

IN THE SUPREME COURT OF OHIO
2012

ORIGINAL

STATE OF OHIO,

Plaintiff-Appellant

-vs-

EMMANUEL HAMPTON,

Defendant-Appellee

Case No. 11-1473

On Appeal from the
Franklin County Court
of Appeals, Tenth
Appellate District

Court of Appeals
Case No. 10AP-1109

**PLAINTIFF-APPELLANT STATE OF OHIO'S MOTION FOR
RECONSIDERATION**

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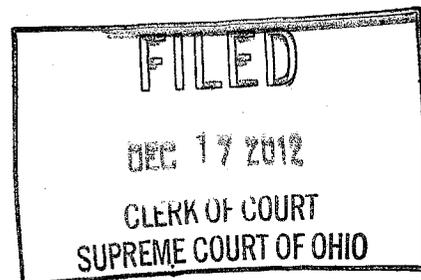
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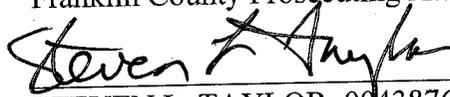
PLAINTIFF-APPELLANT STATE OF OHIO'S MOTION FOR RECONSIDERATION

Pursuant to S.Ct.Prac.R. 11.2, and for the reasons stated in the following memorandum in support, plaintiff-appellant State of Ohio respectfully requests that this Court reconsider its December 6, 2012, opinion.

The oft-applied standard for this Court accepting review of a case is whether this Court's rendering of a decision will aid the development of the law and provide answers for the bench and bar in applying the law. The State respectfully submits that the December 6th majority opinion falls short of these goals, leaving unaddressed the status of key cases and failing to address the State's key point about the meaning of "final verdict" in relation to a venue-based "acquittal." Reconsideration is warranted.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

The question presented is whether a court's order invoking Crim.R. 29 to "acquit" the defendant strictly based on improper venue falls within the "final verdict" exception of R.C. 2945.67(A) so as to bar the State from appealing. The trial began in this case in Franklin County, but it became clear that the offenses occurred in Fairfield County. The trial court expressly acknowledged that it was an improper

venue, but the court nevertheless invoked Crim.R. 29 to “acquit” the defendant of the offenses “strictly on the issue of Venue.”

In a 4-3 decision, the majority concluded that Crim.R. 29 could be applied to such a situation and that a “judgment of acquittal” was a proper label to attach to a trial court’s conclusion that the court was an improper venue. The majority also concluded that such an “acquittal” amounts to a “final verdict.”

The test generally used in ruling on a motion for reconsideration is “whether the motion calls to the attention of the court an obvious error in its decision, or raises an issue for consideration that was either not considered at all or was not fully considered by the court when it should have been.” *Columbus v. Hodge*, 37 Ohio App.3d 68, 68, 523 N.E.2d 515 (10th Dist. 1988). Under this standard, the State respectfully submits that reconsideration is warranted on three grounds.

A.

The four-justice majority did not address what could be described as the State’s “big picture” argument. To be sure, the majority concluded that the language of Crim.R. 29 literally would allow a trial court to “acquit” based on improper venue. And, to be sure, the majority concluded that such an “acquittal” would amount to a “final verdict” under this Court’s *Keeton-Yates* line of cases. Of course, the State respectfully disagrees with these conclusions, for all of the reasons stated in its briefing and for all of the similar reasons stated in the three-justice dissenting opinion.

But there was a larger issue as well. As the State argued in its briefing, even if the Court concluded that improper venue was properly addressed under Crim.R. 29,

the trial court's action still could not be considered a "verdict," "final" or otherwise. This is because a trial court finding improper venue lacks the basic power to "acquit" anyone. In fundamental terms, a "verdict" of "acquittal" based on improper venue is an oxymoron because it conflicts with how the doctrine of venue works. A court finding improper venue is concluding that it should not be entertaining the lawsuit at all. It simply has no power to reach the merits of the lawsuit, and it has no power to reach a "verdict," no matter what label it would nominally attach to its action.

The State put it this way in its merit brief:

Overall, the Tenth District missed the forest for the trees on the issue. The purpose of Crim.R. 29 is to grant an "acquittal," and an "acquittal" by its very nature should be tied to factual innocence of the crime. Lack of venue does not indicate any innocence. It only indicates that the case was brought in the wrong county.

Indeed, lack of venue denotes the inability of *any* decisionmaker in that county, whether it be the jury or the judge, to entertain the issues of guilt or innocence. Venue embodies "the geographic division where a cause can be tried." *Morrison v. Steiner*, 32 Ohio St.2d 86, 88, 290 N.E.2d 841 (1972). Given the lack of venue, a judge would have no more power to try and thereby "acquit" the defendant than would a jury in that county. A defendant cannot both prevail on the issue of lack of venue and prevail on the merits of whether he is guilty or innocent. In the absence of a waiver of venue by the defendant, improper venue precludes a trial of the merits and therefore precludes an acquittal.

State's Merit Brief, at 10. As further stated in the State's reply brief:

One thing plainly emerges from the[] briefing [of defendant and his amici]. They have no response to the basic problem of how a court could purport to "acquit" the defendant when the court is sustaining the defendant's objection to improper venue. An

“acquittal” purports to reach the merits of the prosecution, but no court lacking venue could purport to reach the merits, as the very point of the venue objection is to have the court recognize that it is not the proper tribunal to entertain the lawsuit.

* * *

[E]ven assuming venue is properly addressed in such a motion [under Crim.R. 29], the issue remains whether the granting of such an “acquittal” would qualify as a “final verdict” that would preclude a State’s appeal under R.C. 2945.67(A). This is a critical point where the arguments of defendant and his amici fall short. Such an “acquittal” simply would not be a “final verdict” because the court’s finding of improper venue means that the court would have no business reaching a “verdict.” A finding of improper venue *precludes* the court from reaching the merits and therefore *precludes* reaching a “verdict.”

State’s Reply Brief, at 1-2.

The four-justice majority opinion never squared this circle, and never even attempted to do so. The majority never addressed the fundamental problem of how a court knowing it is an improper venue could purport to “acquit” or how such an “acquittal” could be deemed a “verdict.” Indeed, the “verdict” cannot even be construed to be “final,” as the majority does not dispute that, consistent with R.C. 2945.08, the case could be reinstated in Fairfield County.

Defendant and/or his amici will contend that the State is engaging in mere reargument here. The State would disagree. The standard for seeking reconsideration readily applies when an appellate court fails to address a fundamental point in the appeal, particularly when there is no apparent answer that the appellate court could give in responding to that point. The State would also submit that it is obvious error

for an appellate court to issue a decision in this case without addressing the obvious and fundamental problem that a court finding improper venue lacks the basic power to reach any “verdict,” as that term is commonly understood and as the General Assembly would have understood that term. Indeed, based on R.C. 2945.08, the General Assembly would have believed that only a transfer to the proper county, not a “verdict,” would be entered in such a situation.

Reconsideration is warranted. Upon such reconsideration, this Court should conclude that a trial court finding improper venue does not thereby enter a “final verdict,” even when the court characterizes its ruling as a “judgment of acquittal.”

B.

Another obvious error arises out of the majority’s determination that the Tenth District was following “precedent” that was “well established.” Opinion, at ¶¶ 1, 17. The majority was referring to the decisions in *State v. Keeton*, 18 Ohio St.3d 379, 481 N.E.2d 629 (1985), and in *State ex rel. Yates v. Montgomery Cty. Court of Appeals*, 32 Ohio St.3d 30, 512 N.E.2d 343 (1987). According to the majority opinion, these “precedents” stand for the unqualified proposition that a judgment of acquittal under Crim.R. 29 is a “final verdict.” And the majority stated that “[t]here is no reason to overrule the clear pronouncement in *Yates* that a judgment of acquittal is not appealable by the state * * *.” Opinion, at ¶ 17.

The obvious error here arises out of what constitutes “precedent.” While the language of *Keeton* and *Yates* stated that a judgment of acquittal would be a “final verdict,” they did not address the specific problem of whether a finding of improper

venue could be a basis for “acquittal” or whether a venue-based “acquittal” would be a “final verdict.” Those questions were not presented in *Keeton* or *Yates*, and given that the “acquittals” in those cases were based at least in part evidentiary insufficiency on a material element, neither *Keeton* nor *Yates* could be said to settle the problem of whether a venue-based “acquittal” would be a “final verdict.” These cases were not “precedent” on the critical questions here. These cases were not “precedents” to “follow” on these points, and the majority opinion committed obvious error in saying so.

This view finds support in the decision issued by this Court on the same day in *In re Bruce S.*, ___ Ohio St.3d ___, 2012-Ohio-5696. In *Bruce S.*, the question was whether the provisions of the Adam Walsh Act applied to offenders who committed their offenses after the 2007 enactment of the law and before the January 1, 2008 effective date of the law. In a prior decision, this Court had seemingly drawn the line at the date of enactment, expressly stating in the syllabus of the prior decision that AWA would not apply prior to enactment. But in *Bruce S.*, this Court did not tarry long on whether this was “precedent.” It dismissed the “enactment” language from the prior case as having been made “in passing” and concluded that the earlier case “never addressed the discrete issue presented here * * *.” *Id.* at ¶ 6.

Just as the earlier case referenced in *Bruce S.* was found to be neither precedential nor controlling, neither were the *Keeton* and *Yates* decisions precedential or controlling here. *Keeton* and *Yates* “never addressed the discrete issue presented here” and therefore did not settle the question of whether a venue-based “acquittal” is

a “final verdict.” Treating these cases as “precedent” far overstates their significance, and such an obvious error should be reconsidered.

C.

A third problem arises out of the majority’s failure to address the status of earlier key decisions by the Court. The State contended that “acquittals” under Crim.R. 29 are limited to claims of insufficiency of evidence and that such insufficiency claims are limited to a review of the “material elements” of the offense. The State further pointed out that venue is not a material element of the offense.

The majority rejected the State’s argument. The majority concluded that the “plain language” of the rule “does not distinguish between ‘material’ elements and ‘immaterial’ elements.” Opinion, at ¶ 22. The majority contended that “Crim.R. 29 is clear and straightforward and does not limit its application to elements of the offense alone – the trial judge may grant an acquittal when there is a failure of proof to sustain a conviction.” Id. at ¶ 23.

These contentions create considerable tension with earlier cases, a tension which the majority did not acknowledge or address. The State had not created its “material elements” argument out of thin air. It was directly relying on Ohio Supreme Court decisions. In particular, this Court has specifically held in syllabus language that a material-elements standard applies *under Crim.R. 29*:

Pursuant to Crim.R. 29(A), a court shall not order an entry of judgment of acquittal if the evidence is such that reasonable minds can reach different conclusions as to whether each *material element* of a crime has been proved beyond a reasonable doubt.

State v. Bridgeman, 55 Ohio St.2d 261, 381 N.E.2d 184 (1978), syllabus (emphasis added). This “material elements” standard has been long-standing. As stated in *Bridgeman*, “[i]t has long been established law in Ohio that a question is one for determination by the jury when ‘reasonable minds can reach different conclusions as to whether each material element of a crime has been proved beyond a reasonable doubt * * *.’” Id. at 263, quoting *State v. Swiger*, 5 Ohio St.2d 151, 214 N.E.2d 417 (1966), paragraph two of the syllabus.

This focus on material elements of the crimes extends beyond *Bridgeman*. This Court has expressly stated that the standard under Crim.R. 29 is the same as the sufficiency standard used for federal due process. *State v. Tenace*, 109 Ohio St.3d 255, 2006-Ohio-2417, 847 N.E.2d 386, ¶ 37. Under the due-process sufficiency standard, “the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the *essential elements of the crime* beyond a reasonable doubt.” *State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160, 840 N.E.2d 1032, ¶ 34, quoting *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) (emphasis added). This Court emphasized in *Hancock* that the due-process standard focuses on the “substantive elements of the criminal offense”: “[t]he *Jackson* standard of review ‘must be applied with explicit reference to *the substantive elements of the criminal offense as defined by state law.*’” *Hancock*, ¶ 38, quoting *Jackson*, 443 U.S. at 324 n. 16 (emphasis in *Hancock*). As can be seen, sufficiency review under federal due process and under Crim.R. 29 focuses on the “material elements” or “substantive

elements” of the crime.

Did the majority in the present case really favor overruling the “material elements” standard espoused in this long-standing line of cases?

Did the majority really mean to overrule the several decisions of the Ohio Supreme Court relying on *Bridgeman* and its syllabus, some of them explicitly referencing the “material elements” standard?

If the majority was meaning to overrule this standard, then why did it not apply the high *Galatis* standard for overruling precedents? See *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256.

Rather than settling the law, the majority opinion creates far more questions than it answers. It does so without applying or purporting to apply the difficult *Galatis* standard for overruling such long-standing precedent. The bench and bar are not aided by the majority opinion, and unnecessary litigation will ensue because of the majority’s failure to address the long-standing “material elements” standard of *Bridgeman*.

Equally disturbing is the majority’s failure to acknowledge key statements from *State v. Draggo*, 65 Ohio St.2d 88, 418 N.E.2d 1343 (1981). This Court specifically stated in *Draggo* that “[v]enue is not a material element of any offense charged.” *Id.* at 90. “The elements of the offense charged and the venue of the matter are separate and distinct.” *Id.* Further emphasizing what is an “element,” this Court in *Draggo* stated that “[t]he elements of a crime are the constituent parts of an offense which must be proved by the prosecution to sustain a conviction.” *Id.* at 91.

The majority never acknowledged this language from *Draggo*. Under this language, venue is not even an “element,” let alone a “material element,” since venue is “separate and distinct” from the “elements.”

The majority’s reliance on *State v. Nevius*, 147 Ohio St. 263, 71 N.E.2d 258 (1947), did not answer these cases and did not justify the complete failure to address them. Both *Bridgeman* and *Draggo* came after *Nevius*, and both have been in place for several years. *Bridgeman* emphasized that the material-element standard was “long established.” In addition, the rule makers did not carry over “directed verdict” language into Crim.R. 29 when it was adopted in 1973. The language of Crim.R. 29 expressly distinguishes between “verdict” and “judgment of acquittal.” Thus, the pre-Rules practice surrounding “directed verdict” motions in *Nevius* is not nearly as informative as this Court’s post-Rules decisions in *Bridgeman* and *Draggo*. (*Nevius* also actually supports the State’s position in some respects here – see Reply Brief, at 11-12)

In light of *Bridgeman* and *Draggo*, the majority was engaging in vast overstatement when it contended that “[o]ver a century of well-established jurisprudence clearly mandates that a motion for judgment of acquittal must be granted when the evidence is insufficient for reasonable minds to find that venue is proper.” Opinion, at ¶ 24. Had the majority at least mentioned the contrary language and logic of *Bridgeman* and *Draggo*, the majority would not have been able to claim reliance on a supposed unbroken “century” of case law “clearly mandat[ing]” that an “acquittal” be ordered when a trial court finds venue to be improper. This

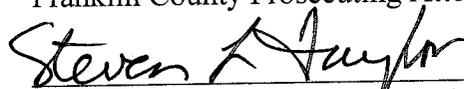
overstatement has the significant potential to mislead the bench and bar in the absence of a discussion of *Bridgeman* and *Draggo*.

Again, the State respectfully submits that reconsideration is warranted. The majority failed to address key language from *Bridgeman* and *Draggo* that severely undercuts the majority's conclusions. The bench and bar are left to guess as to whether the language from these cases now stands overruled. And the State respectfully submits that the majority committed obvious error in failing to address or engage in any way the key language from *Bridgeman* and *Draggo*.

In light of the foregoing, the State respectfully requests that this Court should reconsider the December 6th decision. Upon such reconsideration, and based on the State's merit brief and reply brief, the Court should conclude that the trial court's venue-based "acquittal" was not a "final verdict" and thereby should reverse the Tenth District's judgment and remand accordingly.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was sent by regular U.S. Mail on this 17th day of Dec., 2012, to the following:

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