

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
	:	Case No. 2011-1912
Plaintiff-Appellee,	:	
	:	On Appeal from the Erie
vs.	:	County Court of Appeals,
	:	Sixth Appellate District
THOMAS J. RICKS,	:	
	:	Court of Appeals
Defendant-Appellant.	:	Case No. E-10-022

APPELLANT THOMAS J. RICKS'S MOTION FOR RECONSIDERATION

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SUPREME COURT OF OHIO

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Appellant Thomas J. Ricks requests that this Court reconsider its decision of February 22, 2012, in which this Court dismissed Mr. Ricks's discretionary appeal as not involving any substantial constitutional question. S.Ct.Prac.R. 11.2. Mr. Ricks requests that this Court reconsider that decision regarding *only* Mr. Ricks's second proposition of law, which is:

A non-testifying codefendant's inculpatory, testimonial, out-of-court statements may not be admitted at a defendant's trial through the testimony of an investigating officer as non-hearsay for the purpose of explaining the officer's conduct during the course of an investigation. The admission of a codefendant's statements in that regard violates the defendant's right to confront the State's evidence against the defendant, in violation of the defendant's rights under the Sixth and Fourteenth Amendments to the United States Constitution, and Sections 10 and 16, Article I of the Ohio Constitution.

Mr. Ricks will not belabor the facts underlying his second proposition of law, except to say that the following happened during his aggravated murder trial:

- Prior to trial, Mr. Ricks expressed his concern regarding the State's use of the non-testifying codefendant's ("Mr. Gipson") assertions that Mr. Ricks was involved with the crimes, and that Mr. Gipson had identified Mr. Ricks for the police. (Tr. 317-24). The trial court expressed that "definitely the statements are concerning," but cited to *State v. Blevins*, 36 Ohio App.3d 147, 149, 521 N.E.2d 1105 (1987), and ruled that the statements could be admitted because they explained an officer's conduct during an investigation. (Tr. 317-24)
- During the State's opening argument, the prosecutor told the jury that Mr. Gipson had been a "suspect"; that Mr. Gipson was pulled in for questioning; that the police wondered who was with Mr. Gipson on the night before the shooting; that they "tried to identify" that person; that the police drove Mr. Gipson to the area where Mr. Ricks had been

staying; that Mr. Gipson pointed out Mr. Ricks; that Mr. Gipson became visibly scared; that the police obtained a photograph of Mr. Ricks soon thereafter; and that when the photograph was shown to Mr. Gipson, Mr. Gipson said “that’s him.” (Tr. 340-42). Mr. Ricks’s objections were overruled. (Tr. 340-42).

- During the State’s presentation of evidence, a Michigan police officer testified that he spoke with Mr. Gipson about the crimes; that the officer had learned that there were *two* suspects (one of whom was Mr. Gipson); that the officer had been told by the Sandusky, Ohio police that the other suspect was called “Peanut”; that he spoke with Mr. Gipson for the purpose of determining who Peanut was; that Mr. Gipson provided a description of Peanut; that the officer drove Mr. Gipson to the area where Peanut (Mr. Ricks) was staying because Mr. Gipson knew Peanut; that they were trying to make an identification of Peanut; that Mr. Gipson pointed out Peanut and the house in which Peanut was staying; that Mr. Gipson was afraid; that they went back to the police station and came up with the name Thomas Ricks; that the police officer obtained a photograph of Mr. Ricks; that the police officer showed that photograph to Mr. Gipson; and that Mr. Gipson identified Mr. Ricks as Peanut. (Tr. 432-50). Mr. Ricks’s objections were overruled under the authority of *Blevins* and its progeny, and a curative instruction was given. (Tr. 432-50).
- After the presentation of evidence, Mr. Ricks renewed his motion for a mistrial. (Tr. 1220). During the State’s closing argument, the prosecutor highlighted the out-of-court statements in arguing to the jury that Mr. Ricks was guilty of aggravated murder. (Tr. 1238-40).

Mr. Ricks is not merely asking this Court for error correction. The decision of the Sixth District Court of Appeals overruling Mr. Ricks's confrontation-based claims set a dangerous precedent. And in doing so, it presented this Court with a substantial constitutional question. *See State v. Ricks*, Erie App. No. E-10-022, 2011-Ohio-5043, 2011 Ohio App. LEXIS 4157, ¶ 59-69; *see also Ricks* at ¶ 103-35 (Yarbrough, J., dissenting).

In its majority opinion, the court of appeals quoted from two decisions of the Supreme Court of the United States—*Lilly v. Virginia*, 527 U.S. 116, 123-24, 119 S.Ct. 1887, 144 L.Ed.2d 117 (1999), and *Maryland v. Craig*, 497 U.S. 836, 845, 111 L.Ed.2d 666, 110 S.Ct. 3157 (1990)—both of which analyzed the Confrontation Clause. *Ricks* at ¶ 66. But regarding its analysis of Mr. Ricks's claims under the Confrontation Clause, the majority opinion went no further than mentioning those cases. Instead, the court of appeals shifted its focus to *Blevins* and *State v. Williams*, 10th Dist. Nos. 02AP-730, 02AP-731, 2003-Ohio 5204, 2003 Ohio App. LEXIS 4661 (another *Blevins*-based case from the Tenth District Court of Appeals), and quickly overruled Mr. Ricks's claims. *Ricks* at ¶ 66-69. And inexplicably, the court of appeals claimed that Mr. Gipson's out-of-court statements did not evince that Mr. Gipson attempted to exonerate himself or implicate Mr. Ricks, when Mr. Gipson, to whom most of the prejudicial evidence at Mr. Ricks's trial pointed, directly implicated Mr. Ricks as Mr. Gipson's accomplice. *See Ricks* at ¶ 69.

Certainly, if a statement is not introduced for the truth of the matter asserted, it is not hearsay. *See Evid.R. 801(C)*. That is lawful and well known. And when out-of-court statements are offered *merely* to explain an officer's conduct while investigating a crime, those statements are not offered for the truths of the matters asserted, and are not hearsay. *State v. Thomas*, 61 Ohio St.2d 223, 232, 400 N.E. 2d 401 (1980). But the substantial constitutional question

presented in Mr. Ricks's case involves the misapplication of *Thomas* and lower court cases such as *Blevins*. This Court's decision in *Thomas* was limited. But its over-extension has created an impermissible end-run around the Sixth Amendment right to confrontation. That is what happened in Mr. Ricks's case, and it will happen again (and again, and again), unless this Court tells the lower courts that while the rules of evidence are crucial, they may not be stretched to absurdity so as to undermine the Sixth Amendment.

In essence, this Court's decision in *Thomas* was transformed from one which addressed the proper functioning of the hearsay rule, to a decision relied upon to thwart the Sixth Amendment. That likely happened through confusion, because Confrontation Clause jurisprudence is ever-evolving. But the over-extension of *Thomas* has happened, and its results were devastating in Mr. Ricks's case. What has been created is a rule that if a police officer repeats at trial another person's out-of-court statements, and the officer believes that he needs to do so that the jury can understand how the officer got from one situation to the next, then the out-of-court statements are not hearsay. But that rule can, has, and will lead to Confrontation Clause violations, and this Court should set barriers to such unjust results. That is, the rule only makes sense if the out-of-court statements do not conflict with the Sixth Amendment. Mr. Ricks's case has provided this Court with the opportunity to guide lower courts when the officer-conduct-during-an-investigation rule comes into conflict with an accused's right to confrontation.

In *State v. Issa*, 93 Ohio St.3d 49, 60, 752 N.E.2d 904 (2001), this Court discussed the importance of quelling the introduction of out-of-court, inculpatory statements of non-testifying codefendants such as Mr. Gipson:

In *Lilly v. Virginia* (1999), 527 U.S. 116, 119 S.Ct. 1887, 144 L.Ed.2d 117 (plurality opinion), the lead opinion recognized that the type of hearsay statement challenged herein, *i.e.*, an out-of-court statement made by an accomplice that incriminates the defendant, is often made under circumstances that render the

statement inherently unreliable. For example, when a declarant makes such a statement to officers while he is in police custody, the declarant has an interest in inculcating another so as to shift the blame away from himself. In that situation, a declarant will often admit to committing a lesser crime and point to an accomplice (the defendant) as the culprit in a more serious crime. While the statement is technically against the declarant's penal interest, it is also self-serving and, for that reason, particularly deserving of cross-examination when used as evidence against the defendant. 527 U.S. at 131-132 and 138, 119 S.Ct. at 1897-1898 and 1901, 144 L.Ed.2d at 131 and 135.

In *Issa*, this Court gave meaning to the prohibitions instilled within the Confrontation Clause, which have been repeatedly acknowledged by the Supreme Court of the United States. *See, e.g., Bruton v. United States* (1968), 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476; *Lee v. Illinois* (1986), 476 U.S. 530, 542, 106 S.Ct. 2056, 90 L.Ed.2d 514; *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). But because of the over-extension of this Court's decision in *Thomas* (and cases such as *Blevins*), the Sixth District Court of Appeals obviated this Court's concerns. Further, the court of appeals ignored a central, important aspect of the *Thomas* line of cases. *See State v. Humphrey*, 10th Dist. No. 07AP-837, 2008-Ohio-6302, 2008 Ohio App. LEXIS 5260, ¶ 11. That is: "[W]hen the statements connect the accused with the crime charged, they should generally be excluded." *Id.* This Court should intervene so that a substantial constitutional violation does not happen again.

Finally, contrary to the assertions of the court of appeals and the State of Ohio in its memorandum in opposition to jurisdiction, in cases in which a trial court has violated an accused's Sixth Amendment right to confrontation by allowing the jury to hear a non-testifying codefendant's incriminating hearsay statements, a curative instruction is insufficient to cure that error:

Our ruling in *Bruton* illustrates the extent of the Court's concern that the admission of this type of evidence will distort the truthfinding process. In *Bruton*, we held that the Confrontation Clause rights of the petitioner were violated when his codefendant's confession was admitted at their joint trial, despite the fact that

the judge in the case had carefully instructed the jury that the confession was admissible only against the codefendant. We based our decision in *Bruton* on the fact that a confession that incriminates an accomplice is so “inevitably suspect” and “devastating” that the ordinarily sound assumption that a jury will be able to follow faithfully its instructions could not be applied.

Lee, 476 U.S. at 542.

Mr. Ricks’s second proposition of law presents this Court with a substantial constitutional question. A dangerous precedent has been set, and at least one Ohio court of appeals misunderstands the proper coexistence of the rules of evidence and the Sixth Amendment right to confrontation. This Court should state, unequivocally, that while the rules of evidence provide that not-for-the-truth-of-the-matter statements are not hearsay, the admission of a non-testifying codefendant’s inculpatory, truth-of-the-matter statements during a criminal trial are not only hearsay, they are repugnant to the Sixth Amendment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing APPELLANT THOMAS J. RICKS'S MOTION FOR RECONSIDERATION was forwarded by regular U.S. Mail on this 2nd day of March, 2012, to Kevin J. Baxter, Erie County Prosecuting Attorney, Erie County Prosecutor's Office, 247 Columbus Avenue, Suite 319, Sandusky, Ohio 44870.

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