

IN THE SUPREME COURT OF OHIO

STATE OF OHIO

Appellee,

v.

DESMOND A. BILLINGSLEY

Appellant.

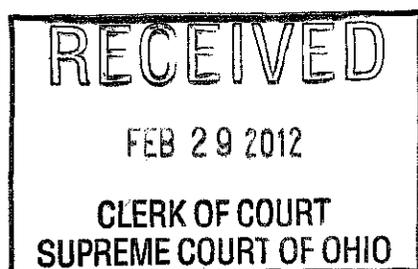
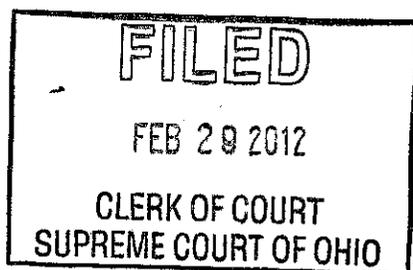
CASE NO. 2011-0827

On Appeal From the Eleventh
District Court of Appeals
Case Nos. 2010-P-30 & 2010-P-31

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STATEMENT OF THE CASE AND FACTS

Procedural History

The Eleventh District Court of Appeals properly affirmed the conviction of Desmond Billingsley for the multiple aggravated robberies he committed in Portage County, Ohio.

In January 2009, the Portage County Grand Jury indicted Billingsley on aggravated robbery in violation of R.C. 2911.01 with a firearm specification in violation of R.C. 2929.14(D) and 2941.145. (Transcript of the Docket, Journal Entries and Original Papers from Case No. 2009 CR 23, hereinafter “2009 CR 23-T.d.” 1). Pre-trial hearings were continued and the Portage County Grand Jury indicted Billingsley on two more counts of aggravated robbery each with a firearm specification. (Transcript of the Docket, Journal Entries and Original Papers from Case No. 2009 CR 509, hereinafter “2009 CR 509-T.d.” 1).

In November 2009, Billingsley filed a motion to enforce a Criminal Rule 11 plea agreement and a motion to dismiss the firearm specifications in both Portage County cases. (2009 CR 23-T.d. 36; 2009 CR 509-T.d. 23). Billingsley claimed that he had entered into an agreement with the State of Ohio via plea negotiations with an assistant Summit County Prosecutor in October 2008. Billingsley further argued that the Summit County agreement prohibited Portage County from either pursuing robbery charges or seeking consecutive sentences for robbery charges filed against him.

The Portage County Common Pleas Court scheduled Billingsley’s motion for a hearing. (2009 CR 23-T.d. 37; 2009 CR 509-T.d. 24). The Public Defender issued subpoenas for the assistant Summit County Prosecutor, Defendant’s Attorney Larry Whitney, and Akron Police Detective James Pasheilich. (2009 CR 23-T.d. 38, 39; 2009 CR 509-T.d. 25, 26). Billingsley, Attorney Whitney, and Detective Pasheilich testified at the hearing. In addition, the transcripts

of proceedings from Billingsley's Summit County plea and sentencing hearings were provided. (Joint Exhibits A and B, 2009 CR 23-T.d. 63; 2009 CR 509-T.d. 49).

The court set the matter for a supplemental hearing "to allow the Defendant time to subpoena other witnesses or present other evidence." (Transcript of Proceedings of January 9, 2010 Motion Hearing, hereinafter "Portage Supplemental T.p." 2; 2009 CR 23-T.d. 41; 2009 CR 509-T.d. 28). Thereafter, the Public Defender's office returned its subpoena for the assistant Summit County Prosecutor unserved. (2009 CR 23 T.d. 42; 2009 CR 509 T.d. 29). At the start of the supplemental hearing, the Public Defender stated he did not wish to present additional evidence. (Portage Supplemental T.p. 2). After allowing the parties to present additional argument, the Portage County judge took the matter under advisement and reserved ruling. (Portage Supplemental T.p. 3).

In a five-page order and journal entry, the Portage County Court detailed its reasons for overruling Billingsley's motion to enforce and to dismiss firearm specifications. (2009 CR 23-T.d. 43; 2009 CR 509-T.d. 33; February 2, 2010 Order and Journal Entry, Appellant's Appendix A-2). The court reviewed the disputed portion of the Summit County agreement and the testimony provided at the Portage County hearing. The court concluded Billingsley failed to meet his burden of proof to establish that the Portage County Prosecutor was bound by the Summit County agreement.

Billingsley subsequently entered a written no contest plea, and was found guilty of all charges. (2009 CR 23-T.d. 48, 49; 2009 CR 509-T.d. 36). The Portage County court sentenced Billingsley to consecutive terms of eight years in prison on each aggravated robbery to run consecutive to the mandatory three years in prison for each firearm specification for a total of 33 years. The Portage County court specified the time would run "concurrent to the prison term

Defendant is presently serving for Summit County Case No. CR-2008-01-0290D.”¹ (2009 CR 23-T.d. 51; 2009 CR 509-T.d. 39; Sentencing Judgment Entry, Appellant’s Appendix A-3). The court also ordered Billingsley to pay restitution to McDonald’s in the amount of \$1,710, to Wendy’s in the amount of \$1,000 and to Subway in the amount of \$590.

Upon appeal, the Eleventh District Court of Appeals correctly affirmed the decision of the trial court. *State v. Billingsley*, 11th Dist. Nos. 2010-P-0030, 2010-P-0031, 2011-Ohio-1586, *appeal allowed*, 129 Ohio St.3d 1474, 2011-Ohio-1586. In rejecting Billingsley’s sole assignment of error that “[t]he trial court abused its discretion to the prejudice of appellant by overruling his motion to enforce the Criminal Rule 11 plea agreement and motion to dismiss firearm specifications,” the Eleventh District noted “[t]he Portage County Prosecutor’s Office was not mentioned anywhere in the record of the plea hearing.” *Id.* at ¶ 18. Moreover, the Summit County and Portage County prosecutions were not successive prosecutions of the same factual scenario, but separate prosecutions of separate crimes occurring in separate jurisdictions. *Id.* at ¶ 14. The Eleventh District reasoned that a county prosecutor is empowered to investigate and prosecute crimes only within that county’s territorial jurisdiction and, therefore, rejected Billingsley’s argument that the Summit County Prosecutor’s agreement bound Portage County under an agency theory. *Id.* at ¶ 23-26.

This Court accepted discretionary review in September 2011. *State v. Billingsley*, 129 Ohio St.3d 1474, 2011-Ohio-1586. In November 2011, this Court dismissed the appeal for want of prosecution by the Appellant. 957 N.E.2d 327, 2011-5980. Billingsley filed a motion for reconsideration, and this Court reinstated the appeal in January 2012. 131 Ohio St.3d 1415, 2012-Ohio-136.

¹ Billingsley erroneously asserts the Portage County court did not run his sentence concurrent to his Summit County sentence. Appellant’s Brief at 6.

Statement of Facts

The issue before this Court involves the impact, if any, a plea agreement entered into in one county has on the prosecution of a separate criminal case in another county. Therefore, the statement of facts will summarize the relevant Summit County proceedings prior to the Portage County proceedings.

Summit County Proceedings

In Summit County, Billingsley had been facing a 24-count indictment including charges of complicity in a threatening situation, witness intimidation, and eight or nine counts of aggravated robbery with firearms specifications. (Transcript of Proceedings of October 15, 2008 Summit County Plea Hearing, hereinafter "Summit Plea T.p." 3; Transcript of Proceedings of December 21, 2009 Portage County Motion Hearing, hereinafter "Portage Hearing T.p." 9). Facing a potential sentence of well over 100 years, Billingsley entered into plea negotiations with Summit County. Billingsley agreed to plead guilty to two aggravated robberies with firearm specifications and one attempted aggravated robbery. In exchange, Summit County agreed to dismiss the remaining counts. (Summit Plea T.p. 3).

When asked if there was an agreed upon sentence, the assistant Summit² County Prosecutor stated:

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

So we're going to sit down. The detective is here. He's going to sit down with Mr. Billingsley and get the information. If he is cooperative and truthful, then as to sentencing, State will recommend eight years. If not, then if he doesn't sit

² Billingsley erroneously states this agreement was enunciated by the Portage County Prosecutor. Appellant's Brief at 10.

down and give information, subject to a polygraph, if we don't believe that he's telling the truth, then the recommendation by the State would be different.

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

(Summit Plea T.p. 4-5). Defense Attorney Whitney, then, stated, "In addition, Your Honor, if there are any cases that he talks about outside of the indictment, he would not be charged with those cases." (Summit Plea T.p. 5). The Summit County Prosecutor agreed not to pursue any additional charges. (Summit Plea T.p. 5). The Summit County court inquired if Billingsley had been listening and understood the plea offer. (Summit Plea T.p. 6-7). Billingsley confirmed that he was listening, understood, and wanted to accept the offer as described. (Summit Plea T.p. 7).

Following this Summit County plea agreement, Billingsley cooperated and provided information regarding many aggravated robberies. (Transcript of Proceedings of November 17, 2008 Summit County Sentencing Hearing, hereinafter "Summit Sentencing T.p." 2-3). During the sentencing hearing, it was indicated that in addition to providing information about Summit County crimes, Billingsley also provided information about Stark and Portage County crimes. (Summit Sentencing T.p. 3-4). The Summit County Prosecutor recommended that Billingsley receive a prison sentence of three years on the firearm specifications to be run consecutive to concurrent terms of five years for the attempt and the aggravated robberies. (Summit Sentencing T.p. 2-3). The Summit County judge "reluctantly" agreed to abide by the parties' agreement as to sentencing. (Portage Hearing T.p. 19). Consequently, he sentenced Billingsley to a total prison term of only eight years. (Summit Sentencing T.p. 6).

Billingsley was represented by an attorney throughout the Summit County proceedings and at every police interview. (Portage Hearing T.p. 20). There were additional un-indicted

charges in Summit County that were not pursued. (Portage Hearing T.p. 46-47). Portage County was not present during the plea negotiations, nor was it consulted about the negotiations. Billingsley has not moved the Summit County court to vacate his guilty plea or otherwise enforce the plea agreement it accepted.

Portage County Proceedings

After receiving Billingsley's motion to enforce his Summit County Criminal Rule 11 plea agreement and to dismiss firearms specifications, the Portage County court scheduled the matter for a hearing. (2009 CR 23-T.d. 37; 2009 CR 509-T.d. 24). At the hearing, the parties presented the transcripts of proceedings from Billingsley's Summit County plea and sentencing hearings. (Joint Exhibits A and B, 2009 CR 23-T.d. 63; 2009 CR 509-T.d. 49). In addition, Defense Attorney Whitney, Akron Detective Pasheilich, and Billingsley himself testified. A summary of the testimony of each witness follows.

i. Defense Attorney Whitney

Defense Attorney Whitney testified that he and his son represented Billingsley in the Summit County proceedings and that one of them was present each time Billingsley met with the police. (Portage Hearing T.p. 12, 20) He recalled that the plea negotiations with the Summit County Prosecutor resulted in an agreement that Billingsley would enter a plea of guilty to a combination of charges with firearm specifications in Summit County and the remainder of his Summit County indictment would be dismissed with no new charges added in exchange for Billingsley's full cooperation in sharing his knowledge either as a participant or secondhand regarding the robberies. (Portage Hearing T.p. 11-12). At some point, Defense Attorney Whitney learned that in addition to Summit County, Portage and Stark Counties had investigations regarding robberies that involved a group of individuals possibly including

Billingsley. (Portage Hearing T.p. 10-11). Defense Attorney Whitney stated that the Summit County Prosecutor told him, she had contacted the other jurisdictions involved in the group's robberies and they had agreed to either not charge them or to run the time concurrent for any pending indictments. (Portage Hearing T.p. 13). Specifically, he testified that "she indicated to me that she had talked with the Detectives in the other jurisdictions which would include in my mind Portage and Stark." (Portage Hearing T.p. 13).

Defense Attorney Whitney admitted that he did not know who the Summit County Prosecutor had spoken with in Portage County to authorize this agreement. (Portage Hearing T.p. 21). He elaborated:

I would never say that a Summit County Prosecutor had the authority to bind a Stark County Prosecutor or a Portage County Prosecutor.

But she said to me that she had talked to the authorities, okay, and that they had communicated to her, I think that's the words she used, that they had communicated they were following this agreement. I'm not here to say that whatever she says it binds anybody here.

I was under the understanding that they had assented to this agreement.

(Portage T.p. 18-19). Yet, he did not contact anyone in Portage County to confirm the existence of an agreement between the counties. (Portage Hearing T.p. 21).

Regarding the location of the various robberies, Defense Attorney Whitney testified that he had a list of approximately 30 robberies including the address where each occurred. (Portage Hearing T.p. 26). The Portage County court questioned Defense Attorney Whitney regarding the list of robberies. In response, Defense Attorney Whitney indicated that he believed the Summit County Prosecutor also had the list and that the Akron Detective may have created the list. (Portage Hearing T.p. 26). The Portage County court specifically asked, "To your recollection, and only if you know, the matters that are in front of me today, were they on the list?" Defense

Attorney Whitney responded, "I'm assuming they were, Judge." The court pressed, "You don't know." He again stated he was just assuming. (Portage Hearing T.p. 27). This list of robberies was not produced by Billingsley and placed on the record in either his Summit or Portage County proceedings. (Portage Hearing T.p. 24).

Finally, Defense Attorney Whitney explained why he added un-indicted robberies to the plea as follows:

I tried to make it a blank check there when I said anything else, you know, during the plea.

At the plea I tried to - - I tried to indicate that we were also - - I was afraid that he would say something that wasn't in those, that list, talk about those cases, so I wanted to make sure that he wouldn't be charged in any of those cases that he talked about that weren't on the list that I had. That's why I mentioned or any other thing not indicted.

(Portage Motion T.p. 28). He testified that a great deal of the negotiations occurred between Billingsley's plea and sentencing hearings in Summit County. (Portage Hearing T.p. 13).

ii. Akron Detective Pasheilich

Detective Pasheilich was the lead investigator on the Akron cases in a string of aggravated robberies that occurred over the course of a year throughout Summit, Stark, and Portage Counties. (Portage Hearing T.p. 30-31). He spoke with five individuals including Billingsley to close approximately 30 aggravated robberies. (Portage Hearing T.p. 33). Regarding any promises made to Billingsley, the Akron Detective stated, "[m]y promise was that I would go to bat for any of the other counties if they tried to run cases consecutive [] with the cases in Summit County." (Portage Hearing T.p. 33). The Akron Detective testified that Billingsley spoke with him and he relayed that information to the Summit County Prosecutor. (Portage Hearing T.p. 36).

Due to the number of defendants in these robberies, the Akron Detective couldn't remember if he spoke with Billingsley before or after the plea because they'd done it both ways. (Portage Hearing T.p. 36-37). But he conceded if the plea was entered before Billingsley spoke with him, then he would not have had the details of Portage County robberies prior to Billingsley's plea. (Portage Hearing T.p. 36). Furthermore, he admitted that no one, including the Summit County Prosecutor, promised Billingsley a "pass" for the Portage County robberies. He stated, "That's not our county, we can't do that." (Portage Hearing T.p. 37). He expanded, "It was my understanding that we would go to bat for these individuals if charges were brought up against them." (Portage Hearing T.p. 37).

The Akron Detective further revealed that he was not aware of Billingsley's robbery of the Brimfield Wendy's on February 12, 2008 and Brimfield Subway on February 24, 2008 before Billingsley's plea hearing. (Portage Hearing T.p. 42-43). Although the robberies had the same general characteristics of the group aggravated robberies that were being investigated, these two Brimfield robberies were new information from Billingsley after his plea hearing. In fact, the Wendy's robbery was committed solely by Billingsley not a group. The Akron Detective remarked, "he robbed that place alone, masked up, [and] gloved up." (Portage Hearing T.p. 43).

The Akron Detective did not personally have any contact with the Portage County Prosecutor and did not know if anyone else had made contact with the Portage County Prosecutor regarding Billingsley. (Portage Hearing T.p. 38). He stated, "I was in contact with the other jurisdictions departmentwise not prosecutorwise." (Portage Hearing T.p. 37). The Akron Detective was present for many of the pretrial discussions between the parties and the court and had multiple discussions with the Summit County Prosecutor on these cases. But the

Summit County Prosecutor never told him that she had a deal in all the other counties for Billingsley. (Portage Hearing T.p. 39).

iii. Appellant Desmond Billingsley

Billingsley testified at the Portage County hearing regarding his understanding of the plea negotiations in Summit County. Billingsley never spoke with the Summit County Prosecutor, but was advised by Defense Attorney Whitney that after entering a plea of guilty to two aggravated robberies and an attempted aggravated robbery that the Summit County court would expect Billingsley to cooperate with the prosecutor meaning, “explaining everything that I had to do with or anything that I knew about [the robberies]” (Portage Hearing T.p. 46-47).

Billingsley stated that his 24-count indictment in Summit County did not contain all of the robberies that he was involved in, both inside and outside of Summit County. (Portage Hearing T.p. 46-47). Billingsley claimed it was his understanding that the Summit County plea agreement would also cover the robberies that were not yet indicted in Portage and Stark Counties. (Portage Hearing T.p. 46, 48). In exchange for his cooperation, Billingsley believed that he would receive one sentence of eight years from Summit County. (Portage Hearing T.p. 50). Billingsley admitted that he had spoken with the Akron Detective prior to entering his plea deal. (Portage Hearing T.p. 51). But he specifically denied mentioning anything about the Portage County robberies prior to the Summit County plea. (Portage Hearing T.p. 51).

Portage County Supplemental Hearing

The court set the matter for a supplemental hearing. (2009 CR 23-T.d. 41; 2009 CR 509-T.d. 28). At the start of the supplemental hearing, the Portage County judge reiterated the purpose of the hearing was “to allow the Defendant time to subpoena other witnesses or present other evidence.” (Portage Supplemental T.p. 2). The Public Defender stated that he did not have

any additional evidence to present. (Portage Supplemental T.p. 2). He did not offer any testimony from the assistant Summit County Prosecutor or the judge who handled the case in Summit County. He also did not produce the list of robberies previously testified to by Defense Attorney Whitney. The court permitted counsel to make further argument. Finding that Billingsley failed to meet his burden of proof, the court denied his motion in a written ruling. (2009 CR 23-T.d.43; 2009 CR 509-T.d. 33; February 2, 2010 Order and Journal Entry, Appellant's Appendix A-2).

ARGUMENT

Response to Billingsley's Proposition of Law: Neither the Eleventh District Court of Appeals nor the Portage County Common Pleas Court abused their discretion in denying Billingsley's motion to enforce the Summit County Criminal Rule 11 plea agreement and motion to dismiss firearm specifications in Portage County.

- A. The record does not support Billingsley's claim that the Summit County plea agreement encompassed crimes he had committed in Portage County.

Plea bargains are generally subject to contract law principles. *State v. Bethel*, 110 Ohio St.3d 416, 2006-Ohio-4853, 854 N.E.2d 150, ¶ 50. It is necessary to determine the terms of a plea agreement before it can be determined whether a party breached the agreement. The objective standard of what was reasonably understood by the parties is used to resolve any disputes over the terms of the plea agreement. *U.S. v. Partida-Parra*, 859 F.2d 629, 633 (9th Cir. 1988) (Citations omitted).

A review of the Summit County plea hearing reveals that Billingsley agreed to enter pleas of guilty to two counts of aggravated robbery with firearm specifications and one count of attempted aggravated robbery. (Summit Plea T.p 2-3). The Summit County Prosecutor agreed to dismiss the remaining 21 counts of Billingsley's indictment. Billingsley agreed to provide "information regarding remaining aggravated robberies *we're aware of.*" (Summit Plea T.p. 4)

(Emphasis added). In exchange for his cooperation and truthfulness, Summit County agreed to recommend an eight-year sentence and not to pursue any additional charges. (Summit Plea T.p. 5).

The plea transcript further reveals that Summit County was investigating and prosecuting at least five individuals involved in a series of aggravated robberies. (Summit Plea T.p. 4). With respect to those investigations, the Summit County Prosecutor cautioned:

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

(Summit Plea T.p. 5) (Emphasis added). Billingsley asserts that this statement evidenced a "meeting of the minds" that he would not be prosecuted in any other counties, and specifically not in Portage County. Appellant's Brief at 9.

In actuality, this statement put Billingsley on notice that other counties may potentially be filing charges against him despite his plea in Summit County. Regarding those other charges, the Summit County Prosecutor stated that she was making a "recommendation." She specified that the other counties agreed in the "other defendants' cases," which further put Billingsley on notice that she had not made an agreement with those counties in his case. Her reference to "pleas" in the plural also indicates that she was discussing something beyond Billingsley's plea agreement.

Moreover, the record does not support that the Summit County Prosecutor was aware of any Portage County robberies at the time she entered into her agreement with Billingsley. The evidence supports that Billingsley was involved with some robberies outside of the indictment that the parties were aware of, and some that they were not. Defense Attorney Whitney testified

that he had a list of about 30 robberies and that he believed the Summit County Prosecutor had the same list. (Portage Hearing T.p. 24-26). Billingsley's Summit County indictment included only 24 charges. Moreover, Defense Attorney Whitney testified there may have been as many as 40 robberies between the multiple counties. (Portage Hearing T.p. 10). So, the list included some robberies that Billingsley was not indicted for that the parties were aware of. However, there were also additional robberies that were not on the list, and, therefore, not within the parties awareness. When asked by the Portage County court whether the Portage County cases were on the list, Defense Attorney Whitney was unable to specifically recall, but assumed they were. (Portage Hearing T.p. 27). Defense Attorney Whitney conceded:

I tried to make it a blank check * * * I was afraid he would say something that wasn't in those, that list, so I wanted to make sure that he wouldn't be charged in any of those cases that he talked about that weren't on the list that I had. That's why I mentioned or any other thing not indicted.

(Portage Hearing T.p. 28). But if the parties were not "aware of" the crimes, those crimes were not included in the agreement.

In addition, Defense Attorney Whitney testified that a lot transpired between the plea and the sentencing. (Portage Hearing T.p. 13). The only time Portage County is mentioned in Summit County is at the sentencing hearing. (Summit Sentencing T.p. 4). It is probable that the parties became "aware of" the Portage County robberies after Billingsley's plea. Billingsley's own testimony that he did not reveal his Portage County crimes until after the plea supports this conclusion. (Portage Hearing T.p. 51). The Akron Detective confirmed that at least two of the Portage County robberies were unknown to him before Billingsley's plea hearing, one of those because Billingsley had acted alone. (Portage Hearing T.p. 42-43). Defense Attorney Whitney also testified "[Billingsley] admitted to two that he was the only one there, I remember that, and that he was masked up and he cooperated in those two that they didn't know that anybody in this

group had committed.” (Portage Hearing T.p. 11-12). Accordingly, without knowledge of Billingsley’s involvement in the Portage County robberies before the plea hearing, there could not have been a “meeting of the minds” that the Summit County plea agreement addressed the Portage County crimes.

Assuming *arguendo* the reference to other counties was meant to be binding outside of Summit County and all the parties were aware of Billingsley’s Portage County robberies, Billingsley has not demonstrated that there was any actual authority from the Portage County Prosecutor to forego prosecution of Billingsley’s Portage County crimes. It is undisputed that the Portage County Prosecutor was not present at the plea hearing, nor was Portage County even mentioned during the Summit County plea hearing.

Regarding his discussions with the Summit County Prosecutor, Defense Attorney Whitney stated “she indicated to me that she had talked *with the Detectives in the other jurisdictions* which would include in my mind Portage and Stark.” (Portage Hearing T.p. 13) (Emphasis added). But he further testified to his knowledge that a police detective would be without authority to bind a prosecutor’s office. (Portage Hearing T.p. 22). Defense Attorney Whitney stated that he did not know who from Portage County authorized the deal, only that it “was the authorities, whoever they are.” (Portage Hearing T.p. 21). While he testified that the Summit County Prosecutor spoke with “authorities,” he concedes that she never said she talked to anybody from Portage County specifically. (Portage Hearing T.p. 24). Moreover, Defense Attorney Whitney admits that he never made any independent inquiry or attempt to contact the Portage County Prosecutor. (Portage Hearing T.p. 21).

Likewise, the Akron Detective testified that he was in contact with other counties “departmentwise” not “prosecutorwise.” (Portage Hearing T.p. 37). Not only did the Akron

Detective not personally contact the Portage County Prosecutor, he did not know if anyone else had made contact with the Portage County Prosecutor regarding Billingsley. (Portage Hearing T.p. 38). Throughout his multiple discussions with the Summit County Prosecutor regarding the cases, she never told him that she had an agreement with all the other counties for Billingsley. (Portage Hearing T.p. 39). Furthermore, the Akron Detective asserted that no one, including the Summit County Prosecutor, promised Billingsley a “pass” for the Portage County robberies. He acknowledged, “That’s not our county, we can’t do that.” (Portage Hearing T.p. 37). Consequently, there was no actual authority to enter into the Summit County plea agreement on behalf of the Portage County Prosecutor.

B. The Summit County Prosecutor lacked apparent authority to bind other county prosecutors in the state, including the Portage County Prosecutor.

Unable to establish an actual agreement with the Portage County Prosecutor or any actual authority by the Summit County Prosecutor, Billingsley now relies on an apparent agency theory. Apparent agency requires that the principal hold the agent out as having authority to act on his behalf. *Ohio State Bar Assn. v. Martin*, 118 Ohio St.3d 119, 2008-Ohio-1809, 886 N.E.2d 827, ¶ 41 (citing *Master Consol. Corp. v. BancOhio Natl. Bank* (1991), 61 Ohio St.3d 570, 575 N.E.2d 817, syllabus). The principal is not responsible for the agent’s acts when the agent’s conduct, rather than the principal’s, creates the impression of apparent authority. *Id.* Finally, the party dealing with the agent must in good faith believe that the agent possessed the necessary authority to enter into the agreement. *Id.*

In the present case, Billingsley argues the State of Ohio is the principal and the Summit County Prosecutor is the agent. But rather than focusing on the actions of the State, as principal, the evidence presented at the hearing on the motion to enforce centered on the actions of the Summit County Prosecutor, as alleged agent. Defense Attorney Whitney testified that the

Summit County Prosecutor had spoken with the “authorities” from the other counties. (Portage Hearing T.p. 18, 21). This statement might indicate that the Summit County Prosecutor held herself out as having authority from the other counties, but it does not support an argument that she held herself out as having authority to bind the State to her agreement. Moreover, if she had broad authority to contract as an agent of the State, as Billingsley contends, it would have been unnecessary for her to contact any other authorities.

Billingsley’s attorney, who advised him throughout the Summit County proceedings and police interviews, specifically testified that he knew the Summit County Prosecutor had no ability to bind the Portage County Prosecutor. He stated:

I would never say that a Summit County Prosecutor had the authority to bind a Stark County Prosecutor or a Portage County Prosecutor.

* * *

I was under the understanding that they had assented to this agreement.

(Portage T.p. 18-19) (Emphasis added). This statement belies any good faith belief that Summit County, as the alleged agent, possessed the necessary authority to enter into the agreement under an apparent agency analysis. At best, it can be argued that Defense Attorney Whitney relied on unconfirmed representations from the alleged agent that she had actual authority from the other counties. It can not be argued that he believed in good faith that the State of Ohio had clothed the Summit County Prosecutor with apparent authority to enter into a binding agreement for any other county.

Billingsley has pointed to no evidence in the record that the State of Ohio did anything as the alleged principal to support an inference that the Summit County Prosecutor had authority to enter into plea bargains regarding the separate crimes he committed in Portage County. And the Eleventh District correctly concluded, “[t]he laws of the state of Ohio support no such inference.” *Billingsley*, 2011-Ohio-1586 at ¶ 26 (quoting *State v. Barnett*, 124 Ohio App.3d 746,

755, 770 N.E.2d 564 (2d Dist. 1998), appeal not accepted, 81 Ohio St.3d 1497, 691 N.E.2d 1058).

In *Barnett*, a plea agreement was entered into between the Warren County Prosecutor and the defendant. The defendant's counsel articulated, "the consideration for this plea is that the representation by the prosecution that *no charges of any kind, anywhere* are going to be filed relating to these children, on anything that's happened to-date, obviously, that the prosecutor's aware of." *Id.* at 748 (Emphasis added). After the defendant completed his Warren County jail term, he was charged in Montgomery County for gross sexual imposition involving some of the same children. The *Barnett* court held although a county prosecutor is an agent of the state, "the county prosecutor's agency authority extends to the county line when investigating and prosecuting crimes. Thus, the county prosecutor is an agent of the state with respect to crimes committed in his county." *Id.* at 755. Unlike United States Attorneys who are under the direct supervision of the United States Attorney General, Ohio county prosecutors may interact with, but are not directly supervised by, the Ohio Attorney General. *Id.* Rather, Ohio county prosecutors "are elected by local residents and work on behalf of those constituents, inquiring into the commission of crimes within the county." *Id.*

Barnett relied, in part, on the analysis set forth in *Staten v. Neal*, 880 F.2d 962 (7th Cir. 1989). *Staten* involved a petition for a writ of habeas corpus. Staten was initially imprisoned in Fayette County, Illinois. He was transferred to Champaign County, Illinois where he escaped. He was later arrested in Iowa on robbery charges. The Iowa prosecutor contacted the Illinois Department of Corrections regarding the escape charge. The Department of Corrections referred him to the Fayette County State's Attorney who agreed to waive the prosecution of the Illinois escape charge. Relying on the promise that he would not be prosecuted for Illinois escape,

Staten pled guilty to second degree robbery in Iowa. After completing his Iowa sentence, Staten was prosecuted by the Champaign County State's Attorney for the Illinois escape. The Seventh Circuit held that "the Fayette County State's Attorney had no authority to promise not to prosecute an offense that occurred in Champaign County." *Id.* at 964. The *Staten* court reasoned the Illinois Constitution provides for the election of a state's attorney in each county. *Id.* In addition, the Illinois statute provides that the state's attorney in each county prosecutes criminal actions "in the circuit court for his county, in which the people of *the State or county* may be concerned." *Id.* (quoting Ill.Rev.Stat. ch. 14, ¶ 5(1) (1985)). (Emphasis added).

Similarly, in Ohio, each county elects a prosecuting attorney to represent it. R.C. 309.01. Each Ohio county prosecuting attorney is empowered to inquire into the commission of crimes within his county and prosecute those criminal complaints on behalf of the state. R.C. 309.08(A). The Ohio Constitution provides for a prosecution in the county where the crime occurred. Ohio Constitution, Article I, Section 10. Even when there is a change of venue, the prosecuting attorney where the action originated is required to prosecute the case. Crim.R.18. Consequently, the Illinois statute at issue in *Staten* is similar to the Ohio statute with respect to the authority conferred on a county prosecutor. Whether it be "on behalf of the state" or "in which the people of the State *** may be concerned," both are prosecuting violations of state laws when the crime occurs in their county.

Moreover, unlike the defendant in *Staten* who mistakenly believed that he was dealing with someone who had the ability to contract, Billingsley through his attorney knew the Summit County Prosecutor had no apparent authority to contract regarding his Portage County crimes. (Portage Hearing T.p. 18). Even assuming arguendo that the Summit County Prosecutor might have exceeded her authority:

It is hardly novel that an agent might have general authority to enter into an agreement of some kind but nevertheless can exceed his authority in the final agreement's specific terms. In other words, a prosecutor acts on his own (or at least on the county's) behalf when he exceeds the authority expressly delegated to him by the state."

Cady v. Arenac County, 574 F.3d 334, 347 (6th Cir. 2009) (Martin, J., concurring).

Billingsley's reliance on the Eighth District's decision in *State v. Urvan*, 4 Ohio App.3d 151, 446 N.E.2d 1161 (1982), is misplaced. *Urvan* involved a double jeopardy challenge to a successive prosecution where two allied offenses occurred in some part in both of two counties. The defendant stole property from his employer in Cuyahoga County. He then sold some of the stolen merchandise in Summit County and stored some of it at his home in Medina County. He was charged in Medina County with receiving stolen property. As part of his placement in a Medina County pretrial diversion program, the defendant entered a contract containing terms that upon successful completion his charges were to be nolle and "*at no time thereafter[would he] be subject to arbitrary prosecution or additional court appearances on charges covered by this agreement.*" *Id.* at 154 (Emphasis sic). Although he had only been charged with receiving stolen property, the contract listed both receiving stolen property and grand theft. In addition, the individual who prepared the contract was specifically aware of the Cuyahoga County theft. *Id.* at 153. Thereafter, the defendant was indicted in Cuyahoga County for grand theft. Reasoning that the offenses were part of a continuing course of conduct and allied offenses of similar import, for which the defendant could have been charged in either county, the Eighth District found the second prosecution was barred by double jeopardy. *Id.* at 155-157.

But the Eighth District has declared "*State v. Urvan* must be limited to its specific facts." *State v. Mutter*, 14 Ohio App.3d 356, 358, 471 N.E.2d 782 (1983). In *Mutter*, the defendant was involved with drug trafficking in Cuyahoga, Summit, and Medina Counties. He was first

prosecuted in Summit County and then charged in Cuyahoga County. *Id.* at 356. The Eighth District affirmed the trial court's denial of the defendant's motion to dismiss the Cuyahoga County indictment. In distinguishing *Urvan*, the court held, "We do not believe the law is that a person can sell drugs for weeks, months, or years, and then claim it was all one course of conduct." *Id.* at 358. Other appellate districts have similarly noted the limited applicability of *Urvan*. See, e.g., *State v. Cunningham*, 3d Dist. No. 13-92-5, 1992 WL 198123 (Aug. 14, 1992) (allowing prosecution in multiple counties where separate violations of the same offense); *State v. Amato*, 55 Ohio App.3d 32, 561 N.E.2d 1058 (10th Dist. 1989) (allowing prosecution in multiple counties where different victims on different dates even if similar motive and modus operandi).

Similar to *Barnett*, and unlike *Urvan*, Billingsley's crimes were not allied offenses of similar import. Rather Billingsley targeted different victims at different locations on different dates. Billingsley was not subjected to successive prosecutions arising out of the same factual circumstances. Rather, he was prosecuted by Portage County for the separate crimes he committed in Portage County.

Billingsley further confounds his apparent agency argument by asserting that both the Summit and Portage County Prosecutors are State employees under R.C. 2969.21(C). As a State employee, Billingsley argues that the Summit County Prosecutor binds the State of Ohio and all counties therein to its contracts. Under R.C. 2969.21, prosecutors are "government employees." *Cruse v. Larson*, 10th Dist. No. 07AP-370, 2007-Ohio-5926, ¶ 17. However, that does not convert a prosecutor into a State employee. The term "employee" in R.C. 2969.21(C) encompasses both employees of the state and of political subdivisions. County prosecutors are elected by the political subdivisions they represent, namely their respective counties. R.C.

309.01. Moreover, county prosecutors and assistant county prosecutors are compensated out of the general fund of each county. R.C. 325.01 and 309.06. Consequently, they are employees of their respective counties, not the State.

C. To hold that one county prosecutor, as a state agent, can bind other state agents would open a veritable Pandora's box.

Defendants, who alone have full knowledge of where they have committed crimes, can not frustrate the prosecution of those crimes throughout the entire State of Ohio merely by entering into an agreement with one local prosecutor. If a defendant could contract away all his crimes throughout the entire State by entering into an agreement with one local prosecutor, then defendants would be encouraged to commit minor crimes in one jurisdiction in order to foreclose the prosecution of more serious crimes committed in other jurisdictions. It is fundamentally unfair to allow one party to a contract to bind the other party to unrevealed terms.

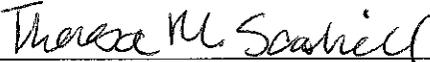
The implications of Billingsley's agency theory are broader than the 88 counties in Ohio. In addition to county prosecutors, village solicitors and city law directors also prosecute criminal charges on behalf of the state. See R.C. 1901.34(C) and 309.08; see also *Pusey v. City of Youngstown*, 11 F.3d 652 (6th Cir. 1993) (holding a city prosecutor is an agent of the state). If even a village solicitor could bind the entire State of Ohio, a guilty plea on a relatively minor charge, could be used to prevent a county prosecutor from pursuing charges on a major crime, such as murder. Moreover, there are other state agents who also deal with criminal matters in Ohio. Some examples include the Ohio Attorney General (R.C. 109.02), the State Medical Board (R.C. 4731.22), and the State Board of Pharmacy (R.C. 4729.16). Following Appellant's argument to its logical conclusion, county prosecutors, or indeed any state agents, could bind all other state agents. This is not the law in Ohio. Rather, Ohio has delegated certain responsibilities to certain agents, but not all agents possess the same authority.

CONCLUSION

Billingsley should not be permitted to broaden his plea agreement beyond what was contemplated by the parties and beyond the limited authority he knew the Summit County Prosecutor possessed. The record in this case is devoid of any reference of anyone contacting the Portage County Prosecutor regarding the Summit County plea negotiations. And Billingsley received the benefit of his bargain in Summit County. Rather than face a potential sentence in excess of 100 years if convicted, he received 8 years, and Summit County did not indict him on any additional charges. See *State v. Dumas*, 5th Dist. No. 02CA60, 2003-Ohio-4117, ¶ 39, appeal not accepted, 100 Ohio St.3d 1509, 799 N.E.2d 187. Billingsley's attempt to pass a "blank check" for all his crimes throughout the State of Ohio must fail. This Court should reject Billingsley's proposition of law and affirm the decisions of the Eleventh District Court of Appeals and the Portage County Common Pleas Court.

Respectfully submitted,

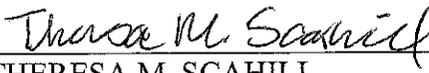
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Merit Brief has been sent by regular U.S. mail to John P. Laczko, Attorney for Appellant, Portage County Public Defender's Office, 209 South Chestnut Street, Suite 400, Ravenna, Ohio 44266, and Stephen A. Goldmeier, Attorney for Amicus Curiae Ohio Public Defender, Office of the Ohio Public Defender, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215 this 28th day of February 2012.



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