

IN THE SUPREME COURT OF OHIO

State of Ohio,

Case No. 11-1473

Plaintiff-Appellant,

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

-vs-

Court of Appeals Case No. 10APA-11-09

Emmanuel Hampton,

Defendant-Appellee.

MERIT BRIEF OF DEFENDANT-APPELLEE, EMMANUEL HAMPTON

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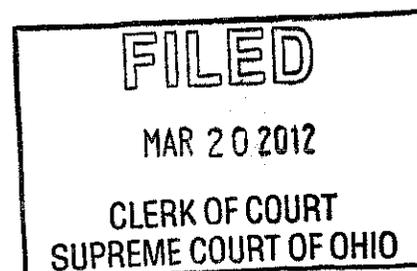


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STATEMENT OF THE CASE AND RELEVANT FACTS

On or about December 30, 2005, Mr. Byron Woods and his family were the victims of a home invasion whereby Mr. Woods suffered serious injury. (Tr. passim). Evidence at trial established that the entire crime occurred, not within Franklin County, as alleged in the indictment, but within Fairfield County, Ohio. (Tr. page 23, 51, 59-60, 82-84, 87-88).

On March 5, 2010, following a bindover from Franklin County Juvenile Court, the Franklin County Grand Jury indicted Defendant-Appellee, Emmanuel Hampton, alleging counts of attempted murder, felonious assault, aggravated burglary, kidnapping, and having a weapon while under disability. R. 1 (3-5-10 Indictment). Furthermore, the indictment clearly alleged that all of the offenses in question occurred within Franklin County, Ohio. Id.

On October 8, 2010, trial began. At the conclusion of the State's case, Defendant-Appellee, Emmanuel Hampton, moved for a judgment of acquittal pursuant to Rule 29(A) of the Ohio Rules of Criminal Procedure. Tr. page 135-138. Defendant's motion alleged that the evidence was insufficient as to the elements of both identification and venue. Ultimately, the trial court overruled Defendant's motion for judgment of acquittal on the element of identification, but granted Defendant's Rule 29(A) motion for judgment of acquittal on the necessary element of venue. Tr. page 161, 166, 170-171; R. 107-108 (10-25-10 Judgment Entry).

The State attempted to appeal the trial court's judgment of acquittal, but the Court of Appeals ultimately dismissed the appeal, ruling that such appeals were not permitted under Revised Code § 2945.67(A). State v. Hampton (July 14, 2011), Franklin App. No. 10-AP-119, 2011-Ohio-3486. It is from this ruling that the State of Ohio now appeals to this Court.

ARGUMENT

I. The Court of Appeals properly dismissed the appeal by the State of Ohio in this matter.

In its appeal, the State of Ohio has set forth the following two 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 to 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).

And

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 a ruling by leave of court under R.C. § 2945.67(A) when such an appeal does not violate double jeopardy. (State ex. rel. Yates v. Court of Appeals for Montgomery Cty., 32 Ohio St. 3d 30, 512 N.E. 2d 343 (1987), overruled)

In support of Proposition of Law No. 1 and Proposition of Law No. 3, the State of Ohio argues that the judgment of acquittal issued by the trial court under Rule 29 of the Ohio Rules of Criminal Procedure is appealable under Revised Code § 2945.67(A). The State of Ohio then argues that the long standing precedent found in State ex. rel. Yates v. Court of Appeals for Montgomery Cty. (1987), 32 Ohio St. 3d 30, and its progeny, should be overruled.

“A court of record speaks only through its journal entry and not by oral pronouncement or mere written minute or memorandum.” Shenley v. Kauth (1953), 160 Ohio St. 109, syllabus 1. Here, through its journal entry, the trial court granted defendant’s motion for a judgment of acquittal pursuant to Criminal Rule 29. Because the judgment of acquittal occurred prior to any finding of guilt by the trier of fact, the judgment of acquittal was necessarily granted pursuant to Crim. R. 29(A).

As such, the judgment of acquittal is a “final verdict” within the meaning of Revised Code § 2945.67(A), and thus, not appealable by the state. State v. Keeton (1985), 18 Ohio St. 3d 379, syllabus 2. The State of Ohio does not seek to have this Court overrule Keeton, supra.

Since the trier of fact never made a guilty finding in this matter, this case is factually and procedurally distinguishable from State ex. rel. Yates v. Court of Appeals for Montgomery Cty. (1987), 32 Ohio St. 3d 30. In the syllabus of Yates, this Court held that “[a] judgment of acquittal by a trial judge, based upon Crim. R. 29(C) is a final verdict within the meaning of Revised Code § 2945.67(A) and is not appealable by the State as a matter of right or by leave to appeal pursuant to that statute.” 32 Ohio St. 3d 30, syllabus.

In Yates, supra, the jury had found the defendant guilty, and defendant made a motion pursuant to Rule 29(C) of the Ohio Rules of Criminal Procedure for a judgment of acquittal notwithstanding the jury verdict. Here, no such verdict was ever rendered by the trier of fact before the court granted defendant’s motion for judgment of acquittal. Here, Defendant-Appellee, Emmanuel Hampton, made his motion for judgment of acquittal at the conclusion of the State’s case. The trial court did not rule on that motion, but instead deferred ruling to allow the parties to do additional research. Eventually, the Defendant rested and renewed the motion previously made under Criminal Rule 29(A). Such a renewal of the original motion was simply a continued request for the Court to rule on the motion originally made pursuant to Criminal Rule 29(A), which was granted by the trial court.

As such, the State’s request to have this Court review and overrule the Yates decision is a request for this Court to go beyond the scope of this case. Since the trial court granted Defendant’s motion for judgment of acquittal under Criminal Rule 29 prior to any finding of

guilty by the trier of fact, this Court should, instead, look to cases like Keeton, supra, and State v. Bistricky (1990), 51 Ohio St. 3d 157.

The reasoning of cases like Keeton, supra, and Bistricky, supra, is extremely sound, and should not be disturbed by this Court. The rationale of this Court in Keeton is simple, forthright, and impeccably clear. In six paragraphs, Justice Brown laid out the simple ruling that a judgment of acquittal, under Criminal Rule 29, constitutes a “final verdict” within the meaning of Revised Code § 2945.67(A), which is not appealable by the State as a matter of right or by leave to appeal pursuant to that statute. In Keeton, supra, this Court reviewed a case where a judgment of acquittal was rendered under Crim. R. 29(A) and expressed its awareness that the “double jeopardy protections of the United States Constitution and the Ohio Constitution bar the retrial of the Defendant.” 18 Ohio St. 3d at 380-381 (citing State v. Calhoun (1985), 18 Ohio St. 3d 373). This Court upheld the judgment of acquittal by denying the State’s right to appeal the matter under Revised Code § 2945.67(A).

As in Keeton, the facts of Bistricky, supra, support the decision of the Court of Appeals in this matter, and the position of Defendant-Appellee, Emmanuel Hampton. Like Keeton, supra, the Bistricky case involves a situation where the trial court granted a motion for judgment of acquittal prior to any finding of guilt by the trier of fact. In Bistricky, the trial court granted a motion for judgment of acquittal at the conclusion of the State’s case based upon the trial court’s interpretation of various statutes, including Revised Code § 3719.14 relating to various immunity provisions for police officers. In Bistricky, the defendants moved for a judgment of acquittal pursuant to Criminal Rule 29(A) at the conclusion of the State’s case. The defendants in Bistricky argued that they were immune from prosecution pursuant to Revised Code § 3719.14. The State of Ohio argued instead that the immunity provisions of Revised Code § 3719.14 were

affirmative defenses, and that the immunity provisions furthermore did not include the “sale and delivery of drugs.” Bistricky, supra, at 157-158. The trial court ruled that the police officer defendants were immune from prosecution, as a matter of law, and granted the defendants’ motion for judgment of acquittal pursuant to Criminal Rule 29(A). The State of Ohio sought leave to appeal and said appeal was dismissed by the Court of Appeals.

In Bistricky, supra, this Court reaffirmed Keeton, supra and Yates, supra, while further pointing out that the double jeopardy protections contained in the United States Constitution and the Ohio Constitution would prevent any retrial or modification of the existing judgment of acquittal. Under Keeton, supra, and Bistricky, supra, the judgment of acquittal rendered in favor of Defendant-Appellee, Emmanuel Hampton, by the trial court, is a “final verdict” under Revised Code § 2945.67(A). As such, the State of Ohio has no ability to appeal the judgment of acquittal. Such an appeal not only violates Revised Code § 2945.67(A), and this Court’s decision in Keeton, supra, but such an appeal further violates Defendant’s rights against double jeopardy as set forth in the constitutions of the State of Ohio and the United States. Bistricky, supra, at 160.

The State of Ohio, in support of its Proposition of Law No. 1, suggests that courts must look beyond the journal entry to determine whether the trial court is actually granting a judgment of acquittal or not. If the trial court’s journal entry indicates that a judgment of acquittal was granted in favor of a defendant, then a judgment of acquittal was granted in favor of the defendant, period. Under the current legislative scheme, and under the constitutions of both the State of Ohio and the United States, such a judgment of acquittal may not be disturbed on appeal. Keeton, supra, at 380-381.

The State of Ohio is not seeking an advisory opinion here. The State of Ohio is not seeking guidance as to an evidentiary ruling, or some other interpretation of statute relied upon by the trial court at the time that the court rendered its judgment of acquittal in favor of Defendant-Appellee, Emmanuel Hampton. Instead, the State of Ohio is ultimately seeking to have the trial court's judgment of acquittal set aside, and to further pursue a conviction against Defendant-Appellee, Emmanuel Hampton. Consequently, the Court of Appeals correctly dismissed the State's appeal in this matter. Keeton, supra.; Bistricky, supra.

II. Failure to present any evidence of proper venue at trial must result in a judgment of acquittal pursuant to Rule 29 of the Ohio Rules of Criminal Procedure.

The State of Ohio also sets forth the following as its second proposition of law:

“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.”

In support of Proposition of Law No. 2, the State of Ohio suggests that State v. Bridgeman (1978), 55 Ohio St. 2d 261, requires trial judges to consider only the “material” elements when evaluating whether sufficient evidence has been presented by the State of Ohio to withstand a motion for judgment of acquittal pursuant to Criminal Rule 29. Then, citing State v. Draggo (1981), 65 Ohio St. 2d 88, 90, the State of Ohio points out that this Court has, in the past, indicated that venue is not a “material” element of any offense charged. In turn, the State argues that “there can be no such thing as a Crim. R. 29 ‘acquittal’ based solely on venue.” Appellant's Merit Brief at Page 11. However, such a simplistic analysis ignores both the plain language and the history of Criminal Rule 29. Moreover, such an argument ignores the importance of proper venue in a criminal case under both the Ohio Constitution and the Ohio Revised Code.

Criminal Rule 29(A) states as follows:

“The court on motion of a defendant or on its own motion, after the evidence on either side is closed, shall order the entry of a judgment of acquittal of one or more offenses charged in the indictment, information, or complaint, if the evidence is insufficient to sustain a conviction of such offense or offenses. The court may not reserve ruling on a motion for judgment of acquittal made at the close of the State’s case.”

The plain language of the rule itself does not distinguish between “material” elements or “immaterial” elements. Instead, the plain language of the rule itself simply indicates that a judgment of acquittal is appropriate when “the evidence is insufficient to sustain a conviction of such offense or offenses.” If the State of Ohio fails to produce evidence of proper venue, then the evidence is insufficient to sustain a conviction of such offense or offenses. The evidence is insufficient because, under Section 10 Article I of the Ohio Constitution, and under Revised Code § 2901.12, evidence of proper venue must be presented in order to sustain a conviction for an offense. State v. Headley (1983), 6 Ohio St. 3d 472, 477, (citing State v. Draggio (1981), 65 Ohio St. 2d 88, 90); State v. Gribble (1970), 24 Ohio St. 2d 85; State v. Nevious (1947), 147 Ohio St. 263, certiorari den. sub. nom., 331 U.S. 839.

Long before the Rules of Criminal Procedure were created, the Ohio Constitution provided each defendant in a criminal case with the absolute Constitutional right to have the case heard in county where the acts of the crime were alleged to have been committed. Ohio Const. Section 10, Article I. This Court has recognized for over a century that venue is a necessary element that must be alleged and proven by proof beyond a reasonable doubt for a conviction to be valid. Knight et al. v. The State (1896), 54 Ohio St. 365, 377; State v. Dickerson (1907), 77 Ohio St. 34, syllabus 1. In fact, forty years after this Court’s decision in Dickerson, this Court, in State v. Nevious (1947), 147 Ohio St. 263, certiorari den. sub. nom., 331 U.S. 839, addressed the very issue raised here by the State.

In Nevious, the court of appeals found insufficient evidence of venue as it related to count four of the indictment. The court of appeals reversed the decision of the trial court, and ordered that defendant be retried in court four of the indictment. This Court affirmed the decision of the court of appeals as it related to the finding of insufficient evidence relating to venue, but this Court then reversed the order by the court of appeals remanding the matter for a new trial, instead ordering the lower courts to issue a “directed verdict” in favor of defendant as to count four of the indictment, and discharging the defendant accordingly from that count. In its decision, this Court in Nevious stated the following:

“We also affirm the judgment of the Court of Appeals in reversing the judgment of the trial court on the fourth count in the indictment. However, we reverse the judgment of the Court of Appeals in remanding the case to the trial court for a new trial on the fourth count for the reason that the evidence fails to show that the crime alleged occurred in Clark County where the indictment was returned in trial had. Therefore, defendant’s motion to direct a verdict of not guilty on such fourth count, made at the close of the State’s case and renewed at the conclusion of all the evidence, should have been sustained.”

Nevious, *supra*, at 212.

This common law concept of a “directed verdict” has now been memorialized through Rule 29 of the Ohio Rules of Criminal Procedure. Criminal Rule 29 does not speak in terms of “material” elements, or “immaterial” elements, but instead speaks about the requirement that a “judgment of acquittal” be ordered by the trial court whenever the “evidence is insufficient to sustain a conviction for such offense or offenses.” This Court, in Bridgeman, *supra*, specifically held that the enactment of the Criminal Rules had not changed the test applied to a motion for acquittal from the standard that existed previously. Bridgeman, *supra*, at 402 (citing State v. Swiger (1966), 5 Ohio St. 2d 151, syllabus 2, and Sate v. Antill (1964), 176 Ohio St. 61, syllabus 5). In Bridgeman, this Court discussed the standard as follows:

“The standard for sending a question to the jury under Fed. R. Crim. P. 29 and under Swiger and Antill are the same. (If reasonable minds can reach difference conclusions as to whether each element of the crime has been proved beyond a reasonable doubt, they clearly might find guilt). Crim. R. 29(A) and Fed. R. Crim. P. 29 are virtually identical. Therefore, the adoption of Crim. R. 29(A) does not alter the Swiger standard for sending an issue to the jury.”

Bridgeman, supra, at 402.

This Court in Swiger, supra, in turn, relied and reiterated the rule established in Antill, supra, where in this Court adopted a Civil Rule for purposes of determining motions for judgment of acquittal in criminal cases. The fifth paragraph of the syllabus in Antill reads as follows:

“Where 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.”

Antill, supra, at syllabus 5.

Antill was not overruled by Swiger. Instead, this court in Swiger followed Antill. Likewise, this Court in Bridgeman, followed Swiger. At no time over the last century or more, has this Court ever suggested that a judgment of acquittal is inappropriate where the State of Ohio fails to produce sufficient evidence establishing the Constitutionally and statutorily required element of venue. The enactment of the Criminal Rules, and Revised Code § 2910.12, merely preserved and codified the long established rule that a defendant is entitled to a judgment of acquittal whenever the prosecution fails to properly establish venue in a criminal case.

In 1983, two years after this Court’s decision in Draggo, supra, and five years after this Court’s decision in Bridgeman, supra, this Court decided the case of State v. Headley (1983), 6 Ohio St. 3d 475. In Headley, the trial court convicted Mr. Headley after denying his motion for judgment of acquittal made pursuant to Criminal Rule 29. In his first assignment of error to the Court of Appeals, Mr. Headley averred as follows:

“The state failed to produce competent evidence sufficient to convince a rational trier of fact of three essential elements of the offense charged, to wit: venue in Summit County, purpose to resell control substances, and intent that such a resale be in greater than bulk amount, and thus defendant was entitled to judgment of acquittal under Crim. R. 29 and the Fourteenth Amendment.”

State v. Headley (April 28, 1982), Summit App. No. C.A. No. 10485, 1982 WL 4979.

The Court of Appeals found Mr. Headley’s assignment of error to be well taken, and reversed the trial court’s conviction of his charges. Subsequently, this Court affirmed the Court of Appeals decision reversing Mr. Headley’s conviction. ¹

In its merit brief, the State of Ohio argues that Revised Code § 2945.08 required the trial court to declare a mistrial, and transfer the matter to Fairfield County. Such a procedure would clearly violate Defendant’s double jeopardy protections under both the Ohio Constitution and the United States Constitution. Harpster v. Ohio (6th Cir. 1997), 128 F. 3d 322, 327-328 (citing numerous cases from the United States Supreme Court). Furthermore, such a procedure by the trial court in this case would ignore the fact that no warrant for Mr. Hampton’s arrest was ever issued by Fairfield County, and Mr. Hampton had no charges pending in Fairfield County. Revised Code § 2945.08 sets the procedure, including the time limits, for the detention or release of a defendant when that defendant has a case pending in another county for which a warrant has been issued.

Revised Code § 2945.08 does not permit the State of Ohio to simply begin trial and then, subsequently, after jeopardy has attached, request that a mistrial occur so that the matter can then be transferred to the appropriate county for a second trial. Not only would such a procedure violate a defendant’s double jeopardy rights, the availability of such a procedure would encourage prosecutors to engage in a pattern of forum shopping, delay, and neglect in the

¹ In light of this Court’s decision, remanding the matter to the trial court for the issuance of a judgment of acquittal, this Court found that Mr. Headley’s other assignments of error and propositions of law raised in his cross appeal had been rendered moot.

investigation and prosecution of criminal cases. In contrast, without such a procedure available to prosecutors, prosecutors will be encouraged to properly investigate cases and bring them in the appropriate county where venue is proper under the Ohio Constitution and the Ohio Revised Code.

Over a century of well established jurisprudence here in the State of Ohio clearly mandates that a motion for judgment of acquittal must be granted when the evidence is insufficient for reasonable minds to reach different conclusions regarding the element of venue. Here, it is undisputed that all of the events in question occurred in Fairfield County, Ohio, not Franklin County, Ohio, as alleged in the indictment. Under Headley, supra, Criminal Rule 29, Revised Code § 2901.12, and the well established common law rule set forth in cases like Nevius, supra, a judgment of acquittal is required when the evidence is insufficient to establish venue beyond a reasonable doubt.

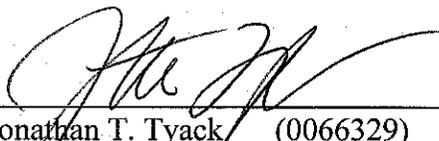
III. Conclusion

Under the Ohio Constitution, and under Revised Code § 2901.12, venue must be proven beyond a reasonable doubt in every criminal case. Whether this Court classifies venue as an “element” of the offense, or just as some additional fact to be proven in each case, the fact remains that in the absence of evidence establishing proper venue, a person may not be found guilty and convicted in a criminal case. Since a failure by the State of Ohio to establish proper venue makes the evidence “insufficient to sustain a conviction for such offense or offenses,” any defendant in any case where the State of Ohio fails to present evidence of proper venue is entitled to a judgment of acquittal pursuant to Rule 29 of the Ohio Rules of Criminal Procedure. Such a result is required not only by the Criminal Rules, but by statute, and the Ohio Constitution. Moreover, any attempt to appeal a ruling on this basis violates this Court’s

established precedent, Revised Code § 2945.67(A), and the double jeopardy protections contained in both the Ohio Constitution and the United States Constitution.

Wherefore, the decision of the Court of Appeals, dismissing the State's appeal, should be affirmed.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been delivered via regular U.S. Mail to Steven L. Taylor, Chief Counsel, 373 South High Street, 13th Floor, Columbus, Ohio 43215 and Attorney General Mike Dewine, 30 E. Broad St., 14th Floor, Columbus, OH 43215, this 20th day of March, 2012.



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