

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Appellant,

v.

JEFFERY L. McFARLAND ,

Appellee.

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S. Ct. Case No.: 12-1042

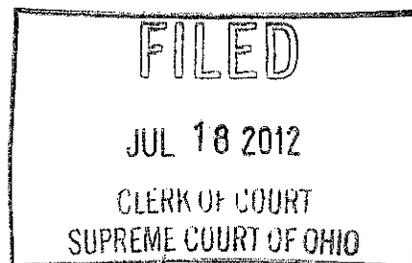
Ct. of Appeals Case No.: E-11-048

Common Please Case No.: 2010-CR-292

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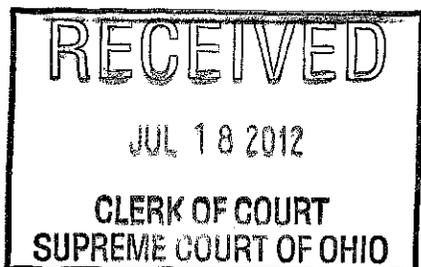
APPELLEE'S MEMORANDUM IN RESPONSE  
TO APPELLANT'S MEMORANDUM IN SUPPORT OF JURISDICTION

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**APPELLEE'S POSITION THAT THIS IS NOT A CASE OF PUBLIC OR GREAT  
GENERAL INTEREST**

Appellee asserts that the present case is not one of public or great general interest. In fact, the Sixth District Court of Appeals specifically noted that the case was not one that would affect the outcome of other criminal cases. The Court of Appeals specifically stated, “[u]nder the limited facts of this case, any successive prosecution for additional child sex crimes related to the seizure of his computer, which *could* have been brought in the Lucas County case but were not, frustrates the purpose and intent of the plea agreement and sentencing in the Lucas County case and is unduly prejudicial to appellee.”

Appellant attempts to suggest that the case is of great public interest by suggesting that the decision of the lower courts somehow inappropriately expanded the definition of Double Jeopardy recently enunciated in *State v. Johnson* (2010), 128 Ohio St. 3d 153. This argument ignores the findings and rationale of the Appellate Court, which was based on established statutory and case law that Appellant does not dispute.

The Appellate Court performed a de novo review of the matter. Upon completing that de novo review the Court realized that the decision of the trial court was appropriate without even reaching the issue of double jeopardy. The Court noted that, pursuant to R.C. 2901.12, venue for all of the offenses existed in both Erie and Lucas Counties. The Court further concluded that the State reached a plea agreement in Lucas County on some of the charges rather than all, and a sentence was rendered, which would have been rendered meaningless by the, “piecemeal prosecution.”

Accordingly the Court noted that when applying the decision of *State v. Urvan* (1982), 4 Ohio App. 3d 151, to the unique facts in the present case, the decision of the trial court was proper and should be affirmed. Appellant does not dispute the validity of *Urvan* or R.C. 2901.12.

The State of Ohio's dissatisfaction with the rulings below does not create a case of public or great interest. The law has been analyzed and is well defined. Therefore, the clear, undisputed facts and legal issues do not justify this Court's acceptance of jurisdiction.

## STATEMENT OF THE FACTS AND CASE

On February 27, 2010, the Erie County Sheriff's Department received information from Whitehouse Police Department in Lucas County, Ohio, that Appellee was being charged in Lucas County for allegedly using his computer in Erie County to meet and solicit sexual activity with a Juvenile in Lucas County. The Erie County Sheriff's Department also received information from the Whitehouse Police Department that Appellee had been arrested in Lucas County and consented to having his computer searched.

On February 28, 2010, the Erie County Sheriff's Department assisted the officers from Lucas County in retrieving a computer from Appellee's home. After seizing the computer it was turned over to the Toledo Police Department to search for evidence of child enticement and child pornography.

During the initial search several child pornography thumbnails were found and the Whitehouse Police Department was contacted and made aware of the findings. Consequently, officers in Lucas County were put on notice of the purported evidence.

Charges were filed in Lucas County through the Maumee Municipal Court for Disseminating Matter Harmful to Juveniles and Importuning, under Case No. 10-CRA-00143. Thereafter, Appellee reached a plea agreement resolving the charges.

On April 27, 2010 Appellee's felony charges were amended to misdemeanors. Appellee pled "no contest" to the amended charges filed under 10-CRB-00365. Defendant was placed on probation through June 11, 2013, and he was ordered to complete a CBCF in Lucas County as a condition of

probation. As a part of his sentence Appellee's computer and vehicle were forfeited. Appellee was also labeled a Tier I Child Victim Offender, compelling him to register for a period of fifteen (15) years.

Despite the plea agreement and resolution of the charges in Lucas County, on or about August 11, 2010, Appellee, was indicted in Erie County for six counts of Pandering Obscenity Involving a Minor, in violation of R.C. 2907.321, and six counts of Pandering Sexually Oriented Matter Involving a Minor, in violation of R.C. 2907.322. The indictment was for the thumbnails discovered on Appellee's computer by the Toledo Police Department in connection with the Lucas County case.

On or about November 12, 2010, Appellee filed a Motion to Dismiss the indictment. Appellant filed its initial response on December 1, 2011. Appellee filed a Supplement to the Motion on January 26, 2011. Appellant then filed a Supplemental Response on or about March 8, 2011.

Given that the facts relevant to the issue were not truly in dispute. The Court initially ruled on the issue based upon the briefs. Said decision was filed by the Court on April 15, 2011.

Ultimately, at the request of Appellant, the Court vacated its initial order to give Appellant the opportunity to present evidence as to why Appellee's motion should not be granted. A hearing was held by the Court on June 8, 2011.

Again, because the facts relevant to the issue were not truly in dispute, at the June 8, 2011 hearing the parties jointly stipulated and admitted as a joint exhibit, the police reports, Judgment Entries, and documents relevant to the issue of Appellee's Motion to Dismiss. Appellant was then given the opportunity, at the hearing, to supplement the documentary evidence with testimony from

an investigating officer from Lucas County.

After a thorough review of the testimony, joint exhibits, and arguments of counsel, the Court issued an Opinion and Judgment Entry granting the Motion to Dismiss. Appellant thereafter appealed. Again, after a thorough de novo review of the law and undisputed unique facts of the present case, the Sixth District Court of Appeals agreed with the decision of the trial court and affirmed the decision. Appellant now brings this appeal.

**APPELLEE'S POSITION REGARDING THE PROPOSITIONS OF LAW  
RAISED IN THE MEMORANDUM IN SUPPORT OF JURISDICTION  
ARGUMENT**

Even though the Appellate Court did not need to reach the issue of Double Jeopardy in affirming the decision of the trial court, Appellant asserts that this court should accept jurisdiction because the trial court's interpretation of double jeopardy was flawed. Appellee disputes this claim.

Based upon the undisputed facts, presented to the trial court, and specifically found by the trial judge, the Erie County prosecution violated Appellee's right to be free from Double Jeopardy.

In the present case, the Court dutifully performed the test for allied offenses outlined in *State v. Johnson* (2010), 128 Ohio St. 3d 153, and correctly and appropriately determined that, given the facts of the present case, the offenses were allied. Accordingly, allowing the State to go forward with the Erie County prosecution runs afoul of Double Jeopardy protections.

In the present case the trial court, pursuant to *Johnson*, supra, looked at, and found, that it is possible to commit the Pandering charges (the Erie County charges) and the Attempted Dissemination charges (the Lucas County charges) at the same time. Appellant does not appear to contest this issue. Nowhere in Appellant's brief does Appellant suggest otherwise.

Given the Court's first finding, the trial court, in accordance with *Johnson*, supra, then went on and considered whether Appellee committed the offenses with a separate animus. After fully reviewing the matter the Court concluded Appellee had a single animus. The finding certainly is supported by the record. The on-line computer chat with the person that Appellee believed to be a juvenile, occurred on February 27, 2010. Appellee was then arrested in Lucas County on that date.

The arresting officer, apparently recognizing the connection between using a computer to chat with teens online for sexual gratification, and viewing photographs of teens online for sexual gratification, specifically asked Appellee at the time of his arrest about photographs. Appellee's computer was then seized. Appellee clearly did not get the photographs after chatting on line with the Lucas County officer.

It is clear, based on the testimony presented, and the joint exhibit introduced, that both cases involved the same class of offenses, to wit: sex offenses. Further, the victims are of the same type or group, to wit: children. Given that the alleged offenses are of the same class, involve the same class of victims, and are alleged to have happened in close proximity in time, it is clear that that matter involves the same course of conduct. Further, all of the offenses are connected to, and involve the use of the same computer. As such, the finding of the trial court is clearly supported by the record.

In *Johnson*, this Court acknowledged that the new analysis may lend itself to an outcome different than that in prior cases, or even in cases apparently similar in nature. As the Court stated:

We recognize that this analysis may be sometimes difficult to perform and may result in varying results for the same set of offenses in different cases. But different results are permissible, given that the statute instructs courts to examine a defendant's conduct – an inherently subjective determination.

*State v. Johnson*, supra

In the present case, even though the decision may not be to Appellant's liking, it clearly is supported by the record.

Second, it must be noted that this Court has long acknowledged other judicially recognized violations of Double Jeopardy independent of subsequent prosecutions for allied offenses. In fact, in *Johnson*, supra, the Court specifically noted, “We have modified it and created exceptions to it in order to avoid its attendant absurd results.”

One of the exceptions to an allied offense analysis is the “relitigation of factual issues on a successive prosecution.” As expressly stated in *State v. Edwards* (Eighth Dist., January 13, 2011), 2011-Ohio-95:

Even if two offenses are sufficiently different to permit the imposition of consecutive sentences, successive prosecutions will be barred in some circumstances where the second prosecution requires the relitigation of factual issues already resolved by the first. *Brown v. Ohio* (1977), 432 U.S. 161, 166-167. N. 6, 97 S.Ct. 2221, 53 L.Ed.2d 187.

*State v. Edwards*, supra.

Similarly, in *State v. Clelland* it was held:

Nevertheless, the *Blockburger* test is not the exclusive means by which the protection against double jeopardy is deemed to apply to particular offenses. *State v. Tolbert* (1991), 60 Ohio St. 3d 89, 90-91. Even if two offenses are sufficiently different to permit the imposition of consecutive sentences, successive prosecutions will be barred in some circumstances where the second prosecution requires relitigation of factual issues already resolved by the first. (Emphasis added.)

*State v. Clelland* (1992), 83 Ohio App. 3d 474, 486.

In the present case, a successive prosecution would require re-litigation of factual issues. The Erie County charges clearly stemmed from the original search of the computer, which was allegedly obtained with Appellee’s consent. In defense of the Erie County charges counsel for Appellee would need to re-litigate factual issues such as “Waiver of Miranda” and “consent of the search.” In addition,

counsel would need to independently examine the computer and evidence allegedly recovered therefrom. This is not possible given the resolution reached in the first matter.

In *Edwards*, supra, the Court reviewed and relied on the decision of *Rashad v. Burt* (1997), 108 F.2d 677. In both *Edwards* and *Rashad* police discovered, and the state obtained convictions, against the defendant after cache's of drugs were discovered in the Defendant's property. Further prosecutions were then barred based on additional drugs discovered during subsequent searches by the police. While the contraband that was seized in the present case is different (alleged child pornography verses illegal drugs), the fact pattern as to how the police came into possession of the contraband is the same. A successive prosecution was pursued based on evidence the State obtained during the initial prosecution. Accordingly, the result in the present case should be the same as that in *Edwards* and *Rashad*.

Appellant attempts to distinguish the present case from *Edwards* by suggesting that a supplemental crime lab report was not received until after Appellee entered his plea in Lucas County. This type of argument misses the point. Lucas County knew of the photographs when they arrested Appellee. When they arrested Appellee in February, a Lucas County officer asked Appellee about photographs on his computer. At that time Lucas County took possession of the computer. Information was passed along to Erie County. Clearly, the State knew about the photographs, and had possession of the computer prior to resolving the charges that were brought in Lucas County. The State could have completed an examination of the computer prior to agreeing to resolve the charges brought in Lucas County. The State cannot sit on its hands with an investigation simply to stagger out charges. Double Jeopardy prohibits this.

One of the other judicial recognized violations of Double Jeopardy involves the imposition of multiple successive criminal penalties. In *State v. Clelland* (1992), 83 Ohio App. 3d 474, the court acknowledged that Double Jeopardy safeguards also protect against multiple criminal punishments for the same conduct. Similarly, the Sixth District Court of Appeals has specifically noted that Double Jeopardy protections contained in both the United States and Ohio State Constitutions protect against, among other things, multiple punishments for the same criminal conduct. *State v. Williams* (2008), 2008 Ohio 2730; 2008 Ohio App. LEXIS 2290.

Further, in *State v. Casalicchio* (1991), 58 Ohio St. 3d 178, the Ohio Supreme Court found that property ruled to be contraband, and forfeited, constitutes a separate criminal penalty in addition to the penalty the Defendant faces for the conviction of the crime. In fact, in *In re Forfeiture of Certain Real Property* (1994, Trumbull Co.), 99 Ohio App. 3d 565, it was found that the action for forfeiture of the defendant's home, brought after her drug conviction, was barred by Double Jeopardy provisions even though forfeiture was sought prior to sentencing. Further, in *State v. Adams* (1995), 105 Ohio App. 3d 492, it was found that Double Jeopardy protections preclude a criminal forfeiture action where the related criminal charges have been dismissed on speedy trial grounds.

In the present case, as part of Appellee's criminal case in Lucas County, Appellee's computer was ordered forfeited as part of his punishment for the conviction. This is an undisputed fact, stipulated to by Appellant and specifically found by the Judge in the findings of fact.

Given that the Erie County case was based on allegations as to what Appellee had stored on that computer, Appellee was already been put in Jeopardy for the materials on his

computer, and could not be subsequently prosecuted in Erie County.

### CONCLUSION

It is clear that Appellee was charged in Erie County based on the offense, and underlying investigation, completed in Lucas County. Had Appellee not surrendered his computer to officers in Lucas County for an examination of the computer, and had Appellee not talked to Lucas County about the possible existence of photographs on his computer, Erie County would never even have known about any possible charges.

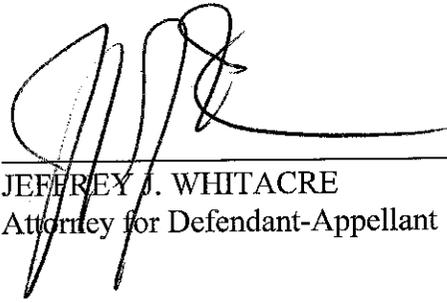
It is also clear that both cases involve the same class of offenses, to wit: sex offenses. Further, the victims are of the same type or group, to wit: children. Given that the alleged offenses are of the same class, involve the same class of victims, and are alleged to have happened in close proximity in time, it is clear that that matter involves the same course of conduct. Further, all of the offenses are connected to, and involve the use of the same computer.

It is also clear that Appellee entered into a plea agreement and was sentenced in Lucas County, without any mention, or reservation by the State, that additional charges could be forthcoming. Defendant accepted his plea, and was sentenced, which included a forfeiture of his computer.

Consequently, splitting the charges between separate counties, "either by design or inadvertence" is prohibited.

Accordingly, it is respectfully suggested that this case does not present a substantial constitutional question to be resolved and it is not of public or great interest. As such, this Court should decline jurisdiction to decide the case on the merits.

Respectfully submitted,

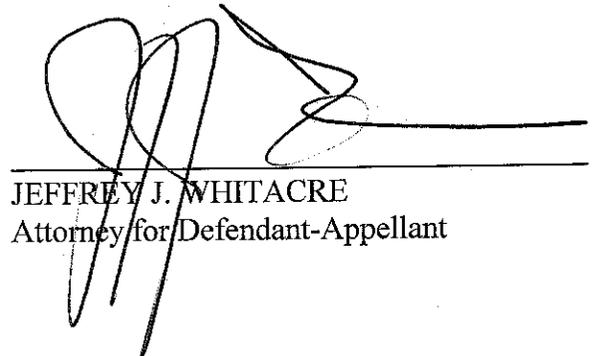


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JEFFREY J. WHITACRE  
Attorney for Defendant-Appellant

**CERTIFICATION**

This is to certify that a copy of the foregoing Appellee's Memorandum in Response to Appellant's Memorandum in Support of Jurisdiction was sent to MaryAnn Barylski, Assistant Erie County Prosecutor, 247 Columbus Ave., Sandusky, Ohio 44870 on this 16<sup>th</sup> day of July, 2012, by regular U.S. Mail.



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JEFFREY J. WHITACRE  
Attorney for Defendant-Appellant