

ORIGINAL

IN THE SUPREME COURT OF OHIO
Case No. 2012-651

STATE OF OHIO	:	
Appellant	:	
-vs-	:	On Appeal from the
JAMES DZELAJLIJA	:	Cuyahoga County Court
Appellee	:	of Appeals, Eighth
		Appellate District Court
		of Appeals
		CA: 95851

APPELLEE'S MEMORANDUM IN OPPOSITION TO JURISDICTION

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WHY THIS CASE DOES NOT INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION OR ISSUE OF GREAT PUBLIC INTEREST:

This is a case about finality of judgments and respect for the appellate process. When the State of Ohio, or any litigant, loses in the court of appeals, it has two choices: 1) appeal to the decision to this Court; or 2) abide by the court of appeals' decision. With this appeal, the State asks this Court to establish a third option which would allow litigants to fail to exercise their appellate rights and then relitigate the issue in the trial court. In this case, the State elected not to appeal an adverse decision, waited an additional sixteen months, and then, when the controlling precedent changed, asked the *trial court* to exceed its mandate and reinstate a conviction previously vacated by the appellate court. The Eighth District correctly rejected the State's attempt to circumvent the normal appellate process. This Court should decline the State's request to accept jurisdiction over this case which, in addition to being correctly decided, presents a complex and highly unique procedural history that is unlikely to recur with any frequency.

Three years ago, the Eighth District Court of Appeals vacated appellant's robbery convictions due to a defective indictment under *State v. Colon*, 119 Ohio St.3d 204, 2008-Ohio-3749, 893 N.E.2d 169. *State v. Dzelajlija*, 8th Dist. No. 91115, 2009-Ohio-1072 ("*Dzelajlija IP*"). The State *did not appeal that decision*. And the case was remanded to the trial court for the *sole purpose* of an entering an order vacating appellant's convictions.

No action was taken by the trial court or the State for over sixteen months. Eventually, despite the fact that the case *not* remanded for a new trial, the trial court inexplicably ordered appellant "back to stand trial." Two months later, the trial court, at the State's request, "re-impos[ed]" appellant's prior sentence. Ignoring the fact that appellant's conviction had been vacated on appeal, the trial court justified this decision on the basis that *Colon* had been

subsequently overruled by this Court's decision in *State v. Horner*, 126 Ohio St. 3d 466, 2010-Ohio-3830, 935 N.E.2d 26.

The Eighth District, sustaining four separate assignments of error, reversed the trial court. It explained the case was remanded for the limiting purpose of vacating the convictions, that the decision became final when the State did not appeal, that "the matter was no longer a pending case," and that the mandate did not authorize the trial court to resentence the defendant because there was no valid finding of guilt. *State v. Dzelajlija*, 8th Dist. No. 95851, 2012-Ohio-913 ("Opinion Below") Opinion Below at ¶¶ 15-19.

In urging this Court to take this case, the State laments that the case "involves the vacation of a guilty verdict based on what amounts to nothing more than blind adherence to procedure." (State's MSJ at 1). However, what the State derisively refers to as "procedure" actually constitute three bedrock principles of our legal system: 1) finality of judgments; 2) lower court fidelity to the ruling a reviewing court; 3) a litigant's obligation to exhaust their appellate remedies before turning to extraordinary means of relief. The State's proposition of law ignores these important aspects of this case and the unique procedural history of the case. If this Court were to accept the State's argument, there would be no end to litigation. Parties could always seek to have trial courts overturn appellate court decisions whenever there has arguably been a change in the law. Under the State's approach, a criminal defendant, who unsuccessfully raised a Confrontation challenge on direct appeal to the testimony of a lab technician who did not do the testing, could, after *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 129 S.Ct. 2527 (2009), re-raise the issue in the *trial court* and prevail. Indeed, potential examples of litigation being reopened due to changes in the law are infinite.

While the State emphasizes the “sanctity of the jury verdict,” it neglects to mention it chose *not* to defend that verdict when it was originally vacated by the Eighth District. Instead, it chose to accept the appellate court ruling and then seek the extraordinary remedy of having a trial court declare that ruling to be invalid. While there may be circumstances when an inferior court can deviate from the mandate of the reviewing court, this case is not one of them.

Moreover, even if the State were to prevail on the single issue raised here, that would not change the outcome of this case because the Eighth District separately sustained four different assignments of error. With its appeal to this Court, the State does not address appellant’s arguments that, the mandate rule aside, the trial court acted outside its jurisdiction, improperly imposed a sentence without a valid finding of guilt, and was precluded from granting the State’s request by the doctrines of *res judicata* and collateral estoppel.

Accordingly, this Court should not accept this case.

STATEMENT OF THE CASE AND FACTS

Defendant James Dzelajlija was charged in a two count indictment with the September 30, 2005 robbery of William Bond, an assistant store manager at Elgin Furniture. *State v. Dzelajlija*, Cuyahoga App. 91115, 2007 Ohio 4050, ¶¶ 2-3 (“*Dzelajlija I*”). Dzelajlija’s charges for robbery under R.C. 2911.02(A)(2) (theft with physical harm) and R.C. 2911.02(A)(3) (theft with force) were based on a “single occurrence.” *Dzelajlija II* at ¶ 1, n.1. Dzelajlija pled not guilty and the case proceeded to a jury trial. On September 5, 2006, the jury returned its verdict finding Dzelajlija guilty of both counts of robbery. And the trial court imposed concurrent sentences of 7 years on both counts. Dzelajlija filed a timely appeal.

On August 9, 2007, the Eighth District reversed Dzelajlija’s robbery convictions. *Dzelajlija I* at ¶ 1. It held that the State introduced improper opinion testimony from its

investigating officer about the veracity of the State's key fact witness. *Id.* at ¶¶ 36-39. Because this improper testimony deprived Dzelajlija of a fair trial, the Eighth District reversed his convictions and remanded the case for a new trial. *Id.* at ¶ 39.

Mr. Dzelajlija was retried in February 2008. He was again convicted, after a jury trial, of both robbery counts and received an aggregate sentence of seven years. Dzelajlija filed a timely appeal of his convictions and raised two assignments of error:

1. "The case must be dismissed as a result of a defective indictment."
2. "The convictions of appellant were against the manifest weight of the evidence."

Dzelajlija II at ¶¶ 1-3. On March 12, 2009, the Eighth District sustained Dzelajlija's first assignment of error and *vacated* his convictions. *Id.* at ¶¶ 4 and 27.¹ Specifically, the Eighth District held that "the state failed to charge the appellant with the requisite mens rea of recklessness for the charged offenses, thereby rendering the indictment defective, and that this error permeated throughout the trial." *Id.* at ¶ 4. The rationale for its decision was based on the this Court's holding in *State v. Colon* (2008), 118 Ohio St. 3d 26 and its subsequent clarifying opinion in *State v. Colon* (2008), 119 Ohio St. 3d 204. The State elected *not* to appeal the Eighth District's decision in *Dzelajlija II*.

On May 20, 2009, the case was remanded to the trial court to carry out the Eighth District's mandate of vacating the convictions. The trial court, however, took no action for fourteen months. The trial court later explained that delay saying that it was "under the impression that the case may, based on the fact that it was a two-to-one decision, may have been appealed by the State to the Supreme Court, and we subsequently learned that was not correct."

¹ Because the first assignment of error resulted in the convictions being vacated, the second assignment of error became moot and was not addressed by the Eighth District.

(Tr. at 29). On July 28, 2010, the trial court, instead of following the Eighth District's mandate, issued an order to the sheriff to transport Dzelajlija "back to stand trial."

On August 27, 2010, this Court issued its decision in *State v. Horner* (2010), 126 Ohio St. 3d 466 overruling *Colon*. Paragraphs one and two of the syllabus. Specifically, this Court held that "when an indictment fails to charge a mens rea element of the crime, but tracks the language of the criminal statute describing the offense, the indictment provides the defendant with adequate notice of the charges against him and is, therefore, not defective." *Id.* at 473.

On September 14, 2010, the trial court held a hearing at the State's request to address the effect, if any, of the *Horner* decision on Mr. Dzelajlija's case. At the hearing, the State argued that *Horner* "nullified" and/or "made moot" the Eighth District's ruling in *Dzelajlija II* and therefore the trial court was left "with only one option and that is to execute the prior prison sentence of seven years." The trial court agreed with the State and, over defense counsel's objection, "reimpose[d] the sentence that it imposed initially on February 19, 2008."

Mr. Dzelajlija appealed the trial court's order and raised four assignments of error: 1) The trial court could not impose a sentence without a valid finding of guilt; 2) The trial court lacked jurisdiction to affect the court of appeals' judgment; 3) Res judicata and collateral estoppel precluded the State from relitigating the validity of Dzelajlija's indictment when it failed to appeal the case to the Ohio Supreme Court; and 4) The State failed to present extraordinary circumstances to justify deviation from the mandate. The Eighth District sustained *all four* assignments of error and reversed the trial court's decision to re-impose the sentence.

The State filed a notice of appeal and a request for this Court to accept jurisdiction over this case.

LAW AND ARGUMENT

Proposition of Law I (as formulated by Appellant-State of Ohio): An inferior court may deviate from the mandate of a reviewing court when an intervening decision from a superior court justifies such deviation.

The State maintains that the Eighth District must be reversed because it “insists that a third trial be held” despite the fact that, in hindsight, “no error occurred at the second trial.” (State’s MSJ at 5). The State’s formulation of the issue misses the mark for several reasons and its legal analysis is inconsistent with existing law.

1. The Eighth District, in *Dzelajlija II*, did not reverse the case for a new trial; rather, it vacated the convictions.

While the State can certainly consider whether or not to pursue further criminal charges against appellant, the Eighth District has not required a new trial; rather, it vacated the convictions. Opinion Below at ¶ 19. The case was remanded for the ministerial act of entering an order vacating the convictions. *Id.* Because of the narrow basis of the remand, the trial court lacked jurisdiction to reimpose a sentence where there was no valid finding of guilt. The Eighth District sustained two interrelated assignments of error raising these issues. And the State has not challenged the Eighth District’s resolution of these two assignments of error on appeal to this Court.

2. The State is wrong that it has been determined that no error occurred at the second trial.

Accepting the State’s argument that *Horner* (if it had been the law at the time) would have changed the Eighth District’s resolution of the indictment issue, it has still never been determined that no error occurred during the second trial. Because the Eighth District reversed the conviction due to a defective indictment, it did not need to reach Dzelajlija’s argument that his convictions were against the manifest weight of the evidence. Opinion Below at ¶ 6. There

has never been a determination of whether the State presented substantial, credible evidence to support Dzelajlija's conviction at the second trial.

3. Res judicata and collateral estoppel preclude the State from relitigating the validity of Dzelajlija's indictment when it failed to appeal that issue to this Court.

In asking the trial court to ignore the Eighth District's ruling in *Dzelajlija II*, the State was clearly relitigating the Eighth District's legal conclusion that Dzelajlija's indictment was fatally defective. Its attempt to relitigate this issue should have been barred by *res judicata* and collateral estoppel. *Res judicata* is routinely applied to criminal defendants who fail to raise issues on appeal. And these same rules apply to the State.

Principles of *res judicata* and collateral estoppel may be applied to "bar the further litigation in a criminal case of issues which were raised or could have been raised previously in an appeal." *Moviel*, 2007 Ohio 5947 at ¶ 23. *Res judicata* dictates that a "valid, final judgment rendered upon the merits bars all subsequent actions based upon any claim arising out of the transaction or occurrence that was the subject matter of the previous action." *Grava v. Parkman Twp.* (1995), 73 Ohio St. 3d 379, 382. This doctrine operates to preclude a subsequent action both on claims that were actually litigated and also those that could have been litigated in a previous action. *Id.*; see also *Rogers v. City of Whitehall* (1986), 25 Ohio St. 3d 67, 69. The doctrine of collateral estoppel "preclude[s] the relitigation of a point of law or fact that was at issue in a former action between the same parties and was passed upon by a court of competent jurisdiction." *Consumers' Counsel v. Pub. Util. Comm.* (1985), 16 Ohio St. 3d 9, 10.

In this case, the State and Dzelajlija previously litigated the validity of Dzelajlija's robbery indictment and the Eighth District, in *Dzelajlija II*, held that it was fatally defective. The State had the right to appeal that decision to the Ohio Supreme Court, but choose not to do so. The State is therefore barred by *res judicata* and collateral estoppel from relitigating that final

judgment and legal conclusion in the trial court. Moreover, the fact that the Ohio Supreme Court, in *Horner*, subsequently changed the law upon which the Eighth District's decision in *Dzelajlija II* rested does not limit the application of these legal doctrines. There is "no exception in the doctrine of res judicata for merely erroneous judgments." *LaBarbera v. Batsch* (1967), 10 Ohio St. 2d 106, 110.

Because the State failed to pursue its right to appeal the Eighth District's decision in *Dzelajlija II* in the Ohio Supreme Court, it is barred by res judicata and collateral estoppel from relitigating that judgment in the trial court. Again, despite the fact that Eighth District sustained this assignment of error, the State has not raised it on appeal to this Court.

4. The State did not present extraordinary circumstances to justify the trial court's deviation from the mandate of *Dzelajlija II*.

Even if this Court were to conclude that the trial court could sentence without a finding of guilt, that the trial court had jurisdiction to affect the judgment of the Eighth District, and res judicata and collateral estoppel do not apply, the State nonetheless failed to present extraordinary circumstances necessary for the trial court's deviation of the Eighth District's mandate.

This Court has expressly held that the Ohio Constitution "does not grant to a court of common pleas jurisdiction to review a prior mandate of a court of appeals."² *State ex rel. Cordray v. Marshall* (2009), 123 Ohio St. 3d 229, 236. Under the "mandate rule," a lower court must "carry the mandate of the upper court into execution and not consider the questions which the mandate laid at rest." *Sprague v. Ticonic Natl. Bank* (1939), 307 U.S. 161, 168, 59 S.Ct. 777, 83 L.Ed. 1184. The lower court may, however, rule on issues left open by the mandate. *Id.* But when the mandate leaves nothing left to decide, the lower court is bound to execute it. *Id.*

² The mandate rule is grounded in constitutional law, statutory law, and court rules. See Art. IV of the Ohio Constitution; R.C. 2949.05; App. R. 27.

This Court has provided, however, that a trial court may disregard a superior court's mandate in "extraordinary circumstances, such as an intervening decision by the Supreme Court." *State ex rel. Heck v. Kessler* (1995), 72 Ohio St. 3d 98, 102. In this case, the trial court concluded that the State had presented extraordinary circumstances to deviate from the Eighth District's mandate in *Dzelajlija II* because *Horner* demonstrated, in retrospect, that *Dzelajlija II* was wrongly decided. *Dzelajlija* fully recognizes that the Ohio Supreme Court's decision in *Horner* undercut the Eighth District's legal reasoning in *Dzelajlija II*. However, the *Horner* decision does not constitute extraordinary circumstances for deviating from the Eighth District's mandate in *Dzelajlija II* for several reasons.

a. *The Eighth District's mandate in Dzelajlija II did not require the trial court to deviate from Ohio Supreme Court precedent.*

The Eighth District's mandate in *Dzelajlija II* was simple and straightforward—the trial court was required to vacate *Dzelajlija*'s convictions. The trial court's implementation of that mandate in no way contravenes the Ohio Supreme Court's decision in *Horner*. Nothing in *Horner* prevents a trial court from vacating convictions reversed on appeal.

In relying on *Horner* to disregard the Eighth District's mandate, the trial court interpreted the "extraordinary circumstances" exception much too broadly and in a manner that contravenes Article IV of the Ohio Constitution. This exception does not vest trial courts with jurisdiction to review the *legal reasoning* of appellate court decisions. It merely provides that a trial court cannot take an action, pursuant to implementing an appellate court mandate, that is squarely precluded by an intervening Ohio Supreme Court decision. A good example of when this narrow exception to the mandate rule might apply is when an appellate court issues a mandate requiring a trial court to merge two particular offenses as allied, but then an intervening decision from the Ohio Supreme Court provides that these two offenses are not allied. Under that circumstance,

the trial court could not implement the mandate (merger of two particular convictions) because it would be directly inconsistent with an Ohio Supreme Court decision that provides that those same two convictions cannot be merged.

Such a circumstance is very different from what happened here. In this case, the intervening Ohio Supreme Court decision in *Horner* only pertained to the Eighth District's legal reasoning in *Dzelajlija II* (indictment was defective) and *not* to the mandate issued by the Eighth District (vacate the convictions). Because implementation of the Eighth District's mandate is not inconsistent with *Horner*, *Horner* does not provide extraordinary circumstances for disregarding the Eighth District's mandate. If this Court were to accept to the trial court's expansive view of the "extraordinary circumstances" exception to the mandate rule, then lower courts would unconstitutionally be reviewing the legal reasoning of superior courts. Any time this Court reverses an intermediate appellate court decision, a trial court could elect to deviate from the mandate if it feels that a subsequent Ohio Supreme Court decision undercut the *legal reasoning* which resulted in the mandate. Such a result is clearly not countenanced by Article IV's creation of "superior" and "inferior" courts. *State ex rel. Cordray*, 123 Ohio St. 3d at 236.

Because the intervening Ohio Supreme Court decision only affected the legal reasoning of *Dzelajlija II* and not its mandate, the trial court erred in relying on *Horner* to disregard the Eighth District's mandate.

b. Extraordinary circumstances are not present when the State failed to exhaust its available appellate remedies and when disregard of the mandate prejudices the defendant.

Even if this Court finds that the Eighth District's mandate, as opposed to its legal reasoning, was affected by *Horner*, the State nonetheless did not demonstrate the existence of "extraordinary circumstances" to deviate from the Eighth District's mandate because the State

failed to exhaust its appellate remedies and the disregard of the Eighth District's mandate would clearly prejudice Dzelajlija.

Extraordinary relief—like the disregard of a superior court's mandate—should not be a substitute for a direct appeal. To the extent that the State disagreed with the Eighth District's decision in *Dzelajlija II*, it had the right and the obligation to appeal that decision to the Ohio Supreme Court. Indeed, the Ohio Supreme Court accepted the *Horner* case less than two weeks after *Dzelajlija II*, well within the State's deadline for filing a timely appeal. Instead of exercising its right to appeal, the State did nothing and simply waited until *Horner* was decided more than a year later. And then, it sought to have the trial court effectively do what it should have asked the Ohio Supreme Court to do—overrule the Eighth District's decision in *Dzelajlija II*.

Moreover, the State's failure to properly pursue its available appellate remedies has prejudiced Dzelajlija by denying his right to have the Eighth District address all of the issues raised in his prior appeal. In *Dzelajlija II*, Dzelajlija raised two assignments of error: 1) the indictment was defective; and 2) the evidence was against the manifest weight of the evidence. 2009 Ohio 1072, ¶¶ 2-3. Because the Eighth District found the indictment to be defective, it did not address Dzelajlija's other assignment of error, finding it to be moot. *Id.* at ¶ 28. If the State had properly pursued its right to appeal the Eighth District's resolution of Dzelajlija's first assignment of error and the Ohio Supreme Court had reversed this Eighth District's decision, the case would have been remanded to address Dzelajlija's remaining assignment of error. However, because the State failed to appeal *Dzelajlija II*, Mr. Dzelajlija was deprived of his opportunity to have the Eighth District review all his assignments of error. Such prejudice to

Dzelajlija, a direct consequence of the State's nonfeasance, precludes a finding of extraordinary circumstances to justify disregard of the Eighth District's mandate.

CONCLUSION

For the foregoing reasons, Defendant-Appellee James Dzelajlija respectfully asks this Court to decline jurisdiction over this matter as it does not present a substantial constitutional question for review.

Respectfully Submitted,


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Counsel for Appellee

CERTIFICATE OF SERVICE

A copy of the foregoing Memorandum In Response was served upon WILLIAM D. MASON, ESQ., Cuyahoga County Prosecutor, The Justice Center - 9th Floor, 1200 Ontario Street, Cleveland, Ohio 44113 on this 30th day of April, 2012.


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