

IN THE SUPREME COURT OF OHIO
Case No. 2007-1755

STATE OF OHIO :
Appellee :
-vs- :
SAMUEL BREWER :
Appellant :

On Appeal from the
Cuyahoga County Court
of Appeals, Eighth
Appellate District Court
of Appeals
CA: 87701

REPLY BRIEF OF APPELLANT

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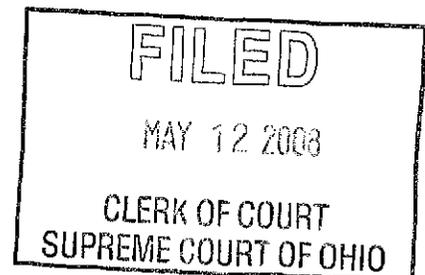


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INTRODUCTION

With this appeal, appellant Samuel Brewer has asked this court to correct the Eighth District Court of Appeals' creation of an unconstitutional dichotomy between the appellate review of bench trials and that of jury trials. In *State v. Lovejoy* (1997), 79 Ohio St. 3d 440, 449-50, this Court held that an appellate court should review sufficiency arguments after excluding any improperly admitted evidence and that a retrial is barred by double jeopardy unless the remaining admissible evidence was legally sufficient. In the instant case, the Eighth District limited *Lovejoy* to bench trials and held that, in reviewing the sufficiency of the evidence in jury trials, appellate courts must consider *both* admissible and inadmissible evidence. *State v. Brewer*, Cuyahoga App. No. 87701, 2007 Ohio 4291, ¶¶ 13-15. Appellant Brewer maintains that the Eighth District's limitation of *Lovejoy* to bench trials is both illogical and unconstitutional.

In its merit brief, the State concedes that it "cannot find any support" for the Eighth District's "distinction between bench trials and jury trials on this issue." (Appellee's Br. at 8, n. 1). However, rather than recognizing that the Eighth District's decision should be reversed on the basis of *Lovejoy*, the State asks this Court to overrule *Lovejoy* and adopt the test for reviewing sufficiency of the evidence for federal cases that was established by *Lockhart v. Nelson* (1988), 488 U.S. 33. *Lovejoy* already rejected the *Lockhart* test. Because the State has failed to present a compelling justification for overruling *Lovejoy*, its request to do so now should be denied.

LAW AND ARGUMENT

This Court should decline the State's request to overrule *State v. Lovejoy* because *Lovejoy* was correctly decided and because doing so would be inconsistent with principles of stare decisis. Moreover, even if this Court overrules *Lovejoy* and thus modifies its interpretation of Ohio's Double Jeopardy Clause, it cannot, as a matter of constitutional due process, apply that new rule to Mr. Brewer.

I. *State v. Lovejoy* Should Not Be Overruled.

"The doctrine of stare decisis is of fundamental importance to the rule of law." *Wampler v. Higgins* (2001), 93 Ohio St. 3d 111, 120. It provides "continuity and predictability in our legal system." *Westfield Ins. Co. v. Galatis* (2003), 100 Ohio St. 3d 216, 226. Adherence to stare decisis is "a means of thwarting the arbitrary administration of justice as well as providing a clear rule of law by which the citizenry can organize their affairs." *Id.* Any departure from the doctrine of stare decisis "demands special justification." *Wampler*, 93 Ohio St. 3d at 120 (noting that a "special justification" is required even in cases of constitutional interpretation). Consistent with the doctrine of stare decisis, a prior decision of this Court may only be overruled where "(1) the decision was wrongly decided at that time, or changes in circumstances no longer justify continued adherence to the decision, (2) the decision defies practical workability, and (3) abandoning the precedent would not create an undue hardship for those who have relied upon it." *Galatis*, 100 Ohio St. 3d at 226. Here the State has failed to demonstrate any "special justification" for overruling *Lovejoy*. Each of the *Galatis* criteria are discussed below.

A. *Lovejoy* Was Correctly Decided.

In his merit brief, Mr. Brewer explained in detail why *Lovejoy* was correctly decided. (Appellant's Br. at 6-12). According to *Lovejoy*, double jeopardy prevents the retrial of a

defendant when the *admissible* evidence presented at trial was legally insufficient. 79 Ohio St. 3d 440, 450. *Lovejoy* embodies the fundamental principle of double jeopardy that the state should not get a “second bite at the apple” or “a second opportunity to do that which it failed to do the first time.” *Id.*

The State suggests that *Lovejoy* does not represent sound judicial policy because it would force prosecutors to “overtry” their cases and “offer every bit of relevant and competent evidence” in anticipation that some of their evidence would be deemed inadmissible on appeal. (Appellee’s Br. at 12). The State contends that this would “adversely affect the administration of justice, if for no other reason, than the time that would be required for preparation and trial of every case.” (Appellee’s Br. at 12). The State’s “time” concern is misplaced because it could hardly be argued that one complete trial is more burdensome on judicial and prosecutorial resources than two separate trials. Indeed, *Lovejoy*’s approach actually furthers judicial economy because it forecloses successive trials after the State failed to prove its case the first time with admissible evidence.

The State also argues that the application of the *Lovejoy* rule deprives the State of “‘one fair opportunity’ to make its proof.” (Appellee’s Br. at 12). That is simply not the case. Nothing in *Lovejoy* deprives the State of its opportunity to assemble its case or to present whatever evidence it deems relevant and/or necessary to prove its case. *Lovejoy* simply prevents the State from receiving a benefit from introducing inadmissible evidence to save an otherwise legally insufficient case. When the State’s case is so lacking that, as a matter of law, a “jury could not properly have returned a guilty verdict,” the State can hardly complain of prejudice when it is not afforded the “‘proverbial’ second bite at the apple.” *Burks v. United States* (1978), 437 U.S. 1, 16-17.

The State claims that it is not seeking “a second bit of the apple,” but rather simply wants to “recreat[e] the situation” that would have existed if the trial court had not erroneously admitted evidence. (Appellee’s Br. at 13). But contrary to the State’s argument, that is precisely what *Lovejoy* does. *Lovejoy* simply removes the erroneously admitted evidence from consideration and recreates the situation as if the trial court had not erroneously admitted the evidence.

Because *Lovejoy* was corrected decided, this Court should decline the State’s request to overrule it.

B. There Have Been No Changes In Circumstances That Require Overruling *Lovejoy*.

As noted by the State, *Lovejoy* was decided nine years after the United States Supreme Court’s decision in *Lockhart*. Since *Lovejoy* rejected *Lockhart*’s approach, there have been no changes in circumstances that require this Court to depart from that holding. The double jeopardy concerns at issue in *Lovejoy* remain unchanged. Moreover, there are no new countervailing interests that require erosion of the double jeopardy protections established by *Lovejoy*. Although the State emphasizes that “most” state courts have followed the *Lockhart* rule,¹ these courts generally followed *Lockhart* without independently analyzing the double

¹ While Brewer does not disagree with the State that this Court’s decision in *Lovejoy* represents a minority position amongst the states, many of the cases cited by the State to support that proposition address a completely different issue; namely, whether a court may modify a verdict on appeal to a lesser-included offense when the evidence is insufficient with respect to the offense of conviction. See *People v. Oliver* (1976), 38 Ill.App.3d 166, 347 N.E.2d 865, 868; *Ritchie v. State* (1953), 243 Ind. 614, 189 N.E.2d 575, 576-79; *State v. Lampman* (1982), 1982 Iowa App. LEXIS 1616, 342 N.W.2d 77, 81; *State v. Moss* (1976), 221 Kan. 47, 557 P.2d 1292, 1295; *State v. Byrd* (1980), 1980 La. LEXIS 7853, 385 So. 2d 248, 251-52; *Brooks v. State* (1989), 314 Md. 585, 552 A.2d 872, 880; *People v. Hoffmeister* (1975), 394 Mich. 155, 229 N.W.2d 305, 309; *State v. Wood* (1936), 198 Minn. 111, 268 N.W. 924, 926; *State v. Gunn* (1931), 89 Mont. 453, 300 P. 212, 217; *State v. Haynie* (1994), 116 N.M. 746, 867 P.2d 416, 417-18; *People v. Monaco* (1964), 14 N.Y.2d 43, 197 N.E.2d 532, 535; *Kilpatrick v. State* (1942), 75 Okla. Crim. 28, 128 P.2d 246, 249; *State v. Jackson* (1979), 40 Or.App. 759, 596 P.2d

jeopardy principles at issue or the separate double jeopardy protections afforded by their respective state constitutions.

This Court has consistently held that Ohio's Constitution is "a document of independent force" which may afford "greater civil liberties and protections" to individuals and groups than the United States Constitution. *State v. Farris* (2006), 109 Ohio St. 3d 519, 529 (quoting *Arnold v. Cleveland* (1993), 67 Ohio St. 3d 35, paragraph one of the syllabus). Indeed, this Court has interpreted several provisions of the Ohio Constitution more expansively to afford greater protection for the rights of individuals in the criminal context. See e.g. *State v. Brown* (2003), 99 Ohio St. 3d 323, syllabus (holding that Article I, Section 14 provides greater protection than the Fourth Amendment regarding warrantless arrests for minor misdemeanors); *Farris* (2006), 109 Ohio St. 3d at 529 (holding that Article I, Section 10 provides greater protection to criminal defendants than the Fifth Amendment and requires suppression of physical evidence seized as a result of unwarned statements). Indeed, by rejecting *Lockhart's* approach in *Lovejoy*, this Court has already determined that Ohio's Double Jeopardy Clause affords greater protection to criminal defendants than does the Double Jeopardy Clause of the Fifth Amendment.

In so doing, this Court is not alone. See e.g. *State v. Maldonado* (2005), 108 Haw. 436, 445 (citing *State v. Wallace* (1996), 80 Haw. 382, 414 n.30) (explaining that Article I, Section 10 of Hawaii's Constitution provides greater protection than the Double Jeopardy Clause of the Fifth Amendment and that its state constitutional provision barred the retrial of a defendant whose conviction is not supported by sufficient *admissible* evidence); cf. also. *Commonwealth v.*

600, 602; *State v. Eiseman* (1983), 1983 R.I. LEXIS 961, 461 A.2d 369, 384; *State v. Brown* (1992), 1992 Tenn. LEXIS 401, 836 S.W.2d 530, 544; *Bigley v. State* (1993), 1993 Tex. Crim. App. LEXIS 124, 865 S.W.2d 26, 27-28; *State v. Plakke* (1982), 31 Wn. App. 262, 639 P.2d 799-800; *State v. Sorrentino* (1924), 31 Wyo. 129, 224 P. 420, 426.

DiBenedetto (1992), 414 Mass. 37, 46 n.14 (citing *Commonwealth v. Kirouac* (1989), 405 Mass. 557 and *Commonwealth v. Funches* (1979), 379 Mass. 283) (explaining that, when a conviction is legally insufficient but for inadmissible evidence, double jeopardy bars retrial *unless* the State has “a reasonable prospect of filling the gap in its proof” created by the exclusion of the inadmissible evidence.) The State has presented no compelling reason for this Court to overrule *Lovejoy* and shrink the scope of Ohio’s Double Jeopardy Clause.

While the State contends that “[s]ubsequent to *Lovejoy*, this Court has shifted to the *Lockhart* approach” in reviewing sufficiency claims, (Appellee’s Br. at 13), that is simply not the case. This Court has never relied on *Lockhart*’s rationale in reviewing a sufficiency claim. Indeed, in the 20 years since *Lockhart* was decided, this Court has only cited *Lockhart* once and only as dicta in a capital murder case. *See State v. Yarbrough* (2002), 95 Ohio St.3d 227, 240 (concluding that contested evidence was admissible). A single reference to the *Lockhart* approach in dicta hardly constitutes a “shift” away from the constitutional protections established by this Court in *Lovejoy*.

As the State has failed to identify any changes in circumstances that require departure from *Lovejoy*, it should not be overruled.

C. *Lovejoy* Does Not Defy Practical Workability.

Lovejoy does not defy practical workability. On the contrary, it is a pragmatic and predictable approach to reviewing the sufficiency of the evidence in a criminal case. The State has not identified a single specific circumstance where its application is practically unworkable. Consistent with fundamental principles of double jeopardy, the State gets one fair opportunity to try a defendant in a particular case. If the State does not adduce sufficient *admissible* evidence, it should not get a second opportunity to present its case. If, on the other hand, the State does present sufficient admissible evidence at trial but other error infected the proceeding, it would

get a new opportunity to present its case.² *Lovejoy* is simple, clear, and constitutionally sound. Its application does not lead to anomalous or indefensible results.

D. Departure from *Lovejoy* Creates Undue Hardship to Mr. Brewer.

When Brewer was tried, he reasonably expected that any conviction based solely on inadmissible evidence would be reversed on appeal and that principles of double jeopardy would bar his retrial. If this Court overrules *Lovejoy* and applies that ruling retroactively to Brewer's case, Brewer would, quite unexpectedly, be forced to run the gauntlet of trial a second time even though the State failed to present admissible evidence of his guilt at the first trial. Such a result creates undue hardship for appellant and other criminal defendants who reasonably relied on *Lovejoy*'s double jeopardy principles in their calculus of deciding, among other things, whether to enter into a plea agreement or to exercise their constitutional rights to a jury or bench trial.

The State claims that Brewer would be unaffected if this Court were to overrule *Lovejoy* because, even excluding inadmissible evidence, Brewer's conviction was supported by sufficient evidence. That is not true. The State makes this claim by relying on several excerpts from three lower court opinions that were sometimes inconsistent and often unclear. For instance, the State cites to *Brewer II*,³ at ¶ 14, which provides that the alleged victim "testified that appellant touched her (apparently pointing to her vagina) and kissed her." However, there is nothing in the record that even suggests that the alleged victim pointed to her vagina in describing where she was touched. Indeed, as noted in this Eighth District's prior opinion, the victim "denied that

² In appellant's view, this would be true even if the State merely attempted to offer the competent, admissible evidence but that evidence was excluded by the trial court as cumulative to other improperly admitted evidence. However, the State does not suggest, nor could it, that such a circumstance is present in the instant case.

³ *State v. Brewer*, Cuyahoga App. No. 87701, 2007 Ohio 3407.

[appellant] touched her ‘privacy.’” *State v. Brewer*, Cuyahoga App. No. 87701, 2006 Ohio 6029, at ¶ 13 (“*Brewer I*”).

The State also relies upon the alleged victim’s hearsay statements to her mother and father as related in *Brewer II* at ¶ 14. (“[T]here was also testimony that [the alleged victim] told her mother that appellate had touched her ‘private area.’ Finally, there was testimony that [the alleged victim] told [her father’s] girlfriend that appellant had used his tongue in kissing her.”) But, the Eighth District, in *Brewer I*, at ¶ 13, has already held that the alleged victim’s statements to her mother and father were “hearsay accounts of different statements the child made to different persons at different times.”⁴ Such inadmissible testimony must likewise be excluded from consideration on a review for sufficiency under *Lovejoy*.⁵

A review of the transcript makes clear that Brewer’s conviction is not supported by legally sufficient *admissible* evidence. As explained in Brewer’s merit brief, the alleged victim’s trial testimony constitutes the sole admissible evidence in the record relating to the gross sexual imposition charge. At trial, she testified that the defendant kissed her once on the lips, without using his tongue, and that he touched her in some unspecified location above her waist. (Tr. at 297-99 and 304-305); *see also Brewer I* at ¶ 6 (“[The alleged victim] testified that appellant kissed her, but she denied that he used his tongue when he did so, and denied that he touched her. She specifically denied that appellant touched her ‘privacy,’ but did say that he touched her

⁴ The alleged victim’s father’s girlfriend did not testify at trial notwithstanding the prosecutor’s representation to the jury, in his opening statement, that it would hear from her. (Tr. at 143) (“Roshawn will come in here and say . . .”).

⁵ The State’s reliance on the testimony of the alleged victim’s mother and father as substantive evidence in its merit brief is also inconsistent with its prior assertion, in its brief below, that their testimony was “not offered into evidence to prove the truth of the matter asserted.” (State’s Br. at 12-15).

somewhere not apparent from the record. Appellant also told [the alleged victim] not to tell anyone.) There is no other substantive evidence in the record about this incident. *See Brewer I* at ¶ 8 (“There was no evidence of any physical trauma.”)

Given the lack of admissible evidence to support Brewer’s conviction for gross sexual imposition, Brewer would suffer undue hardship if this Court were to depart from *Lovejoy* and “give the state a ‘second bite at the apple’ and a chance to present evidence it failed to offer at the first trial.” *Lovejoy*, 79 Ohio St. 3d at 450.

II. If *Lovejoy* Is Overruled, Due Process Forecloses Application of This New Rule of Constitutional Law to Appellant.

As discussed *supra*, Ohio’s Double Jeopardy Clause, as interpreted by this Court in *Lovejoy*, prevents the State from retrying Brewer since it failed, at his first trial, to present legally sufficient admissible evidence of guilt. If, however, this Court were to overrule *Lovejoy* and adopt the United States Supreme Court’s approach in *Lockhart*, this new rule of constitutional law cannot be applied retroactively to Mr. Brewer’s case.

When new constitutional rules for the conduct of criminal prosecutions operate to the *benefit* of criminal defendants, they must *always* be applied retroactively “to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a ‘clear break’ with the past.” *Griffith v. Kentucky* (1987), 479 U.S. 314, 328. Such a rule is intended to avoid the inequities “when only one of many similarly situated defendants receives the benefit of the new rule.” *Id.* However, new constitutional rules that operate to the *detriment* of criminal defendants must, as a matter of due process, be handled differently. “[L]imitations on *ex post facto* judicial decisionmaking are inherent in the notion of due process.” *Rogers v. Tennessee* (2001), 532 U.S. 451, 456; see generally, *Bowie v. South Carolina* (1964), 378 U.S. 347 (federal due process limits retroactive application of judicial

precedent). As a matter of “fundamental fairness,” the Due Process Clause “safeguard[s] defendants . . . against unjustified and unpredictable breaks with prior law.” *Id.* at 462. When a court announces a new rule of constitutional law that constitutes “a significant departure” from its prior rule *and* the new rule is detrimental to criminal defendants, due process precludes the retroactive application of the new rule to a criminal proceeding in which the conduct occurred prior to the announcement of the new rule. *See Marks v. United States* (1977), 430 U.S. 188, 189 and 195-96 (concluding that the new constitutional standards of obscenity established by *Miller v. California* (1973), 413 U.S. 15 cannot be applied “retroactively to the potential detriment of a defendant in a criminal case.”)⁶

Based on this Court’s rule in *Lovejoy*, Brewer went to trial believing that, if the State did not prove all the elements of the offense with *admissible* evidence, any conviction would be vacated and Ohio’s Double Jeopardy Clause would bar retrial. To change that rule in the manner suggested by the State would constitute a substantial and, for Brewer, detrimental departure from the constitutional standard previously established by *Lovejoy*. As such, its retroactive application to Brewer would violate the Due Process Clauses of the Ohio and United States Constitutions.

⁶ At the same time, the United States Supreme Court reiterated that “any constitutional principle enunciated in *Miller* which would serve to benefit [defendants] must be applied in their case.” *Marks*, 430 U.S. at 196-97 (quoting *Hamling v. United States* (1974), 418 U.S. 87, 102). Thus, *Marks* explicitly recognizes that whether or not a new constitutional rule applies retroactively in the criminal context depends on whether that rule benefits or disadvantages a criminal defendant.

CONCLUSION

For the reasons set forth above and in appellant's previously filed merit brief, Defendant-Appellant Samuel Brewer respectfully asks this Court to adopt his proposed propositions of law and conclude that Ohio's Double Jeopardy Clause forbids his retrial.

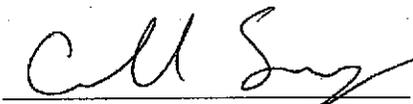
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SERVICE

A copy of the foregoing Appellant's Reply Brief was served upon William D. Mason, Cuyahoga County Prosecutor, The Justice Center, 1200 Ontario Street, 9th Floor, Cleveland, Ohio 44113 on this 12 day of May 2008.



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