

IN THE SUPREME COURT OF OHIO

STATE OF OHIO)	CASE NO. 2012-1242
CITY OF AKRON)	
Plaintiff-Appellee)	On Appeal from the Court of Appeals, Ninth Judicial District, Summit County, Ohio
-vs-)	
MATTHEW KARESKI)	Court of Appeals Case No. 25705
Defendant-Appellant)	

APPELLEE'S MEMORANDUM IN OPPOSITION OF JURISDICTION

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TABLE OF CONTENTS

	<u>PAGE</u>
APPELLANT'S PROPOSITION OF LAW.....	i
EXPLANATION OF WHY THIS CASE IS NOT A MATTER OF GREAT PUBLIC OR GENERAL CONCERN.....	1
STATEMENT OF THE CASE AND FACTS.....	3
ARGUMENT.....	6
CONCLUSION.....	10
CERTIFICATE OF SERVICE.....	11

APPELLANT'S PROPOSITION OF LAW

A TRIAL COURT'S TAKING OF JUDICIAL NOTICE OF AN ELEMENT OF AN OFFENSE CANNOT BE CONSIDERED AS "EVIDENCE" IN DETERMINING WHETHER SUFFICIENT EVIDENCE EXISTS TO ALLOW A RETRIAL UNDER THE DOUBLE JEOPARDY CLAUSES OF THE STATE AND FEDERAL CONSTITUTIONS.

**EXPLANATION OF WHY THIS CASE DOES NOT INVOLVE A
MATTER OF GREAT PUBLIC OR GENERAL CONCERN**

This case does not present a matter of great public or great general concern regarding the application of *State v. Brewer*, 121 Ohio St. 3d 202, 2009-Ohio-593, as opposed to *State v. Lovejoy* (1997), 79 Ohio St. 3d 440, 683 N.E. 2d 1112, when analyzing Double Jeopardy.

Matthew Kareski, was charged with Furnishing Alcohol to a Minor under R.C. 4301.69. In the Trial Court hearing, the Judge took judicial notice that Bud Lite is "beer". The State relied on that evidentiary ruling in deciding what evidence to present. The State did not provide evidence that the Bud Light bottle was brewed or fermented from malt products and tested to determine the percentage of alcohol. The State relied on the Judge's ruling that presentation of evidence that Bud Light was beer was not necessary. Judicial notice had been taken. The Defendant was found guilty by a jury of his peers.

Subsequently, the Ninth District Court of Appeals determined that the trial court incorrectly took judicial notice that Bud Lite was "beer," as defined under R.C. 4301.01(B)(2). The Court held that although the trial court erroneously took judicial notice, they nonetheless could consider the judicially noticed element in their sufficiency analysis to conclude that there was sufficient evidence to convict the Defendant. The Court properly relied upon *State v. Brewer*, 121 Ohio St.3d 202, 2009-Ohio-593, to determine that the judicially noticed fact that Bud Lite was "beer", although trial error, could be considered when deciding the sufficiency of

evidence.

The important difference between *Brewer* and *Lovejoy* is the timing. In *Brewer*, judicial notice was taken prior to the end of presentation of evidence and jury deliberations. Alternatively, in *Lovejoy*, judicial notice was taken at the conclusion of the case, after the parties had presented their case. In the present case, judicial notice was taken prior to the State resting. Thus, *Brewer*, is appropriate in analyzing Double Jeopardy. There is no confusion regarding when application is appropriate.

Here, the Defendant is allowed another opportunity to attempt to prove he is innocent of Furnishing Alcohol to a Minor. The Double Jeopardy Clause does not apply, as the Defendant was found guilty and the State appropriately presented evidence based on the judicial notice determined by the Trial Court Judge. Accordingly, this case does not present this Court with a case of public or great general interest, nor does it present a substantial constitutional question.

STATEMENT OF CASE AND FACTS

Mychael Kimbel ("Kimble") is a 19-year-old confidential informant who works for the Ohio Department of Public Safety, doing compliance checks for alcohol. (Tr. p. 91-92). Matthew Kareski ("Kareski") is a 30-year-old bartender at Lux Night Club and Rubber City Grill. (Tr. p. 168-169). On the evening of August 19, 2010, Kimble was working as a confidential informant. (Tr. p. 94). He went to the Lux Night Club at 9:30 p.m. with Agent Keenan Reese. (Tr. p. 95). They passed through the front door, where there were a few men speaking to one another, but no bouncer or doorman was present to ask for their identification. (Tr. p. 97, 175). Doormen do not stand at the front door to check for identification until a quarter to ten. (Tr. p. 175).

Kimble and Agent Reese went through the front door, were escorted by a female employee to an elevator up to the bar area. (Tr. p. 96). No identification was requested at the front door, by the female employee or at the bar area. (Tr. p. 97-8, 176).

Kimble walked up to the bar and asked for a Bud Lite Bottle. (Tr. p. 98). Kareski opened the Bud Lite and placed it in front of Kimble. (Tr. p. 176). Kimble paid cash for the drink and Kareski accepted the money and rang it up in the register. (Tr. p. 98, 105, 191, 196). Kareski did not ask for identification at any point before, during or after the sale. (Tr. p. 98).

Agent Reese witnessed the entire transaction with Kareski handing Kimble the Bud Light beer. (Tr. p. 117). Kimble received change for the Bud Light and left the

bar area a few seconds later to take a call. (Tr. p. 98). Kareski did not ask Kimble for identification, nor did Kimble ever receive a stamp on his hand for the purpose of buying alcohol. (Tr. p. 98-99). During the trial, Kareski referred to the Bud Light as beer. (Tr. p. 178).

Agent Reese, an alcohol enforcement agent with the Ohio Department of Public Safety, also testified that no one checked Kimble or his identification. (Tr. p. 111,114). A few moments later, Reese picked up the Bud Light from the counter and testified that the bottle in evidence was in fact the same Bud Light that Kareski handed to Kimble after he paid for the beer. (Tr. p. 116-117).

At the jury trial on October 22, 2010, Agent Reese recognized the Bud Light bottle that was taken from the Club on the night in question. (Tr. p. 117). The label on the bottle read Bud Light Beer. (Tr. p. 119). Agent Reese stated that the ingredients for Bud Light are listed on the bottle, but they were covered by the sample analysis. (Tr. p. 119). After several questions by Judge Holcomb to Agent Reese, Judge Holcomb took Judicial Notice that the Bud Lite bottle produced was beer. (Tr. p. 140).

The State was able to introduce the Bud Light can into evidence as Exhibit 1. (Tr. p. 141). The State rested their case and the Defense attorney made a motion for directed verdict, stating that the state had failed to meet the critical elements in this case. (Tr. p. 142). Judge Holcomb denied the motion. (Tr. p. 143).

Judge Holcomb read the Jury instructions where he included all elements of the offense of sale of alcohol to an underage person. (Tr. p. 213-220).

At the end of the trial, Kareski was found guilty of sale to an underage person. (Tr. p. 225).

On November 29, 2010, Defendant-Appellant filed a notice of appeal with the Ninth District Court of Appeals. On February 28, 2011, Defendant-Appellant filed a Brief on this matter and the State responded. On May 16, 2012, the Ninth District Court of Appeals determined that the trial court incorrectly took judicial notice that Bud Lite was "beer," as defined by R.C. 4301.01(B)(2). However, the Ninth District Court disagreed with Defendant-Appellants second and third assignment of error, stating there was sufficient evidence to convict the Appellant beyond a reasonable doubt for the sale of beer to an underage person based on *State v. Brewer*, 121 Ohio St.3d 202, 2009-Ohio-593. The case was remanded to the trial court for a new trial.

Defendant-Appellant asked the Court of Appeals to reconsider its' decision arguing that the Court incorrectly relied on *State v. Brewer*, for the proposition that judicial notice that Bud Lite is beer can be used to analyze the sufficiency of evidence. The Defendant-Appellant argued that *State v. Lovejoy*, 79 Ohio St.3d 440 (1997) should control.

On July 24, 2012, Defendant-Appellant filed a Notice of Appeal and Memorandum in Support of Jurisdiction with this Court. In Response, the State of Ohio files this Memorandum in Opposition to Jurisdiction.

ARGUMENT

Appellant contends that when a trial court takes judicial notice of an element of an offense, it cannot be considered as evidence to determine whether sufficient evidence exists to retry a case under the Double Jeopardy Clauses of the State and Federal Constitutions. Appellant argues that *State v. Lovejoy* (1997), 79 Ohio St. 3d 440, 683 N.E.2d 1112, should be followed rather than *State v. Brewer*, 121 Ohio St. 3d 202, 2009-Ohio-593. We disagree because the timing in this present case is distinguishable from *Lovejoy*.

In *Lovejoy*, the case involved two counts: aggravated murder with prior calculation and design and felony murder based on aggravated robbery. *Id* at 446. After closing arguments, the trial court *sua sponte* decided to “take judicial notice of prior proceedings in an earlier case to supply a crucial fact that the state failed to prove”. *Id* at 449. The State closed its case without proving all elements of the offenses and then the Court, on its own, went back to provide the missing pieces.

Similarly, in our case, the trial court judge took judicial notice that Bud lite was “beer”. However, unlike *Lovejoy*, this was done prior to the Appellee resting their case. Judicial notice was taken while the Appellee was still presenting their case. The judge took judicial notice and the Appellee relied on this judicially noticed fact, which was an element of the offense. At the close of trial, the court did not *sua sponte* insert evidence that the Appellee did not provide but rather made a decision to take Judicial Notice during Appellee’s presentation of evidence that Bud Lite was “beer”. Once the decision was made, we cannot imagine or suggest what evidence

the Appellee may have provided if Judicial Notice had not been taken. We must take the Trial Court's decision to admit evidence as accurate and present any missing evidence regarding the elements of the offense.

The Ninth District Court of Appeals declared *State v. Brewer*, 121 Ohio St.3d 202, 2009-Ohio-593, to control in the present case. In *Brewer*, the Defendant was charged with gross sexual imposition. *Id* at 202. During the trial, the court admitted hearsay evidence in error. The Defendant argued that when the trial court improperly admitted hearsay testimony, that improper testimony cannot be used to determine whether the sufficiency of the evidence supports a conviction. *Id* at 202.

He argued that only properly admitted testimony can be submitted to determine whether there was sufficient evidence to support a guilty verdict. *Id* at 205. Similar to our case, the court admitted the improper evidence prior to Defendant's conviction. In our case, the Judge took Judicial notice that Bud Lite was "beer" prior to the conviction of the Appellant.

In *Brewer*, the Supreme Court of Ohio determined that "the court's error in admitting hearsay testimony does not implicate the type of governmental oppression that the Double Jeopardy Clause was intended to prevent. Hence, reversal of Brewer's conviction based upon this error allows him to obtain a fair readjudication of his guilt free from error". *Id* at 207.

Double Jeopardy was established by the Fifth Amendment to the Constitution of the United States which states: No person shall ***be subject for the same offense to be twice put in jeopardy of life or limb***. *Lovejoy* at 443. The Fifth

Amendment is applicable to the states through the Fourteenth Amendment. Double Jeopardy was established to protect a person who has been acquitted from embarrassment and stress of having a second trial. *Id.* Once a tribunal has decided a case in favor of the Defendant, Double Jeopardy should preclude a second trial.

Although Double Jeopardy protects a defendant from being prosecuted several times for a single offense, "society has an interest in affording the prosecutor one full and fair opportunity to present his evidence to an impartial jury". *Brewer* at 206. The Court understands that it would be a high price to pay for society if every Defendant were immune from retrial if there was an error made during the trial. Here, the Appellant was found guilty by a jury of his peers and a new trial would allow both sides to try their case with accurate evidence being admitted.

The Appellant relies on *Lovejoy* to argue that the facts are similar to the present case. In contrast, the facts presented in *Lovejoy* differ vastly from those in *Brewer*. In *Lovejoy*, the state failed to present sufficient evidence to prove its case and the court, sua sponte, had to "reopen the case to take judicial notice of prior proceedings in a different case to establish a missing element". *Id.* at 208. In *Brewer*, similar to the present case, the Appellee relied on an erroneous trial court evidentiary ruling to meet its' burden of proof to prove the Defendant's guilt beyond a reasonable doubt. Thus, *Lovejoy* is factually different from *Brewer*. In the present case, similar to *Brewer*, the Appellee relied on the erroneous trial court decision in deciding what evidence to present at trial. Had the trial court judge not taken judicial notice that Bud Lite was "beer", we cannot adduce what evidence would have been

presented. As the Supreme Court of Ohio accurately states: "[h]ad the trial court properly ruled on the admissibility of the state's evidence, the state would have had the opportunity to present additional evidence in support of its' burden of proof". *Brewer* at 209.

In *Lockhart v. Nelson*, 488 U.S. 33, 109 S.Ct. 285, the court distinguished between appellate court reversals based solely on insufficiency of the evidence and those based on ordinary "trial errors" stating: "While the former is in effect a finding 'that the government has failed to prove its case' against the defendant, the latter 'implies nothing with respect to the guilt or innocence of the defendant,' but is simply 'a determination that [he] has been convicted through a judicial process which is defective in some fundamental respect.'" *Id* at 40. In our case, the Appellee relied on the trial court's evidentiary ruling in how to present their case. The Judge, as the ultimate trier of fact, must be trusted as accurate. To instruct the attorney to present evidence which has already been admitted through the court would be time consuming and draw into question why we have a judge. It is the Court and societies decision to have a judge who makes a decision that is ultimately trusted and followed. The Appellee followed the decision of the trial court judge and presented evidence based on his ruling.

Thus, the Court of Appeals was correct in denying the Appellant's motion for reconsideration. The City of Akron proved beyond a reasonable doubt that on August 19, 2010: Appellant sold beer to an underage person. As such, Appellant violated R.C. 4301.69(A).

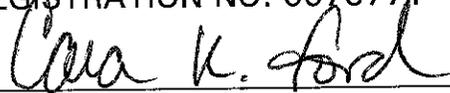
CONCLUSION

For the above stated reasons, the present case presents this Court with an issue that does not involve great public or general concern regarding Double Jeopardy. As such, Plaintiff-Appellee requests that this Court deny jurisdiction of this case.

RESPECTFULLY SUBMITTED,

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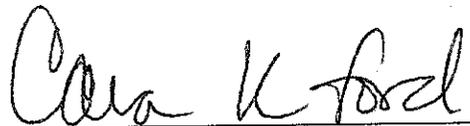
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum was sent by regular U.S. Mail this 21st day of August, 2012, to Thomas R. Houlihan, c/o Amer Cunningham, 159 South Main Street, Suite 1100, Akron, Ohio 44308.



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