

**ORIGINAL**

NO. 2012-0651

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IN THE SUPREME COURT OF OHIO

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APPEAL FROM  
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO  
NO. 95851

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STATE OF OHIO,

Plaintiff-Appellant

-vs-

JAMES DZELAJILJA,

Defendant-Appellee

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**REPLY BRIEF OF APPELLANT STATE OF OHIO**

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## **I. SUMMARY OF REPLY TO APPELLEE'S ARGUMENT**

Appellee's argument rests on the same flawed analysis of the procedural posture of this case. Appellee assumes – as did the Eighth District Court of Appeals – that the criminal case against him was dismissed. However, it was not. After appeal of Appellee's second trial, the appellate court vacated the convictions and remanded the case to the trial court. It did not dismiss the indictments in the case. Thus, pursuant to bedrock principles of law, the State and Appellee were placed within the same position they had been in prior to trial.

Defendant further seeks to have this Court find that the outcome of this case would be otherwise even if this Court accepts as true the State's proposition of law because the appellate court sustained assignments of error finding that the trial court could not act to reenter the prior judgment to allow Appellee the direct appeal of his trial. This logic is circular and the State's proposition of law addresses these issues. At issue in this matter is whether the trial court can recognize extraordinary circumstances in the law after remand and apply those changes that, as in this case, obviated the appellate decision. If this Court finds that the trial court appropriately applied this Court's holding in *Horner* to the case, then the independent bases of reversal Appellee argues foreclose meaningful review of this matter are rendered moot.

Accordingly, the State asks that this Court accept its proposition of law, find that the trial court acted appropriately by recognizing that this Court's decision in *Horner* obviated the necessity of further proceedings in the trial court, and remand this matter to the trial court to consider the appeal of Appellee's second trial on the previously mooted assignment of error.

**II. THE CASE AGAINST APPELLEE WAS OPEN AND THE TRIAL COURT COULD ENTER THE JUDGMENT OF CONVICTION IN LIGHT OF *HORNER*.**

The appellate court did not dismiss this case, nor did it order the trial court to dismiss the case as it could have. App.R. 12. It simply vacated the convictions and ordered the trial court to proceed consistent with that order. It specifically stated the following in reversing the case:

Specifically, we find 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. **Accordingly, we vacate appellant's convictions.**

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Accordingly, having found that all five *Colon* prongs are met in this case, we must follow the Ohio Supreme Court's direction and conclude that the defective indictment so permeated appellant's trial, resulting in structural error **and requiring reversal.**

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Judgment reversed and case remanded to the lower court for further proceedings consistent with this opinion.

*State v. Dzelajlija*, 8<sup>th</sup> Dist No. 91115, 2009-Ohio-1072, at ¶4, 27, 28. (Citations omitted.)

A reading of the appellate decision clearly shows that the trial itself was reversed and the convictions were vacated. Upon remand, the trial court had before it an open criminal case upon an indictment. Appellee argues that this remand left only the act of dismissing the case for the trial court. That is not true. Before that court was an indictment that was, pursuant to Crim.R. 7, subject to amendment. The State may have pursued a new indictment as noted as an option by Appellee, but the remand in this matter was not subject to only one course of action as stated by Appellee. Moreover, had the appellate court wished to dismiss the indictments in its remand, it had the ability to specifically do so

pursuant to App.R. 12(B) to dismiss the indictment in this case. It did not do so. Accordingly the trial court had the ability to act on the matter, hold pretrials, and consider the effect of this Court's *Horner* decision upon the appellate opinion.

**III. THERE IS NO INDEPENDENT BASIS UPON WHICH THE TRIAL COURT'S REVERSAL OF THE ENTRY OF CONVICTION CAN BE SUSTAINED WHERE THE TRIAL COURT PROPERLY APPLIED THE HOLDING IN HORNER TO THIS CASE.**

Appellee argues that there were several bases upon which the appellate decision to vacate the trial court's entry of conviction in this case existed, and which would render moot this Court's determination of the propriety of that entry. However, the arguments presented by Appellee: that there was no finding of guilt, that res judicata and collateral estoppel precluded the entry of conviction, and the trial court lacked jurisdiction, are not independent bases to affirm the appellate court's judgment in this case.

However, the premise that a trial court can ever deviate from a mandate of a reviewing court, such as was done here, is an exception to the principles which Appellee claims preclude any meaningful relief to the State in having the trial court's entry affirmed and in having a substantive review of Appellee's claimed trial errors reviewed. This Court has long recognized an exception to the issues argued by Appellee as independent that allows lower courts to deviate from the mandate of a trial court upon remand. *State ex rel. Potain v. Mathews*, 59 Ohio St.2d 29, 32, 391 N.E.2d 343 (1979); *Nolan v. Nolan*, 11 Ohio St.3d 1, 3, 462 N.E.2d 410 (1984). As such, Appellee's arguments preclude the existence of such ability and thus do not mandate that this Court abandon the resolution of this matter.

**IV. THIS COURT'S DECISION IN *HORNER* CONSTITUTED AN EXTRAORDINARY CIRCUMSTANCE THAT ALLOWED THE TRIAL COURT TO REENTER THE CONVICTION.**

Finally, Appellee argues that this Court's decision in *Horner* does not constitute an extraordinary circumstance justifying the trial court's entry of conviction. He states that *Horner* only "undercut" the reasoning that led to the vacation of convictions. However, it did more than that. The appellate court recognized that, "This court concluded that due to recent changes in the controlling case law, the original indictment could no longer be deemed structurally defective \*\*\*" *State v. Dzelajlija*, 8<sup>th</sup> Dist. No. 95851, 2012-Ohio-913, at ¶8. Thus, *Horner* did not simply undercut the reasoning used by the appellate court as argued– it gutted it. The indictment in this case simply did not contain error. As such, the trial court was left with the predicament of having to expend valuable judicial and State resources by trying Appellee for a third time, where no error in the proceedings was found to justify the third trial. It is unjust to disregard a jury verdict based upon a technicality in timing of appellate court procedure. This case exemplifies the necessity to define under what circumstances an inferior court may deviate from a mandate; the State posits that such action is to do so where justice so requires. The appellate court never addressed this issue, avoiding this issue by its adherence to its reading of its prior mandate. That reading and failure to address the issue amounted to an improper invasion of the jury's verdict in the second trial, especially in light of the appellate court's admission that there was no error in the indictments. Based on this Court's precedent, and in conjunction with the inappropriate invasion of a jury verdict based, *Horner* did constitute an extraordinary circumstance that allowed for the trial court's entry of conviction.

Respectfully submitted,

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**V. CERTIFICATE OF SERVICE**

A copy of the foregoing Reply Brief of Appellant has been mailed this the 12<sup>th</sup> day of October 2012 via U.S. regular mail to John T. Martin, & Cullen Sweeney, Assistant Public Defenders, 310 Lakeside Ave., Suite 400, Cleveland, Ohio 44113.



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