

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Plaintiff-Appellee,

vs.

DESMOND A. BILLINGSLEY,

Defendant-Appellant.

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Case No. 2011-0827

On Appeal from the Portage County
Court of Appeals, Eleventh Appellate
District Case No. 10 PA 00030 & 10 PA 00031

**MERIT BRIEF OF AMICUS CURIAE OFFICE OF THE OHIO PUBLIC DEFENDER
IN SUPPORT OF NEITHER PARTY**

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STATEMENT OF THE CASE AND OF THE FACTS

Desmond Billingsley made a plea agreement with the State of Ohio through its agent, the Summit County Prosecutor. That agreement, made pursuant to Criminal Rule 11, included terms that precluded the State from pursuing similar robbery charges against the defendant through any of its other agents in other counties. October 15, 2008 Hearing Transcript. At that same time, Mr. Billingsley was also being investigated for such a robbery in Portage County.

At this hearing, the Summit County Prosecutor stated that she had spoken with representatives from those other counties, and she represented that these other prosecutors had agreed to either not pursue their charges for robbery or to run any sentences concurrently.

After Mr. Billingsley complied with his end of the plea agreement by cooperating with law enforcement and providing information about other defendants, he was sentenced in Summit County according to the prosecutor's recommendation. However, the State, through the Portage County Prosecutor, charged Mr. Billingsley on the basis of these cooperative statements with three counts of aggravated robbery. On November 30, 2009, Mr. Billingsley filed a Motion to Enforce Criminal Rule 11 Plea agreement. The trial court overruled that motion on February 2, 2010, concluding that Mr. Billingsley "did not meet the burden of proof necessary to establish the Portage County Prosecutor is bound by the Summit County plea agreement." February 2, 2010 Order and Journal Entry, p. 4-5. The trial court concluded that since Portage County was not a party to the contract, the Portage County Prosecutor cannot be bound by terms of the plea agreement.

On February 19, 2010, Mr. Billingsley appeared in court with counsel and entered a written plea of no contest to all counts. He was sentenced to eight years' incarceration for each of

the three counts of Aggravated Robbery, consecutive to each other and to the mandatory three year sentence for the firearm specification. March 29, 2010 Judgment Entry.

On March 31, 2011, the Eleventh District Court of Appeals agreed with the trial court and affirmed Mr. Billingsley's sentence. It is from that affirmance that Mr. Billingsley appealed.

**STATEMENT OF INTEREST OF AMICUS CURIAE
OFFICE OF THE OHIO PUBLIC DEFENDER**

The Office of the Ohio Public Defender (OPD) is a state agency, designed to represent criminal defendants and to coordinate criminal defense efforts throughout Ohio. The OPD also plays a key role in the promulgation of Ohio statutory law and procedural rules. The primary focus of the OPD is on the appellate phase of criminal cases, including direct appeals and collateral attacks on convictions. The primary mission of the OPD is to protect the individual rights guaranteed by the state and federal constitutions through exemplary legal representation. In addition, the OPD seeks to promote the proper administration of criminal justice by enhancing the quality of criminal defense representation, educating legal practitioners and the public on important defense issues, and supporting study and research in the criminal justice system.

As amicus curiae, the OPD offers this Court the perspective of experienced practitioners who routinely handle significant criminal cases in the Ohio appellate courts. The OPD has an interest in the present case insofar as this Court will address criminal defendants' rights to agree with a prosecuting attorney as a representative of the State of Ohio in plea agreements. OPD writes as amicus curiae for the limited purpose of clarifying the power of individual prosecuting attorneys to contract on behalf of the State of Ohio and how such contracts bind other state agents. OPD urges this court to recognize Ohio law's mandate that county prosecutors act as agents of the State and therefore have all of the duties and powers that agency relationship implies.

ARGUMENT

PROPOSITION OF LAW OF AMICUS CURIAE

AN OHIO COUNTY PROSECUTOR PURSUING A CRIMINAL PROSECUTION IS THE REPRESENTATIVE AND AGENT OF THE STATE OF OHIO AND HAS THE AUTHORITY TO BIND THE STATE TO A PLEA AGREEMENT.

The prosecutors installed in each of Ohio's counties act on behalf of the State of Ohio to prosecute crimes in their counties. The Portage County Prosecutor argues, and the Court of Appeals determined, that he cannot be bound to an agreement by the prosecutor of Summit County. But the Portage County Prosecutor has wrongly assessed his role. In actuality, both the Portage County Prosecutor and the Summit County Prosecutor are authorized to make agreements on behalf of the State of Ohio, and both are bound by such agreements. A decision otherwise confuses the role of the county prosecutor and misinterprets the agency relationship between the State and its prosecutors.

Ohio's county prosecutors act both on the actual authority of the State of Ohio and by manifesting apparent authority. Actual authority arises when it is expressly granted to an agent by the principal or when it is implicitly granted as is reasonably necessary to carry into effect the power expressly conferred. *Damon's Missouri, Inc. v. Davis*, 63 Ohio St.3d 605, 608, 590 N.E.2d 254 (1992), citing *Spengler v. Sonnenberg*, 88 Ohio St. 192, 200-201, 102 N.E. 737 (1913). Similarly, a principal is bound by the acts of its agent under a theory of apparent authority when evidence establishes "(1) that the principal held the agent out to the public as possessing sufficient authority to embrace the particular act in question, or knowingly permitted him to act as having such authority, and (2) that the person dealing with the agent knew of the facts and acting in good faith had reason to believe and did believe that the agent possessed the necessary

authority." *Master Consolidated Corp. v. BancOhio Natl. Bank*, 61 Ohio St.3d 570, 576-577, 575 N.E.2d 817 (1991).

The prosecutor of any individual county has actual authority to bind the State to plea agreements in criminal trials. At the outset, Ohio law unambiguously mandates that "[t]he prosecuting attorney shall prosecute, *on behalf of the state*, all complaints, suits, and controversies in which the state is a party." R.C. 309.08(A) (emphasis added). A county prosecutor is a State "employee." R.C. 2969.21(C). And state employees act, by statute, under the color of Ohio law. *Curse v. Larson*, 10th Dist. No. No. 07AP-370, 2007-Ohio-5926, 2007 Ohio App. LEXIS 5195. A county prosecutor is therefore actually acting as a state agent when enforcing state law and pursuing or disposing of state criminal actions.

In *State v. Urvan*, the Eighth District Court of Appeals, based on United States Supreme Court precedent, clearly established that the county prosecutor acts as an agent of the State, and all other county prosecutors are bound by decisions made in that agency capacity. *State v. Urvan*, 4 Ohio App. 3d 151, 446 N.E.2d 1161 (1982). In *Urvan*, the first county prosecutor pursued charges against the defendant for receiving stolen property and made a plea deal, but the second county prosecutor subsequently pursued charges for grand theft. *Id.* at 152-155. The Eighth District held that the second county was barred by res judicata from pursuing charges arising from the same incident, since both counties were agents of the State. *Id.* at 155-156, citing *Waller v. Florida*, 397 U.S. 387, 90 S. Ct. 1184, 25 L. Ed. 2d 435 (1970) and *Brown v. Ohio*, 432 U.S. 161, 97 S. Ct. 2221, 53 L. Ed. 2d 187 (1977). The county prosecutor's decision to pursue the charges was made on behalf of the State, and that foreclosed the State from pursuing the same charges through another agent. *Id.*

The same logic applies here. As in *Urvan*, the State has chosen to act through its agent. And, as in *Urvan*, that choice binds the State, as principle, against ignoring the actions of its agents and charging a defendant for crimes that a state agent told him were no longer pending.

And even if the State's grant of actual authority does not establish the agency relationship, the Summit County Prosecutor, along with Ohio's other county prosecutors, acts with apparent authority, thus still binding the State by her actions as an agent. In order to establish apparent agency, the evidence must show that the principal held the agent out as having the authority to act on the principal's behalf and that the third party dealing with the agent had reason to believe that the agent possessed the necessary authority. *Master Consolidated Corp. v. BancOhio Natl. Bank*, 61 Ohio St.3d at 576-577, 575 N.E.2d 817.

As described above, the State's intentions to "hold out" the prosecutor are clearly established by statute: the prosecutor acts, first and foremost, on behalf of the State. R.C. 309.08(A). No clearer statement of an agency relationship could exist. And in this case, the prosecutor told the defendant that she had the authority to act as an agent. The prosecutor told the defendant and the court that she had "been in contact with those other counties," and that those counties "have agreed" to the State's proposition. The prosecutor therefore represented to the defendant and the court, not only that she was an agent of the State, but that her actions were approved by her co-agents and the State itself. Even if the Summit County Prosecutor had no actual authority to bind the State of Ohio and its agents, she clearly manifested that she did. To punish the third party for relying on a reasonable manifestation of agency flies in the face of the purpose of agency law. And since the third party is a criminal defendant, such a disregard for agency principles also deprives that defendant of his right to due process of the law.

And this agency relationship has been borne out repeatedly by the courts. The Sixth Circuit has held that a county cannot be held liable for the actions of the county prosecutor; the proper party to sue is the State itself. Specifically, the court has held that, in formulating a plea recommendation, the prosecutor “was acting as an agent of the state rather than of [the] County.” *Cady v. Arenac County*, 574 F.3d 334 (6th Cir. 2009). The Sixth Circuit has also held that a county prosecutor “act[s] on behalf of the state when she prosecute[s] state criminal charges and therefore her actions in prosecuting the charge, at that point, could not be attributed to the City.” *Pusey v. City of Youngstown*, 11 F.3d 652 (6th Cir. 1993). Entering plea agreements is uncontestedly a part of the prosecution’s role in prosecuting state criminal charges. *Santobello v. New York*, 404 U.S. 257, 261, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971). There can therefore be no other conclusion except that the prosecutor of any given county acts as an agent of the State, not the county, when entering plea agreements.

The Eleventh Appellate District and the State are right in asserting that the Second Appellate District’s decision in *State v. Barnett* declares that there are limitations to an individual prosecutor’s agency. *State v. Barnett*, 124 Ohio App. 3d 746; 707 N.E.2d 564 (1998). But *Barnett* too severely contracts a prosecutor’s actual power as an agent for the State of Ohio. For instance, Ohio’s courts have cited to *Barnett* to limit the prosecutor’s agency to criminal, and not administrative, matters. *FOE v. Ohio State Liquor Control Comm’n*, 10th Dist. No. 01AP-1330, 2002-Ohio-4441, 2002 Ohio App. LEXIS 4600, ¶ 18. But the courts have clearly manifested that when the prosecutor is acting on its authority in criminal matters, it is acting as the agent of the State. “No one could seriously dispute that the prosecutor acts as an agent of the State of Ohio.” *Lee v. Ohio Adult Parole Authority*, 2nd Dist. No. 18833, 2001 Ohio App. LEXIS 3852 (August 31, 2001).

Finally, and perhaps most importantly, the *Barnett* case primarily relied on *Staten v. Neal* for its analysis, which was a Seventh Circuit case interpreting an Illinois statute. *Staten v. Neal*, 880 F.2d 962 (7th Cir. 1989). That statute notably does not contain any language defining the agency relationship between the State and its state's attorneys. Ill.Rev.Stat., Ch. 14, para. 5 (1985). Ohio's legislature has made a different policy decision: the statute specifically charges county prosecutors with acting "on behalf of the state." R.C. 309.09(A). This distinction means that *Barnett's* reasoning cannot apply here; actual authority has been granted, or at the very least apparent authority exists, because of this unambiguous grant of power by the State of Ohio.

The Eleventh District Court of Appeals held that one county prosecutor lacks the authority to bind another county prosecutor. But Ohio law establishes that this is to approach the issue from the wrong direction. One prosecutor is not binding another; rather, the prosecutor binds the State of Ohio, and the other prosecutor is in turn bound by the State of Ohio itself. This Court should therefore reject the Eleventh District's inverted argument and hold that a county prosecutor's actions as agent of the State are binding on the whole state, not just one portion thereof.

CONCLUSION

The Office of the Ohio Public Defender, as amicus curiae, urges this Court to hold, in accordance with Ohio law, that a prosecutor acts as an agent of the State of Ohio, and any other prosecutors are bound, as the State of Ohio itself is bound, by the actions of its duly appointed agents.

Respectfully submitted,

OFFICE OF THE OHIO PUBLIC DEFENDER



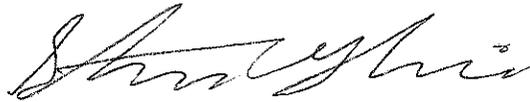
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **MERIT BRIEF OF AMICUS CURIAE OFFICE OF THE OHIO PUBLIC DEFENDER IN SUPPORT OF NEITHER PARTY** was forwarded by regular U.S. Mail, postage prepaid to Theresa M. Scahill, Assistant Prosecuting Attorney, Portage County, 241 S Chestnut St, Ravenna, Ohio 44266 and John P. Laczko, Assistant Public Defender, Portage County, 209 South Chestnut Street, Suite 400, Ravenna, Ohio 44266, on this 27th day of January, 2012.



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