

In the
Supreme Court of Ohio

STATE OF OHIO, : Case No. 07-1640
: :
Plaintiff-Appellant, : :
: : On Appeal from the
v. : : Cuyahoga County
: : Court of Appeals,
RITA RODDY, : : Eighth Appellate District
: :
Defendant-Appellee. : : Court of Appeals Case
: : No. 88759
: :

**MERIT BRIEF OF *AMICUS CURIAE*
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IN SUPPORT OF PLAINTIFF-APPELLANT STATE OF OHIO**

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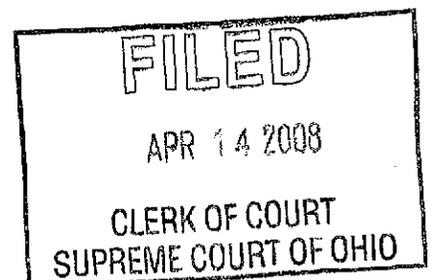


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INTRODUCTION

This case is about Ohio prosecutors' ability to appeal Criminal Rule 29(C) acquittals. The lower court incorrectly limited this ability by misinterpreting both the statute that governs when prosecutors may appeal and the Double Jeopardy Clause. The court was wrong on both counts. First, as the Court has already held, R.C. 2945.67(A) permits prosecutors to appeal substantive law rulings. When ruling on a 29(C) motion, the judge makes a legal determination, not a factual determination, making the judge's decision a substantive law ruling that prosecutors may appeal.

Second, as both the U.S. Supreme Court and this Court have recognized, double jeopardy is literally concerned with *double* jeopardy, so no violation exists where there is no chance of a second trial. *United States v. Wilson* (1975), 420 U.S. 332, 337 (holding that double jeopardy poses no bar to a government appeal "where those appeals would not require a new trial"); *State v. Calhoun* (1985), 18 Ohio St. 3d 373, 376 ("The purpose of the Double Jeopardy Clause is . . . not to shield from review erroneous legal conclusions . . ."). Indeed, the clauses' text does not even use the word "double" but says that no one shall be "twice put in jeopardy." The Double Jeopardy Clause serves several related purposes, and all depend upon the threat of a second trial: (1) prohibiting a retrial for the same offense for which the defendant was already tried, (2) increasing finality of judgments, and (3) decreasing the likelihood that the government could bully a defendant into pleading guilty through adding stress, embarrassment, and expense upon an accused individual who has already endured a trial regarding the same offense. Here, none of those concerns apply. A jury convicted Rita Roddy of assault, and the judge granted her 29(C) motion for acquittal on that charge. If an appellate court overturns the trial court's 29(C) ruling, the jury's verdict will simply be reinstated, without an additional trial.

Finally, the Attorney General recognizes that criminal defendants should be tried fairly and justly, but in order to ensure public safety and to deter crime, the State must also have an

opportunity to fairly and justly prosecute an alleged criminal. The State entrusts prosecutors with the weighty duty of ensuring that criminals are held accountable for their actions. During a criminal prosecution, trial courts sometimes make legal errors. Because those legal errors inhibit the administration of justice, Ohio prosecutors must be afforded an appellate outlet. But by misinterpreting R.C. 2945.67(A) and misapplying the Double Jeopardy Clause, the Eighth District's opinion leaves prosecutors crippled in their fight to fix erroneous trial court rulings, which will inevitably result in the creation of uncorrectable bad law, and that, in turn, could let the guilty go free again and again.

STATEMENT OF AMICUS INTEREST

Ohio Attorney General Marc Dann acts as Ohio's chief law officer. R.C. 109.02. Accordingly, he has a strong interest in ensuring rigorous and consistent enforcement of Ohio's criminal laws, including those pertaining to double jeopardy and appellate jurisdiction in criminal matters. Additionally, R.C. 2945.67(A) defines the Attorney General's appellate jurisdiction. Therefore, the Attorney General has an interest in ensuring that his appellate opportunities are not eviscerated through adoption of the Eighth District's incorrect view.

STATEMENT OF THE CASE AND FACTS

Rita Roddy was charged with felonious assault and kidnapping in the Cuyahoga County Court of Common Pleas. *State v. Roddy* (8th Dist.), 2007 Ohio App. Lexis 3681, 2007-Ohio-4015, ¶ 2. The jury found Roddy guilty of kidnapping and not guilty of felonious assault. *Id.* After the verdict, Roddy moved for an acquittal under Criminal Rule 29(C) regarding the guilty kidnapping verdict. Because the trial court found there was insufficient evidence to convict Roddy, the trial court granted the motion, overruled the jury's guilty verdict, and acquitted Roddy of the kidnapping charge. *Id.* at ¶ 3-4.

Under R.C. 2945.67(A), the State appealed the trial court's acquittal, citing concerns with the trial court's underlying substantive law rulings. *Id.* at ¶ 6. On October 18, 2006, the Eighth District Court of Appeals granted the State's Motion for Leave to Appeal. On August 9, 2007, the court decided it lacked jurisdiction to hear the case and dismissed the appeal, because in its words, "the constitutional principle of double jeopardy precludes" the court's review of the State's arguments. *Id.* at ¶ 13. In its opinion, the court also discussed Ohio Revised Code Section 2945.67(A), *id.* at ¶ 12, although it is unclear as to whether the court actually relied on that provision in reaching its decision.

The State filed its Notice of Appeal in this Court on August 31, 2007. The Court denied the State's Leave to Appeal, but after the State filed a Motion for Reconsideration, this Court granted jurisdiction on February 20, 2008.

ARGUMENT

Amicus Curiae Attorney General's Proposition of Law:

R.C. 2945.67(A) permits the State to appeal 29(C) acquittals and doing so does not run afoul of the Double Jeopardy Clause.

The General Assembly explicitly authorized Ohio prosecutors to appeal erroneous trial court rulings under R.C. 2945.67(A). The State has an interest in fair trials, protecting the public, and deterring crime. The achievement of those goals will be thwarted if appellate courts dismiss the State's appeals of Rule 29(C) acquittals for lack of jurisdiction. The Eighth District, however, did just that. The court found that it did not possess appellate jurisdiction because, in its view, the State's appeal violated 2945.67(A) and the Double Jeopardy Clauses of the U.S. and Ohio Constitutions. The court was wrong on both counts. First, the State was appealing a substantive law ruling, and, according to this Court's precedent, the State may appeal such rulings under R.C. 2945.67(A).

Second, the Double Jeopardy Clause does not even apply to questions of whether acquittals may be appealed, because that clause protects defendants against being re-tried for the same offense. But at no time is a defendant such as Roddy threatened with the possibility of retrial when the State appeals a Criminal Rule 29(C) acquittal. If the appellate court overrules the Rule 29(C) acquittal, the original guilty verdict that the jury imposed will be reinstated. The history of the double jeopardy clause also supports this reading. The clause protects against multiple government prosecutions but is not intended to prevent government appeals.

It is unclear whether the Eighth District included its discussion of R.C. 2945.67(A) as the basis for its decision or included it as mere dicta. However, because the court should avoid constitutional issues when possible, *State v. Talty* (2004), 103 Ohio St. 3d 177, 2004-Ohio-4888,

¶ 9, the State will first focus on the parameters of R.C. 2945.67(A) before addressing the constitutional issues.

A. R.C. 2945.67(A) permits appeals of substantive law rulings, and the grant of a 29(C) Motion for Acquittal is a substantive law ruling.

The State has the statutory authority to appeal the trial court's 29(C) ruling. Both the Ohio Constitution and R.C. 2945.67(A) govern the State's ability to appeal. Section 3(B)(2), Article IV of the Ohio Constitution provides that courts of appeal shall only have jurisdiction as provided by law, and prosecutors may appeal only when given express statutory authority. *In the Matter of: B.W., Alleged Delinquent* (2d Dist.), 2006 Ohio App. Lexis 6513, 2006-Ohio-6605, ¶ 7 (citing *State ex rel. Leis v. Kraft*, 10 Ohio St. 3d 34, 36). The express authority given to prosecutors for appellate review is found in R.C. 2945.67(A), which states that prosecutors can appeal as of right from any one of four enumerated types of orders, and "may appeal by leave of court to which the appeal is taken any other decision, except the final verdict, of the trial court in a criminal case" This Court has held that R.C. 2945.67(A) permits the State to appeal criminal trial courts' substantive law rulings. *State v. Bistricky*, 51 Ohio St. 3d 157, 159-60.

A determination as to the sufficiency of evidence is a purely legal issue, and a Rule 29(C) motion for acquittal is granted only if, as a matter of law, the judge finds that insufficient evidence exists to convict the defendant. *State v. Haffey* (8th Dist.), 1993 Ohio App. Lexis 4278, *31. The "claim of insufficient evidence invokes inquiry about due process" and "[i]t raises a question of law, the resolution of which does not allow the court to weigh the evidence." *Id.* at *30-31. Although the judge must consider the evidence when ruling on a 29(C) motion, the judge's role is to apply the *law* to that evidence, and legal determinations regarding evidence are appealable under 2945.67(A). *State v. Arnett* (1986), 22 Ohio St. 3d 186, 188 ("Pursuant to R.C. 2945.67(A), a court of appeals has jurisdiction to grant the state leave to appeal from a decision

of the trial court on the admissibility of evidence, notwithstanding the acquittal of the defendant.”). Although the judge must consider the evidence in ruling on a 29(C) motion, she applies the law to the evidence, and a prosecutor may appeal that substantive law ruling. Thus, contrary to the Eighth District’s opinion, R.C. 2945.67(A) grants the State the necessary authority to appeal the trial court’s 29(C) ruling.

B. When no threat of retrial exists, the Double Jeopardy Clause is not violated.

The criminal justice system rightly affords criminal defendants protections, including protections against double jeopardy. The United States and Ohio Constitutions’ double jeopardy provisions are similar: the Fifth Amendment of the United States Constitution states that no person shall “be subject for the same offence to be twice put in jeopardy of life or limb,” while Article I, Section 10 of the Ohio Constitution reads, “[n]o person shall be twice put in jeopardy for the same offense.” The state and federal double jeopardy terms are undeniably alike and, therefore, federal law is typically cited in state court decisions whenever a double jeopardy issue arises. See, e.g., *State v. Calhoun* (1985), 18 Ohio St. 3d 373, 375-76.

In this case, the Eighth District held that the State’s appeal of a Criminal Rule 29(C) acquittal after a guilty jury verdict violated the Double Jeopardy Clause. Criminal Rule 29 permits the filing of three types of motions; which motion a defendant files depends on its timing. Criminal Rule 29(A) accounts for acquittal motions raised after the evidence on either side is closed and provides that trial court judges cannot reserve ruling on acquittal motions raised at the close of the State’s evidence. Criminal Rule 29(B) notes only that trial court judges may reserve ruling on acquittal motions raised at the close of all evidence. Lastly, Criminal Rule 29(C) covers motions raised after the jury returns a verdict or is discharged without having returned a verdict. Importantly, even if a jury found the defendant guilty, Criminal Rule 29(C)

provides that the trial court judge may set aside the guilty verdict and enter a judgment of acquittal in favor of the defendant.

Double jeopardy principles, which protect against being twice subjected to trial for the same offense, cannot bar appeals from cases in which the jury returned a guilty verdict but the trial judge acquitted the defendant under Criminal Rule 29(C), because even if the appellate court holds in favor of the State, the underlying guilty verdict can be reinstated without a second trial ever occurring.

Courts have specifically held that the Double Jeopardy Clause does not apply to government appeals that will not require retrial on remand: “where the jury returns a verdict of guilt but the trial court thereafter enters a judgment of acquittal, an appeal is permitted.” *United States v. Scott* (1978), 437 U.S. 82, 92 n.7 (quoting *United States v. Jenkins* (1975), 420 U.S. 358, 365). The Ohio Supreme Court followed the United States Supreme Court holding in *Scott* and decided that the Double Jeopardy Clause does not bar such appeals when retrial is not necessary because no one is “twice put in jeopardy.” *Calhoun*, 18 Ohio St. 3d at 376-77. Several Ohio appellate courts have likewise followed this precedent. See, e.g., *City of N. Olmstead v. Miller* (8th Dist.), 1987 Ohio App. Lexis 6911, *3 (noting that there is no double jeopardy violation where there is no risk or re-trial); *State v. Meade* (4th Dist.), 1983 Ohio App. Lexis 13118, *4 n.1 (finding that because the appeal is “from a post judgment order and, if successful, would not require a trial, . . . jeopardy provisions do not bar the appeal”).

In *State v. Dunn*, the Ninth District noted two major reasons that “the government may appeal from a Crim[inal] R[ule] 29 judgment of acquittal entered after a guilty verdict” where retrial would not result, even if the acquittal order was based on an insufficiency of the evidence. (9th Dist.), 1985 Ohio App. Lexis 6322, at *4, *7. In *Dunn*, the defendant was found guilty by

the jury, and after filing a Criminal Rule 29(C) motion, was acquitted by the trial court judge. The defense claimed that a government appeal in such a situation violates the Double Jeopardy Clause. The court, however, rejected this argument for two reasons. First, as the court noted, the only way a retrial would be possible is if the government wins its appeal, the previous verdict is reinstated, and the defendant moves for a new trial. This action would “not [be] a process imposed upon him by the Government,” but instead is imposed upon him by his own motion, and would therefore not violate the Double Jeopardy Clause. *Id.* at *5; see also *Scott*, 437 U.S. at 91 (providing that the Double Jeopardy Clause does not protect defendants who are required to stand trial a second time if the reason they are subjected to a second trial is because that defendant sought and won “a statutory right of appeal to upset his first conviction,” as no “governmental oppression” exists in that situation because the defendant brought the second trial upon himself). Second, if the government is granted its appeal, the appellate court is limited to reviewing the sufficiency of the evidence determination and can consider only the record, which is not the same as subjecting the defendant to a new trial. This activity can hardly be couched as the government attempting to get a “second crack” at proving its case against the defendant, as even if the appellate court determines that the trial court erred in its decision, no new trial will be required. *Dunn*, 1985 Ohio App. Lexis 6322, at *6.

Unlike the Ninth Circuit in *Dunn*, the Eighth District here ignored that, regardless of the appellate court’s decision, Roddy would not be put “twice in jeopardy.”

C. The history of the Double Jeopardy Clause demonstrates its focus is on disallowing multiple government prosecutions and not on eliminating government appeals.

The Double Jeopardy Clause dates back to the fifteenth century, but throughout the many years of its existence, the idea of double jeopardy has focused on the prohibition of multiple trials and not on government appeals. *United States v. Wilson* (1975), 420 U.S. 332, 340 (citing

3 E. Coke, Institutes 212-13 (6th ed. 1680); 4 W. Blackstone, Commentaries *335-36). James Madison included the double jeopardy language in the United States Constitution in an effort to appease the few States that suggested it. Though the debate report is brief, it focused on the concerns with retrial, did not mention government appeals, and suggested that any restrictions should apply equally to the State and to the defense. *Id.* at 341 n.9, 342. Additionally, the common law background does not suggest an overall prohibition of government appeals, as it protected only defendants who were being tried a second time after having been convicted or acquitted. *Id.* at 240-41. Therefore, the “development of the Double Jeopardy Clause from its common-law origins . . . suggests that it was directed at the threat of multiple prosecutions, not at Government appeals, at least where those appeals would not require a new trial.” *Id.* at 241.

The United States Supreme Court was acutely aware of the potential problems that the Double Jeopardy Clause aims to prevent. *Scott*, 437 U.S. at 87. It held that an “unacceptably high risk” of the government potentially “wear[ing] down the defendant with its vastly superior resources” arises when the government appeals an acquittal and puts on a second trial. *Id.* Without the Double Jeopardy Clause, the government would eventually obtain guilty verdicts against the innocent, who simply have been beaten down by constant and unending government harassment. *Id.*

Here, Roddy faces no risk of retrial. Only two possible resolutions exist: (1) the appellate court would hold in favor of the government, and the jury’s previous guilty verdict would be reinstated, or (2) the appellate court would hold in favor the defense and the acquittal would remain, ending the appeal. Neither option results in retrying Roddy. Also, an appeal from a Criminal Rule 29(C) acquittal, in which the jury previously returned a guilty verdict, is not an example of the government attempting to harass the defendant, as the State is not appealing

solely to add more anxiety, embarrassment, and expense, thereby bullying the defendant into a guilty plea. Instead, it is an example of the government attempting to correct a substantive law error and ensure justice is obtained. As the history of the Double Jeopardy Clause provides, the focus of the analysis should not be on eliminating government appeals, but instead should be on eliminating multiple prosecutions. Because Roddy faces no threat of retrial in this case, no double jeopardy violation exists.

CONCLUSION

For the above reasons, this Court should reverse the judgment below and remand this case to the Eighth District Court of Appeals for further consideration of the State's original appeal.

Respectfully submitted,

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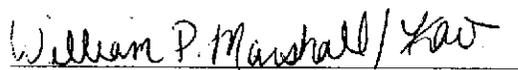
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