

ORIGINAL

IN THE SUPREME COURT OF OHIO
2012

STATE OF OHIO,

Plaintiff-Appellant

-vs-

EMMANUEL HAMPTON,

Defendant-Appellee

Case No. 11-1473

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

Court of Appeals
Case No. 10AP-1109

MERIT BRIEF OF PLAINTIFF-APPELLANT STATE OF OHIO

RON O'BRIEN 0017245
Franklin County Prosecuting Attorney
373 South High Street, 13th Floor
Columbus, Ohio 43215
Phone: 614-525-3555
Fax: 614-525-6103
E-mail: sltaylor@franklincountyohio.gov

and

STEVEN L. TAYLOR 0043876 (Counsel of Record)
Chief Counsel, Appellate Division

COUNSEL FOR STATE

JONATHAN TYACK 0066329
Attorney at Law
536 South High Street
Columbus, Ohio 43215
Phone: 614-221-1341

COUNSEL FOR DEFENDANT

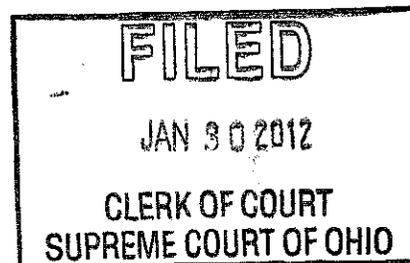


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STATEMENT OF FACTS

On March 5, 2010, following a bindover from juvenile court, the grand jury indicted defendant Emmanuel Hampton on counts of attempted murder, felonious assault, aggravated burglary, kidnapping, and having a weapon while under disability. (3-5-10 Indictment) All of the counts except the WUD charge included a three-year firearm specification. (Id.)

Defendant waived his right to a jury, and a bench trial began on October 8, 2010. (Tr. 5-9) The following events transpired at trial.

I. The State's Evidence Established the Material Elements of Each Offense

Byron Woods testified that, on December 30, 2005, at approximately 10:30 p.m., he and his family had just returned home from his son Byron Jr.'s varsity basketball game. (Tr. 21-25, 27) The Woods family lived in a two-bedroom apartment on the first floor of the apartment complex at 2645 Jonathan Park Way. (Tr. 21-25) The apartment was small: the front door opened into the kitchen/living room area. (Tr. 25)

Byron was watching television on the couch, waiting for Byron Jr. to get out of the shower so the two could talk about the basketball game. (Tr. 24-25) Byron's other son Joshua was washing the dishes in the kitchen. (Tr. 46) Byron's daughter Megan and Megan's friend Deserray were in Megan's room. (Tr. 24-25) Byron's nephew Marquis was playing a videogame in the other bedroom. (Tr. 25)

Suddenly, an intruder kicked open the front door of the apartment and pointed a handgun at Byron and Joshua. (Tr. 25-26) Byron and Joshua each testified that the intruder had a bandana over his face and wore a large dark jacket. (Tr. 30, 46-47) Byron could tell that the intruder was a young black male. (Tr. 30-31) The "loud bang" caused Megan to

open her bedroom door to see “a big black coat standing over my dad with a gun, asking him to lay down or get down.” (Tr. 52) She quickly closed her door. (Tr. 52)

The intruder ordered Woods and Joshua to get down. (Tr. 25, 46) Byron, already seated, told the intruder that he was already “down” when the intruder turned and pointed his gun towards Joshua. (Tr. 25-26) Joshua stood in “shock.” (Tr. 29) The fear of something happening to Joshua sent Byron into a “rage,” and Byron lunged at the intruder. (Tr. 26, 29) Byron and the intruder wrestled, and their struggle carried them out through the front door. (Tr. 26)

Megan testified that the intruder resembled a short teenage boy. (Tr. 55) As Byron struggled with the intruder, he started to believe that the intruder was a “kid” based on the intruder’s size. (Tr. 31-32) Byron testified that the intruder was “light” and barely 5’8”. (Tr. 31-32) Byron said that the struggle felt like he was wrestling with one of his kids. (Tr. 31) “I knew that I was dealing with a kid.” (Tr. 31) To Megan, the intruder’s coat looked too big for him, and at first she thought that her cousin was playing a prank on her father. (Tr. 54-55) She testified that the intruder looked young, 17 or 18 years old. (Tr. 55)

During the struggle on the front doorstep, Byron fell down but grabbed hold of the intruder’s coat. (Tr. 26) The intruder managed to slip out of the coat and still maintained control of the gun. (Tr. 26) Now free from Byron’s grasp, the intruder shot Byron four times. (Tr. 26, 38)

Byron began falling in and out of consciousness. (Tr. 29) He remembered seeing the intruder and another person running away. (Tr. 29, 37) Screaming and crying, Joshua and Megan attempted to stop the bleeding by placing towels over their father’s wounds. (Tr.

36, 48-49, 53-54) Byron blacked out, and his children called the emergency squad. (Tr. 36, 48)

Byron was transported to Grant Hospital, where he remained for four months. (Tr. 38) He underwent a total of nine surgeries, involving the removal of a portion of his intestines and his spleen. (Tr. 39) Bullets were removed from his lungs and liver. (Tr. 39) Another bullet was too close to his heart to be removed. (Tr. 39) He possibly faces amputation of his leg due to a severed blood vessel. (Tr. 39) Byron testified that he incurred over \$1 million in hospital costs and has no insurance. (Tr. 39) He will continue to need surgery and hospital care for the rest of his life. (Tr. 39)

Detective Lowell Titus arrived at the scene after Byron had been taken to the hospital. (Tr. 57) Detective Titus saw shell casings on the ground and noticed that the front door had been kicked in. (Tr. 57) The police collected the intruder's black coat from the crime scene and submitted it for DNA testing. (Tr. 59, 64)

Amoreena Pauley, a forensic scientist with Columbus Police, swabbed the left cuff of the coat and discovered epithelial cells left by a single contributor. (Tr. 95, 97-99) She submitted the DNA profile to CODIS in January 2006. (Tr. 99)

In August 2008, Detective Kenneth Kirby, who was later assigned to the case, received a CODIS hit matching the DNA found on the coat. (Tr. 72) The database indicated that the DNA belonged to defendant. (Tr. 75, 100) Kirby prepared a photo array with defendant's face, and Byron identified defendant as the intruder based on age and body build, but not by facial characteristics. (Tr. 76-77)

In March 2009, police made contact with defendant and obtained an oral swab from

him. (Tr. 78-79) Police also obtained a swab from Byron. (Tr. 78-79)

Subsequent testing by Jamie Armstrong, another forensic scientist with Columbus police, revealed that defendant's DNA swab matched the DNA recovered from the left cuff of the intruder's coat. (Tr. 120-122) Defendant's DNA frequency is one in 256 quadrillion 300 trillion for the African-American population. (T. 121-22) The blood found on the coat matched Byron's blood. (Tr. 102)

II. Evidence Developed that the Crime Occurred in Fairfield County Rather Than Franklin County

During the trial, evidence developed that the crime occurred in Fairfield County rather than Franklin County. The first indication occurred during the direct examination of Byron Woods, when Woods expressed uncertainty about whether the apartment was located in Franklin County. (Tr. 23)

After Joshua Woods testified, the court noted on the record that the crime may have occurred outside Franklin County. (Tr. 51) The court explained to defendant that "[y]ou may win your case just because of geography, irrespective of anything else. That doesn't mean Fairfield can't indict you * * *." (Tr. 51)

The prosecutor thereafter sought to clarify the venue issue during the direct examination of Detective Titus:

Q. Has it come to your attention today in the last just few minutes about a possible location of what county this might be in?

A. Yes, sir.

Q. Where do we think this is in?

A. We're believing now it was actually just over the border in to Fairfield County, sir.

(Tr. 59-60)

The prosecutor confirmed that venue was improper during the direct examination of

Detective Kirby:

Q. Additionally, just to clarify this, Detective Kirby, about a half hour to an hour ago, did an issue come up as to potential jurisdictional issues in this case?

A. Yes, sir.

Q. What is it that we appeared to have concluded that the location of 2645 Jonathan Parkway from the phone calls and visits we made over at the Franklin County Auditor's Office and the MapQuest and so on and so forth?

A. From what I understand, the 2645 Jonathan Parkway is coming up under -- in Fairfield County --

Q. Okay.

A. -- not Franklin.

* * *

Q. Is it fair to say -- you correct me here -- but when did you discover that this now appears to be Fairfield County where 2645 Jonathan Parkway is and not Franklin County?

A. A half hour ago when I was told about it.

Q. And we went over to the auditor's office together and tried to clarify that, too, right?

A. Correct.

Q. So this is not something you knew before today?

A. No, sir.

Q. You were not aware of it before an hour or so ago?

A. No.

(Tr. 82-83) Kirby testified that the county line in that area “jogs in and out” of particular locations. (Tr. 83-84) Although the vast majority of the city of Columbus is in Franklin County, there are parts of Columbus situated in other counties. (Tr. 87-88)

III. The Trial Court Overruled Defendant’s Crim.R. 29 Motion for Acquittal Based on the Sufficiency of the Evidence But Purported to Grant the Motion Based On Improper Venue

After the State announced that it had no further evidence to present, the parties took an hour-long recess to research the venue issue. (Tr. 128-29) The State rested its case, and the defense moved for a Crim.R. 29 judgment of acquittal, raising improper venue and also challenging the sufficiency of the evidence establishing identification. (Tr. 135-38)

The trial court overruled the sufficiency-of-the-evidence portion of the defense motion, stating “I do think there’s enough evidence to get past a Rule 29.” (Tr. 142) Turning to venue, the trial court agreed to hear preliminary arguments on the issue but decided to hear the remaining venue arguments on the following Tuesday, after the Columbus Day weekend. (Tr. 142) The court stated: “And I’ll let you do more Rule 29s on Tuesday if you want. You’ve rested, so this really is – I don’t think there’s any factual dispute. I think it’s a legal question on the venue, unless I’m missing something in the facts.” (Tr. 144) Before adjourning, the State argued that, because venue was not challenged by the defense before trial, it was waived. (Tr. 145-46)

At the Tuesday morning hearing, the parties made their final arguments. (Tr. 152) The State noted that the victim had testified in the juvenile bindover hearing that the address was in Franklin County. (Tr. 154-55) The State reiterated that defendant waived any venue challenge by failing to raise the issue before trial and argued, alternatively, that a

mistrial is the appropriate remedy rather than a dismissal or a Crim.R. 29 acquittal. (Tr. 160) The trial court rejected the mistrial request and stated that "venue" has "factual connotations" which can only be addressed via Crim.R. 29. (Tr. 161) The court stated, "I think if I grant it, it's got to be a Rule 29 because venue wasn't proven." (Tr. 161)

The defense insisted that "the law is clear and I feel the court has no choice but to dismiss it on a Rule 29 basis." (Tr. 166)

The trial court concluded: "venue has not been factually proven. For that reason, the court grants the Rule 29 motion to dismiss the case." (Tr. 170) The prosecutor sought to clarify that the decision was based on "venue" and "not the underlying facts of the case." (Tr. 170-71) The trial court agreed: "It's based on the failure to prove the fact of venue. That's a factual issue, but it's only as to venue. I'm not making a decision about whether the DNA evidence is strong enough to convict or anything remotely going to the balance of the case." (Tr. 171)

Before concluding the hearing, the court said that its dismissal of the case may not preclude another indictment: "Now maybe the State can re-file. That's an issue I can't decide." (Tr. 171)

The trial court's "Judgment Entry," filed on October 25, 2010, journalized its four decisions: (1) its decision finding that venue was not waived by the defense; (2) its decision denying the State's request for a mistrial; (3) its decision overruling "defendant's motion for a Rule 29 Judgment of Acquittal based on the underlying case facts and sufficiency of the evidence as to the issue of Identification"; and (4) its decision granting defendant's "Motion for Judgment of Acquittal pursuant to Rule 29 * * * based strictly on the issue of

Venue.” (10-25-10 Judgment Entry) The court ordered defendant “hereby discharged in this matter.” (Id.) The trial court had not used the word “acquit” at the hearing; rather, it had stated that it was granting a “Rule 29 motion to dismiss the case.” (Tr. 170)

IV. The State’s Appeal is Dismissed

The State appealed, contending that it had an appeal of right from what the trial court had characterized as a dismissal. (11-24-10 Motion for Leave to Appeal) In the alternative, and as a matter of caution, the State also timely sought leave to appeal. (Id.) The State was seeking to raise two assignments of error:

FIRST ASSIGNMENT OF ERROR

The trial court erred by finding that venue had not been waived by defendant.

SECOND ASSIGNMENT OF ERROR

Even if the venue challenge was properly preserved, the trial court erred by refusing to order a mistrial.

The Tenth District reserved ruling on the motion for leave to appeal and allowed the case to proceed to full briefing. (1-4-11 Journal Entry)

After full briefing, in which the State asserted the aforementioned assignments of error, and after oral argument, the Tenth District issued its decision on July 14, 2011. *State v. Hampton*, 10th Dist. No. 10AP-1109, 2011-Ohio-3486. The court concluded that the trial court’s lack-of-venue ruling, which invoked Crim.R. 29 and referred to “acquittal” in the judgment entry, constituted a “final verdict” from which the State could not appeal as of right or by leave of court. Id. at ¶¶ 20-21. The Tenth District denied the State’s motion for leave to appeal and dismissed the appeal. Id.

This Court accepted review. 11-30-2011 *Case Announcements*, 2011-Ohio-6124.

ARGUMENT

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.

Under R.C. 2945.67(A), the State is granted the ability to appeal some decisions as a matter of right, including orders of dismissal. The State is also given the broad ability to appeal “any other decision” of the trial court by leave of the court of appeals, subject to a narrow exception for “final verdicts.” R.C. 2945.67(A) (“any other decision, except the final verdict”).

In determining that the State here was appealing from a “final verdict,” the Tenth District relied on this Court’s precedents indicating that a ruling granting a judgment of acquittal at the end of the State’s case or after trial “based upon” Crim.R. 29(A) or (C) is a “final verdict.” *State ex rel. Yates vs. Court of Appeals for Montgomery Cty.*, 32 Ohio St.3d 30, 512 N.E.2d 343 (1987); *State v. Keeton*, 18 Ohio St.3d 379, 481 N.E.2d 629 (1985). The Tenth District then contended that the trial court’s lack-of-venue ruling properly fell within the ambit of a motion for Crim.R. 29 judgment of “acquittal.”

The Tenth District erred. A motion for judgment of acquittal under Crim.R. 29 is limited to arguments over the sufficiency of the evidence on the material elements of the offense, and venue is not a material element. Also, a court’s mere use of a “Crim.R. 29” or

“acquittal” label does not insulate such a ruling from appellate review under R.C.

2945.67(A).

Overall, the Tenth District missed the forest for the trees on the issue. The purpose of Crim.R. 29 is to grant an “acquittal,” and an “acquittal” by its very nature should be tied to factual innocence of the crime. Lack of venue does not indicate any innocence. It only indicates that the case was brought in the wrong county.

Indeed, lack of venue denotes the inability of *any* decisionmaker in that county, whether it be the jury or the judge, to entertain the issues of guilt or innocence. Venue embodies “the geographic division where a cause can be tried.” *Morrison v. Steiner*, 32 Ohio St.2d 86, 88, 290 N.E.2d 841 (1972). Given the lack of venue, a judge would have no more power to try and thereby “acquit” the defendant than would a jury in that county. A defendant cannot both prevail on the issue of lack of venue and prevail on the merits of whether he is guilty or innocent. In the absence of a waiver of venue by the defendant, improper venue precludes a trial of the merits and therefore precludes an acquittal.

A. Lack of Venue not Cognizable under Crim.R. 29 Motion for Judgment of Acquittal

This Court has held that a trial court cannot intervene under Crim.R. 29 and “acquit” a defendant “if the evidence is such that reasonable minds can reach different conclusions as to whether each *material element* of a crime has been proved beyond a reasonable doubt.” *State v. Bridgeman*, 55 Ohio St.2d 261, 381 N.E.2d 184 (1978), syllabus (emphasis added). This Court has specifically held that “[v]enue is not a material element of any offense charged.” *State v. Draggo*, 65 Ohio St.2d 88, 90, 418 N.E.2d 1343 (1981). “The elements of the offense charged and the venue of the matter are separate and distinct.” *Id.* Further

emphasizing what is an “element,” this Court in *Draggo* stated that “[t]he elements of a crime are the constituent parts of an offense which must be proved by the prosecution to sustain a conviction.” *Id.* at 91.

The standard under Crim.R. 29 is the same as the sufficiency standard used for federal due process. *State v. Tenace*, 109 Ohio St.3d 255, 2006-Ohio-2417, 847 N.E.2d 386, ¶ 37. Under the due-process sufficiency standard, “the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the *essential elements of the crime* beyond a reasonable doubt.” *State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160, 840 N.E.2d 1032, ¶ 34, quoting *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) (emphasis added). This Court emphasized in *Hancock* that the due-process standard focuses on the “substantive elements of the criminal offense”: “[t]he *Jackson* standard of review ‘must be applied with explicit reference to *the substantive elements of the criminal offense as defined by state law.*’” *Hancock*, ¶ 38, quoting *Jackson*, 443 U.S. at 324 n. 16 (emphasis in *Hancock*). As can be seen, sufficiency review under federal due process and under Crim.R. 29 focuses on the “material elements” or “substantive elements” of the crime.

Because Crim.R. 29 narrowly tests the evidence supporting “material elements,” and because venue is not a “material element,” there can be no such thing as a Crim.R. 29 “acquittal” based solely on venue. *Bridgeman* and *Draggo* in combination prove this point, a point also supported by the New Hampshire Supreme Court, which has recognized that, “Because ‘[v]enue has nothing whatever to do with the guilt or innocence of a defendant,’ *

* * dismissal of an indictment for improper venue is not an adjudication on the merits and

is thus distinguishable from a verdict of acquittal.” *State v. Johanson*, 156 N.H. 148, 157-158, 932 A.2d 848, 858 (2007) (quotations omitted).

Upon finding a lack of venue, the trial court here logically and naturally should have ended the trial with the recognition that it could not convict or acquit the defendant. The remedy should have been a mistrial, not an “acquittal.”

B. Appealability not Controlled by Trial Court’s Label

The court’s erroneous “acquittal” label makes no difference given the clear reliance on lack of venue as the basis for decision. “[W]hat constitutes an ‘acquittal’ is not to be controlled by the form of the judge’s action. Rather, we must determine whether the ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged.” *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571, 97 S.Ct. 1349, 51 L.Ed.2d 642 (1977). “[A]n appellate court must look behind the trial court’s announced findings to determine if in reality its judgment acquitting the defendant was on grounds of insufficiency * * *.” *State v. Damico*, 1st Dist. No. C-880730 (May 23, 1990); *State v. Lee*, 9th Dist. No. 08CA009504, 2009-Ohio-4617, ¶ 17 (“trial court did not, in fact, rule on a Crim.R. 29 motion” even though so labeled).

This Court has adopted this look-beyond-the-label approach in determining appealability under R.C. 2945.67. In *In re A.J.S.*, 120 Ohio St.3d 185, 2008-Ohio-5307, 897 N.E.2d 629, syllabus, this Court concluded that the State had an appeal of right because the denial of the bindover had been the “functional equivalent” of a dismissal.

In *State v. Davidson*, 17 Ohio St.3d 132, 477 N.E.2d 1141 (1985), this Court determined that a pretrial motion, “however labeled,” was “in effect, a motion to suppress”

when it resulted in the exclusion of evidence that destroyed the State's ability to prosecute the case. This Court explained in *Davidson* why the "label" of the motion or ruling should not control the issue of appealability:

Any other result would improperly elevate form over substance, and would be unfaithful to the spirit and intent of both R.C. 2945.67 and Crim. R. 12(J). As noted above, both of these provisions were enacted to facilitate the effective prosecution of crime and to promote fairness between the accuser and the accused.

Davidson, 17 Ohio St.3d at 135. See also, *State v. Malinovsky*, 60 Ohio St.3d 20, 23, 573 N.E.2d 22 (1991) ("the ruling is, in essence, a final order").

This view is also supported by the decision in *Yates*, in which this Court found that a Crim.R. 29 acquittal was a "final verdict." This Court emphasized the "significance of a factual insufficiency" and argued that a Crim.R. 29(C) acquittal "is a factual determination of innocence and as much a final verdict as any judgment of acquittal granted pursuant to Crim.R. 29(A)." *Yates*, 32 Ohio St.3d at 32-33 & n. 1. *Yates* therefore supports the view that a reviewing court must look beyond the label to see whether the trial court was actually applying the sufficiency-of-evidence standard.

When the Tenth District extended *Yates* beyond insufficiency acquittals to include venue-based "acquittals," the Tenth District cut loose the "final verdict" case law from its moorings. A judge's lack-of-venue conclusion is no more a "verdict" on innocence than would be a ruling on speedy trial or jurisdiction. In effect, the Tenth District's approach would insulate from appellate review *any* granting of a nominal motion under "Crim.R. 29," even when it is clear that the trial court was not engaging in any sufficiency-of-evidence review under that rule. Nothing in *Keeton* or *Yates* supports such an approach.

C. No Double Jeopardy Bar to Appellate Review

This look-beyond-the-label approach is also consistent with double-jeopardy analysis, which recognizes that “what constitutes an ‘acquittal’ is not to be controlled by the form of the judge’s action.” *Martin Linen*, 430 U.S. at 571. The question is “whether the ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged.” *Id.* A judge’s characterization of his own action cannot control the classification of the action. *United States v. Scott*, 437 U.S. 82, 96, 98 S.Ct. 2187, 57 L.Ed.2d 65 (1978). Trial courts cannot defeat appellate review merely by placing a “Crim.R. 29” or “acquittal” label on a ruling.

In addition, questions of improper venue involve mere trial error, and “double jeopardy will not bar retrial of a defendant who successfully overturns his conviction on the basis of trial error, through either direct appeal or collateral attack.” *State v. Brewer*, 121 Ohio St.3d 202, 2009-Ohio-593, 903 N.E.2d 284, ¶16, citing *Lockhart v. Nelson*, 488 U.S. 33, 38, 109 S.Ct. 285, 102 L.Ed.2d 265 (1988). Unlike reversal for evidentiary insufficiency, reversal for trial error “implies nothing with respect to the guilt or innocence of the defendant. Rather, it is a determination that a defendant has been convicted through a judicial process which is defective in some fundamental respect * * *.” *Burks v. United States*, 437 U.S. 1, 15, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978); *see also, Brewer*, ¶ 18.

Nationwide, courts agree that a dismissal based solely on venue, even when styled as an “acquittal,” does not prevent retrial on double-jeopardy grounds. “[A] trial court’s ruling that the prosecution’s case-in-chief failed to establish venue, *though framed as a judgment of acquittal*, does not preclude retrial because venue is an element more procedural

than substantive that does not go to culpability.” *Johanson*, 156 N.H. at 157-158 , quoting 5 W. LaFave et al., *Criminal Procedure* § 25.3(a), at 666 (2d ed. 1999) (emphasis added).

“[A] failure to properly establish venue does not bar retrial, because evidence of venue does not go to the guilt or innocence of the accused, and hence it does not invoke double jeopardy concerns.” *Jones v. State*, 272 Ga. 900, 904, 537 S.E.2d 80 (2000); *Willett v. United States*, 655 F.2d 1007, 1011 (10th Cir. 1981); *Neff v. State*, 915 N.E.2d 1026 (Ind. App. 2009); *State v. Hutcherson*, 790 S.W.2d 532, 535 (Tenn. 1990); *State v. Roybal*, 139 N.M. 341, 343, 132 P.3d 598 (N.M. App. 2006) (“A dismissal based upon lack of venue, therefore, is not an adjudication of the merits and does not amount to an acquittal.”); *Derry v. Commonwealth*, 274 S.W.3d 439, 444-445 (Ky. 2008) (“Because venue and the determination of any facts related to it do not affect guilt, a court’s decision to terminate a trial for want of proper venue cannot amount to an acquittal.”).

Double-jeopardy doctrine also recognizes that a lack-of-venue ruling that terminates a trial does not bar a retrial, as such a ruling constitutes an outcome other than on guilt or innocence. When a defendant decides “to seek termination of the proceedings against him on a basis unrelated to factual guilt or innocence of the offense of which he is accused, [he] suffers no injury cognizable under the Double Jeopardy Clause” by his retrial. *Scott*, 437 U.S. at 98-99; *State v. Broughton*, 62 Ohio St.3d 253, 262-66, 581 N.E.2d 541 (1991) (following *Scott*).

Here, defendant sought an “acquittal” based on improper venue, yet venue has nothing to do with guilt or innocence. See *Draggo*, 65 Ohio St.2d at 90. “Venue is wholly neutral; it is a question of procedure, more than anything else, and it does not either prove or

disprove the guilt of the accused.” *United States v. Perez*, 280 F.3d 318, 330 (3rd Cir. 2002), quoting *Willett*, 655 F.2d at 1011; *United States v. Kaytso*, 868 F.2d 1020, 1021 (9th Cir. 1988). As such, defendant “has chosen by his motion to terminate the proceedings and so forego a verdict based on the merits.” *Id.* at 1021, citing *Scott*, 437 U.S. at 100. Under these circumstances, double-jeopardy doctrine did not shield the court’s purported “acquittal” from review and does not prevent a retrial in a properly-venued setting.

D. R.C. 2945.08

The trial court violated R.C. 2945.08, which requires trial courts to commit or release on bail the defendant pending the issuance of an arrest warrant from the properly-venued county.

If it appears, on the trial of a criminal cause, that the offense was committed within the exclusive jurisdiction of another county of this state, *the court must direct the defendant to be committed to await a warrant from the proper county for his arrest*, but if the offense is aailable offense the court may admit the defendant to bail with sufficient sureties conditioned, that he will, within such time as the court appoints, render himself amenable to a warrant for his arrest from the proper county, and if not sooner arrested thereon, will appear in court at the time fixed to surrender himself upon the warrant.

The clerk of the court of common pleas shall forthwith notify the prosecuting attorney of the county in which such offense was committed, in order that proper proceedings may be had in the case. A defendant in such case shall not be committed nor held under bond for a period of more than ten days.

(emphasis added).

The duty to commit or release on bail pending the issuance of an arrest warrant is mandatory: “the court *must* direct the defendant to be committed to await a warrant from the proper county for his arrest.” R.C. 2945.08 (emphasis added). Venue has nothing to do

with the guilt or innocence of a defendant, and, therefore, R.C. 2945.08 does not violate double jeopardy.

R.C. 2945.08 is similar to the federal standard. “When venue has been improperly laid in a district, the district court should either transfer the case to the correct venue upon the defendant’s request, see Fed.R.Crim.P. 21(b), or, in the absence of such a request, dismiss the indictment *without prejudice*, see *United States v. Kaytso* (9th Cir. 1989), 868 F.2d 1020, 1021.” *United States v. Ruelas-Arreguin*, 219 F.3d 1056, fn 1 (9th Cir. 2000) (emphasis added). “[V]enue is not properly considered a true ‘element’ of a criminal offense.” *United States v. Zidell*, 323 F.3d 412, 421 (6th Cir. 2003). As such, any dismissal based solely on the lack of venue cannot be viewed as an “acquittal.” *United States v. Hernandez*, 189 F.3d 785, 792 n. 5 (9th Cir. 1999) (“We reject the contention by Hernandez that a judgment of acquittal is the appropriate remedy in the case of improper venue.”).

R.C. 2945.08 demonstrates that “acquittal” is not a proper outcome in the lack-of-venue situation. To be sure, a mistrial was in order if venue had not been waived. The trial could not proceed to reach a verdict if there was a lack of venue. But the mechanism under R.C. 2945.08 contemplates further proceedings in the properly-venued county, not an “acquittal” in the county in which venue is lacking. In choosing to “acquit” defendant based on lack of venue, the trial court was violating R.C. 2945.08.

E. Unpersuasive Appellate Decisions

The Tenth District relied on a number of appellate decisions, contending that improper venue is properly addressed under a Crim.R. 29 motion for acquittal. But the Tenth District conceded that some of the decisions only “reached the same conclusion by

implication.” This Court has specifically rejected the concept of “implicit” precedent. *State v. Lester*, 123 Ohio St.3d 396, 2009-Ohio-4225, 916 N.E.2d 1038, ¶ 31; *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, 873 N.E.2d 306, ¶¶ 10-12; *B.F. Goodrich v. Peck*, 161 Ohio St. 202, 118 N.E.2d 525 (1954); *State ex rel. Gordon v. Rhodes*, 158 Ohio St. 129, 107 N.E.2d 206 (1952), paragraph one of the syllabus.

The remainder of the cited appellate decisions do state, either directly or in passing, that the venue issue can be raised by a Crim.R. 29 motion. But there is much doubt about whether these courts were directly faced with the issue of whether a court can truly “acquit” the defendant under “Crim.R. 29” based on lack of venue. In any event, to the extent such appellate decisions might be seen as precedential, they have not come to grips with the fact that: (1) under *Bridgeman*, Crim.R. 29 acquittals are limited to claims of lack of proof of material elements; (2) under *Draggo*, venue is not a material element; and (3) under R.C. 2945.08, a lack-of-venue ruling results in potential further prosecution of the defendant, not an “acquittal” or “discharge.”

Particularly inapposite was the Tenth District’s citation to *State v. Simpson*, 9th Dist. No. 21475, 2004-Ohio-602. That case merely answered whether Crim.R. 12 is the appropriate vehicle to challenge venue when improper venue is not apparent from the face of the indictment. The Ninth District answered no, and, in dicta, added: “in such a case, a defendant may only raise the issue of improper venue at trial via a Crim.R. 29 motion for acquittal, and may later appeal that decision, like any jury determination of fact, based on either the sufficiency of the evidence or manifest weight.” *Id.* at ¶ 74. For the reasons stated earlier, this dicta is wrong. This Court’s decisions in *Bridgeman* and *Draggo* prove that

Crim.R. 29 does not apply to venue. And, like the Tenth District here, the Ninth District failed to heed the provisions of R.C. 2945.08. The possibility of the defense requesting a mistrial based on improper venue was not discussed in the *Simpson* dicta.

In the end, *Bridgeman*, *Draggo*, and R.C. 2945.08 lead to the inexorable conclusion that lack of venue cannot supply a basis for Crim.R. 29 “acquittal.” The appellate decisions cited by the Tenth District fail to recognize this conclusion.

F. Remedy

Because the trial court’s lack-of-venue ruling did not properly fall within the ambit of a judgment of acquittal under Crim.R. 29, the Tenth District erred in concluding that this Court’s “final verdict” case law barred the State’s appeal. The case should be remanded to the Tenth District with instructions to grant the State’s motion for leave to appeal and to consider the State’s two assignments of error as briefed below.

While the court of appeals usually possesses discretion in deciding whether to grant a motion for leave to appeal, there would be no such discretion left here. By finding error in the Tenth District’s “final verdict” analysis, this Court will have concomitantly concluded that reversible error occurred in the trial court’s proceedings when that court characterized its lack-of-venue ruling as the granting of a Crim.R. 29 “acquittal.” With this Court having already concluded that error occurred, there would be no conceivable basis for the Tenth District now to exercise “discretion” by refusing to allow the appeal or by refusing to enter a reversal of that very error.

The State’s first and second propositions of law warrant relief.

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.*, 32 Ohio St.3d 30, 512 N.E.2d 343 (1987), overruled)

In *Yates*, this Court held that an order granting a Crim.R. 29 motion for "acquittal" is a "final verdict." But this concept is grounded in the premise that such motions are based on insufficiency of the evidence. Application of *Yates* in the present situation in which the "acquittal" was based on lack of venue, not insufficiency, would show that the *Yates* standard is unworkable and unjust. See *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256.

This Court should revisit and overrule the *Yates* concept, also expressed in *Keeton*, that the granting of a Crim.R. 29 motion is a "final verdict." While R.C. 2945.67(A) precludes the appeal of a "final verdict," there are repeated indications in Title 29 and this Court's rules that a court's granting of a Crim.R. 29 motion is not a "verdict." Relief under Crim.R. 29 results in a "judgment of acquittal," and the rule expressly differentiates between such a "judgment" and a "verdict." Crim.R. 29(B) & (C). Thus, Crim.R. 29 itself shows that a "judgment of acquittal" is something other than a "verdict." In a jury trial, a verdict is the jury's unanimous written finding, "returned by the jury to the judge in open court." Crim.R. 31(A); R.C. 2945.171; R.C. 2945.77.

R.C. 2945.15 provides that the relief for insufficiency is a *discharge*:

An accused person, when there is not sufficient evidence to put him upon his defense, may be discharged by the court, but if not so discharged, shall be entitled to the immediate verdict of the jury in his favor. Such order of discharge, in either case, is a bar to another prosecution for the same offense.

This provision at most would result in a “verdict” when the court directed the *still-sitting* jury to do so. In all other respects, the court’s action would be a “discharge.”

Given these understandings of “verdict,” this Court’s earlier decisions have erred in concluding that a ruling under Crim.R. 29 is a “final verdict.” In a jury trial, a verdict is rendered by the jury and accepted by the court. In the vast majority of cases, the granting of a Crim.R. 29 motion results in a “judgment” and “discharge,” not a “verdict.” Inasmuch as R.C. 2945.67 was first adopted in 1978, which was five years after adoption of the Criminal Rules, the General Assembly would have taken these distinctions between “judgment,” “discharge,” and “verdict” into account when it placed only a “final *verdict*” beyond the reach of a prosecution appeal. *See also, State v. Lomax*, 96 Ohio St.3d 318, 2002-Ohio-4453, 774 N.E.2d 249, ¶ 23 (“verdict” is jury’s resolution of factual issues, or, in non-jury trial, judge’s resolution of such issues).

“The legislature could easily have used the word ‘judgment’ in place of or in addition to the term ‘verdict’ if that had been its intention. Instead, the statute refers only to verdicts, and this court may not assume that judgments are also encompassed in the statute’s purview.” *Yates*, 32 Ohio St.3d at 36 (Douglas, J., dissenting). Reading the word “verdict” to mean a “judgment” of acquittal amounts to judicial legislation. In interpreting a provision, “it is the duty of this court to give effect to the words used, not to delete words used or to insert words not used.” *Columbus-Suburban Coach Lines v. Pub. Util. Comm.*, 20 Ohio St.2d 125, 127, 254 N.E.2d 8 (1969).

While double jeopardy would bar a State’s appeal of a mid-trial Crim.R. 29 acquittal based on insufficiency of evidence, it would not bar appeal of a post-verdict granting of a

Crim.R. 29 motion based on insufficiency of evidence. Such an appeal merely would be seeking a reinstatement of the jury's guilty verdict and therefore would not be seeking a second trial that would violate double jeopardy. *United States v. Wilson*, 420 U.S. 332, 95 S.Ct. 1013, 43 L.Ed.2d 232 (1975). Moreover, if Crim.R. 29 is to be extended beyond sufficiency review to include issues like lack of venue, then double jeopardy would never bar a State's appeal on such issues, even when the Crim.R. 29 "acquittal" was granted mid-trial. *Scott*, 437 U.S. at 98-99.

Yates and *Keeton* should be overruled because such cases would be unworkable and unjust if they prevent courts from determining whether the "acquittal" was really based on insufficiency of the evidence. Focusing on the mere label, and barring review of "Crim.R. 29 acquittals" that are not even based on lack of sufficient evidence, "would improperly elevate form over substance, and would be unfaithful to the spirit and intent of * * * R.C. 2945.67," which was "enacted to facilitate the effective prosecution of crime and to promote fairness between the accuser and the accused." *Davidson*, 17 Ohio St.3d at 135.

The State's third proposition of law warrants relief.

CONCLUSION

The State respectfully requests that this Court reverse the Tenth District's judgment and remand the case with instructions for that court to grant the State's motion for leave to appeal, to address the State's two assignments of error, and to, at a minimum, reverse the trial court's language purporting to grant a Crim.R. 29 motion for judgment of acquittal based on lack of venue.

Respectfully submitted,

RON O'BRIEN
Franklin County Prosecuting Attorney



STEVEN L. TAYLOR 0043876

(Counsel of Record)

Chief Counsel, Appellate Division

Counsel for State

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was sent by regular U.S. Mail on this 30th day of Jan., 2012, to Jonathan Tyack, 536 South High Street, Columbus, Ohio 43215, counsel for defendant.


STEVEN L. TAYLOR

ORIGINAL

IN THE SUPREME COURT OF OHIO
2011

STATE OF OHIO,

Plaintiff-Appellant,

-vs-

EMMANUEL HAMPTON,

Defendant-Appellee

Case No. **11-1473**

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

Court of Appeals
Case No. 10AP-1109

**NOTICE OF APPEAL OF
PLAINTIFF-APPELLANT STATE OF OHIO**

RON O'BRIEN 0017245
Franklin County Prosecuting Attorney
373 South High Street, 13th Floor
Columbus, Ohio 43215
Phone: 614-525-3555
Fax: 614-525-6103
E-mail: sltaylor@franklincountyohio.gov

and

STEVEN L. TAYLOR 0043876 (Counsel of Record)
Chief Counsel, Appellate Division

COUNSEL FOR PLAINTIFF-APPELLANT

JONATHAN TYACK 0066329
Attorney at Law
536 South High Street
Columbus, Ohio 43215
Phone: 614-221-1341

COUNSEL FOR DEFENDANT-APPELLEE

FILED

AUG 29 2011

**CLERK OF COURT
SUPREME COURT OF OHIO**

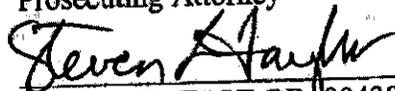
NOTICE OF APPEAL OF PLAINTIFF-APPELLANT STATE OF OHIO

Plaintiff-appellant, the State of Ohio, hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Franklin County Court of Appeals, Tenth Appellate District, entered in *State v. Hampton*, 10th Dist. No. 10AP-1109, on July 14, 2011.

The State of Ohio invokes the jurisdiction of the Supreme Court on the grounds that the case presents questions of public or great general interest and involves a felony and warrants the granting of leave to appeal.

Respectfully submitted,

RON O'BRIEN 0017245
Prosecuting Attorney



STEVEN L. TAYLOR 0043876
(Counsel of Record)
Chief Counsel, Appellate Division

Counsel for Plaintiff-Appellant

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was sent by regular U.S. Mail on this 29th day of Aug., 2011, to Jonathan Tyack, 536 South High Street, Columbus, Ohio 43215, counsel for defendant.

Pursuant to S.Ct.Prac.R. 14.2(A), a copy was also sent by regular U.S. mail on this 29th day of Aug., 2011, to the Ohio Public Defender, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215.


STEVEN L. TAYLOR

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

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State of Ohio, :
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 Plaintiff-Appellant, :
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 v. :
 :
 Emmanuel Hampton, :
 :
 Defendant-Appellee. :

No. 10AP-1109
(C.P.C. No. 10CR02-1190)
(REGULAR CALENDAR)

JUDGMENT ENTRY

For the reasons stated in the decision of this court rendered herein on July 14, 2011, we deny the state's motion for leave to appeal and dismiss the state's purported appeal as a matter of right. Costs assessed against appellant.

KLATT, J., BRYANT, P.J., and CONNOR, J.

By William A. Klatt
Judge William A. Klatt

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

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10th DISTRICT

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CLERK OF COURTS

No. 10AP-1109
(C.P.C. No. 10CR02-1190)

(REGULAR CALENDAR)

State of Ohio,
Plaintiff-Appellant,
v.
Emmanuel Hampton,
Defendant-Appellee.

DECISION

Rendered on July 14, 2011

Ron O'Brien, Prosecuting Attorney, and Steven L. Taylor, for appellant.

Jonathan T. Tyack and Thomas M. Tyack, for appellee.

APPEAL from the Franklin County Court of Common Pleas

KLATT, J.

{¶1} Plaintiff-appellant, the state of Ohio, seeks to appeal as a matter of right and with leave of court a judgment of the Franklin County Court of Common Pleas granting defendant-appellee, Emmanuel Hampton's, motion for judgment of acquittal pursuant to Crim.R. 29. Because the state cannot appeal the trial court's judgment, we dismiss the state's appeal and deny the state's motion for leave to appeal.

Factual and Procedural Background

{¶2} On March 5, 2010, a Franklin County grand jury indicted Hampton with a number of charges arising from a violent home invasion, including attempted murder in violation of R.C. 2923.02 and 2903.02, aggravated burglary in violation of R.C. 2911.11, and kidnapping in violation of R.C. 2905.01. The indictment alleged that Hampton

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committed these offenses in Franklin County. Hampton entered a not guilty plea to the charges and proceeded to a trial.

{¶3} At trial, testimony in the state's case-in-chief made it clear that the home invasion did not occur in Franklin County. After the state rested its case, Hampton moved, pursuant to Crim.R. 29, for a judgment of acquittal based in part on the state's failure to prove proper venue. Hampton argued that pursuant to Section 10, Article I, of the Ohio Constitution, a defendant shall be subject to a trial in the county in which the offense is alleged to have been committed. See also R.C. 2901.12(A). Although not a material element of any offense, venue is a fact the state must prove beyond a reasonable doubt. *State v. Headley* (1983), 6 Ohio St.3d 475, 477. The trial court reserved its ruling on the motion. Hampton then rested his case without presenting any evidence and renewed his motion for acquittal. After a hearing on the motion, the trial court stated on the record that it would grant Hampton's motion only as to the venue issue. In a subsequent judgment entry, the trial court granted Hampton's motion for judgment of acquittal, based solely on the state's failure to prove venue, and ordered Hampton discharged.

{¶4} The state seeks to appeal the trial court's judgment entry and assigns the following errors:

I. THE TRIAL COURT ERRED BY FINDING THAT VENUE HAD NOT BEEN WAIVED BY DEFENDANT.

II. EVEN IF THE VENUE CHALLENGE WAS PROPERLY PRESERVED, THE TRIAL COURT ERRED BY REFUSING TO ORDER A MISTRIAL.

R.C. 2945.67(A) and the State's Authority to Appeal in Criminal Cases

{¶5} We first address the state's authority to appeal the trial court's judgment entry.

{¶6} R.C. 2945.67(A) provides:

A prosecuting attorney * * * may appeal as a matter of right any decision of a trial court in a criminal case, * * * which decision grants a motion to dismiss all or any part of an indictment, complaint, or information, a motion to suppress evidence, or a motion for the return of seized property or grants post conviction relief pursuant to sections 2953.21 to 2953.24 of the Revised Code, and may appeal by leave of the court to which the appeal is taken any other decision, except the final verdict, of the trial court in a criminal case[.]

{¶7} Simply put, this statute allows the state to appeal certain specified decisions as a matter of right and any other decision in a criminal case, except the final verdict, by leave of court.

{¶8} Here, the trial court entered a judgment of acquittal pursuant to Crim.R. 29. That rule allows trial courts to "order the entry of a judgment of acquittal of one or more offenses charged in the indictment, information, or complaint, if the evidence is insufficient to sustain a conviction of such offense or offenses."

{¶9} In *State v. Keeton* (1985), 18 Ohio St.3d 379, the Supreme Court of Ohio considered a judgment of acquittal granted pursuant to Crim.R. 29(A) and concluded that a "directed verdict of acquittal by the trial judge in a criminal case is a 'final verdict' within the meaning of R.C. 2945.67(A) which is not appealable by the state as a matter of right or by leave to appeal pursuant to that statute." *Id.* at paragraph two of the syllabus. Similarly, the Supreme Court of Ohio noted in another case that "[a] judgment of acquittal by the trial judge, based upon Crim.R. 29(C), is a final verdict within the meaning of R.C. 2945.67(A) and is not appealable by the state as a matter of right or by leave to appeal pursuant to that statute." *State ex rel. Yates v. Court of Appeals for Montgomery Cty.* (1987), 32 Ohio St.3d 30, syllabus. Thus, a judgment of acquittal made pursuant to either

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Crim.R. 29(A) or (C) is a final verdict and, as such, is not appealable by the state. *Id.* at 32-33.

{¶10} Here, the trial court's judgment entry states that:

For the reasons set forth on the record at the time of hearing on Tuesday October 12, 2010, Defendant's Motion for Judgment of Acquittal pursuant to Rule 29 of the Ohio Rules of Criminal Procedure based strictly on the issue of Venue is well taken, and is hereby granted as to Counts One, Two, Three and Four. The clerk shall note Defendant's acquittal in the Court record, and Defendant is hereby discharged in this matter.

On its face, the trial court's judgment entry grants Hampton a judgment of acquittal pursuant to Crim.R. 29. Such a judgment is not appealable by the state as a matter of right or by leave to appeal pursuant to R.C. 2945.67(A). *Yates*.

{¶11} The state, however, contends that the trial court did not acquit Hampton. Instead, the state argues that the trial court "dismissed" the case, one of the specified decisions the state may appeal as a matter of right pursuant to R.C. 2945.67(A). Notwithstanding the clear language of the trial court's judgment entry, the state notes that the trial court stated at the hearing that it would grant Hampton's Crim.R. 29 motion "to dismiss the case." (Tr. 170.) We reject the state's argument.

{¶12} Hampton's counsel requested a judgment of acquittal pursuant to Crim.R. 29 after it became apparent that the state could not prove venue. The trial court granted the request, and its judgment entry is clear: "Defendant's Motion for Judgment of Acquittal pursuant to Rule 29 of the Ohio Rules of Criminal Procedure based strictly on the issue of Venue is well taken, and is hereby granted as to Counts One, Two, Three and Four. The clerk shall note Defendant's acquittal in the Court record, and Defendant is hereby discharged in this matter."

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{¶13} In spite of the trial court's clear language, the state seeks to divine the trial court's true "intent" through statements it made at the hearing. However, "[i]t is well-established that a court only speaks through its journal entries and not by oral pronouncement or through decisions." *State v. Smith*, 12th Dist. No. CA2009-02-038, 2010-Ohio-1721, ¶59 (citing *Schenley v. Kauth* (1953), 160 Ohio St. 109); *State v. Wimer* (Oct. 16, 2001), 10th Dist. No. 01AP-288. Here, the trial court entered a judgment of acquittal.

{¶14} The state also argues that the trial court must have dismissed the case for lack of venue because venue issues cannot be resolved by a Crim.R. 29 motion for acquittal. We disagree.

{¶15} The plain language of Crim.R. 29 allows trial courts to grant an acquittal if "the evidence is insufficient to sustain a conviction of such offense or offenses." The Supreme Court of Ohio, however, set forth the following standard of review for trial courts to apply when analyzing a motion for judgment of acquittal: "[A] court shall not order an entry of judgment of acquittal if the evidence is such that reasonable minds can reach different conclusions as to whether each *material element of a crime* has been proved beyond a reasonable doubt." *State v. Bridgeman* (1978), 55 Ohio St.2d 261, syllabus (emphasis added). Based upon that standard, the state argues that the trial court could not grant a judgment of acquittal based on improper venue because venue is not a material element of the offense. In support of this argument, the state cites *State v. Johanson* (2007), 156 N.H. 148, 157-58, 932 A.2d 848, 858.

{¶16} We are not persuaded by the authority offered by the state on this issue. We find more persuasive cases from appellate courts in this state that have expressly or

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implicitly concluded that improper venue is an issue that can be addressed by a Crim.R. 29 motion for acquittal.

{¶17} For example, in *State v. Spak* (July 5, 1996), 11th Dist. No. 95-P-0092, the Eleventh District Court of Appeals reversed a trial court's pretrial dismissal of a number of offenses based on improper venue and remanded those charges for trial. However, the court noted that it would be incumbent on the state to prove venue at trial, and that "[s]hould the facts and circumstances presented by the [state] fail to demonstrate * * * venue is proper, appellee may move the court for acquittal on those charges pursuant to Crim.R. 29." Similarly, the Ninth District Court of Appeals consistently notes that absent a defect in the indictment regarding venue, "a defendant may only raise the issue of improper venue at trial via a Crim.R. 29 motion for acquittal." See *State v. Simpson*, 9th Dist. No. 21475, 2004-Ohio-602, ¶74; *State v. Reed*, 9th Dist. No. 07CA0026-M, 2008-Ohio-1880, ¶15.

{¶18} The Twelfth District Court of Appeals also allows Crim.R. 29 motions for acquittal to challenge venue. *State v. Clapp* (June 29, 1987), 12th Dist. No. CA87-01-001 (concluding that trial court erred in denying Crim.R. 29 motion for judgment of acquittal because the "state had failed to prove the action was properly venued"); *State v. Piersall* (Feb. 22, 1988), 12th Dist. No. CA87-06-052 (citing *Clapp* to address situation where defendant asserted venue challenge in motion for acquittal); See also *State v. Lahmann*, 12th Dist. No. CA2006-03-058, 2007-Ohio-1795, ¶45 (concluding trial counsel was ineffective because counsel failed to move for judgment of acquittal pursuant to Crim.R. 29 and that such a motion would have been successful because the state failed to prove venue).

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{¶19} Other Ohio courts have reached the same conclusion by implication. *State v. Matz*, 5th Dist. No. 08COA021, 2009-Ohio-3048, ¶¶16-17 (affirming denial of Crim.R. 29 motion for acquittal based on venue because state presented sufficient evidence of venue); *State v. Baxla* (June 13, 1988), 4th Dist. No. 656 (failure to assert insufficient evidence of venue in Crim.R. 29 motion waived issue in appeal); *State v. Coe*, 153 Ohio App.3d 44, 2003-Ohio-2732, fn. 6 (considering hypothetical situation where the state failed to present evidence of venue at trial and noting that a defendant would then move for judgment of acquittal, which could be granted by the trial court).

{¶20} The import of these cases is clear: venue is a proper issue for determination by a Crim.R. 29 motion for acquittal. We agree. Thus, the trial court could enter a judgment of acquittal in Hampton's favor based on the state's admitted failure to prove venue in this case. A judgment of acquittal is a final verdict for purposes of R.C. 2945.67(A) and cannot be appealed by the state.

{¶21} Accordingly, we deny the state's motion for leave to appeal and dismiss the state's purported appeal as a matter of right.

*Motion for leave to appeal denied;
case dismissed.*

BRYANT, P.J., and CONNOR, J., concur.

TERMINATION NO. <u>6</u>
BY: <u>SL</u>

IN THE COMMON PLEAS COURT OF FRANKLIN COUNTY, OHIO
CRIMINAL DIVISION

STATE OF OHIO,

Plaintiff,

Case No. 10 CR -02-1190

-vs-

JUDGE FRYE

EMMANUEL HAMPTON,

Defendant.

FILED
COMMON PLEAS COURT
FRANKLIN COUNTY, OHIO
2010 OCT 25 AM 11:53
CLERK OF COURTS

JUDGMENT ENTRY

This matter came before the Court on Friday October 8, 2010 for Trial. At that time, Defendant, knowingly, intelligently, and voluntarily waived his right to a Jury Trial, and agreed to have the matter tried directly to the Court. Trial began, and in the course of the case presented by the State of Ohio, it became clear that the events giving rise to the charges in this case all occurred within Fairfield County, Ohio, and not Franklin County, Ohio, as alleged in the Indictment. Because the testimony had already begun, the State's witnesses were all present and ready to testify, and case law was not readily available to research the venue issue, the State proceeded with its case. At the conclusion of the evidence, subject to the introduction of its exhibits and the ability to research the venue issue, the State rested its case.

Defense counsel then made a Motion for Judgment of Acquittal pursuant to Rule 29 of the Ohio Rules of Criminal Procedure. At the request of the Prosecutor, no ruling was immediately rendered on Defendant's Motion for Judgment of Acquittal. The Defendant then rested his case, without presenting any evidence, with the understanding that the Court had not yet rendered a decision on the Rule 29 motion. Defendant then renewed his Motion for Judgment of Acquittal under Rule 29. In response to Defendant's Motion, the State of Ohio moved to dismiss Count Five (Kidnapping in respect to Joshua Woods) and Count Six (Weapon Under Disability) with prejudice. For the reasons set forth on the record, the Prosecution's Motion to Dismiss Count Five and Count

Six of the Indictment with prejudice was granted. Therefore, Count Five and Count Six are dismissed, with prejudice, at the request of the Prosecuting Attorney. Counts One through Four remained.

This matter then proceeded with brief oral arguments regarding the Defendant's Motion for Judgment of Acquittal pursuant to Criminal Rule 29. Defendant's motion alleged numerous grounds for acquittal, and among them was the claim that the Prosecution had failed to establish Venue under R.C. §2901.12 and Article I, §10 of the Ohio Constitution. At the request of the Prosecuting Attorney, and with the agreement of defense counsel, this Court agreed to recess the case over the Columbus Day weekend to allow both sides, and the Court, to do further legal research on the specific issue of Venue as it related to Defendant's Motion for Judgment of Acquittal.

This matter reconvened for further Oral Argument on Tuesday, October 12, 2010, after the Columbus Day holiday. At that time, further Oral Arguments were made by both parties regarding the issue of Venue. The State's request for a Court finding that venue had been waived by the Defendant was denied. The State's motion for a declaration of a mistrial instead of a Rule 29 acquittal was denied. The defendant's motion for a Rule 29 Judgment of Acquittal based on the underlying case facts and sufficiency of the evidence as to the issue of Identification was denied. For the reasons set forth on the record at the time of hearing on Tuesday October 12, 2010, Defendant's Motion for Judgment of Acquittal pursuant to Rule 29 of the Ohio Rules of Criminal Procedure based strictly on the issue of Venue is well taken, and is hereby granted as to Counts One, Two, Three and Four. The clerk shall note Defendant's acquittal in the Court record, and Defendant is hereby discharged in this matter.

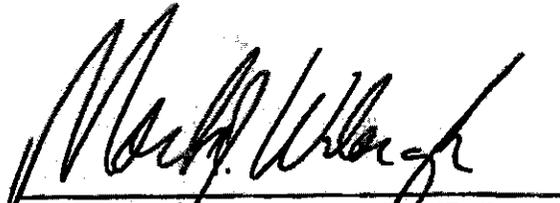
Costs taxed against the State. Bond released. EAA

IT IS SO ORDERED.


JUDGE FRYE

APPROVED (as to form):


JONATHAN T. TYACK (0066329)
536 South High Street
Columbus OH 43215
Telephone: 614-221-1341
Attorney for Defendant


MARK WOLDARCYK (0046744)
373 South High Street, 1st Floor
Columbus OH 43215
Telephone: 614-462-3555
Prosecuting Attorney

2945.67 Appeal by state by leave of court.

(A) A prosecuting attorney, village solicitor, city director of law, or the attorney general may appeal as a matter of right any decision of a trial court in a criminal case, or any decision of a juvenile court in a delinquency case, which decision grants a motion to dismiss all or any part of an indictment, complaint, or information, a motion to suppress evidence, or a motion for the return of seized property or grants post conviction relief pursuant to sections 2953.21 to 2953.24 of the Revised Code, and may appeal by leave of the court to which the appeal is taken any other decision, except the final verdict, of the trial court in a criminal case or of the juvenile court in a delinquency case. In addition to any other right to appeal under this section or any other provision of law, a prosecuting attorney, city director of law, village solicitor, or similar chief legal officer of a municipal corporation, or the attorney general may appeal, in accordance with section 2953.08 of the Revised Code, a sentence imposed upon a person who is convicted of or pleads guilty to a felony.

(B) In any proceeding brought pursuant to division (A) of this section, the court, in accordance with Chapter 120. of the Revised Code, shall appoint the county public defender, joint county public defender, or other counsel to represent any person who is indigent, is not represented by counsel, and does not waive the person's right to counsel.

Effective Date: 07-01-1996

RULE 29. Motion for Acquittal

(A) Motion for judgment of acquittal. 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 charged 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.

(B) Reservation of decision on motion. If a motion for a judgment of acquittal is made at the close of all the evidence, the court may reserve decision on the motion, submit the case to the jury and decide the motion either before the jury returns a verdict, or after it returns a verdict of guilty, or after it is discharged without having returned a verdict.

(C) Motion after verdict or discharge of jury. If a jury returns a verdict of guilty or is discharged without having returned a verdict, a motion for judgment of acquittal may be made or renewed within fourteen days after the jury is discharged or within such further time as the court may fix during the fourteen day period. If a verdict of guilty is returned, the court may on such motion set aside the verdict and enter judgment of acquittal. If no verdict is returned, the court may enter judgment of acquittal. It shall not be a prerequisite to the making of such motion that a similar motion has been made prior to the submission of the case to the jury.

[Effective: July 1, 1973.]

2945.08 Prosecution in wrong county - proceeding.

If it appears, on the trial of a criminal cause, that the offense was committed within the exclusive jurisdiction of another county of this state, the court must direct the defendant to be committed to await a warrant from the proper county for his arrest, but if the offense is a bailable offense the court may admit the defendant to bail with sufficient sureties conditioned, that he will, within such time as the court appoints, render himself amenable to a warrant for his arrest from the proper county, and if not sooner arrested thereon, will appear in court at the time fixed to surrender himself upon the warrant.

The clerk of the court of common pleas shall forthwith notify the prosecuting attorney of the county in which such offense was committed, in order that proper proceedings may be had in the case. A defendant in such case shall not be committed nor held under bond for a period of more than ten days.

Effective Date: 10-01-1953