

ORIGINAL

NO. 10-0504

IN THE SUPREME COURT OF OHIO

APPEAL FROM  
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO  
NO. 94481

STATE OF OHIO,  
Plaintiff-Appellant

-vs-

STEPHEN OGLETREE,  
Defendant-Appellee

**MEMORANDUM IN SUPPORT OF JURISDICTION**

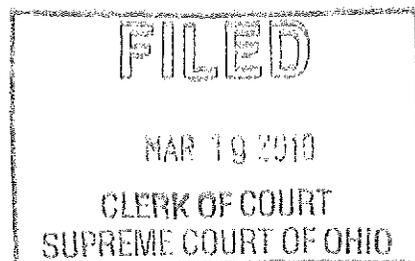
Counsel for Plaintiff-Appellee

**WILLIAM D. MASON**  
**CUYAHOGA COUNTY PROSECUTOR**

**T. ALLAN REGAS (0067336)**  
Assistant Prosecuting Attorneys  
The Justice Center  
1200 Ontario Street  
Cleveland, Ohio 44113  
(216) 443-7800

**Counsel for Defendant-Appellant**

**THOMAS A REIN,**  
LEADER BLDG., SUITE 940  
526 SUPERIOR AVE  
CLEVELAND, OH 44114



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**EXPLANATION OF WHY THIS APPEAL INVOLVES A SUBSTANTIAL  
CONSTITUTIONAL QUESTION OR ISSUE OF GREAT PUBLIC INTEREST**

In the criminal trial against Appellee Stephen Ogletree, Jr. , Cuyahoga Court of Common Pleas Case No. 528694, Appellee was convicted of several sex offenses. Attendant to the offenses was a sexually violent predator specification. Prior to trial, Appellee waived the right to trial by jury on the sexually violent predator offenses and elected to have the court determine the allegations of the specification. The trial court resolved the specification in a manner inconsistent with law:

THE COURT: [T]he defendant had bifurcated the sexually violent predator specification and had tried to the bench and the judge entered a plea of not guilty to that specification **without providing the State of Ohio a hearing.**

*State v. Ogletree*, CR 528694, Transcript of Proceedings, Sentencing Hearing, December 16, 2009, at 4.

On January 7, 2010, the State filed within the Eighth District Court of Appeals its motion for leave to appeal the proceedings contending that its right to present evidence at trial was curtailed. On February 8, 2010, the appellate Court denied the motion for leave to appeal without explanation. The State now asks this Court to accept this case, reverse the appellate court, and remand the matter to the Eighth District Court of Appeals so that that court can determine whether or not a verdict entered without evidence is valid because that order entering a verdict after trial is null and void where a party was precluded from presenting evidence.

The system of justice in this State has been compromised, and it is necessary that this Court reverse the Eighth District to allow the State the ability to appeal from an order entering a verdict where no evidence was allowed to be presented. Such trial procedure, now validated by the appellate court's denial of the State's motion for leave

to appeal, erodes the system of criminal justice whereby trial courts now have the ability to enter verdicts without providing the State an opportunity for the presentation of evidence. Because of this, the State asks that this Court accept its appeal, summarily reverse the Eighth District Court of Appeals decision to deny it leave to appeal the entry of verdict in this matter where the verdict was reached without the opportunity for the State to present evidence.

### **STATEMENT OF THE CASE AND FACTS**

This appeal results from the Eighth District Court of Appeal's denial of the State's motion for leave to appeal a nunc pro tunc order by the trial court entering a verdict of not guilty upon a specification to an indictment, a finding reached without hearing the State's evidence of guilt and without allowing the State the opportunity to present evidence.

In this case, the Appellee asked that the trial court hear evidence as to the sexually violent predator specifications attendant to the allegations of sexual crimes. The trial court did not provide an opportunity for the State to present evidence of guilt upon the specification in this case to it; it only allowed for the State to present evidence before the jury as to the underlying charges determined by a jury. Weeks after trial, the trial court announced its verdict without presenting the State the opportunity to present evidence. At Appellee's sentencing on December 16, 2009, the trial court unequivocally acknowledged that it did not allow the State to present evidence at trial.

Appellee Stephen Ogletree was indicted on the following 9 counts in Case No. 528694:

1. Kidnapping of a minor under 13 years of age in violation of R.C. 2905.01(A)(4)  
-Sexual Motivation Specification, R.C. 2941.147(A)

2. Rape of a minor under 13 years of age in violation of R.C. 2907.02(A)(1)(b)  
-Sexually Violent Predator Specification, R.C. 2941.148(A)
3. Gross Sexual Imposition of a minor under 13 years of age in violation of R.C. 2907.054(A)(4)  
-Sexually Violent Predator Specification, R.C. 2941.148(A)
4. Kidnapping of a minor under 13 years of age in violation of R.C. 2905.01(A)(4)  
-Sexual Motivation Specification, R.C. 2941.147(A)
5. Rape of a minor under 13 years of age in violation of R.C. 2907.02(A)(1)(b)  
-Sexually Violent Predator Specification, R.C. 2941.148(A)
6. Gross Sexual Imposition of a minor under 13 years of age in violation of R.C. 2907.054(A)(4)  
-Sexually Violent Predator Specification, R.C. 2941.148(A)
7. Kidnapping of a minor under 13 years of age in violation of R.C. 2905.01(A)(4)  
-Sexual Motivation Specification, R.C. 2941.147(A)
8. Attempted Rape of a minor under 13 years of age in violation of R.C. 2903.022907.02(A)(1)(b).  
-Sexually Violent Predator Specification, R.C. 2941.148(A)
9. Gross Sexual Imposition of a minor under 13 years of age in violation of R.C. 2907.054(A)(4)  
-Sexually Violent Predator Specification, R.C. 2941.148(A)

Prior to trial, Appellee asked the Court to bifurcate trial of the Sexually Violent Predator Specifications attendant to the Rape, Attempted Rape, and Gross Sexual Imposition counts. The jury returned a verdict of guilty of two counts of Kidnapping with Sexual Motivation Specifications as charged in Counts 1 and 4 of the indictment; two counts of gross sexual imposition 2907.05 as charged in counts 3 and 6 of the indictment. The trial court dismissed Counts 7 and 9 pursuant to Crim.R. 29. The jury rendered a verdict of not guilty on the remaining counts.

The court's November 20, 2009 journal entry reflecting the verdict stated that the jury had found Appellant guilty of the sexually violent predator specifications

attendant to the counts of gross sexual imposition. It did not. Further, at the close of the trial, the Court did not afford the State the opportunity to present evidence in furtherance of the sexually violent predator specifications attended to the two counts of gross sexual imposition for which Appellee was found guilty.

On November 16, 2009, after trial, but before sentencing in this case, Appellant appeared before the trial court. At that time the trial court announced its verdict as to the two sexually violent predator specifications. Appellant then entered pleas in two separate cases. In Case No. 523474, Appellant entered pleas to three counts of gross sexual imposition, felonies of the fourth degree. In Case No. 517376, Appellant entered pleas to tampering with records, a felony of the third degree and to failure to provide notice of change of address, a felony of the fourth degree. On December 11, 2009, the trial court entered the following order from which the State appeals:

NUNC PRO TUNC ENTRY AS OF AND FOR 11/02/2009. PRIOR TO COMMENCEMENT OF TRIAL DEFENDANT BIFURCATED THE SEXUAL VIOLENT PREDATOR SPECIFICATION ATTACHED TO THE GSI COUNTS AND WAIVED A JURY TRIAL AS TO THE COUNTS CONTAINING SUCH A SPECIFICATION 11-16-09 COURT FOUND DEFENDANT NOT GUILTY AS TO THE SEXUAL PREDATOR SPECIFICATIONS.

At the sentencing hearing, the Court stated:

Additionally in that docket, the defendant had bifurcated the sexually violent predator specification and had tried to the bench and the judge entered a plea of not guilty to that specification **without providing the State of Ohio a hearing.**

It then proceeded to sentencing. In its entry of conviction, the trial court journalized the following:

DEFENDANT IN COURT. COUNSEL FERNANDO MACK PRESENT. COURT REPORTER PRESENT. ON A FORMER DAY OF COURT THE JURY RETURNED A VERDICT OF GUILTY OF KIDNAPPING 2905.01 A(4) F1 WITH SEXUAL MOTIVATION SPECIFICATION 2941.147 AS

CHARGED IN COUNT(S) 1, 4 OF THE INDICTMENT. ON A FORMER DAY OF COURT THE JURY RETURNED A VERDICT OF NOT GUILTY OF RAPE 2907.02 A(1)(B) WITH SEXUAL VIOLENT PREDATOR SPECIFICATION AS CHARGED IN COUNT(S) 2, 5 OF THE INDICTMENT. ON A FORMER DAY OF COURT THE JURY RETURNED A VERDICT OF GUILTY OF GROSS SEXUAL IMPOSITION 2907.05 A(4) F3 WITH SEXUAL VIOLENT PREDATOR SPECIFICATION AS CHARGED IN COUNT(S) 3, 6 OF THE INDICTMENT. ON A FORMER DAY OF COURT THE JURY RETURNED A VERDICT OF NOT GUILTY OF GROSS SEXUAL IMPOSITION 2907.05 A(4) F3 WITH SEXUAL VIOLENT PREDATOR SPECIFICATION AS CHARGED IN COUNT(S) 9 OF THE INDICTMENT. RULE 29 WAS GRANTED AS TO COUNT(S) 7, 8. DEFENDANT ADDRESSES THE COURT, VICTIM/REP KANAE JONES ADDRESSES THE COURT THE COURT CONSIDERED ALL REQUIRED FACTORS OF THE LAW. THE COURT FINDS THAT PRISON IS CONSISTENT WITH THE PURPOSE OF R. C. 2929.11. THE COURT IMPOSES A PRISON SENTENCE AT THE LORAIN CORRECTIONAL INSTITUTION OF 5 YEAR(S). 5 YEARS ON COUNTS 1 AND 4, 3 YEARS ON COUNTS 3 AND 6, CONCURRENT. CREDIT FOR TIME SERVED; SHERIFF TO CALCULATE. CASES CR 517376, CR 523474 AND CR 528694 TO RUN CONCURRENT WITH EACH OTHER. \* DEFENDANT TO REGISTER AS TIER III SEX OFFENDER AND FOLLOW ALL REPORTING RULES. \* POST RELEASE CONTROL IS PART OF THIS PRISON SENTENCE FOR 5 YEARS MANDATORY FOR THE ABOVE FELONY(S) UNDER R.C.2967.28. DEFENDANT ADVISED OF APPEAL RIGHTS. DEFENDANT INDIGENT, COURT APPOINTS THOMAS A REIN AS APPELLATE COUNSEL. TRANSCRIPT AT STATE'S EXPENSE. DEFENDANT IS TO PAY COURT COSTS. DEFENDANT REMANDED. SHERIFF ORDERED TO TRANSPORT DEFENDANT STEPHEN OGLETREE, DOB: 01/18/1972, GENDER: MALE, RACE: BLACK. 12/16/2009 CPEDB 12/17/2009 10:59:45

December 18, 2009, Journal Entry.

In that entry the trial court recited the record incorrectly; the jury did not enter a verdict as to the sexually violent predator specifications after hearing evidence; the trial court did so without hearing evidence. Such practice cannot be condoned and this Court must reverse the appellate court as there can be no confidence in a system of justice that allows courts to begin trial and enter verdicts without affording the litigants an opportunity to present evidence.

**LAW AND ARGUMENT IN SUPPORT OF JURISDICTION**

**A. Proposed Proposition of Law**

By not affording the State the ability to present evidence upon the specifications in this case, the trial court violated statutory law as to trial procedure. In this matter, the State intended to introduce evidence of Appellee's prior actions and/or offenses, evidence not presented before the jury. The State asked that the appellate court grant leave to appeal the nunc pro tunc entry where it intended to raise the following assignments of error:

Assignment of Error No. I:

The trial court did not follow trial procedure in accord with the Revised Code and was without jurisdiction to enter a verdict.

Issue Presented:

Does a trial court that does not follow procedures at trial in accord with the Revised Code err by entering a verdict if it did not allow the parties to present evidence?

Assignment of Error No. II:

The trial court committed error by entering a verdict without affording the State to present evidence in support of a specification to an indictment.

Issue Presented:

Can a verdict entered without a litigant's ability to present evidence be deemed valid and have any effect?

The State did not seek to address the merits of the verdict upon its appeal; rather, it sought to appeal the procedure of the trial court in conducting trial. Now, the State asks that this Court determine the following proposition of law:

***PROPOSITION OF LAW: In a criminal trial, the State may appeal error that affects its right to present evidence upon charges or an indictment. An appellate court errs by not allowing the State an appeal where a gross violation of procedure and process is alleged.***

**B. Trial Procedure is Governed By The Ohio Revised Code**

The trial court precluded the State from presenting any evidence in its prosecution of Appellee. This is not a matter of whether or not evidence would have been admitted at hearing; rather it is imperative to realize that the State was precluded from a hearing regarding the specifications. A trial court may only conduct trial in accord with rule. It is axiomatic that a litigant is allowed to present evidence in support of its case.

The Ohio Revised Code provides that a party is allowed to present evidence in its case. See, R.C. 2315.01(A)(3). Although the State was able to present evidence of Defendant's specific sexual crimes where the trial court heard the evidence as it was presented to the jury, it was precluded from putting other evidence on the record before the Court as the trier of fact. *Any* judgment resulting from a proceeding truncated is invalid and must be reversed. *Bargo v Conrail Construction Corp*, No. C-830771 (1st Dist Ct App, Hamilton, 7-11-84 (Where judge renders judgment prior to close of Defendant's case, such failure to follow trial procedure as provided in RC 2315.01 constitutes reversible error.)) As the court stated in *Bargo*, supra:

We understand the general rule to be that it is reversible error for a trial court to fail to follow trial procedure as provided in R.C. 2315.01, which is what occurred here. *Polasky v. Stampler* (1st Dist. 1971), 30 Ohio App. 2d 15, 281 N.E.2d 191. Moreover, a litigant must be given his day in court in the form of a meaningful opportunity to present evidence in his own behalf. It was improper for the judge presiding below to render a decision before the defendant had rested, thus denying the plaintiff Bargo the right to present rebuttal evidence and also barring the opportunity for him to present his defense to Conrail's counterclaim. A similar issue was before us in *Buscema v. Fluegeman* (1st Dist. 1980), 70 Ohio App. 2d 128, 434 N.E.2d 1386. We held:

The failure to afford the appellant an opportunity to present evidence in his own behalf requires that we reverse the judgment of the Court of Common Pleas of Hamilton County and remand the instant cause to that court for further

proceedings in accordance with law. *Id.* at 130, 434 N.E.2d at 1388.

The trial court did not abide by R.C. 2923.15 where it failed to afford the State a trial upon the specifications. This failure on the part of the trial court is reversible error. *Bargo, supra.* Because the trial court clearly committed reversible error at trial by not allowing the State to present evidence and then later entered judgment, such judgment is void and invalid.

As this case is a criminal case, the State recognizes that double jeopardy concerns prohibit it from appealing a verdict of acquittal. However, the verdict in this case cannot be deemed valid for the purposes of double jeopardy where no trial or hearing was held. Further, double jeopardy concerns are not at issue because Appellee would not be subject to a second trial; that would be impossible where there was no first trial, as the State was not allowed the opportunity to present evidence. Because the trial court committed clear, reversible error by denying the State an opportunity to present evidence before it rendered a verdict in this matter, the State asks that this Court reverse the appellate court's decision that denied it leave to appeal the nunc pro tunc entry of December 11, 2009 purporting to enter a verdict as to the specifications in Appellee's criminal case.

### **CONCLUSION**

The State of Ohio respectfully asks this Honorable Court to accept jurisdiction in this matter and summarily reverse the appellate court's denial of its motion for leave to appeal. If it does not, then trial courts will be empowered to truncate trials and enter verdicts without allowing the State the ability to prosecute criminal cases. Such actions rail against the principles of open, fair, and honest courts. The trial court's

decision to enter a verdict in this matter by nunc pro tunc entry, when no verdict could have been reached as the State could not present evidence must be subject to appellate review. It is for these reasons that State asks this Court to summarily reverse the Eighth District Court of Appeals denial of its motion for leave to appeal the entry of a verdict as to the Sexually Violent Predator Specifications.

Respectfully submitted,

WILLIAM D. MASON  
CUYAHOGA COUNTY PROSECUTOR

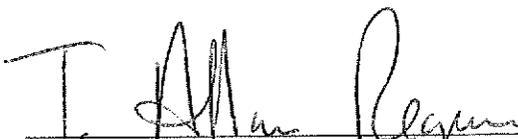
BY:

  
\_\_\_\_\_  
T. ALLAN REGAS (0067336)  
Assistant Prosecuting Attorney  
1200 Ontario Street, 9<sup>th</sup> Floor  
Cleveland, Ohio 44113  
216.443.7800

**SERVICE**

A copy of the foregoing Memorandum in Support of Jurisdiction was sent this 18<sup>th</sup> day of March 2010 to:

**THOMAS A REIN,  
LEADER BLDG. SUITE 940  
526 SUPERIOR AVE  
CLEVELAND, OH 44114**

  
\_\_\_\_\_  
T. ALLAN REGAS (0067336)  
Assistant Prosecuting Attorney

# Court of Appeals of Ohio, Eighth District

County of Cuyahoga  
Gerald E. Fuerst, Clerk of Courts

STATE OF OHIO

Appellant

COA NO.  
94481

LOWER COURT NO.  
CP CR-528694

COMMON PLEAS COURT

-vs-

STEPHEN OGLETREE

Appellee

MOTION NO. 429960

Date 02/08/10

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Journal Entry

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MOTION BY APPELLANT FOR LEAVE TO APPEAL DISCOVERY ORDER IS DENIED.

RECEIVED FOR FILING

FEB 08 2010

GERALD E. FUERST  
CLERK OF THE COURT OF APPEALS  
BY *G. Fuerst* DEP.

Judge MARY EILEEN KILBANE, Concur

*James J. Sweeney*  
Presiding Judge JAMES J. SWEENEY

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