

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
	:	
Plaintiff-Appellee	:	Case No. 2011-0827
	:	
vs.	:	On Appeal from the Portage County
	:	Court of Appeals, Eleventh Appellate
DESMOND A. BILLINGSLEY	:	Dist. Case No. 10 PA 00030 & 10 PA 00031
	:	
Defendant-Appellant	:	

**MERIT BRIEF OF *AMICUS CURIAE* OHIO PROSECUTING ATTORNEYS
ASSOCIATION IN SUPPORT OF APPELLEE**

COUNSEL FOR APPELLEE
Victor V. Vigluicci (0012579)
Portage County Prosecuting Attorney
Theresa M. Scahill (0078432)
(Counsel of Record)
Assistant Prosecuting Attorney

241 South Chestnut Street
Ravenna, Ohio 44266
(330) 297-3850 (Phone)
(330) 347-3856 (Fax)

AMICUS CURIAE
Ohio Prosecuting Attorneys Association
Carol Hamilton O'Brien (0026965)
Delaware County Prosecuting Attorney
Douglas N. Dumolt (0080866)
Assistant Prosecuting Attorney

140 N. Sandusky St., 3rd Floor
Delaware, Ohio 43015
(740) 833-2690 (Phone)

COUNSEL FOR APPELLANT
Dennis Day Lager (0026073)
Portage County Public Defender
John P. Laczko (0051918)
(Counsel of Record)
Assistant Public Defender

209 South Chestnut Street, Suite 400
Ravenna, Ohio 44266
(330) 297-3665 (Phone)

AMICUS CURIAE
Office of the Ohio Public Defender
Stephen A. Goldmeier (0087553)
Assistant State Public Defender

250 East Broad Street, Suite 1400
Columbus, Ohio 43215
(614) 466-5394 (Phone)
(614) 752-5167 (Fax)

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Ohio Prosecuting Attorneys Association is an association of county prosecutors in the eighty-eight counties of the State of Ohio. This case comes before this Honorable Court because Appellant sought to bind the Portage County prosecutor to a plea agreement he had negotiated with a Summit County prosecutor in a Summit County criminal case. Although the Portage County prosecutor had no knowledge of the agreement and had not consented to its terms, Appellant sought to use the agreement to prevent the Portage County prosecutor from prosecuting him for criminal acts wholly committed within Portage County.

The Ohio Prosecuting Attorneys Association asks this Court to affirm the Eleventh District Court of Appeals who, relying on well-settled principles of contract law, found that the Summit County prosecutor lacked both express and apparent authority to bind the Portage County prosecutor to her negotiated plea. To reverse the Eleventh District, who followed the well-reasoned decisions of the Second and Fifth District Courts of Appeal, would arbitrarily bind an innocent third party to a contract to which it was not a party and of which it had no knowledge. Moreover, it would represent a novel expansion of the powers and the authority of the office of the county prosecutor not supported by statute.

STATEMENT OF FACTS

The *amicus curiae*, the Ohio Prosecuting Attorneys Association, fully adopts the Statement of Facts as contained in the brief filed by Appellee State of Ohio.

PROPOSITION OF LAW

The Eleventh District Court of Appeals did not abuse its discretion in affirming the trial court's decision to deny Appellant's motion to enforce the Summit County Criminal Rule 11 plea agreement and motion to dismiss in Portage County.

ARGUMENT

I. The Eleventh District Court of Appeals properly affirmed the trial court's denial of Appellant's motion to enforce the Summit County Criminal Rule 11 plea agreement

The United States Supreme Court has repeatedly held that principles of contract law will apply when examining plea negotiations between a defendant and the state. *See Santobello v. New York* (1971), 404 U.S. 257. The Court has recognized that while the analogy may not hold in all respects, plea bargains are essentially contracts between criminal defendants and the government. *See Puckett v. U.S.* (2009) 566 U.S. 129, 137 (citing *Mabry v. Johnson* (1984), 467 U.S. 504, 508). In *Puckett*, the Court explained that if the government fails to meet its obligations, a defendant may be entitled to rescission or specific performance of the plea agreement. *Puckett* at 137.

Following the guidance of the United States Supreme Court, this Court has adopted the same analysis and held that principles of contract law are to govern plea negotiations between defendants and the state. *See State v. Bethel* (2006), 110 Ohio St.3d 416, 423; *State v. Underwood* (2010), 124 Ohio St.3d 365, 377. Recognizing that the United States Supreme Court has not held that the United States Constitution requires specific performance when the government breaches a plea agreement, this Court has declined to adopt a broader interpretation. *See e.g. State ex rel. Seikbert v. Wilkinson* (1994), 69 Ohio St.3d 489, 491. Instead, this Court applies traditional principles of contract law which dictate that the decision to grant specific performance rests in the sound discretion of the trial court. *See Sternberg v. Board of Trustees of Kent State University et al.* (1974), 37 Ohio St.2d 115, 119 (quoting *Huntington v. Rodgers* (1859), 9 Ohio St. 511, 516) (explaining specific performance is not a matter of right, but of grace).

Appellant in this case requested specific performance of the plea agreement he negotiated with the Summit County Prosecutor. An action in specific performance requires a contract which is valid and mutually binding upon the parties to the contract. *See Bretz v. The Union Central Life Ins. Co.* (1938), 134 Ohio St. 171, 177. While there is no assertion that the Portage County prosecutor was a party to negotiations, he could still be bound to the terms of the agreement under principles of agency even if not explicitly a party to the contract.

The relationship of principal and agent, and the resultant liability of the principal for the acts of the agent, may be created by an express grant of authority by the principal. Express authority is the authority which is directly granted to or conferred upon the agent or employee in express terms by the principal, and it extends only to such powers as the principal gives the agent in direct terms. *See Master Consolidated Corp. v. BancOhio Natl. Bank* (1991) 61 Ohio St.3d 570, 574 (internal citations omitted).

In addition to instances where principals are bound by the acts of agents to whom they have conferred the express authority to act, a principal may be bound by agents acting with apparent authority. This Court has held that “even where one assuming to act as agent for a party in the making of a contract has no actual authority to so act, such party will be bound by the contract if such party has by his words or conduct, reasonably interpreted, caused the other party to the contract to believe that the one assuming to act as agent had the necessary authority to make the contract.” *Miller v. Wick Blg. Co.* (1950), 154 Ohio St. 93, paragraph two of the syllabus; *see also, Cascioli v. Central Mut. Ins. Co.* (1983), 4 Ohio St.3d 179, 181.

A. The Summit County Prosecutor Lacked Apparent and Express Authority to bind Appellee to the terms of the Criminal Rule 11 Plea Agreement

In this case, Appellee performed no actions and made no representations which would imbue the Summit County prosecutor with the apparent authority to negotiate on his behalf. In

order for a principal to be bound by the acts of his agent under the theory of apparent agency, evidence must affirmatively show: (1) that the principal held the agent out to the public as possessing sufficient authority to embrace the particular act in question, or knowingly permitted him to act as having such authority, and (2) that the person dealing with the agent knew of those facts and acting in good faith had reason to believe and did believe that the agent possessed the necessary authority. *See Master Consolidated Corp.*, syllabus. The record is unequivocally clear that Appellee engaged in no actions and made no representations which would cause the Appellant to believe the Summit County prosecutor had the authority to negotiate on his behalf.

At the hearing conducted on Appellant's Motions on December 21, 2009, hereinafter "Motion Hearing", testimony was offered by Appellant's trial counsel from his Summit County criminal case, a detective who interviewed Appellant, and Appellant himself. Appellant's trial counsel from his Summit County criminal case, Larry Whitney, testified regarding the negotiations with the Summit County prosecutor. He explained that the prosecutor has "talked with the detectives in other jurisdictions" and that if Appellant was charged "they would run their time concurrent or they weren't going to charge him." Motion Hearing Trans. p 13 lines 3-15. He further testified that Portage County was never mentioned in the negotiations but that a Kent Detective was present at one of the sessions where Appellant provided information. Motion Hearing Trans. p 16, lines 1-10.

It is undisputed that the Portage County prosecutor was not part of the plea negotiations in the Summit County case. Moreover, there was no evidence offered that Appellee authorized the Summit County prosecutor to negotiate on his behalf. Whitney testified that while a Kent police officer was present during Appellant's interview, he knew that the police officers are not authorized to engage in plea negotiations on behalf of the Portage County. Motion Hearing

Trans. p 22, lines 5-16. He further testified that despite knowing that the robberies to which Appellant would be offering information occurred in Stark, Portage, and Summit Counties, he made no inquiries of those offices regarding their authorization of the plea agreement. Motion Hearing Trans. p 21 lines 21-24; 25, lines 21-25.

Instead of contacting representatives from the three jurisdictions where his client was subject to prosecution, Appellant and his trial counsel relied upon the vague representations of a Summit County prosecutor. Whitney testified that the Summit County prosecutor told him that “the authorities” authorized this agreement. Motion Hearing Trans. p 21, lines 13-18. While the Summit County prosecutor made no mention, privately or on the record, of Portage County or any other specific jurisdictions she had spoken to, Appellant asserts that these vague representations somehow bound the Appellee to an agreement it did not negotiate and of which it was not aware. Motion Hearing Trans. p 24, lines 9-11.

Appellant’s argument for apparent authority relies on several statements made by the Summit County assistant prosecutor during the change of plea in his Summit County case and testimony from his Summit County trial counsel. Appellant’s Merit Brief p 11-13. However, this argument reflects a fundamental misunderstanding of how apparent authority is created. This Court has long held that “the apparent power of an agent is to be determined by the act of the principal and not by the acts of the agent; a principal is responsible for the acts of an agent within his apparent authority only where the principal himself by his acts or conduct has clothed the agent with the appearance of the authority and not where the agent's own conduct has created the apparent authority.” See *Master Consolidated Corp.* at 576.

The relevant inquiry here relates to the actions taken by Appellee, the alleged principal, which would create the appearance of authority in the Summit County prosecutor. The record is

entirely devoid of any actions taken by Appellee. Nothing in the record supports the conclusion that the Appellee, publicly or privately, conferred any authority onto the Summit County prosecutor to negotiate on his behalf. Moreover, there is no evidence that he was aware of the potential plea agreement and then permitted the Summit County prosecutor to negotiate the agreement without his consent. These facts simply do not exist. Appellant cannot claim that Appellee's actions caused him to reasonably believe that the Summit County prosecutor possessed the necessary authority to negotiate on Appellee's behalf.

Scenarios could exist where a Summit County prosecutor may have had express or apparent authority to bind Appellee to a negotiated plea agreement. Had Appellant, or his trial counsel, been in contact with Appellee and received some assurances that he would honor the terms of the Summit County plea agreement, Appellee may have been bound to its terms. Through Appellee's own actions, he would have granted express authority to the Summit County prosecutor to negotiate on his behalf. Similarly, had Appellant offered evidence that Appellee was aware of the terms of the Summit County plea agreement, but took no actions to inform Appellant that Summit County lacked authority to negotiate on his behalf, Appellee may have been bound to the terms of the negotiations under a theory of apparent authority. However, nothing remotely resembling these scenarios occurred.

Appellant failed to offer evidence that Appellee bestowed express authority upon the Summit County prosecutor to negotiate on his behalf. Furthermore, Appellant failed to demonstrate actions by Appellee that created a reasonable belief that the Summit County Prosecutor had apparent authority to act on his behalf. Given the lack of evidence presented by Appellant, the Eleventh District Court of Appeals properly affirmed the trial court's

determination that Appellee was not bound by negotiated plea agreement of the Summit County Assistant Prosecutor.

B. The Summit County Prosecutor Lacked Both Express and Apparent Authority to bind prosecutors in other counties, through the State of Ohio, to the terms of the Criminal Rule 11 Plea Agreement.

Appellant also alleges that the Summit County prosecutor had the actual and apparent authority to bind the State of Ohio, and through it the elected prosecutors of Ohio's other eighty-seven counties, to the terms of the plea agreement. As discussed above, agents of a principal only have the authority to bind the principal when the principal has conferred express or apparent authority onto the agent. See *Master Consolidated Corp*, supra. Because the Summit County prosecutor negotiated an agreement that was outside the express and apparent authority granted to her by the State of Ohio, the State of Ohio, and the other county prosecutors who act under its authority, are not be bound by the terms of Appellant's Summit County plea agreement.

This Court has long recognized that a prosecuting attorney is a county officer whose election is provided for and whose duties are prescribed by statute. *State ex rel. Finley v. Lodwich* (1940), 137 Ohio St. 329, (*syllabus*, paragraph 1). This Court has explained that a "prosecuting attorney of a county exists only by virtue of the favor of the general assembly of Ohio, under Section 1, Article X, wherein the general assembly is authorized to provide, by law, for the election of such county and township officers as may be necessary. See *State ex rel. Doerfler v. Price* (1920), 101 Ohio St. 50, 57 (internal quotation omitted). Appellant cites no statutory authority granting a county prosecutor the authority to contract on behalf of the prosecuting attorney of another county.

Statutes establishing and governing the office of the county prosecutor are codified in Title III, Chapter 309 of the Revised Code. Revised Code § 309.08 defines the powers and duties of the prosecuting attorney. In pertinent part, R.C. § 309.08 provides:

“(A) The prosecuting attorney may inquire into the commission of crimes within the county. The prosecuting attorney shall prosecute, on behalf of the state, all complaints, suits, and controversies in which the state is a party... and other suits, matters, and controversies that the prosecuting attorney is required to prosecute within or outside the county... In conjunction with the attorney general, the prosecuting attorney shall prosecute in the supreme court cases arising in the prosecuting attorney’s county.”

Revised Code § 309.08 clearly imbues the county prosecutor with the express authority to prosecute criminal cases, on behalf of the State of Ohio, within the prosecutor’s county; however, nothing in this statute suggests the prosecutor has authority to exercise his authority outside the territorial limits of his or her county.

While nothing in R.C. § 309.08 explicitly limits the authority of a county prosecutor to the territorial limits of his county, this Court has previously explained that a prosecuting attorney has only those powers conferred by statute, either expressly or by necessary implication. See *State ex rel. Corrigan v. Seminatore*, 66 Ohio St. 2d 459, 423 N.E.2d 105 (1981). Moreover, repeated references to the “jurisdiction” of county prosecutors throughout the Revised Code suggest that the General Assembly intended to limit the authority of county prosecutors to the county in which they were elected. For example, R.C. § 109.83(A) reads, in pertinent part, “When it appears to the attorney general, ..., that there is cause to prosecute for the commission of a crime, the attorney general shall refer the evidence to the prosecuting attorney having jurisdiction of the matter.” See also, R.C. § 177.03(D)(2)(a).

While the General Assembly has clearly empowered county prosecutors to prosecute criminal offenses on behalf of the State of Ohio within their county, Appellant has offered no

authority to support the proposition they have the power to contract on behalf of prosecutors in other counties. Given that a prosecutor's authority is limited to that granted or necessarily implied by statute, no argument premised upon express authority can prevail absent a showing of express statutory authority allowing a prosecutor to act on behalf of the State of Ohio in counties where he or she was not elected.

Despite Appellant's failure to demonstrate the Summit County prosecutor possessed express authority to bind other counties to her plea agreement, the State of Ohio, and its other county prosecutors, still may have been bound to the plea agreement had Appellant established the existence of apparent authority. However, Appellant offered no evidence at the Motion Hearing of acts taken by the State of Ohio, the alleged principal, which would have conferred the apparent authority upon the Summit County prosecutor to bind the principal to the terms of Appellant's plea agreement.

The record contains a variety of references to actions and representations of the alleged agent, the Summit County prosecutor, but contains no references actions taken by the alleged principal. As discussed above, the apparent power of an agent is to be determined by the act of the principal and not by the acts of the agent. *See Master Consolidated Corp.* at 576. Because Appellant can point to no actions on the part of the principal that would cause him to reasonably believe the Summit County prosecutor had the authority to bind Appellee, and further failed to show that he knew of those facts and relied upon those facts in good faith, the Eleventh District Court of Appeals properly affirmed the trial court's ruling.

While relatively few appellate decisions address the central issue of this case, several courts of appeal have examined whether a county prosecutor has the actual or apparent authority to prohibit an offender's prosecution in another county on charges that are not allied offenses of

similar import. Thus far the Second, Fifth, and Eleventh District Courts of Appeal have issued decisions directly on point. In each case the courts of appeal have held that one county prosecutor is not bound by the promise of a county prosecutor a different county when the plea agreement is negotiated without the consent of the prosecutor in the second county. See *State v. Barnett*, 124 Ohio App.3d 746; *State v. Dumas*, 2003-Ohio-4117; *State v. Billingsley*, 2011-Ohio-1586.

The Second District Court of appeals has examined circumstances highly similar to the case at bar. In *Barnett*, the Warren County prosecutor negotiated a plea agreement that appeared to bar the prosecution of offenses that occurred wholly within Montgomery County. The question before the court was whether a county prosecutor has the actual or apparent authority to prohibit a defendant's prosecution in a second county for an unrelated offense without the second county prosecutor's consent. *Barnett* at 752. The Second District concluded that although a county prosecutor is an agent of the state and has the express authority of the state to investigate and prosecute crimes within a county, that authority does not extend beyond the county line. *Id.* at 755. Furthermore, the court found that the State of Ohio performed no act which would confer apparent authority to negotiate plea bargains with respect to offenses committed wholly outside Warren County. *Id.*

Similarly in *Dumas*, the Fifth District Court of Appeals examined a case where a defendant sought to use the terms of a plea agreement negotiated with a Franklin County prosecutor to avoid criminal liability in a subsequent prosecution in Fairfield County. *Dumas* at ¶ 13. The defendant in *Dumas* had provided information on a number of robberies in accordance to a plea agreement negotiated with the Franklin County prosecutor. Based in part upon the information he provided, the Fairfield County prosecutor indicted him for a number of offenses.

Adopting the reasoning of *Barnett*, the Fifth District held that under Ohio law, a county prosecutor is only an agent of the State of Ohio with respect to crimes committed in his or her county. They concluded that a prosecutor in one county is not bound by a plea agreement agreed to by a prosecutor in another county. *Id* at ¶ 26.

The Tenth District Court of Appeals has also adopted the reasoning of *Barnett* in a similar context. See *FOE Aerie 2177 Greenville v. Ohio State Liquor Control Comm'n*, 2002-Ohio-4441 at ¶ 17. In this case, a Darke County prosecutor had negotiated a plea agreement in which the State of Ohio would not proceed with other criminal or administrative charges against appellant arising out of the investigation. *Id.* at ¶ 15. The Tenth District concluded that although a county prosecutor is an agent of the state for purposes of prosecuting crimes committed within a county, his or her authority to contract is not unlimited. *Id.* at ¶ 17. Recognizing that the authority that agents of the state have to contract is limited to that which is delegated to them by the General Assembly, the Tenth District found nothing in R.C. § 309.08 that authorized the Darke County prosecutor to bind the State of Ohio with respect to an administrative matter within the province of the Ohio State Liquor Control Commission. *Id* at ¶ 19. Similarly, nothing in R.C. § 309.08 authorizes the one county prosecutor to bind a prosecutor in a different jurisdiction to a plea agreement to which he was not a party.

The primary authority relied upon by Appellant in support the proposition that Appellee is bound by the plea agreement of Summit County is *State v. Urvan*, 4 Ohio App. 3d 151. In *Urvan*, the defendant engaged in a course of criminal conduct that encompassed both Medina and Cuyahoga County. *Id.* at 155. When the defendant was charged with receiving stolen property in Medina County, he successfully completed the diversion program and the case was dismissed. After the case was dismissed, the Defendant was then charged in Cuyahoga County

for theft of the items that were subject to the Medina County indictment. Relying upon “the spirit and the letter of constitutional Double Jeopardy policy,” the Eight District Court of Appeal found that successful completion of a prosecutor’s diversion program in one jurisdiction precluded prosecution of an offense in a second jurisdiction when the offenses were allied offenses of similar import. *Id.* at 158.

Approximately a year after *Urvan*, the Eight District revisited its decision in a similar context and held that “*State v. Urvan* must be limited to its specific facts.” See *State v. Mutter*, 14 Ohio App.3d 356, 358. Regardless of the original wisdom of *Urvan*, the Eighth District itself expressly limited the reasoning of its decision. Assuming *arguendo* and *dubitante* that *Urvan* possesses some persuasive authority, its facts are clearly distinguishable from the case at bar. Unlike in *Urvan*, the conduct for which Appellant was convicted in Portage County occurred wholly within Portage County. The offenses were distinct and independent robberies that occurred in an entirely separate jurisdiction from those he pled guilty to in Summit County. The offenses were not allied offenses of similar import, so whatever merit the “Double Jeopardy” argument may have possessed is inapplicable in this case.

CONCLUSION

The Appellant in this case negotiated a plea agreement with a Summit County prosecutor in his Summit County criminal case. There is no evidence that Appellee took any actions, expressly or implicitly, to authorize the Summit County to negotiate a plea agreement on his behalf. Appellee was an innocent third party, entirely unaware of Appellant’s Summit County plea agreement. Appellant had full knowledge of where he committed his criminal offenses, yet never bothered to determine if Appellee, or the prosecutors in the other counties where he engaged in criminal conduct, would consent to the proposed plea agreement.

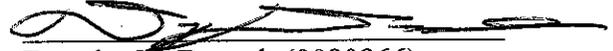
Appellant can point to no statutory authority authorizing a county prosecutor to negotiate agreements that would prohibit the prosecution of criminal offenses wholly committed within a foreign county. Absent evidence of express statutory authority, Appellant must rely upon the novel argument that the Summit County prosecutor somehow had apparent authority to bind the State of Ohio to an agreement she had no authority to make. However, it is a well settled principle of agency law that it is the actions of the principal, not of the agent, that create apparent authority. Appellant can point to no actions on the part of the State of Ohio, or the Appellee, which could substantiate a reasonable good faith belief that the Summit County prosecutor could bind the Appellee to her agreement.

It is the Appellee, not the Summit County prosecutor, who the General Assembly has granted both express and apparent authority to investigate criminal offenses that occur within Portage County. It is the Appellee, not the Summit County prosecutor, who is entrusted with prosecuting criminal offenses that occur within Portage County. It should therefore, be the decision of Appellee, not the Summit County prosecutor, whether or not to hold Appellant accountable for the aggravated robberies he committed within Portage County as it is Appellee, not the Summit County prosecutor, who is ultimately accountable to the citizens of Portage County.

For the foregoing reasons, The Ohio Prosecuting Attorneys Association urges this Honorable Court to uphold established principles of agency and affirm the well-reasoned decision of the Eleventh District Court of Appeals.

Respectfully submitted,

CAROL HAMILTON-O'BRIEN,
PROSECUTING ATTORNEY



Douglas N. Dumolt (0080866)
Assistant Prosecuting Attorney
Delaware County
140 N. Sandusky Street
Delaware, Ohio 43015
(740) 833-2690
(740) 833-2689 FAX
ddumolt@co.delaware.oh.us
COUNSEL FOR *AMICUS CURIAE*

CERTIFICATE OF SERVICE

The undersigned Attorney hereby certifies that a true and accurate copy of the foregoing MERIT BRIEF OF *AMICUS CURIAE* OHIO PROSECUTING ATTORNEYS ASSOCIATION IN SUPPORT OF APPELLEE was served upon the following counsel via regular mail this 29th of February, 2012; Theresa M. Scabill, 241 South Chestnut St. Ravenna OH, 44266; John P. Laczko, 209 South Chestnut St., Suite 400, Ravenna, OH 44266; Stephen A. Goldmeier, 250 East Broad St., Suite 1400, Columbus, OH 43215.



Douglas N. Dumolt (0080866)
Counsel for *Amicus Curiae*