

IN THE SUPREME COURT OF OHIO

ORIGINAL

STATE OF OHIO

Appellee,

v.

DESMOND A. BILLINGSLEY

Appellant.

CASE NO. 2011-0827

On Appeal From the Eleventh  
District Court of Appeals  
Case No. 2010-P-30 & 2010-P-31

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APPELLEE STATE OF OHIO'S RESPONSE IN OPPOSITION TO  
APPELLANT'S MEMORANDUM IN SUPPORT OF JURISDICTION

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VICTOR V. VIGLUICCI (0012579)  
Portage County Prosecuting Attorney  
THERESA M. SCAHILL (0078432) (Counsel of Record)  
Assistant Prosecuting Attorney  
241 South Chestnut Street  
Ravenna, Ohio 44266  
(330) 297-3850 (phone)  
(330) 297-3856 (fax)  
E-mail: tscahill@portageco.com

ATTORNEYS FOR APPELLEE

JOHN P. LACZKO (0051918)  
209 South Chestnut Street, Suite 400  
Ravenna, Ohio 44266  
(330) 297-3665

ATTORNEY FOR APPELLANT

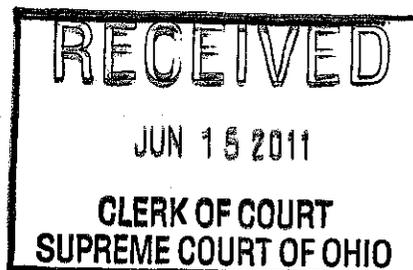
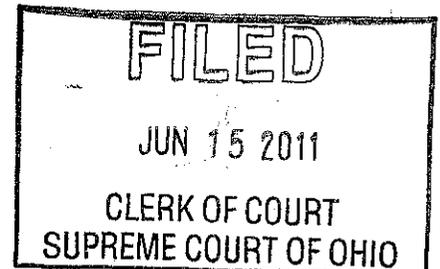


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**THIS CASE DOES NOT PRESENT AN ISSUE OF PUBLIC OR GREAT GENERAL INTEREST AND DOES NOT INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION WARRANTING JURISDICTION FROM THIS COURT.**

Rather than present this Court with a case of public and great general interest or a substantial constitutional question, Appellant Desmond A. Billingsley, is seeking jurisdiction from this Court because he is dissatisfied with the sentence he received for multiple aggravated robberies with firearms specifications committed in Portage County, Ohio. Billingsley was unable to demonstrate to the Portage County Common Pleas Court or the Eleventh District Court of Appeals that the Portage County Prosecutor's Office was a party to a plea agreement that he entered into with the Summit County Prosecutor's Office. *State v. Billingsley* (Mar. 31, 2011), Portage App. Nos. 2010-P-0030 and 2010-P-0031, 2011-Ohio-1586. Moreover, the Eleventh District concluded that a county prosecutor is empowered to investigate and prosecute crimes only within that county's territorial jurisdiction and, therefore, rejected Appellant's argument that the Summit County prosecutor's agreement bound Portage County under an apparent agency theory. *Billingsley*, 2011-Ohio-1586 at ¶23-26.

The Eleventh District also noted that the Summit County and Portage County prosecutions were not successive prosecutions of the same factual scenario, but successive prosecutions of separate crimes occurring in another jurisdiction. *Billingsley*, 2011-Ohio-1586 at ¶14.

Upon appeal, the Eleventh District Court of Appeals correctly affirmed the decision of the trial court. *Billingsley*, 2011-Ohio-1586. A review of the Eleventh District's opinion demonstrates that Billingsley has not presented any error in the decision of the Eleventh District Court of Appeals warranting jurisdiction in this Court.

## STATEMENT OF THE CASE AND FACTS

Appellant was involved in approximately 30 aggravated robberies Summit, Stark, and Portage Counties. (Transcript of Proceedings of December 21, 2009 Motions Hearing, hereinafter "Hearing T.p." 33). *Billingsley*, 2011-Ohio-1586 at ¶2. He was originally charged with a 24 count indictment in Summit County. After negotiations with the Summit County Prosecutor's Office, a plea agreement was reached in Summit County case number CR-3008-01-290. In the Summit County case, Appellant agreed to enter a written plea of guilty to two counts of aggravated robbery with firearm specifications and one count of attempted aggravated robbery with a firearm specification. (Transcript of Proceedings of October 1, 2008 Summit County Plea Hearing, hereinafter "Summit Plea T.p." 2-3). The Summit<sup>1</sup> County assistant prosecutor asked the trial court to nolle the remaining 21 counts of the Appellant's indictment and then stated the following regarding a sentencing recommendation and parties' agreement:

Judge, what we're going to do is similar to what we did with Delaney, we're not asking to sentence him today, Billingsley today. He is going to sit down and give us information regarding remaining aggravated robberies we're aware of. There are certainly even - - other than five people that we have in this case, there are others who are involved in this group of robberies.

So we're going to sit down. The detective is here. He's going to sit down with Mr. Billingsley and get the information. If he is cooperative and truthful, then as to sentencing, State will recommend eight years. If not, then if he doesn't sit down and give information, subject to a polygraph, if we don't believe that he's telling the truth, then the recommendation by the State would be different.

There are potentially other charges from other counties. We have been in contact with those other counties and can say that's our recommendation to him, and they've agreed at least in the other defendant's cases, because we're getting these pleas here, that they will either not pursue charges on their robberies, or if they have already charged that, they'll run concurrent.

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<sup>1</sup> Appellant's Memorandum in Support of Jurisdiction at page 8 erroneously states that this agreement was enunciated by the Portage County Prosecutor.

(Summit Plea T.p. 4-5).

Defense counsel supplemented, “[i]n addition, Your Honor, if there are any cases that he talks about outside of the indictment, he would not be charged with those cases.” (Summit Plea T.p. 5). The Summit County assistant prosecutor agreed that she would not pursue any new charges. (Summit Plea T.p. 5). Following this Summit County plea agreement, Appellant had cooperated and provided information regarding many aggravated robberies. (Transcript of Proceedings of November 17, 2008 Summit County Sentencing Hearing, hereinafter “Summit Sentencing T.p.” 2-3). The Summit County assistant prosecutor recommended that the Appellant’s prison sentence of three years on the firearm specifications be run consecutive to concurrent terms of five years for the attempt and the aggravated robberies. (Summit Sentencing T.p. 2-3). The Summit County trial court sentenced the Appellant accordingly for a total prison term of 8 years. (Summit Sentencing T.p. 6-7).

Thereafter, the Portage County Grand Jury indicted the Appellant on aggravated robbery in violation of R.C. 2911.01 with a firearm specification in violation of R.C. 2929.14(D) and 2941.145 for a robbery at the McDonald’s restaurant in Kent, Ohio (Transcript of the Docket, Journal Entries and Original Papers from Case No. 2009 CR 23, hereinafter “2009 CR 23-T.d.” 1). The Portage County Grand Jury also indicted the Appellant on two more counts of aggravated robbery each with a firearm specification for robberies at the Wendy’s and Subway restaurants in Brimfield, Ohio. (Transcript of the Docket, Journal Entries and Original Papers from Case No. 2009 CR 509, hereinafter “2009 CR 509-T.d.” 1).

Appellant filed a motion to enforce a Crim.R. 11 plea agreement and a motion to dismiss the firearm specifications in both cases. (2009 CR 23-T.d. 36; 2009 CR 509-T.d. 23). Appellant asserted that he had entered into an agreement with the State via plea negotiations

with a Summit County assistant prosecutor prohibiting Portage County from either pursuing robbery charges or seeking consecutive sentences for robbery charges filed against him. (2009 CR 23-T.d. 36; 2009 CR 509-T.d. 23).

During the hearing on his motions, the Appellant provided copies of the transcripts of proceedings from his 2008 Summit County plea and sentencing hearings, testimony from himself, his Summit County defense counsel, and the lead detective from the Akron Police Department. (Joint Exhibits A and B, T.d. 61, 62). After hearings on his motions, the trial court overruled the motions and the Appellant entered no contest pleas to all charges. (2009 CR 23-T.d. 48; 2009 CR 509-T.d. 36).

The Portage County trial court sentenced the Appellant to consecutive terms of eight years in prison on each aggravated robbery to run consecutive to the mandatory three years in prison for each firearm specification for a total of 33 years. (2009 CR 23-T.d. 51; 2009 CR 509-T.d. 39). The trial court did run Appellant's sentence concurrent with the sentence he received in Summit County. (2009 CR 23-T.d. 51; 2009 CR 509-T.d. 39). The trial court also ordered the Appellant to pay restitution to McDonald's in the amount of \$1,710, to Wendy's in the amount of \$1,000 and to Subway in the amount of \$590. (2009 CR 23-T.d. 51; 2009 CR 509-T.d. 39).

A timely appeal was filed with the Eleventh District Court of Appeals. *Billingsley*, 2011-Ohio-1586. Billingsley raised the following assignment of error: "[t]he trial court abused its discretion to the prejudice of appellant by overruling his motion to enforce the Criminal Rule 11 plea agreement and motion to dismiss firearm specifications." *Id.* at ¶13. The Eleventh District Court of Appeals overruled Billingsley's assignment of error and affirmed the trial court's judgment. *Id.* at ¶27.

This matter is now before the Supreme Court of Ohio on Billingsley's memorandum in support of jurisdiction.

### **ARGUMENT OPPOSING JURISDICTION**

**Response to Billingsley's Proposition of Law:** The Eleventh District Court of Appeals did not abuse its discretion in affirming the trial court's decision to deny Billingsley's motion to enforce the Summit County Criminal Rule 11 plea agreement and motion to dismiss firearm specifications in Portage County.

In his sole proposition of law, Billingsley challenges the Eleventh District Court of Appeals' decision affirming the trial court's denial of his motion to enforce the Summit County plea agreement and motion to dismiss firearm specifications in Portage County. More specifically, Billingsley alleges his Summit County plea agreement should be enforced against Portage County because the Summit County assistant prosecutor was an agent of the entire state of Ohio including Portage County.

Plea bargains are generally subject to contract law principles. *Billingsley*, 2011-Ohio-1586 at ¶16 (citing *State v. Bethel*, 110 Ohio St.3d 416, 2006-Ohio-4853, at ¶50). However, under contract law, an entity must be a party to the contract before it can be enforced against it. And both the trial court and the Eleventh District concluded that Portage County was not a party to the Summit County agreement and, therefore, was not bound by its terms. *Billingsley*, 2011-Ohio-1586 at ¶17-20.

The record does not support Appellant's assertions that in exchange for entering a written plea of guilty in Summit County, the Portage County prosecutor agreed to not pursue robbery charges against the Appellant or only to seek concurrent sentences. The terms of the Summit County agreement, stated on the record at the Appellant's Summit County plea hearing, do nothing more than refer to "other counties" with regards to arrangements made "in

the other defendant's cases.” (Summit Plea T.p. 4-5) While Appellant's Summit County defense counsel testified that he believed detectives in other jurisdictions, including Stark and Portage, had been contacted and went along with the Summit County agreement (Hearing T.p. 13), he acknowledged that a police officer or detective wouldn't be able to enter into the agreement. (Hearing T.p. 22). Further, he himself did not contact anyone in Portage County, let alone at the prosecutor's office, to confirm the alleged agreement between the counties. (Hearing T.p. 21). As Appellant failed to demonstrate a plea agreement with the Portage County Prosecutor's Office, there was no error in overruling his motion to enforce the Crim.R. 11 plea agreement and his motion to dismiss the firearm specification. The Eleventh District specifically noted, “The Portage County Prosecutor's Office was not mentioned anywhere in the record of the plea hearing.” *Billingsley*, 2011-Ohio-1586 at ¶18.

The Eleventh District also specifically addressed and rejected Appellant's agency argument. *Billingsley*, 2011-Ohio-1586 at ¶21-26. Appellant argued that the Summit County Prosecutor, as an agent of the State of Ohio, had the ability to bind all counties, including Portage County. *Id.* at ¶21. In responding to this argument, the Eleventh District looked at how the same argument had been addressed by the Second and Fifth Districts. *State v. Barnett* (1998), 124 Ohio App.3d 746, at 751-755; *State v. Dumas*, 5th Dist. No. 02CA60, 2003-Ohio-4117, at ¶26. The Eleventh District noted that *Barnett* was similar to the present case in that the crimes were committed in two different counties and were not allied offenses of similar import. *Billingsley*, 2011-Ohio-1586 at ¶22.

In *Barnett*, the Warren County Prosecutor's Office entered into an agreement where “the consideration for this plea is that the representation by the prosecution that no charges of any kind, anywhere are going to be filed relating to these children, on anything that's happened

to-date, obviously, that the prosecutor's aware of. *Barnett*, 124 Ohio App.3d at 748. Barnett was subsequently charged in Montgomery County for gross sexual imposition involving some of the same children. *Id.* The *Barnett* Court held, and the Eleventh District agrees, "although a county prosecutor is an agent of the state, 'the county prosecutor's agency authority extends to the county line when investigating and prosecuting crimes. Thus, the county prosecutor is an agent of the state with respect to crimes committed in his county.'" *Billingsley*, 2011-Ohio-1586 at ¶23 (quoting *Barnett*, 124 Ohio App.3d at 755). "Unlike federal prosecutors, a county prosecutor's authority is generally limited to the county he serves, as they 'are elected by local residents and work on behalf of those constituents, inquiring into the commission of crimes within the county.'" *Id.* *Barnett* noted unlike United States Attorneys who are under the direct supervision of the United States Attorney General, Ohio County prosecutors are elected by and work on behalf of local residents. While Ohio County Prosecutors may interact with the Ohio Attorney General, they are not directly supervised by him. *Barnett*, 124 Ohio App.3d at 755.

In rejecting Appellant's apparent authority argument, the Eleventh District noted, "Under an apparent-authority analysis, an agent's authority is determined by the acts of the principal rather than by the acts of the agent. The principal is responsible for the agent's acts only when the principal has clothed the agent with apparent authority and not when the agent's own conduct has created the apparent authority. *Billingsley*, 2011-Ohio-1586 at ¶25 (quoting *Ohio State Bar Assn. v. Martin*, 118 Ohio St.3d 119, 2008-Ohio-1809 at ¶41).

In the present case, the alleged principal is either the State of Ohio or the Portage County Prosecutor's Office and the alleged agent is the Summit County Prosecutor's Office. Appellant alleges that the Summit County Prosecutor held herself out as having apparent authority to bind Portage County to the Summit County agreement. Appellant's Memorandum

in Support of Jurisdiction at 10. But no evidence was presented that the Portage County Prosecutor's Office, as the alleged principal, clothed the Summit County Prosecutor's Office, as alleged agent, with any authority to enter into this agreement. Appellant's Summit County defense counsel did not contact anyone at the Portage County Prosecutor's Office (Hearing T.p. 21). Similarly, the Akron police detective did not personally have any contact with the Portage County prosecutor and did not know if anyone else had made contact with the Portage County prosecutor regarding the Appellant. (Hearing T.p. 38). Furthermore, the Detective admitted that no one promised the Appellant a "pass" for the Portage County robberies, "we never promised anybody that this is what was set in stone. That's not our county, we can't do that." (Hearing T.p. 37). "

Likewise, Appellant has pointed to no evidence that the State of Ohio did anything as the alleged principal to support any inference that a Summit County assistant prosecutor had authority to enter into plea bargains regarding crimes committed in Portage County. To the contrary, "[t]he laws of the state of Ohio support no such inference." *Billingsley*, 2011-Ohio-1586 at ¶26 (quoting *Barnett*, 124 Ohio App.3d at 755). The Eleventh District correctly held that the state of Ohio has not represented that the Summit County Prosecutor is authorized to act as its agent with respect to offenses committed outside of Summit County. *Billingsley*, 2011-Ohio-1586 at ¶26. "The laws of Ohio support no [ ] inference" that prosecutors in one county are clothed with apparent authority to act as agents for the state of Ohio and plea bargain with respect to offenses committed wholly outside that county. *Id.* (quoting *Barnett*, 124 Ohio App.3d at 755).

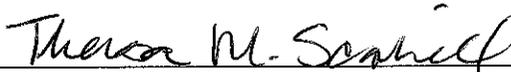
Accordingly, the Eleventh District Court of Appeals properly upheld the trial court's decision and Billingsley has failed to demonstrate error with the appellate opinion warranting jurisdiction from this Court. Billingsley's proposition of law is without merit.

**CONCLUSION**

Billingsley failed to demonstrate any error with the Eleventh District's analysis of the trial court's decision. Accordingly, Billingsley's proposition of law is without merit and does not present grounds warranting jurisdiction from this Court. For the foregoing reasons, Appellee respectfully moves this Court to refuse jurisdiction to hear this discretionary appeal.

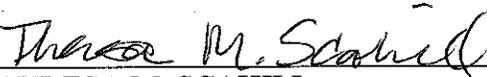
Respectfully submitted,

VICTOR V. VIGLUICCI (0012579)  
Portage County Prosecuting Attorney

  
\_\_\_\_\_  
THERESA M. SCAHILL (0078432) (Counsel of Record)  
Assistant Prosecuting Attorney  
Attorneys for State of Ohio  
241 South Chestnut Street  
Ravenna, Ohio 44266  
(330) 297-3850 (phone)  
(330) 297-3856 (fax)  
E-mail: tscahill@portageco.com

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Response in Opposition to Memorandum in Support of Jurisdiction has been sent by regular U.S. mail to John P. Laczko, Portage County Public Defender's Office, 209 South Chestnut Street, Suite 400, Ravenna, Ohio 44103, this 14th day of June 2011.

  
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THERESA M. SCAHILL  
Assistant Prosecuting Attorney