

In the
Supreme Court of Ohio

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

REPLY BRIEF OF *AMICUS CURIAE*
OHIO ATTORNEY GENERAL NANCY H. ROGERS
IN SUPPORT OF APPELLANT STATE OF OHIO

WILLIAM D. MASON (0037540)
Cuyahoga County Prosecutor

NANCY H. ROGERS (0002375)
Attorney General of Ohio

MATTHEW E. MEYER* (0075253)
Assistant Prosecuting Attorney
**Counsel of Record*

WILLIAM P. MARSHALL* (0038077)
Solicitor General
**Counsel of Record*

MICHAEL GRAHAM (0078000)
The Justice Center
1200 Ontario Street, 9th Floor
Cleveland, Ohio 44113
216-443-7800; 216-443-7806 fax

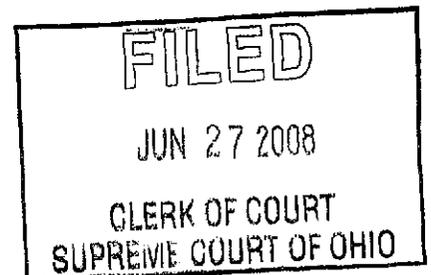
KIMBERLY A. OLSON (0081204)
Deputy Solicitor
KELLY A. BORCHERS (0081254)
Assistant Solicitor
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
614-466-8980; 614-466-5087 fax
wmarshall@ag.state.oh.us

Counsel for Appellant
State of Ohio

Counsel for *Amicus Curiae*
Ohio Attorney General Nancy H. Rogers

ROBERT L. TOBIK
Cuyahoga County Public Defender
JOHN THOMAS MARTIN* (0020606)
Assistant Public Defender
**Counsel of Record*
1200 West Third Street
100 Lakeside Place
Cleveland, Ohio 44113
216-443-7583; 216-443-3632 fax

Counsel for Appellee
Rita Roddy



JASON A. MACKE (0069870)
Assistant Public Defender
Office of the Ohio Public Defender
8 East Long Street, 6th Floor
Columbus, Ohio 43215
614-466-5394; 614-728-8091 fax
mackej@opd.ohio.gov

Counsel for *Amicus Curiae*
Ohio Public Defender

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INTRODUCTION

The Court accepted review of the State's proposition of law that states that double jeopardy allows the court of appeals to review a trial court's substantive law ruling after the trial court enters a judgment of acquittal pursuant to Rule 29(C). See State of Ohio Memorandum in Support of Jurisdiction; State of Ohio Motion for Reconsideration. On this issue, the parties agree. In her brief, Roddy concurs with the State that "double jeopardy principles do not preclude the State's appeal in this case." Roddy Merit Br. at 6.

This case, however, presents an additional issue not included in the proposition of law. And on this issue, the parties disagree. Roddy argues that the State does not have statutory authority to appeal the erroneous legal conclusions in this case. But Roddy is incorrect for three reasons. First, unlike the judgment of acquittal based upon insufficiency of evidence appealed in *State ex rel. Yates v. Court of Appeals for Montgomery County* (1987), 32 Ohio St. 3d 30, here, the State appealed the erroneous conclusions of law supporting the acquittal but not the acquittal itself. State of Ohio Merit Br. at 7. Second, *State v. Bistricky* (1990), 51 Ohio St. 3d 157, which interpreted R.C. 2945.67(A), affirms prosecutors' power to appeal substantive law rulings, and *Bistricky* does not prohibit an appellate court from disturbing a verdict of acquittal. Third, even if an appellate court is prohibited from disturbing a verdict of acquittal, *Bistricky* permits appellate courts to issue opinions on trial courts' substantive legal rulings. Thus, R.C. 2945.67(A) and *Bistricky* grant appellate courts jurisdiction to review the legal errors the State appealed below.

Finally, contrary to Roddy's assertions, the court of appeals did not exercise discretion in dismissing this appeal but instead claimed that it was precluded as a matter of law by the "constitutional principle of double jeopardy." *State v. Roddy* (8th Dist.), 2007 Ohio App. Lexis

3681, 2007-Ohio-4015, ¶ 13. Therefore, the standard of review for this court is de novo and not an abuse of discretion.

ARGUMENT

A. R.C. 2945.67(A) and *Bistricky* permit the State's appeal in this case.

Both Roddy and the Ohio Public Defender, as amicus curiae, argue that *Yates*, 32 Ohio St. 3d 30, prohibits the State's appeal in this case. This appeal, however, differs significantly from the appeal in *Yates*. In *Yates*, the State appealed the judgment of acquittal that was "grounded on the insufficiency of evidence." *Id.* at 32. Here, unlike in *Yates*, the State appealed two substantive legal conclusions unrelated to the sufficiency of the evidence, and as the Attorney General's opening amicus brief argued, an appellate court properly may review a trial court's substantive legal errors that result in a judgment of acquittal. Attorney General Amicus Merit Br. at 5. In this case, the State appealed the trial court's impermissible review of a victim's impact statement and the court's "improper witness credibility analysis." State of Ohio Merit Br. at 7. Therefore, in contrast to the "factual determination of innocence" appealed in *Yates*, see *Yates* 32 Ohio St. 3d 30 at 32-33, here, the State appealed legal conclusions supporting the verdict of acquittal.¹

Moreover, *State v. Bistricky*, decided three years after *Yates*, confirms prosecutors' power to appeal substantive legal errors pursuant to R.C. 2945.67(A). *Bistricky* expressly permits review of underlying substantive legal errors like the ones the State has appealed. *Bistricky*, 51 Ohio St. 3d at 160 (permitting the State to appeal a "substantive issue or 'legal conclusion' made in a criminal proceeding"). Roddy argues that appealing the rationale for a verdict is the same as

¹ The Attorney General's opening amicus brief also argued that certain 29(C) acquittals are substantive legal rulings and are, therefore, appealable under *Bistricky*, which was decided after *Yates*. The Court need not reach this issue, however, because the State has appealed not the acquittal itself but only the underlying substantive legal conclusions supporting the acquittal.

appealing the verdict itself, see Roddy Merit Br. at 8, but *Bistricky* expressly permits appeals of “legal conclusions.” *Id.* at 159. “The question here is whether the court of appeals may consider an appeal of a substantive issue or ‘legal conclusion’ made in a criminal proceeding. We see no distinction between permitting the state to appeal evidentiary rulings and the state’s ability to file an appeal from an issue of law.” *Id.* at 159-60. Indeed, *Bistricky* deliberately left open the door for appeals like the one here, where the State has appealed erroneous legal conclusions. Additionally, *Bistricky* does not prohibit an appellate court from disturbing a 29(C) verdict of acquittal. If the State appeals an underlying substantive legal ruling and the appellate court agrees with the State on the underlying legal principles, the appellate court may reinstate the original jury verdict.

Finally, even if an appellate court is barred from reinstating a guilty verdict, *Bistricky* permits an appellate court to issue an opinion on a legal error that is “capable of repetition but evading review.” *Bistricky*, 151 Ohio St. 3d at 158-59 (citing *Storer v. Brown* (1974), 415 U.S. 724, 737). While Roddy and her amicus curiae argue that this case will lead to an unconstitutional advisory opinion, *Bistricky* makes clear that where the underlying legal error may be repeated but continually evade review, the case is not moot. *Id.*; see also *In re Selection of Judges, Inc.* (1990), 49 Ohio St. 3d 102, 103 (reviewing an otherwise moot election case because the issue was possible of repetition but evading review). In *State v. McGhee*, for example, the prosecutor appealed under R.C. 2945.67(A), and the Tenth District Court of Appeals reviewed the trial court’s rationale for the trial court’s Rule 29(C) acquittal. Ohio App. Lexis 5729, 2007-Ohio-6537, ¶ 7. The court reviewed the underlying substantive legal rationale because the trial court’s legal conclusion could be repeated in future cases but never reviewed. *Id.* (citing *Bistricky*, 151 Ohio St. 3d at 158). The State has an interest in preventing legal errors

that result in erroneous acquittals, but when a judge's substantive legal conclusions supporting a Rule 29(C) acquittal are insulated from review, the same legal errors may occur again and again. Roddy's argument, if accepted, would leave prosecutors with erroneous legal rulings and no avenue to appeal. Thus, the correct interpretation of *Bistricky* and R.C. 2945.67(A) provides a mechanism to review these legal errors.

B. The court of appeals did not exercise discretion when it dismissed the State's appeal but instead held that "the constitutional principle of double jeopardy" precluded the appeal.

Roddy also argues that the Eighth District exercised its discretion and refused to hear the State's appeal. Roddy Merit Br. at 9. The court of appeals has discretion to elect or deny to hear an appeal, and this Court reviews such decisions for abuse of discretion. See *State v. Fisher* (1988), 35 Ohio St. 3d 22, 26. But here the language of the Eighth District's opinion indicates that the court did not exercise its discretion. Instead, the court of appeals declined to hear the State's appeal as a matter of law, concluding "that the constitutional principle of double jeopardy" precluded its review. *Roddy*, 2007-Ohio-4015 at ¶ 13. Thus, because the court of appeals thought double jeopardy barred its review, the court did not exercise discretion in denying jurisdiction. As in *Bistricky*, the proper recourse is to remand the case so that the court of appeals may exercise its discretion. See *Bistricky*, 51 Ohio St. 3d at 160 (remanding because "[i]t is not clear . . . that the court of appeals exercised [its] discretion").

CONCLUSION

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

Respectfully submitted,

NANCY H. ROGERS (0002375)
Attorney General of Ohio



WILLIAM P. MARSHALL* (0038077)
Solicitor General

**Counsel of Record*

KIMBERLY A. OLSON (0081204)

Deputy Solicitor

KELLY A. BORCHERS (0081254)

Assistant Solicitor

30 East Broad Street, 17th Floor

Columbus, Ohio 43215

614-466-8980

614-466-5087 fax

wmarshall@ag.state.oh.us

Counsel for *Amicus Curiae*

Ohio Attorney General Nancy H. Rogers

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Reply Brief of *Amicus Curiae* Ohio Attorney General Nancy H. Rogers in Support of Appellant State of Ohio was served by U.S. mail this 27th day of June, 2008, upon the following counsel:

William D. Mason
Cuyahoga County Prosecutor

Matthew E. Meyer
Assistant Prosecuting Attorney
Michael Graham
The Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

Counsel for Appellant
State of Ohio

Jason A. Macke
Assistant Public Defender
Office of the Ohio Public Defender
8 East Long Street, 6th Floor
Columbus, Ohio 43215

Counsel for *Amicus Curiae*
Ohio Public Defender

John Thomas Martin
Appellate Supervisor Defender
Cuyahoga County Public Defender
310 Lakeside Avenue, suite 200
Cleveland, Ohio 44113

Counsel for Appellee
Rita Roddy



William P. Marshall
Solicitor General