

No. 126824

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS) Appeal from the Appellate Court of Illinois, Third Judicial District, No. 3-16-0758
Plaintiff-Appellant,))
v.) There on Appeal from the Circuit Court of the Tenth Judicial Circuit, Peoria County, Illinois No. 04 CF 232)
ANDREW GRANT, Defendant-Appellee.) The Honorable Albert L. Purham, Jr., Judge Presiding.

**REPLY BRIEF OF PLAINTIFF-APPELLANT
PEOPLE OF THE STATE OF ILLINOIS**

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ORAL ARGUMENT REQUESTED

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ARGUMENT

The question before this Court is whether the General Assembly intended a violation of section 116-4 of the Code of Criminal Procedure, 725 ILCS 5/116-4, to require vacatur of defendant's conviction. It did not. The plain language of section 116-4 does not provide that the premature post-trial destruction of evidence requires vacatur and a new trial. Instead, the General Assembly specified a different consequence for post-trial failures to preserve evidence: potential criminal prosecution under section 33-5 of the Criminal Code, 720 ILCS 5/33-5(a). Thus, it is clear that the General Assembly, exercising its legislative power, considered the consequences to impose for such violations and chose the consequence specified in section 33-5. If, in the decades following the enactment of section 33-5, the General Assembly had determined that its chosen consequence was insufficient, it could have enacted a new or additional consequence. It did not.

Furthermore, the General Assembly could reasonably conclude that vacatur of defendant's constitutionally sound conviction is not an appropriate consequence for a section 116-4 violation because the violation had no role in the process leading to defendant's conviction. Because the post-trial preservation of evidence is not a procedural step in the rendering of a conviction, a violation of section 116-4 neither causes, nor indicates, any infirmity in the trial or conviction.

Moreover, the vacatur of a conviction does not remedy the harm caused by a section 116-4 violation, because destroyed evidence cannot be recreated. Vacating defendant's valid conviction following a fair trial merely provides him with a windfall, a result that the General Assembly did not specify or intend.

Alternatively, should this Court hold that vacatur of defendant's conviction and a new trial are appropriate, it should not require that the jury be instructed that it may draw a negative inference from the Peoria Police Department's (PPD) post-trial failure to preserve evidence. The concerns about due process and bad faith that supported such an instruction in *Arizona v. Youngblood*, 488 U.S. 51 (1988), are not implicated here.

I. The Plain Language of Section 116-4 Does Not Provide for Vacatur of Defendant's Conviction.

There is no constitutional obligation to preserve evidence following a conviction, and thus questions governing preservation of DNA evidence after a criminal trial are matters for the legislature. *Dist. Att'y's Off. v. Osborne*, 557 U.S. 52, 73-74 (2009). Accordingly, this appeal presents an issue of statutory interpretation, requiring this Court to "determine and effectuate the legislature's intent" as to what consequence follows from a violation of section 116-4. *People v. Hardman*, 2017 IL 121453, ¶ 19.

The General Assembly did not provide that the consequence flowing from a violation of section 116-4 is vacatur and a new trial. *See* 725 ILCS 5/116-4. It is evident that the legislature considered what consequences were

appropriate for such a violation, because it expressly identified a different consequence: potential criminal prosecution under section 33-5. Thus, the General Assembly, faced with the questions of consequences, gave a clear, singular answer in section 33-5. Logically, if the General Assembly intended additional consequences to follow from a section 116-4 violation, such as vacatur of a conviction, it could have and would have imposed consequences in addition to section 33-5. But it did not do so.

Dissatisfied with the consequence provided by the plain language of the relevant statutes, defendant — like the appellate court below — asserts that a consequence not imposed by the General Assembly should be inferred because, in his view, section 33-5 does not provide a sufficient remedy for a section 116-4 violation. *See* Def. Br. 21-22; *see also* Peo. A5-6, 9.¹ But that argument merely questions whether the consequence chosen by the legislature is sufficiently effective. And that question is best answered by the legislature. *See Osborne*, 557 U.S. at 73-74. A court may not, “under the guise of statutory interpretation,” rewrite a statute to correct perceived errors or oversights by the legislature. *People v. Pullen*, 192 Ill. 2d 36, 42 (2000); *see also People v. Smith*, 2016 IL 119659, ¶ 28.

The General Assembly considered which consequence best furthered the goals of section 116-4 and provided a single, clear answer in section 33-5.

¹ Citations to the People’s opening brief, the appendix to the opening brief, and defendant’s brief appear as “Peo. Br. __,” “Peo. A__,” and “Def. Br. __,” respectively.

And, in the two decades since it enacted sections 116-4 and 33-5, the General Assembly has found no reason or need to create a different or additional consequence. Thus, under the plain language of the relevant statutes, a violation of section 116-4 does not require the vacatur of defendant's conviction and a new trial.

II. Section 116-4 Does Not Require Vacatur Because Defendant's Conviction Is Not Directly Connected to the Violation.

The question whether a statutory provision is mandatory or directory turns on whether a violation results in a specified consequence; "statutes are mandatory if the intent of the legislature dictates a particular consequence for failure to comply with the provision" and directory where "no particular consequence flows from noncompliance." *People v. Delvillar*, 235 Ill. 2d 507, 514-15 (2009). Here, the legislature specified a consequence for a violation of section 116-4, and thus the statute is mandatory. *See Peo. Br. 11*. But the mandatory nature of the statute does not permit this Court to fashion a new and additional remedy not specified by the legislature.

Relying on *People v. Ramirez*, 214 Ill. 2d 176 (2005), *People v. Robinson*, 217 Ill. 2d 43 (2005), *In re M.I.*, 2013 IL 113776, and *Delvillar*, defendant suggests that whenever a mandatory statute is violated, some related state action must be invalidated. *See Def. Br. 21-23*. Yet in none of defendant's cited cases did the General Assembly expressly identify a consequence for the statutory violation. *See Ramirez*, 214 Ill. 2d at 179 (considering 725 ILCS 5/115-4.1); *Robinson*, 217 Ill. 2d at 55 (considering 725

ILCS 5/122-2.1(a)(2)); *In re M.I.*, 2013 IL 113776, ¶¶ 14-15 (considering 705 ILCS 405/5-810(2)); *Delvillar*, 235 Ill. 2d at 513 (considering 725 ILCS 5/113-8). In the absence of an express consequence, this Court considered whether the General Assembly intended that a consequence be implied. Here, the Court need not infer the General Assembly's intent because the legislature clearly expressed the consequence for a violation of section 116-4 in section 33-5. Thus, defendant is not asking this Court to interpret a statute that is ambiguous as to the consequences for its violation, but instead to deem the legislature's express consequence insufficient and supplant it with a new consequence of judicial invention; this is not permissible under the guise of statutory interpretation. *See, e.g., Pullen*, 192 Ill. 2d at 42.

Furthermore, section 116-4 is different from the statutes at issue in defendant's cited cases because it does not directly relate to a separate state action that can be invalidated. In defendant's cases, the Court considered statutes that created a procedural step that a governmental body must follow when taking some governmental action. Section 115-4.1, considered in *Ramirez*, requires the court to serve a defendant by certified mail before trying a defendant in absentia. 214 Ill. 2d at 179-80. Section 122-2.1(a)(2), considered in *Robinson*, requires the court to serve a defendant within 10 days when it summarily dismisses a postconviction petition. *See* 217 Ill. 2d at 50. Section 5-810(2), considered in *In re M.I.*, requires the court to hold a hearing on a state motion to designate a case as an extended jurisdiction

juvenile (EJJ) matter within 60 days. *See* 2013 IL 113776, ¶¶ 13-14. And section 113-8, considered in *Delvillar*, requires the court to admonish a defendant of potential immigration consequences before accepting a guilty plea. *See* 235 Ill. 2d at 513-14. Because each statute imposed a procedural step that directly related to a judicial action, the Court considered whether the failure to take that required step invalidated the entire process and its end result. *See Ramirez*, 214 Ill. 2d at 187 (holding that failure to properly serve defendant invalidated subsequent trial *in absentia* and resulting verdict); *Robinson*, 217 Ill. 2d at 58-59 (holding that the failure to timely serve the petitioner with order did not invalidate the summary dismissal of his postconviction petition); *In re M.I.*, 2013 IL 113776, ¶¶ 13 & 28 (holding that the untimeliness of the hearing on an EJJ motion did not invalidate the court's order granting of the motion); *Delvillar*, 235 Ill. 2d at 518-19 (holding that the failure to admonish the defendant did not invalidate the court's acceptance of his guilty plea).

By contrast, the post-trial preservation of evidence required by section 116-4 plays no role in the process of obtaining or rendering a conviction. Once the trial is complete and the conviction secured, there is no governmental action to which the post-trial preservation requirement relates and no pending proceeding or governmental action that can be undone as a consequence of the section 116-4 violation. The only governmental action to which section 116-4 directly relates is the act of destroying the evidence. And

while the statute renders the destructive act invalid in certain circumstances, *i.e.*, the PPD had no authority to destroy the evidence here, there is no way to undo that action in the same way that the resultant governmental actions could be vacated in *Ramirez, Robinson, In re M.I., and Delvillar*. Consequently, defendant's cited cases are distinguishable and provide no basis for this Court to impose a consequence not provided or intended by the General Assembly.

III. The General Assembly Did Not Deem Vacatur of Defendant's Conviction to Be the Appropriate Consequence for a Section 116-4 Violation Because It Does Not Remedy the Harm.

The General Assembly correctly determined that vacatur of defendant's conviction is not an appropriate consequence for a section 116-4 violation. Vacatur does not remedy the harm caused by the violation, but instead provides defendant a windfall by vacating a judgment untainted by the violation.

There is no retrospective curative remedy for a section 116-4 violation. The only right of defendant's that was violated was the limited statutory right to test the recovered hair. *See Grant*, 2016 IL App (3d) 140211, ¶ 30 (citing 725 ILCS 5/116-3); *see also Osborne*, 557 U.S. at 73-74 (finding no constitutional right to the post-trial preservation of evidence). The failure to preserve the hair makes exercising that right impossible. Consequently, there is no way to know whether testing the hair would have provided further inculpatory evidence (if the hair matched defendant), exculpatory evidence (if the hair did not match defendant), or no relevant evidence at all (if the

testing were inconclusive). Vacating defendant's conviction will not alter that fact. As the dissent reasoned, this is likely why the General Assembly expressly created the serious consequence of felony liability for intentional failures to comply with section 116-4. *See Peo. A12.* Because there is no appropriate curative remedy for a section 116-4 violation, the legislature instead decided to deter such violations prospectively by imposing criminal liability for willful violations. *See id.*

Dissatisfied with the unavailability of a curative consequence, and the General Assembly's express specification of prospective consequence, the appellate court below provided a windfall to defendant by vacating a constitutionally sound judgment that was not directly affected by the section 116-4 violation. *See Peo. A9.* Through direct appeal and numerous collateral attacks, defendant has identified no meritorious claim of error in his trial and conviction. C104-05, 112-13, 118-24, 213-73, 353-67. And the failure to preserve the hair does not affect the constitutionality of that conviction. *See Osborne*, 557 U.S. at 73-74. Nevertheless, the appellate court vacated defendant's constitutionally sound conviction and granted him a new trial, based upon the failure to preserve evidence that was just as likely to harm defendant as help him, if testing provided any new information at all. The court's vacatur of defendant's conviction is an absurd result that the General Assembly did not specify and would not have intended. *See People v.*

Ringland, 2017 IL 119484, ¶ 13 ([A] court presumes that the General Assembly did not intend to create absurd, inconvenient, or unjust results.”).

IV. Alternatively, an Adverse-Inference Instruction Is Not Appropriate at Any Retrial.

For the reasons expressed in the People’s opening brief, Peo. Br. 15-16, should this Court affirm the vacatur of defendant’s conviction, it should hold that a jury instruction similar to that given in *Youngblood* is not required at defendant’s retrial. *Youngblood* involved the bad faith destruction of potentially exculpatory evidence prior to the defendant’s trial in violation of due process. 488 U.S. at 58. Concurring, Justice Stevens approved a jury instruction that would allow the jury to draw a negative inference from pretrial destruction of evidence. *Id.* at 59-60 (Stevens, J. concurring). But here, the failure to preserve evidence occurred *after* defendant’s trial and thus did not implicate his due process rights. *See Osborne*, 557 U.S. at 73-74. The Illinois cases cited by defendant, *see* Def. Br. 27-28, are similarly inapposite because they also concern failures to preserve evidence that occurred pretrial (and thus that implicated the defendant’s due process rights). *See People v. Danielly*, 274 Ill. App. 3d 358, 361 (1st Dist. 1995); *In re Julio C.*, 386 Ill. App. 3d 47, 49-50 (1st Dist. 2008); *People v. Camp*, 352 Ill. 3d 257, 259 (2d Dist. 2004). Moreover, unlike in *Youngblood*, there is no indication that the PPD acted in bad faith, and thus no support for an inference that the hair was destroyed to keep exculpatory evidence from the jury. Accordingly, should this Court agree that a retrial is the appropriate

remedy for the section 116-4 violation, it should hold that defendant is not entitled to an adverse-inference instruction.

CONCLUSION

This Court should reverse the appellate court's judgment.

November 1, 2021

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 10 pages.

/s/ Nicholas Moeller
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PROOF OF FILING AND SERVICE

Under penalties as provided by law pursuant to 735 ILCS 5/1-109, the undersigned certifies that the statements set forth in this instrument are true and correct. On November 1, 2021 the foregoing **Plaintiff-Appellant's Reply Brief** was filed with the Clerk of the Supreme Court of Illinois, using the court's electronic filing system, which provided notice to the following registered e-mail addresses:

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