

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
	:	Case No. 2011-1473
Plaintiff-Appellee,	:	
	:	On Appeal from the Franklin County
vs.	:	Court of Appeals, Tenth Appellate
	:	District Case No. 10AP-1109
EMMANUEL HAMPTON,	:	
	:	
Defendant-Appellant.	:	

**MERIT BRIEF OF AMICUS CURIAE OFFICE OF THE OHIO PUBLIC DEFENDER
IN SUPPORT OF APPELLEE EMMANUEL HAMPTON**

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STATEMENT OF THE CASE AND OF THE FACTS

Amicus adopts by reference the statement of the case and facts set forth by Appellee Emmanuel Hampton.

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

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

As amicus curiae, the Ohio Public Defender offers this Court the perspective of experienced practitioners who routinely handle significant criminal cases in the Ohio appellate courts. The Ohio Public Defender has an interest in the present case insofar as this Court will address the prosecution's constitutional and statutory burden to prove venue at trial.

INTRODUCTION

As set forth in the State of Ohio's merit brief, this Court has agreed to consider the following propositions of law:

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.

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.* (1987), 32 Ohio St.3d 30, overruled)

The State asks this Court to overrule years of precedent in order to remove proof of venue as a requirement to sustain a criminal conviction. The argument is unsound. It is well settled in state and federal law that evidence must be presented by the state to prove venue. Criminal Rule 29 provides that the trial court shall order an acquittal "if the evidence is insufficient to sustain a conviction" of the offense charged. The State must prove the offense occurred as charged – this includes the location of the crime. It is not a question of law to be determined before trial but a question of fact that must be proven at trial beyond a reasonable doubt.

ARGUMENT

A. It is well-established Ohio law that venue must be proven by the State at trial.

The Ohio Constitution establishes the right of the accused to have a “a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed.” Ohio Constitution, Article I, Section 10. Revised Code Section 2901.12(A) ensures this right by requiring a criminal trial in a court with subject matter jurisdiction in the “territory of which the offense or any element thereof was committed.” Criminal Rule 18 provides that venue of a case shall be that as set by law.

This Court has held that unless the prosecution establishes that the crime alleged was committed in the county where the trial was held, the defendant cannot be convicted. *State v. Headley*, 6 Ohio St.3d 475, 477, 4536 N.E.2d 716, 718-719 (1983); *State v. Draggo*, 65 Ohio St.2d 88, 90, 418 N.E.2d 1343, 1345 (1981); *State v. Nevius*, 147 Ohio St. 263, 71 N.E.2d 258 (1947), paragraph three of the syllabus; *State v. Gribble*, 24 Ohio St.2d 85, 89-90, 263 N.E.2d 904, 906-907 (1970); *State v. Dickerson*, 77 Ohio St. 34, 82 N.E. 969 (1907), paragraph one of the syllabus.

B. Requiring the State to prove venue protects a critical right of the criminal defendant and the public.

The federal system and the vast majority of states, including Ohio, require that prosecution prove venue at trial. 4 LaFave, *Criminal Procedure*, Section 16.1(g), at 743-744 (3d Ed.2007). Fewer than a dozen states require that venue be handled pretrial, like other procedural prerequisites for prosecution. *Id.* at 742. Amicus Ohio Attorney General asks this Court to stray from the majority, and require venue to be challenged by a defendant before trial.

The federal and state constitutions guarantee a jury trial where the crime was committed as a safeguard against tyranny of the government. With respect to the fundamental right to a jury

trial, the framers “knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority” and “strove to create an independent judiciary but insisted upon further protection against arbitrary action.” *Duncan v. Louisiana*, 391 U.S. 145, 155-156, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968). Further, requiring the state to prove venue provides a necessary buffer between the criminal defendant and the government.

Venue was so important to our nation’s founders that it was not only addressed in the U.S. Constitution, but also strengthened in the Bill of Rights. Dressler & Thomas, *Criminal Procedure*, 853 (3d Ed.2006). The Sixth Amendment secures the right to be tried “by an impartial jury of the State and district wherein the crime shall have been committed.” *Id.* This requirement stemmed from the framers’ conviction that trial by the community was essential to preserving the fairness of trial. Engel, *The Public’s Vicinage Right: A Constitutional Argument*, 75 N.Y.U.L.Rev. 1658, 1691 (2000).

Without the venue right, the State would be allowed to forum shop for the venue that would most likely convict a criminal defendant. Forum-shopping in a criminal case would present serious barriers to a defendant’s ability to present a defense if the trial were to take place outside of community. Additionally, both parties could no longer depend upon the jury to understand the context in which the crime took place. Proper venue also preserves the community’s right to try those who offend upon them. Thus the trial is appropriately set where the crime occurred and not where the defendant resides or another jurisdiction altogether. A local jury ensures that jurors understand the context in which the crime took place and the seriousness of the offense upon their community.

The State must not only prove that the defendant committed the crime charged but also that the crime occurred. The crime's occurrence relies upon a location and a proper indictment of the accused must reflect that. Most jurisdictions place some burden upon the state to prove venue – whether it be beyond a reasonable doubt, by a preponderance of the evidence, or some evidence – because it is a fact of the crime. *See* 4 LaFave at 714, Section 16.1(c).

The Model Penal Code requires that the prosecution prove beyond a reasonable doubt each “element of the offense” and includes in its definition of “element of an offense” conduct or circumstances that establish “jurisdiction or venue.” Model Penal Code, 1.12, 1.13(9) (1962). Jurisprudence reflects this interpretation that venue is one item that must be proven by the state, and whatever it may be called (element, jurisdictional fact, or issuable fact) it remains that the state must prove venue. *See, e.g., State v. Wardenburg*, 261 Iowa 1395, 158 N.W.2d 147 (1968) (describing other jurisdictions on proof of venue), *Anderson v. Commonwealth*, 349 S.W.2d 826, 827 (Ky. 1961) (“Venue in a criminal prosecution is a jurisdictional fact” and “[i]t is fundamental that in order to establish the jurisdiction of the trial court *** the Commonwealth must prove that the necessary elements of the crime charged were perpetrated in the county alleged in the indictment as the situs of the offense”).

C. Ohio is among the majority of states that require proof of venue and any change is a matter for the General Assembly, not this Court.

In most states, venue must be proven by the prosecution and “it is not simply a prerequisite that the defendant may choose to challenge pretrial.” 4 LaFave at 744, Section 16.1(g). For example, the Supreme Court of Alabama has said that “proof of venue is essential to a conviction.” *Willcutt v. State*, 284 Ala. 547, 550, 226 So. 547 (1969). Similarly, in Wisconsin, a conviction will be reversed if evidence is so insufficient that there is no basis upon which a trier of fact could determine venue beyond a reasonable doubt. *State v. Corey J.G.*, 215

Wis. 2d 395, 407-408, 572 N.W.2d 845 (1998). In Indiana, although it is only required to be proven by a preponderance of the evidence, venue “is usually an issue for determination by the jury” because it “typically turns on an issue of fact, i.e., where certain acts occurred.” *Alkhalidi v. State*, 753 N.E.2d 625, 628 (Ind. 2001).

Illinois, Iowa, Utah, Louisiana, Montana, and Colorado are among the small minority of states that require venue to be addressed procedurally pretrial, and do so according to their respective state codes. 4 LaFave at 742, Section 16.1(g). For example, Illinois statute specifically states that the “State is not required to prove during trial that the alleged offense occurred in any particular county” and if the defendant wishes to dispute venue, they must do so by pretrial motion. Ill.Comp.Stat. Ann., Chapter 720 5/1-6. In some of these minority states, however, even explicit provisions in the code do not absolve the prosecution’s burden to prove venue at trial. The Supreme Court of Montana determined that although the Montana Code states that “objections that a charge is filed in the improper county are waived by a defendant unless made before the first witness is sworn at the time of trial” they could still evaluate whether the state met its burden of proof on appeal. Mont. Code Ann., 46-3-111; *State v. Johnson*, 257 Mont. 157, 161, 48 P.2d 496 (1993).

Venue is a matter of legislative discretion. Currently, Ohio’s Constitution and Revised Code require that venue be proven by the State in its case against a criminal defendant. Proper venue is constitutionally and statutorily defined as the county that the crime took place. Any change to this is a matter for the legislature, not the courts.

Ohio Revised Code Section 2901.12 includes many ways in which venue is proper in multiple jurisdictions when a single crime occurs in two or more counties. For example, R.C. 2901.12(B) provides that if the offense is committed in a moving vehicle and jurisdiction cannot

be determined, the offender may be tried in any jurisdiction through which the vehicle passed. Revised Code Section 2901.12(G) allows for an offense that was committed in two or more jurisdictions to be charged in any of those jurisdictions. Those provisions illustrate how the General Assembly has given the State considerable flexibility with respect to establishing venue when it cannot determine a precise location of the offense. In this case, however, the State could easily have determined the proper venue, but simply failed to meet its burden.

The General Assembly could also choose to address venue through a statutory change that would allow Mr. Hampton to be tried in Franklin County because of the location on the indictment's proximity to it. Nineteen states have "county-line buffer" statutes that allow criminal defendants to be tried in the neighboring county if the crime is committed within a certain distance from the county line. Kalt, *Crossing Eight Mile: Juries of the Vicinage and County-Line Buffer Statutes*, 80 Wash. L. Rev. 271, 277-279 (2005). But absent legislative change, the trial court and Tenth District Court of Appeals appropriately found that the State failed to meet its burden to prove venue.

D. Criminal Rule 29 acquittal of Mr. Hampton is appropriate for lack of proper venue.

Appellant erroneously relies on this Court's use of the term "material element" in *State v. Bridgeman* and *State v. Draggo* to conclude that there should be "no such thing as Crim.R. 29 'acquittal'" based on venue. Appellant's Brief at 11. This conclusion is flawed because it merely takes words that exist in both opinions for different purposes, and attempts to create new law.

In *Bridgeman*, the jury found Mr. Bridgeman guilty and he was sentenced to death. 55 Ohio St.2d 261, 262, 381 N.E.2d 184 (1978). The Court of Appeals affirmed his conviction and sentencing. *Id.* Mr. Bridgeman appealed as of right to this Court and argued that the trial court

erred in denying his motion for a Crim.R. 29 acquittal. *Id.* This Court found that the trial court did not err and cited state and federal interpretations of the standard to determine whether a question should proceed to a jury. *Id.* at 263-264. If there is enough evidence that the jury might find a defendant guilty, it should proceed. *Id.* Essentially, “[i]f reasonable minds can reach *different* conclusions as to whether each element of a crime has been proved beyond a reasonable doubt, they clearly *might* find guilt.” (Emphasis sic.) *Id.* at 264. This reasoning was summarized in the syllabus: “Pursuant to Crim.R. 29(A), 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.” *Id.* at syllabus. Venue was not at issue in *Bridgeman*.

Venue, in *Draggo*, is defined as “not a material element of any offense charged” but “a fact that that must be proved at trial unless waived.” 65 Ohio St.2d 88, 90, 418 N.E.2d 1343 (1981). Simply because “material element” is used in *Bridgeman* and in the definition of venue in *Draggo* does not mean that the state does not bear the burden of proving venue at trial, and if it does not prove venue, is somehow immune from Crim.R. 29. Additionally, Appellant did not address the portion of *Draggo* that reestablishes that venue is still a fact that must be proven at trial: “in all criminal prosecutions, venue is a fact that must be proved at trial unless waived.” *Id.* at 90, citing *State v. Nevius*, 147 Ohio St. 263 (1947). “Material element” is nowhere to be found in Crim.R. 29. The rule, instead, states that the trial court shall order an acquittal “if the evidence is insufficient to sustain a conviction” of the offense charged. Evidence and facts are the basis for a proper Crim.R. 29 acquittal.

State v. Swiger, 5 Ohio St. 2d 151, 156, 214 N.E.2d 417 (1966), relied on in *Bridgeman*, explained the genesis of what is a question for the jury in Ohio. First, this Court held in a civil

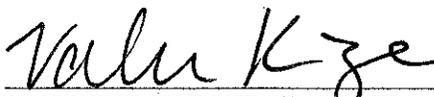
case that “[w]here from the evidence reasonable minds may reach different conclusions upon any question of fact, such question of fact is for the jury.” *Hamden Lodge v. Ohio Fuel Gas Co.* 127 Ohio St. 469, syllabus, 189 N.E. 246 (1934). Later, this civil rule was applied to criminal cases, as follows: “[w]here from the evidence reasonable minds can reach different conclusions on the issue of whether the defendant is guilty beyond a reasonable doubt, the case is one for determination by the jury.” *State v. Antill*, 176 Ohio St. 61, 67, 197 N.E.2d 548 (1964). Thus, a question should proceed to the jury if there is a disputable question of fact. In Mr. Hampton’s case, the case should not have proceeded beyond the Crim.R. 29 motion because there was no dispute that venue was improper.

CONCLUSION

Venue must be proven by the State at trial. When the State fails to meet its burden, a conviction cannot be sustained. Accordingly, the trial court properly granted the Crim.R. 29 motion and acquitted Mr. Hampton. The Office of the Ohio Public Defender, as amicus curiae, urges this Court to affirm the judgment of the court below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **MERIT BRIEF OF AMICUS CURIAE OFFICE OF THE OHIO PUBLIC DEFENDER IN SUPPORT OF APPELLEE EMMANUEL HAMPTON** was forwarded by regular U.S. Mail, postage prepaid to Steven L. Taylor , Franklin County Prosecuting Attorney, 373 South High Street, 13th Floor, Columbus, Ohio 43215 and Jonathan Tyack, Tyack, Blackmore & Liston Co., LPA, 536 South High Street, Columbus, Ohio 43215, on this 20th day of March, 2012.



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