

IN THE SUPREME COURT OF OHIO

State of Ohio,

Case No. 11-1473

Plaintiff-Appellant,

On Appeal from the Franklin County Court
of Appeals, Tenth Appellate District

-vs-

Court of Appeals Case No. 10APA-11-09

Emmanuel Hampton,

Defendant-Appellee.

MEMORANDUM CONTRA REQUEST OF PLAINTIFF-APPELLANT,
THE STATE OF OHIO, FOR JURISDICTION

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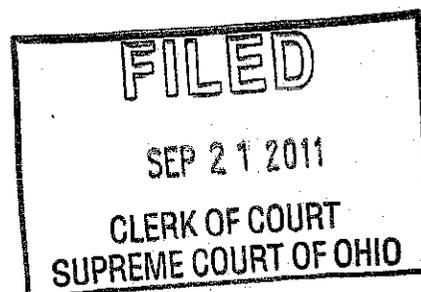


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**EXPLANATION OF WHY THIS COURT
SHOULD NOT ACCEPT JURISDICTION**

This case does not involve a substantial Constitutional question, nor does this case involve a question of great public importance. This case involves an isolated and unique procedural and factual history that will not serve any value to this Court in further defining the scope and extent of Ohio Law across the state. Likewise, the State of Ohio attempts to overturn centuries of established law here in the Ohio as it relates to the Constitutional and statutory requirement that the element of venue be proven by proof beyond a reasonable doubt in each and every criminal case.

Since this case involves a unique fact pattern whereby the Franklin County Prosecutor's Office, the Columbus Police Department, and perhaps the prosecuting witness himself, failed to recognize that the events in question occurred in Fairfield County, Ohio, instead of Franklin County, Ohio, the case has a unique fact pattern that will not be of any precedential value to this Court. Moreover, the arguments by the State of Ohio as it relates to Revised Code § 2945.67 are completely meritless, and do not warrant review by this Court.

The arguments set forth by the State of Ohio in its Memorandum in Support of Jurisdiction directly contradict the plain language of Revised Code § 2945.67, the well established case law of this Court in the syllabus of State ex. rel. Yates v. Court of Appeals for Montgomery Cty. (1987), 32 Ohio St. 3d. 30, and the plain language of Rule 29 of the Ohio Rules of Criminal Procedure. In the end, the State of Ohio raises no substantial Constitutional question or question of great public importance, but instead is simply trying further its desire to prosecute Defendant, Emmanuel Hampton, in this particular isolated case. Therefore, this Court

should reject the request by the State of Ohio to exercise jurisdiction over this case. Further arguments relating to the merits of the State's request are set forth below.

STATEMENT OF FACTS

Defendant-Appellee, incorporates the statement of facts set forth in the Memorandum in Support of Jurisdiction filed by the State of Ohio, and further incorporates the statement of facts and procedure as set forth by the Tenth District Court of Appeals in its decision of this matter. The facts relevant to the issues here are generally not in dispute. Defendant denies involvement in this terrible crime, and he maintains that the evidence was also insufficient at trial to establish the element of identity, however, those issues are beyond the scope of this appeal. Instead, this appeal focuses solely on the trial court's decision to grant a Criminal Rule 29 judgment of acquittal based upon the prosecution's failure to establish the necessary element of venue in accordance with Revised Code § 2901.12, and Section 10, Article I, of the Ohio Constitution.

LAW AND ARGUMENT

The State of Ohio sets forth the following three propositions of law for review by this Court.

Proposition of Law No. 1. In determining whether a trial court ruling is a "final verdict" because it is based on Crim. R. 29, an appellate court must review the actual nature of the ruling, not just the label the trial court attached to the ruling. If the record shows that the trial court's ruling went beyond the sufficiency-of-evidence review allowed by Crim. R. 29, the State can appeal pursuant to R. C. 2945.67(A).

Proposition of Law No. 2. Lack of venue cannot result in an "acquittal" under Crim. R. 29 because motions under that rule are limited to claims of lack of proof of one or more material elements of the offense. Venue is not a material element of the offense.

Proposition of Law No. 3. A trial court's granting of a Crim. R. 29 motion for judgment of acquittal is not a "final verdict." The State can appeal such a ruling by leave of court under R.C. 2945.67(A) when such an appeal does not violate

double jeopardy. (State ex. rel. Yates v. Court of Appeals for Montgomery Cty. (1987), 32 Ohio St. 3d. 30, overruled)

Because the second proposition of law is dispositive of this appeal, it will be addressed first here. In its Memorandum in Support of Jurisdiction, the State of Ohio suggests that a judgment of acquittal under Criminal Rule 29 is not possible when the State fails to present sufficient evidence of the Constitutionally and statutorily required element of venue. The State of Ohio argues that a Rule 29 judgment of acquittal is inappropriate, because the element of venue is not a “material” element of the offense. This argument by the State of Ohio flies in the face of the plain language in Criminal Rule 29, and the established case law.

Long before the Rules of Criminal Procedure were created, the Ohio Constitution provided that each Defendant in a criminal case had the absolute Constitutional right to have the case heard in the county where the acts of the crime were alleged to have been committed. Ohio Const., Sec. 10, Art. I. This Court has recognized for over a century that venue is a necessary element that must be alleged and proven by proof beyond a reasonable doubt for a conviction to be valid. Knight et al. v. The State (1896), 54 Ohio St. 365, 377; State v. Dickerson (1907), 77 Ohio St. 34, syllabus 1. In fact, forty years after this Court’s decision in Dickerson, this Court addressed the very issue raised by the State here. State v. Nevius (1947), 147 Ohio St. 263, certiorari den. sub. nom., 331 U.S. 839. In Nevius, the Court of Appeals found insufficient evidence of venue as it related to count four of the indictment. The Court of Appeals reversed the decision of the trial court, and ordered that defendant be retried on count four of the indictment. This Court affirmed the decision of the Court of Appeals as it related to the finding of insufficient evidence relating to venue, but this Court then reversed the Court of Appeals decision to remand the matter for a new trial, instead ordering the lower courts to issue a

“directed verdict” in favor of defendant as to count four of the indictment, and discharging the defendant accordingly from that count. In its decision, this court in Nevius stated the following:

“We also affirm the judgment of Court of Appeals in reversing the judgment of the trial court on the fourth count in the indictment. However, we reverse the judgment of the Court of Appeals in remanding the case to the trial court for a new trial on the fourth count for the reason that the evidence fails to show that the crime alleged occurred in Clark County where the indictment was returned and trial had. Therefore, defendant’s motion to direct a verdict of not guilty on such fourth count, made at the close of the State’s case and renewed at the conclusion of all the evidence, should have been sustained.”

Nevius, *supra*, at 212.

The common law concept of a “directed verdict” has now been memorialized through Rule 29 of the Ohio Rules of Criminal Procedure. Criminal Rule 29(A) states as follows:

“The court on motion of a defendant or on its own motion, after the evidence on either side is closed, shall order the entry of a judgment of acquittal of one or more offenses charges in the indictment, information, or complaint, if the evidence is insufficient to sustain a conviction of such offense or offenses. The court may not reserve ruling on a motion for judgment of acquittal made at the close of the State’s case.”

Under section 10, article I of the Ohio Constitution, and under Revised Code § 2901.12 of the Ohio Revised Code, evidence of proper venue must be presented in order to sustain a conviction for an offense. State v. Headley (1983), 6 Ohio St. 3d 475, 477 (citing State v. Draggo (1981), 65 Ohio St. 2d 88, 90); State v. Gribble (1970), 24 Ohio St. 2d 85; State v. Nevius (1947), 147 Ohio St. 263, certiorari den. sub. nom., 331 US 839. Criminal Rule 29 does not speak in terms of material elements, or immaterial elements, but instead speaks about the requirement that a “judgment of acquittal” be ordered by the trial court whenever the “evidence is insufficient to sustain a conviction of such offense or offenses.”

The State of Ohio relies on the case of State v. Bridgeman (1970), 55 Ohio St. 2d 261, syllabus, for the proposition that a Rule 29 judgment of acquittal may not be granted where

evidence of venue is insufficient, because the element of venue is not “material”. However, a careful reading of Bridgeman reveals that no such distinction has ever been made regarding the necessary element of venue. This Court in Bridgeman held that the enactment of the Criminal Rules had not changed the test applied to a motion for acquittal from the standard that existed previously. Bridgeman, supra, at 402, (citing State v. Swiger (1966), 5 Ohio St. 2d 151, syllabus 2, and State v. Antill (1964), 176 Ohio St. 61, syllabus 5). In Bridgeman, the Court discussed the standard as follows:

“The standard for sending a question to the jury under Fed. R. Crim. P. 29 and under Swiger and Antill are the same. (If reasonable minds can reach different conclusions as to whether each element of the crime has been proved beyond a reasonable doubt, they clearly might find guilt.) Crim. R. 29(A) and Fed. R. Crim. P. 29 are virtually identical. Therefore, the adoption of Crim. R. 29(A) does not alter the Swiger standard for sending an issue to the jury.”

Bridgeman, supra, at 402.

This court in Swiger, supra, in turn, relies and reiterates the rule established in Antill, supra, wherein this court adopted a Civil Rule for purposes for determining motions for judgment of acquittal in criminal cases. The fifth paragraph of the syllabus in Antill reads as follows:

“Where from the evidence reasonable minds can reach different conclusions on the issue of whether the defendant is guilty beyond a reasonable doubt, the case is one for determination by the jury.”

Antill, supra, at syllabus 5.

Antill was not overruled by Swiger. Instead, this court in Swiger followed Antill. Likewise, this court in Bridgeman, followed Swiger. At no time over the last century or more, has this Court ever suggested that a judgment of acquittal is inappropriate when the State of Ohio fails to produce sufficient evidence establishing the necessary element of venue. The enactment of the Criminal Rules, and the enactment of Revised Code § 2901.12, merely preserved and

codified the long established rule that a defendant is entitled to a judgment of acquittal whenever the prosecution fails to properly establish venue in a criminal case.

In 1983, two years after this Court's decision in Draggo, supra, and five years after this Court's decision in Bridgeman, supra, this Court decided the case of State v. Headley (1983), 6 Ohio St. 3d 475. In Headley, the trial court convicted Mr. Headley after denying his motion for judgment of acquittal made pursuant to Criminal Rule 29. In his first assignment of error to the Court of Appeals, Mr. Headley averred as follows:

"The state failed to produce competent evidence sufficient to convince a rational trier of fact of three essential elements of the offense charged, to wit: venue in Summit County, purpose to resell control substances, and intent that such a resale be in greater than bulk amount, and thus defendant was entitled to judgment of acquittal under Crim. R. 29 and the Fourteenth Amendment."

State v. Headley (April 28, 1982), Summit App. No. C.A. No. 10485, 1982 WL 4979.

The Court of Appeals found Mr. Headley's assignment of error to be well taken, and reversed the trial court's conviction of his charges. Subsequently, this Court affirmed the Court of Appeals decision reversing Mr. Headley's conviction. ¹

Over a century of well established jurisprudence here in the State of Ohio clearly mandates that a motion for judgment of acquittal must be granted when the evidence is insufficient for reasonable minds to reach different conclusions regarding the element of venue. Here, it is undisputed that all of the events in question occurred in Fairfield County, Ohio, not Franklin County, Ohio, as alleged in the indictment. Under Headley, supra, Criminal Rule 29, Revised Code § 2901.12, and the well established common law rule set forth in cases like Nevius, supra, a judgment of acquittal is required when the evidence is insufficient to establish venue beyond a reasonable doubt. Since a judgment of acquittal is appropriate and necessary in

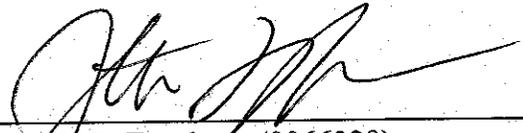
¹ In light of this Court's decision, remanding the matter to the trial court for the issuance of a judgment of acquittal, this Court found that Mr. Headley's other assignments of error and propositions of law raised in his cross appeal had been rendered moot.

circumstances such as this case, then it stands to reason that the prosecution has no statutory or legal authority to appeal the trial court's decision.

Under Revised Code § 2945.67(A), the prosecution can only appeal the judgment of a trial court when the judgment is not a "final verdict." Clearly, a judgment of acquittal under Rule 29 of the Ohio Rules of Criminal Procedure constitutes a "final verdict" under that statute. State ex. rel. Yates v. Court of Appeals for Montgomery Cty. (1987), 32 Ohio St. 3d. 30, syllabus; State v. Keeton (1985), 18 Ohio St. 3d 379, syllabus 1. Because the trial court's judgment of acquittal under Criminal Rule 29 was appropriate here, and because such a judgment constitutes a "final verdict" under Revised Code § 2945.67(A), the State may not appeal the trial court's decision in this case. Consequently, the Court of Appeals correctly dismissed the State's appeal, after appropriately analyzing the facts and law of this particularly unique fact patterns.

Wherefore, the request by the State of Ohio for this Court to exercise jurisdiction of this matter should be overruled. This case does not involve any substantial Constitutional question, nor does it involve a question of great public importance. The State of Ohio is instead simply attempting to change the specific result in this specific case through a complete upheaval and disruption of the existing and established law that has existed in the State of Ohio for over a century.

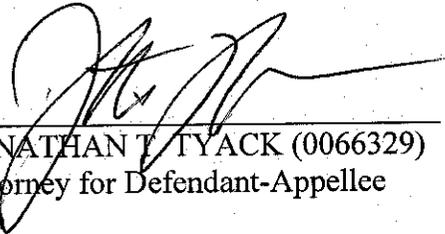
Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been hand delivered via regular U.S. Mail to Steven L. Taylor, Chief Counsel, 373 South High Street, 13th Floor, Columbus, Ohio 43215, this 21st day of September, 2011.



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