

ORIGINAL

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

STATE OF OHIO

Appellant

-vs-

JAMES DZELAJLIJA

Appellee

On Appeal from the
Cuyahoga County Court
of Appeals, Eighth
Appellate District Court
of Appeals
CA: 95851

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SUMMARY OF ARGUMENT

The State's proposition of law sounds fairly innocuous: "An inferior court may deviate from the mandate of a reviewing court when an intervening decision from a superior court justifies such deviation." But the manner in which the State seeks to apply that proposition of law in this case would be a radical departure from well-established legal principles. The State wants this Court to hold that litigants can lose in the court of appeals, fail to exercise their appellate rights to this Court, wait sixteen months for a favorable change in the law, relitigate in the *trial court* the very issue they previously lost on appeal, and ask the trial court to reinstate a conviction previously vacated by the appellate court. Like the Eighth District, this Court should decline the State's invitation to undermine the certainty and finality of our legal system.

In urging this Court reverse the Eighth District, the State laments that the Eighth District's decision amounted to "blind adherence to procedure." (State's Br. at 10). 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 of a reviewing court; 3) a litigant's obligation to exhaust their appellate remedies before turning to extraordinary means of relief. This Court should not callously brush away these venerable principles in order to save the State from its own failure to adhere to these principles. If this Court were to accept the State's argument in this case, then any litigant, including criminal defendants, can fail to exercise their appellate rights, wait for a beneficial change in the law, and then reopen their case. The end result would be a legal system in which finality of judgments would be the exception and not the rule.

Moreover, while the State emphasizes the "sanctity of the jury verdict," (State's Br. at 10), it neglects to mention it chose *not* to defend that verdict when in this Court the verdict was

originally vacated by the Eighth District. Instead, the State chose to accept the appellate court ruling and, later 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. This Court should not craft an *extraordinary remedy* for the State when it neglected to pursue its *ordinary remedy* of appealing the merits of the Eighth District's judgment.

Finally, 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 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 case should be dismissed as having been improvidently granted.

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

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.

appealed by the State to the Supreme Court, and we subsequently learned that was not correct.” (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 an appeal challenging just one aspect of the Eighth District’s decision and raising a single proposition of law. This Court accepted the case for briefing and the State filed

its brief on August 31, 2012. Appellee James Dzelajlija's merit brief now follows.

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's proposed application of its proposition of law to the circumstances of this case is truly radical. For the State to prevail, this Court would have to hold that, after losing in the court of appeals, a party can choose not to appeal to this Court, wait for a change in the law, and then relitigate the very issue it previously lost in the trial court. As much as this change in our legal system might benefit many criminal defendants who would like to take advantage of changes in the law, such a rule is inconsistent with existing law and the operation of our legal system. Accordingly, this Court should affirm the Eighth District's judgment or dismiss the case as having been improvidently granted.

2. The Eighth District, in *Dzelajlija II*, remanded the case for the limited purpose of vacating the convictions and dismissing the case.

The State first argues that the Eighth District misinterpreted its own mandate in *Dzelajlija II* and that a proper reading of *Dzelajlija II* was that it left "the trial court with an open case upon an indictment" upon which the State could pursue a new trial. (State's Br. at 4-7). However, that is simply not the case. In *Dzelajlija II*, the Eighth District applied this Court's decision in *Colon* and vacated Dzelajlija's convictions because his indictment failed to charge an offense. Because Dzelajlija's indictment was fatally flawed, the case was remanded for the ministerial act of entering an order vacating the convictions. And, while the State is correct that the Eighth District's decision did not specifically direct the trial court to dismiss the case, it remanded the case for "proceedings consistent with this opinion." *Dzelajlija III* at ¶ 28. In light of *Colon*'s holding that the flawed indictment could not serve as the basis of a criminal prosecution, the only

proceedings consistent with the opinion were to vacate the convictions and dismiss the case. At that point, the State's remaining option, if it wanted to continue to pursue a criminal prosecution in this case, was to go to the grand jury and attempt to re-indict Dzelajlija as was done with Vincent Colon. *See State v. Colon*, Common Pleas Case No. 514624 (State of Ohio's re-indictment of Vincent Colon following the Ohio Supreme Court's *Colon* decisions). The State also chose not to do this.

2. The Eighth District properly reversed the trial court for several reasons in addition to the single issue raised by the State on appeal.

On appeal, the State confines its argument to the Eighth District's purported misapplication of the mandate rule. The Eighth District, however, sustained *three other assignments of error*, holding that: 1) The trial court erred in re-imposing a sentence without a valid finding of guilt; 2) *Res judicata* and collateral estoppel precluded the State from relitigating the validity of Dzelajlija's indictment when it failed to appeal that issue to the Ohio Supreme Court; and 3) The trial court lacked jurisdiction to affect the Eighth District's judgment in *Dzelajlija II*. Opinion Below at ¶¶ 16-20. Because the State's sole proposition of law does not challenge any of these independent bases for reversal, any decision by this Court on the State's sole proposition of law will have no effect on the outcome of the case. Accordingly, this Court should dismiss the case as having been improvidently allowed.

- a. *The trial court cannot "re-impose" a sentence without a valid finding of guilt.*

In this case, the trial court simply "re-impose[d]" Dzelajlija's prior sentence ignoring the reality that the Eighth District had vacated Dzelajlija's convictions and there was no finding of guilt upon which a sentence could be imposed. That is simply not a legally valid option. The trial court's attempt to "re-impose" Dzelajlija's sentence was a legal nullity because the

underlying finding of guilt had been vacated by the Eighth District. Absent a finding of guilt, there can be no sentence. See R.C. 2929.19(A)(1) (authorizing the imposition of a sentence only upon a conviction); *State v. Woods*, Hamilton App. No. C-060340, 2007 Ohio 1487, ¶¶ 33-34 (concluding that no sentence can be imposed upon a count or specification where there is no valid finding of guilt). Indeed, the imposition of a sentence without a valid finding of guilt violates a criminal defendant's state and federal due process rights. U.S. Const. Amend XIV.

The State's appeal to this Court does not address the flaw of re-imposing a sentence without a valid finding of guilt.

- b. *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 this Court, but chose 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* to 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.

- c. *The trial court lacked jurisdiction to affect the Eighth District’s judgment in Dzelajlija II.*

In *Dzelajlija II*, the Eighth District vacated Dzelajlija’s convictions for robbery because his indictment was fatally defective. Upon remand, the trial court acted directly contrary to that judgment and “reimposed” a sentence on Dzelajlija’s vacated convictions. The trial court lacked jurisdiction to do so.

It is well-established that the “judgment of a reviewing court is controlling upon the lower court as to all matters within the compass of that judgment.” *State ex rel. Special Prosecutors v. Judges* (1978), 55 Ohio St. 2d 94, 97. Moreover, a trial court does not have “the power to vacate a judgment which has been affirmed [or reversed] by the appellate court, for this action would affect the decision of the reviewing court, which is not within the power of the trial court to do.” *Id.* at 98. In short, a trial court lacks jurisdiction to act contrary to the judgment of the appellate court. *Id.*

Although the Eighth District Court remanded the instant case to the trial court in *Dzelajlija II*, it did so for the limited purpose of vacating the convictions. *Id.* at ¶ 27. The trial court had no jurisdiction to consider the State’s “motion to re-impose a sentence” as that would require it to affect the decision of the reviewing court. *Cf. State v. Moviel*, Cuyahoga App. No. 88984, 2007 Ohio 5947, ¶ 22 (concluding that a trial court lack’s jurisdiction to consider a motion to withdraw a plea when the case was merely remanded for resentencing); *See also State v. Craddock*, Cuyahoga App. No. 87582, 2006 Ohio 5915, ¶¶ 8-10 (same).

Jurisdiction relates to the power of the court and restricts its authority to hear a case. *State ex rel. Suster v. Jones* (1998), 84 Ohio St. 3d 70, 75. “If a court acts without jurisdiction, then any proclamation by that court is void.” *Id.* A court’s lack of jurisdiction cannot be waived and can therefore be raised at any time.² *Id.* Because jurisdictional limits are not discretionary, an intervening decision by the Ohio Supreme Court does not serve to create jurisdiction for a court that would not otherwise exist.

² None of the parties below recognized or addressed the jurisdictional bar precluding the trial court from affecting the judgment of this Court. Rather, the State focused exclusively on the prudential law of the case doctrine, a doctrine that *Dzelajlija* does *not* rely on.

In this case, the trial court's jurisdiction was confined to vacating the convictions. It did not have the authority to consider the State's motion to re-impose the original sentence. Because the trial court's actions exceeded its authority, its re-imposition of the sentence is void.

The State's appeal to this Court does not address the trial court's jurisdictional limits.

3. 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 that res judicata and collateral estoppel do not apply, the State nonetheless failed to present extraordinary circumstances necessary to justify the trial court's deviation from 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."³ *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.*

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 that, in retrospect, *Dzelajlija II*

³ 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.

was wrongly decided. Mr. 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 does not, in any way, contravene this 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 State’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. The State believes that lower courts can defy mandates of a superior court, including this Court or even the United States Supreme Court, anytime the lower court believes the *legal reasoning* which resulted in the mandate had been superseded. 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 fails 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 because the disregard of the Eighth District’s mandate would prejudice *Dzelajlija*.

- The State failed to exhaust its appellate remedies.

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, this Court accepted the *Horner* case less than two weeks after *Dzelajlija II*, was decided by the Eighth District, 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 this Court to do—overrule the Eighth District's decision in *Dzelajlija II*.

The State complains that the Eighth District's decision "requires the State to expend valuable judicial and State resources by trying [Dzelajlija] for a third time" and that it is "unjust to disregard a jury verdict upon a *technicality* in the timing of appellate court procedure." (State's Br. at 3) (emphasis added). The State's complaints ring hollow. The State made a strategic choice to accept the Eighth District's ruling *Dzelajlija II* and to relinquish its right to appeal that ruling. Having failed to exhaust its appellate remedies, the State should not be excused of the consequences of its strategic choice. The unnecessary expenditure of judicial and State resources is a byproduct of the State's refusal to accept the consequences of its strategic choice. While the State now expresses concern over the "sanctity of the jury verdict," (State's Br. at 10), its lamentations come *more than three years* too late as it chose *not* to defend that verdict when it was originally vacated by the Eighth District. Moreover, there is nothing "technical[]" about the fundamental rule that judgments become final if a litigant chooses not to file a timely appeal.

- Deviation from the mandate prejudices Dzelajlija.

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 verdict 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 affirm the Eighth District's decision.

Respectfully Submitted,


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CERTIFICATE OF SERVICE

A copy of the foregoing Appellee's Merit Brief was served upon Timothy J. McGinty, Acting Cuyahoga County Prosecutor, The Justice Center - 9th Floor, 1200 Ontario Street, Cleveland, Ohio 44113 on this 3rd day of October, 2012.



JOHN T. MARTIN, ESQ.
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