 (La. 1991). "An exception of no cause of action is

[1] See, *State In the Interest of T.S.*, 2007-CA-0255 (La.App. 4 Cir., 9/7/07), unpublished.

> likely to be granted only in the unusual case in which the plaintiff includes allegations that show on the face of the petition that there is some insurmountable bar to relief." *City of New Orleans v. Board of Directors of Louisiana State Museum*, 98-1170, p. 10 (La. 3/2/99), 739 So.2d 748, 749.

Id., p. 5 (La.App. 4 Cir. 12/3/08), 999 So.2d at 1187-1188 (citing *Southern Tool & Supply, Inc. v. Beerman Precision, Inc.*, 03-0960, pp. 6-7 (La.App. 4 Cir. 11/26/03), 862 So.2d 271, 277-278). Additionally, this Court also continued and stated that,

> [i]n appraising the sufficiency of the petition, the reviewing court should follow the accepted rule that a petition should not be dismissed for failure to state a cause of action unless it appears beyond doubt that the plaintiff can prove no set of facts in support of any claim which would entitled him to relief. *Campbell v. Sottiurai*, 02-2223, p. 2, (La.App. 4 Cir. 1/29/03), 839 So.2d 421, 422-423. The question, therefore, is whether in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the petition states any valid cause of action for relief. *Id*. A petition should not be dismissed on an exception of no cause of action merely because the plaintiff's allegations do not support the legal theory he intends to proceed on, since the court is under a duty to examine the petition to determine if the allegations provide relief under any possible theory.

Id., p. 6, 999 So.2d at 1188.

Louisiana Revised Statute 15:572.8, entitled, *Compensation for wrongful conviction and imprisonment; petition process; compensation; proof; assignment of powers and duties*, paragraphs A and B provide:

> A. A petitioner is entitled to compensation in accordance with this Section if he has served in whole or in part a sentence of imprisonment under the laws of this state for a crime for which he was convicted and:
>
> (1) The conviction of the petitioner has been reversed or vacated; and

> (2) The petitioner has proven by clear and convincing scientific or non-scientific evidence that he is factually innocent of the crime for which he was convicted.
>
> B. All petitions for compensation as provided in this Section shall be filed in the district court in which the original conviction was obtained, hereinafter referred to as "the court", and shall be governed by procedures outlined herein and randomly re-allotted by the court.

Ms. Smith argues that she has fulfilled all of the stipulations required by the statute. She asserts that the petition contained a recitation of the facts necessary,

> to [sic] an understanding of the petitioners innocence that supports the opinion and order vacating the conviction and sentence, specific citations for each fact tending to show innocence, copy of the judgment and opinion that vacated petitioner's conviction and sentence, certified copy that petitioner's matter is closed, explained that matter was one month short of statute limitations to re-prosecute and there exist [sic] no filing for new trial in the file, and a record from the Office Of Youth Development of the time calculated the petitioners spent in custody of [sic] there."

She contends that OYD's Jetson Facility's records reflect the inclusive date of confinement as January 17, 2007, through March 18, 2007. She also maintains that although Tredell was arrested and held at the Youth Study Center in New Orleans, prior to and after the dates reflected at the Jetson Center, the Youth Study Center has refused to forward documented dates of Tredell entire confinement.

The Court notes that Ms. Smith's brief is very confusing to follow in some instances, however, it can be gauged that at the contradictory hearing, the State filed a motion to dismiss her petition. The State alleged that Ms. Smith's official tutrixship had not been established and that Ms. Smith failed to allege the existence of any of the statutory prerequisites. She asserts that once the State realized that she had fulfilled all requirements of the statute, counsel for the State attempted to

withdraw its motion to dismiss on the peremptory exception for no cause of action. She also argues that the district court "interrupted [the] defendant [by] not giving [the] defendant the [sic] opportunity to completely [the] withdraw [the] remaining exceptions and stated that he was going to grant [the State's attorney's] him all other remaining exceptions." Ms. Smith asserts that the State's exception resulted in a ruling that was not prayed for among the exceptions heard at the contradictory hearing.

After the district court made its ruling on the aforementioned motion to dismiss on the peremptory exception for no cause of action, the State filed a second motion to dismiss on the peremptory exception for no cause of action. Ms. Smith argues that in response, she attempted to assert that a vacated sentence was actually a verdict of acquittal. In support of her argument, she attached as an exhibit a "web" definition of verdict of acquittal which she maintained was defined as a "vacated sentence." The district court issued its opinion and explained that the defendant's second motion to dismiss was actually a request for new trial from Ms. Smith.

Ms. Smith contends that she did not seek a new trial. She maintains that she never responded to the State's second motion to dismiss which it filed after the district court's first ruling. She asserts that there was no need for the State to file a second motion to dismiss following the district court's earlier ruling. She alleges that the State's second motion to dismiss was filed only to cover up the district court's ruling in open court which granted all of the State's remaining exceptions, after the State had attempted to withdraw those same exceptions. She maintains that the second filing of the motion to dismiss was moot, and therefore, the district court should have determined that the second motion to dismiss was also moot.

She also argues that pursuant to La. R.S. 15:572.8, that her son is factually innocent of the crime, and that the act of re-litigating his "factual innocence," violates collateral estoppel because Tredell's guilt or innocence has already been adjudicated by the "criminal" [delinquency] court. Further, she asserts that the "criminal" matter [Tredell's delinquency adjudication] is not under the jurisdiction of the civil court.

The State argues that according to La. R.S. 15:572, a petitioner is only entitled to compensation when he proves:

1. His conviction has been reversed or vacated; and
2. He has proven by clear and convincing scientific or non-scientific evidence that he is factually innocent of the crime for which he was convicted.

In support of this contention, the State cites *In re Williams*, 07-1380 (La.App. 1 Cir. 2/20/08), 984 So.2d 789,[2] for the proposition that the burden of proof in a wrongful conviction case is to prove that the accused actually *did not* commit the crime in question:

> [c]learly, the statute requires more than just a showing that a conviction has been overturned or vacated. Implicitly, it reflects the intent that compensation will not be awardable in every matter in which post conviction relief has been granted. An applicant must also prove by clear and convincing evidence that he did not commit the crime or any other crime based on the same set of facts.

Id., p. 5, 984 So.2d at 793.

The State argues that although Tredell's adjudication was vacated by this

[2] In *Williams*, a former inmate filed an application for compensation, alleging that the dismissal of charges against him was based on post-conviction relief and the State's failure to re-try him because of his factual innocence.

Court and he was not retried in the juvenile court, these circumstances only satisfy the first prong of the statute which requires that his conviction be either vacated or reversed. The State asserts that in drafting the statute, the Louisiana legislature did not intend to award compensation to every person who is granted post-conviction relief and who was not retried. *See*, *Id.*, pp. 6-7, 984 So.2d at 794.[3]

The State also argues that pursuant to section G of La. R.S. 15:572.8, Ms. Smith would have to provide the district court with a copy of the verdict of acquittal or of the entry of an order of *nolle prosequi*, or other action of the State declining to re-prosecute the petitioner. The State also notes that Tredell's grandmother, Mrs. Linda Reeves, even acknowledged in a letter to the State's attorney that no such documents existed.[4] The State asserts that the Orleans Parish District Attorney's office may retry Tredell at any time if it chooses to do so.

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[3] In the case, *In re Williams*, the court noted:

> In this case, the trial court's factual determination was interdicted by its erroneous ruling prohibiting the defense from questioning Williams about the murder conviction or otherwise proving his lack of factual innocence in connection with that crime. Assuming, for the sake of argument only, that the court, to whom great deference is owed in making credibility and factual determinations, was correct in finding plaintiff met his original burden, the court's refusal to allow the defendant to introduce evidence related thereto amounted to a directed verdict in favor of the plaintiff, a result clearly not contemplated by the legislature in enacting La. R.S. 15:572.8. [FN5] The trial court erred in denying the state the opportunity to present a defense or to controvert the plaintiff's showing.
>
> > FN5. Indeed, the trial court's analysis, taken to its logical conclusion, would allow compensation to be awarded to every person in favor of whom post-conviction relief, for whatever reason, has been granted, and the state, for whatever reason, did not re-try the matter. The applicant, presumed innocent, and allowed to testify on his behalf, but the state being denied the opportunity to rebut a showing of factual innocence, removes the second statutory requisite from the analysis, and would lead to automatic entitlement to compensation based on post-conviction relief. This is clearly not the intention of the legislature as reflected by the statute.

Id., pp.6-7, 984 So.2d at 794.

[4] The State specifically notes that in paragraph seven of Ms. Smith's Motion In Opposition to [the State's] Motion and Order to Dismiss, it states in pertinent part:

> Plaintiff attempted to provide more proof or state other than what was in the file; however the district attorney for juvenile court was unwilling to provide plaintiff with any other documents showing that there will be no writ prosecution or any other form of acquittal and plaintiffs matter….

Hence, the State asserts that by her own admission, Ms. Smith has failed to comply with La. R.S. 15:572(G)(2).

As to factual innocence, the State asserts that while La. R.S. 15:572.8(B) defines factual innocence as:

> [f]or the purposes of this Section, "factual innocence" means that the petitioner did not commit the crime for which he was convicted and incarcerated nor did he commit any crime based upon the same set of facts used in his original conviction.

While the appellant may be able to prove that his judgment was vacated and that he was not retried, the State argues that Ms. Smith has only met the first statutory requirement—that Tredell's delinquency adjudication was vacated or reversed.

The State also argues that there is no evidence, factual or otherwise, which would conclude Tredell's "factual innocence." The State also notes that Ms. Smith testified against her son at his delinquency hearing. In addition, Ms. Smith went to the police station and advised them that Tredell did not have a driver's license, and that he left her home driving his grandmother's truck without permission. Further, Ms. Smith told police that she saw a gun in her son's waistband, and she also admitted that she went to the police to notify them of Tredell's departure so that they could determine if he had a gun in his possession.

The State also asserts that Mrs. Reeves testified at trial, and admitted that she allowed her grandson to use her truck in emergency situations even though she was aware that he did not possess a driver's license or learner's permit. The State asserts that the admissions by Ms. Smith and her mother do not prove factual innocence, but instead prove Tredell's wrongdoing. They maintain that nothing in the instant matter has been offered up to prove anything to the contrary, and thus, Tredell has not been proven factually innocent of the crimes.

In response to Ms. Smith's allegations of collateral estoppel, the State asserts that Ms. Smith's rationale is flawed because it overlooks the controlling case, *In re Williams*, 2007-1380, pp. 7-8 (La.App. 1 Cir. 2/20/08), 984 So.2d at 794, which provides:

> …[o]nly after the state is allowed to call and question witnesses and present evidence to rebut the plaintiff's prima facie showing, and the plaintiff is allowed to rebut and contradict this evidence, can a proper determination regarding the applicant's factual innocence be made.

Hence, the State argues that Ms. Smith's contention that she does not have to prove Tredell's factual innocence is in error because *Williams* specifically requires that factual innocence be proven.

In the instant matter, our review of the record indicates that contrary to Ms. Smith's assertions, she did not provide the district court with a copy of the verdict of acquittal or an entry of an order of *nolle prosequi*, or other documentary evidence in which the State expresses its intent to not re-prosecute Tredell, pursuant to La. R.S. 15:572.8(G). Although Ms. Smith asserts that this Court found Tredell "innocent," her argument is misleading. In the appeal of the juvenile delinquency case, this Court determined that there was insufficient evidence to support Tredell's adjudication for possession of marijuana, illegal possession of a handgun by a juvenile, and illegal carrying of weapons because the State did not provide sufficient evidence of the crimes for which he was tried. The State did provide notice that it would proffer evidence at the trial, but it failed to have its evidence admitted at trial. However, this Court did not determine that Tredell was factually innocent of those crimes.

Considering that Ms. Smith contacted the authorities herself in an effort to apprehend Tredell, and further considering that she told the police that she saw a

gun in her son's waistband, and that she was "afraid" of his friends, there is no indication from the record that Tredell is factually innocent of the crimes. In order to prove factual innocence, Tredell must prove "by clear and convincing evidence that he did not commit the crime or any other crime based on the same set of facts."[5] Further, Ms. Smith cannot have it both ways—as a witness for the prosecution, and subsequently as a plaintiff who now alleges that her son is factually innocent. This claim has no merit.

As to the argument relating to collateral estoppel, Ms. Smith does not cite any case law in support of her argument. She alleged that alleged prima facie evidence in support of Tredell's "innocence" may not controverted by the State for wrongful adjudication. However, this argument is unfounded.

DECREE

Considering the foregoing, we find that the district court did not err in dismissing Ms. Smith's application for compensation on behalf of her minor son, Tredell Smith.

AFFIRMED

[5] *Williams*, p. 7, 984 So.2d at 789.