

ORIGINAL

IN THE SUPREME COURT OF OHIO

CITY OF COLUMBUS,	:	Case No. 10-0804
	:	
Appellee,	:	On Appeal from the
	:	Franklin County Court
vs.	:	of Appeals, Tenth
	:	Appellate District
REGINALD WILLIAMS,	:	
	:	Court of Appeals
Appellant.	:	Case No. 09 AP-619

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**APPELLEE'S MEMORANDUM IN OPPOSITION OF JURISDICTION**

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**Explanation of why this case does not present an issue of public or great general interest or a substantial constitutional question.**

The instant case does not present an issue of public or great general interest, or a substantial constitutional question, because it deals with the lower court's analysis of discreet facts and does not implicate any larger body of cases or principles of law. Because the trial court applied the correct legal test to the factual circumstances of the case, this Honorable Court should find that no substantial constitution question is raised. Because the lower court's determination was limited to the specific facts of the instant case, this Honorable Court should find the case is not one of public or great general interest. For these reasons, this Court should decline jurisdiction.

**The lower court properly determined that under a plain error standard, Appellant's substantial rights were not prejudiced by the prosecutor's comment in closing argument.**

In the instant case, the Tenth District Court of Appeals determined that Appellant's failure to object to alleged prosecutorial misconduct in the state's rebuttal closing argument waived all but plain error with respect to the alleged misconduct. As such, an isolated comment by the prosecutor that Appellant was "playing the race card", set within a context of a rebuttal closing comprised of proper remarks, did not prejudicially affect Appellant's substantial rights.

**ANSWER TO APPELLANT'S PROPOSITION OF LAW**

The Tenth District Court of Appeals appropriately reviewed Appellant's claim that the prosecution engaged in misconduct that denied him a fair trial. The Tenth District held that because Appellant did not object to the alleged misconduct, he waived all but plain error, following the precedent set by this Court in *State v. Diar*, 120 Ohio St.3d 460, 2008-Ohio-6266, ¶139. *City of Columbus v. Williams*, 10<sup>th</sup> Dist. No. 09AP-619, 2008-Ohio- 1224, ¶25. Reviewing the trial and the prosecution's closing argument in its entirety, pursuant to this

Court's decision in *State v. Williams* (1997), 79 Ohio St.3d 1, 12 and *State v. Treesh* (2001), 90 Ohio St.3d 460, 480, 739 N.E.2d 749, the Tenth District held that the record did not support a finding that Appellant would not have been convicted in the absence of the prosecutor's allegedly improper comment. *Williams* (2008) at ¶28.

**The prosecution did not engage in misconduct which served to deny Appellant a fair trial.**

The instance of misconduct alleged by Appellant was not improper and Appellant cannot demonstrate that he was prejudiced by the actions of the prosecution. The test for prosecutorial misconduct is whether the remarks or conduct were improper and, if so, whether they prejudicially affected substantial rights of the accused. *State v. Smith* (1984), 14 Ohio St.3d 13, 14; *State v. Smith* (2000), 87 Ohio St.3d 424, 442, 721 N.E.2d 93.

The prosecution is entitled to a certain degree of latitude in summation and is entitled to latitude as to what the evidence has shown what inferences can be drawn there from. *State v. Smith* (2000), 87 Ohio St.3d 424, \*443, 2000-Ohio-450; *State v. Jackson* (2005), 107 Ohio St.3d 53, \*75, 2005- Ohio-5981. Throughout the trial, Appellant made numerous references regarding Officer Muscarello and Officer Penhorwood's motivations in stopping and arresting him on October 3, 2009. In Appellant's closing argument he questioned why the officers would stop Appellant and hurry him through an OVI arrest and Appellant told the jury that "it had something to do with the car." Tr., 297. "We talked about the car and the car was the term 'tricked out'. And some of you know that term, some of you don't, but with the rims and all that kind of stuff. But it was a police car. And Mr. Williams testified that he had been pulled over before in that car seemingly for no reason but because they were angry about it." Tr., 297.

The prosecutor's comment regarding "playing the race card" was a direct response to this portion of Appellant's closing argument. The prosecutor argued to the jury that Appellant was

trying every excuse to “get out of this DUI.” Tr., 315. He asked the jury to remember that Appellant’s car had dark window tint on it and the officers could not possibly know who was inside, “man, woman or child. They had no clue who they were pulling over.” Tr., 315. The comment was meant to persuade the jury not to let the defense distract them from the true issue in the case- whether or not Appellant was under the influence of alcohol and/or drugs on October 3, 2009. Tr., 315.

Though the Tenth District Court of Appeals held that the prosecutor’s comment was arguably improper, the lower court appropriately viewed the remark in the context of the entire closing argument and within the context of the trial as a whole. *Treesh*, supra. In doing so, the lower court held that “the state’s rebuttal was approximately 10 or 11 pages, and the statement at issue both was brief and did not ‘pervade the rebuttal portion of appellee’s closing argument.’ ...Rather, the majority of the rebuttal pertained to the record evidence of defendant’s impairment and was a legitimate response to defendant’s argument.” Williams at ¶28. Thus, the Tenth District held that the outcome of Appellant’s trial would not have been different but for the single remark at issue and overruled Appellant’s assignment of error.

Applying the appropriate standard of review and analyzing a discreet set of facts, the Tenth District Court of Appeals held that Appellant’s substantial rights were not prejudiced by the prosecutor’s isolated statement during closing. Accordingly, there is no issue of public or great general importance nor a substantial constitutional question and this Court should deny Appellant’s motion for jurisdiction.

### **CONCLUSION**

For the reasons set forth above, the State respectfully requests that this Honorable Court decline jurisdiction and dismiss Appellant’s Memorandum in Support of Jurisdiction.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

This is to certify that a true copy of the foregoing Memorandum in Opposition of Jurisdiction was mailed by regular U.S. Mail to Joseph D. Reed, Attorney for Defendant-Appellant, 713 South Front Street, Columbus, Ohio 43206, this 3rd day of June, 2010.



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Director – Appellate Unit