

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO

Plaintiff-Appellee,

vs.

MATTHEW KARESKI

Defendant-Appellant.

) CASE NO: 2012-1242  
)  
) APPEAL FROM THE SUMMIT  
) COUNTY COURT OF APPEALS,  
) NINTH APPELLATE DISTRICT  
)  
)  
) COURT OF APPEALS  
) CASE NO. 25705  
)

DEFENDANT-APPELLANT'S REPLY BRIEF

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### III. LAW AND ARGUMENT

**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.**

#### A. The taking of judicial notice is not evidence.

The parties are in essential agreement that a retrial of a criminal defendant is permitted in the case of trial error, but not when insufficient evidence was tendered to support a conviction in the first place. *Lockhart v. Nelson*, 488 U.S. 33, 38-39 109 S.Ct. 285, 102 L.Ed.2d 265 (1988). The parties, however, diverge considerably upon the question of whether a judicially-noticed fact can be considered "evidence" in determining whether sufficient evidence existed to support a conviction.

It is historically clear that judicial notice is not a form of evidence. Instead, it is a judicially-created doctrine designed to substitute for evidence. Judicial notice is not, as suggested by the State, merely another flavor of evidence to be weighed by the fact-finder. It is, instead, a doctrine of law which relaxes the requirement to introduce evidence when a fact is so well-known that no dispute would be reasonable.

The early commentators on American law recognized that judicial notice was not evidence. Louis Hammon noted that judicial notice was largely a rule of common sense, which "dispenses with formal proof of a thing which is a matter of common knowledge...." Hammon, *Law of Evidence*, §93 at 378, (1<sup>st</sup> Ed.1907). Hammon went on to note that "the courts will, **without evidence**, take judicial notice of whatever ought to be generally known within the limits of their territorial jurisdiction." *Id.* (emphasis added).

John Jay McKelvey, in his work on evidence, explained that "with the doctrine of judicial notice, the law of evidence has nothing to do." McKelvey, *Handbook of the Law of Evidence*, pp. 12-13 (2<sup>nd</sup> Ed.1907). McKelvey did go on to address judicial notice in his treatise on evidence, because the doctrine "has to do with evidence, in a negative sense, in that it teaches **when evidence need not be given.**" *Id.* at 18, (emphasis added).

Francis Wharton, in his treatise *On the Law of Evidence in Criminal Issues*, explained that judicial notice "takes the place of proof," and "[a]s a means of establishing facts it is therefore superior to evidence." Wharton, *Crim. Ev.* §309, at 591 (10<sup>th</sup> Ed.1912). Wharton went on to state that the doctrine of judicial notice "displaces evidence, since, as it stands for proof, it fulfils (sic) the object which evidence is designed to fulfil (sic), and makes evidence unnecessary." *Id.*

Modern commentators, too, recognize judicial notice as a legal doctrine, not as evidence, which allows a judge to treat a well-recognized fact as an issue of law, and refrain from submitting it to the jury. Broune, 2 *McCormick On Evid.* § 328 (6<sup>th</sup> Ed.2009). McCormick traces the doctrine back to Lord Coke's Latin expression of the maxim "[t]o questions of fact judges do not answer: to questions of law the jury do not answer." *Id.*, citing *Coke's Commentary upon Littleton* 155b (1832 ed.).

Ohio's law has recognized and incorporated the idea that the doctrine of judicial notice is an alternative to evidence. In one early case, the Court cited *McKelvey, supra*, for the notion that that judicial notice operates when "there are certain facts of which the court **will not require evidence**, because they are so well known, so easily ascertainable, or so related to the official character of the court, that it would not be

good sense to do so." *Geisse v. State*, 22 Ohio C.D. 560 (Cir.Ct. 1910) (emphasis added), *reversed on other grounds* 85 Ohio St. 457, 98 N.E. 1125, 9 Ohio Law Rep. 403 (1911).

For a more modern recognition that judicial notice is not merely one flavor of evidence, one need look no further than Evid.R. 201(B), which states that "[a] judicially noticed fact must be one not subject to reasonable dispute." If a judicially noticed fact is not subject to reasonable dispute, it is not simply another form of evidence. Instead, it is as the early commentators noted – a doctrine of law that supplants evidence. "If taking judicial notice of a matter means that it is indisputable, it must follow that no evidence to the contrary is admissible." Morgan, *Judicial Notice*, 257 Harv.L.Rev., 269 at 279 (1944). That Evid.R. 201(G) requires a trial court to inform the jury that it must make a finding even on judicially-noticed facts does not affect this analysis. The staff notes to the rule make clear that Evid.R. 201(G) only exists to assure that a jury makes a finding on all elements of an offense, whether contested by the defendant or not. Evid.R. 201(G) has no impact on the question of whether or not a judicially noticed fact is or is not evidence.

Accordingly, the argument advanced by the State and its amicus that judicial notice "falls under the broad umbrella of evidence to be submitted to the fact finder for consideration" is misplaced. (Appellee's Brief at p. 7; Amicus Franklin County's Brief at p. 6). The history of the doctrine of judicial notice clearly demonstrates that it is not evidence – it is instead the absence of evidence.

**B. A trial court may not take judicial notice of an element of a crime.**

Next, the State curiously criticizes Kareski for making a "conclusory" assertion

that a trial court may not take judicial notice of the element of a crime. (City of Akron's Brief at p. 10). Kareski cited authority in support of this assertion, and it was, in fact, the basis of Kareski's successful reversal of his conviction. (Kareski's Brief at p. 10). The State cites one case in support of its position that a trial court may accept judicial notice of an adjudicative fact. *State v. Jamnicky*, 9th Dist. No. 03CA0039, 2004-Ohio-324. But in *Jamnicky*, the offense in question was one of speeding in a motor vehicle under R.C. §4511.21(D)(1). The elements of that offense are that the defendant operated a motor vehicle in excess of 55 miles per hour on a highway. The issue in *Jamnicky* was not that the trial court took judicial notice of the defendant's speed, or even that the defendant was on a highway. Instead, the judicial notice issue was related to the trial court's scientific acceptance of the reliability of a laser speed measurement device. Thus *Jamnicky* does not represent an example of a trial court taking judicial notice of an element of an offense.

That Evid.R. 201 allows judicial notice of "adjudicative facts" does not mean that a trial court is permitted to take judicial notice of elements of a criminal offense. The term "adjudicative fact" does not have an "immediately discernible judicial meaning" and was only intended to differentiate judicial notice of facts from so-called "legislative facts," such as what law applies. See Staff Notes to Evid.R. 201, referencing Fed.R.Evid. 201. Any attempt to utilize judicial notice to satisfy an element of a criminal offense offends due process and the presumption of innocence. *State v. Shaw*, 7th Dist. No. 03 JE 14, 2004-Ohio-5121, at ¶55; *State v. Langford*, 8th Dist. No. 80753, 2003-Ohio-159, at ¶28.

**C. The State was not able to identify any instances where a court considered judicial notice of an element of a criminal offense as part of a "sufficiency of the evidence" analysis.**

The State's misunderstanding of the limits of judicial notice flavors another portion of its argument, as well. Kareski, in his Brief, stated that he could not "find another instance, in this state or any other, where a court of appeals included judicial notice of an element of an offense as 'evidence' in a sufficiency-of-the-evidence analysis." (Kareski's Brief at p. 11). The State then purported to list a number of cases which contradict Kareski. But again, none of these cases involve the court of appeals considering a trial court's taking of judicial notice of an element of a criminal offense. Instead, the State's cases involve matters in which the trial court judge sits as the finder of fact, such as venue and sentencing, and thus the quality of the evidence which informed the court's taking of judicial notice was at issue. So Kareski's statement stands intact.

In *State v. Edwards*, 3rd Dist. No. 9-03-63, 2004-Ohio-4015, the court of appeals did a plain-error review of a trial court's determination of venue. The *Edwards* court related several paragraphs of evidence, admitted at trial, demonstrating venue. *Id.* at ¶¶12-14. Ultimately, the *Edwards* court determined that, based upon that evidence, the trial court was correct in taking judicial notice of venue. Nowhere in *Edwards* did the court of appeals find that the trial court was incorrect in taking judicial notice, but yet included that flawed judicial notice in a sufficiency-of-the-evidence review, as the Ninth District did in the present case. Thus *Edwards* is not compelling authority supporting the notion that a trial court can take judicial notice of an element of an offense, but when reversed, that same judicial notice can be considered by the court of appeals in a

sufficiency analysis.

Similar problems prevail with the other cases cited by the State. In *State v. Barr*, 158 Ohio App. 3d 86, 2004-Ohio-3900, 814 N.E.2d 79, ¶15, the court of appeals again weighed the evidence presented to the judge on this issue of venue, noting that "[t]he trial court determines whether a case is properly venued in its court. The jury then determines whether sufficient evidence has been presented to establish venue and that a crime took place within that venue." This, again, is not a case where a court of appeals rejected a trial court's acceptance of judicial notice of an element of an offense, then used that judicial notice in determining whether sufficient evidence of guilt existed to allow a retrial. The same is true of *Vill. of Linndale v. Krill*, 8th Dist. No. 81881, 2003-Ohio-1535, ¶8.

Even more troubling is the State's citation to *Colorado v. Cooper*, 104 P.3d 307 (Colo.App. 2004), which evidences an effort to conflate a trial court's improper admission of a report with the trial court's proper refusal to admit a report, and the taking of judicial notice in its place. In *Kareski*, the State sought to admit a laboratory report purporting to contain the hearsay conclusion that the substance in the bottle sold by Kareski had a certain alcohol content. But this report was plainly inadmissible under *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 129 S.Ct. 2527, 174 L.Ed.2d 314, (2009), and the trial court correctly excluded the report. The admissibility of this report was not challenged by the State on appeal, and therefore the State has waived any argument that the report should have been admitted. The *Kareski* trial court, then, informed by no admissible evidence, took judicial notice that the liquid in the bottle held sufficient alcohol content to meet the statutory definition of "beer."

In contrast to the facts of *Kareski*, the trial court in *Cooper* inappropriately **admitted** a report on the defendant's prior criminal history, relevant to a habitual offender adjudication. 104 P.3d 307 at 311. The reviewing court determined that the admission of that report was in error, and determined that "the trial court should not have taken judicial notice of the 1997 presentence report and that, **without that report**, the evidence was insufficient as to the habitual criminal count." 104 P.3d 307 at 312 (emphasis added). The *Cooper* court went on to consider that improperly admitted report, and determine that a new sentencing hearing was warranted under *Lockhart, supra*, because "retrial is permitted if the evidence, including the improper evidence, was sufficient" to convict. *Id.* Similar issues attend to *Missouri v. Cullen*, 646 S.W.2d 850, (Mo.Ct. App. 1982), where a judge acted as the finder of fact in a sentencing proceeding, and the quality of evidence the judge received was the topic of consideration by the reviewing court. *Id.* at 855 (noting "the record does not make clear whether the court had before it some unidentified documentary evidence of the 1979 conviction or meant simply to rely on the 1973 conviction proved in Exhibits 1 and 2").

Thus *Cooper* and *Cullen* involved an appropriate application of *Lockhart*. Improperly admitted evidence, such as a presentence report, can be considered in determining whether sufficient evidence existed to convict. In sharp contrast, *Kareski* deals with a situation where there is no such evidence – the laboratory report was properly excluded from evidence before it was considered by the finder of fact – and instead, judicial notice was used to fill this hole in the evidence.

Where a trial court improperly admits evidence, whether to inform a jury's decision or to inform the trial court's taking of judicial notice regarding something other

than an element of the offense, that improperly admitted evidence can be used by a reviewing court in a sufficiency-of-the-evidence analysis to determine whether a retrial offends Double Jeopardy. But where, as here, a trial court properly rejects plainly inadmissible evidence, then takes judicial notice of an element of an offense and usurps the jury's function in that regard, the reviewing court cannot consider the unsupported taking of judicial notice as sufficient evidence, and allow a retrial. This affords the State more than one full and fair opportunity to convict.

**D. Amicus Curiae, Franklin County's citation to motor vehicle speeding cases leads to examples of reviewing courts declining to remand cases for retrial when judicial notice fails.**

In Franklin County's Amicus Brief, at page 9, Franklin County identifies several cases where trial courts took judicial notice of particular facts in relation to motor vehicle operation, including *State v. Yaun*, 3rd Dist. No. 8-07-22, 2008-Ohio-1902, and *State v. Gonzalez*, 43 Ohio App.3d 59, 539 N.E.2d 641 (6th Dist.1987). While these cases say nothing more than a trial court may take judicial notice of a foundational fact (as opposed to an element of an offense), reviewing these cases led to a relevant line of authority, where reviewing courts in these types of cases have refused to allow retrial when the judicially noticed fact fails.

Kareski still has found no cases nationwide which discuss whether a reviewing court can include an improperly judicially-noticed element of an offense in an analysis of whether a defendant may be retried under a sufficiency-of-the-evidence standard, except *McDaniels v. Florida*, 388 So. 2d 259, 260-61 (Fla. Dist. Ct. App. 1980), a case of limited depth which neither the State nor Franklin County discussed. However, each of the cases below declined a retrial when a judicially noticed fact failed, even without

specifically considering the Double Jeopardy clause in detail.

In *State v. Polen*, 1st Dist. No. C-050959, C-050960, 2006-Ohio-5599, ¶¶20-21; *Cleveland v. English*, 8th Dist. No. 84945, 2005-Ohio-1662, ¶¶11-13; *Cincinnati v. Levine*, 158 Ohio App. 3d 657, 2004-Ohio-5992, 821 N.E.2d 613, ¶¶18-21; and *State v. Starks*, 196 Ohio App. 3d 589, 2011-Ohio-2344, 964 N.E.2d 1058, ¶¶28-31, 44, the courts of appeals, in each case, were presented with cases where a trial court purported to take judicial notice of the reliability of a speed measurement device, and for various reasons, the judicial notice of this foundational element was found lacking. In each case, because the speed measurement was excluded from evidence, the reviewing court found that insufficient evidence existed to permit a retrial, and discharged the defendant.

Further, in *State v. Matthews*, 7th Dist. No. 06 BE 36, 2007-Ohio-4999, ¶¶19-21, a trial court took judicial notice of a fact that a person would not have an odor of wine about him or her seven hours after consumption in support of an underage drinking conviction. The reviewing court found error in this determination, and found that without it, there was insufficient evidence to convict the minor. Consequently, the charges against the minor were discharged by the court of appeals.

None of these cases provide a detailed analysis, or apply *Lockhart* or any of the other relevant authority on Double Jeopardy issues. But these cases clearly indicate that, when judicial notice fails, the appellate courts of Ohio are not in the habit of bootstrapping a trial court's incorrect judicial notice determination into a sufficiency analysis, and remanding the matter for a retrial.

**E. The inadmissible laboratory report, properly excluded by the trial court, cannot serve as a basis to determine that sufficient evidence exists for a retrial.**

The State's final argument features a re-imagining of the trial court record, and in its version of the record, the excluded laboratory report is the star of the show. But it is clear that the laboratory report was properly excluded from evidence, and the State's effort to rely upon it is misplaced. If the State intended to rely upon the laboratory report to demonstrate that sufficient evidence existed to retry Kareski, then it was incumbent for the State to seek leave to file an appeal of trial court's decision to exclude it. R.C. §2945.67(A); *State v. Keeton*, 18 Ohio St. 3d 379, 481 N.E.2d 629, (1985); *State v. Arnett*, 22 Ohio St. 3d 186, 489 N.E.2d 284, (1986). The State did not do so, and is precluded from now advancing the proposition that the excluded report demonstrates that the evidence was sufficient to allow a retrial of Kareski. *Kostelnik v. Helper*, 96 Ohio St. 3d 1, 2002-Ohio-2985, 770 N.E.2d 58, ¶14.

At page 12 of the State's Brief, the State accuses Kareski of misstating the record in an effort to minimize the State's evidence in support of the contention that the liquid in the bottle was "beer" under the statutory definition. The first example that the State tenders of this "evidence" is a discussion regarding the admissibility of the laboratory report occurring from pages 116 to 128 of the transcript. Pages 116 to 117 feature a discussion of the fact that a sample of beer was taken and sent to Columbus. On page 118, the State offers the laboratory report, and the court sustains a hearsay objection. On page 119, the State attempts to have the agent read a list of ingredients from the label, but the agent can't find the ingredients. The State then requests judicial notice that the Bud Lite bottle is present in the courtroom. (Tr. 119).

A discussion directed at the *authentication* of the report begins at page 120. Cindy Armsey is identified as the person who would have received the report from Columbus, but even if the report could have been authenticated, that did not cure the hearsay nature of the report. (Tr. 120). Further discussion concerning Ms. Armsey's ability to authenticate the report occurs until page 122, until counsel for Kareski restates that the objection is a hearsay objection, not an authentication objection. On page 123, the State defends the hearsay objection on the basis that the report is self-authenticating – again, a response that does not satisfy the hearsay concern. An authenticated document may still be barred for containing hearsay. *Stevenson v. Prettyman*, 193 Ohio App. 3d 234, 2011-Ohio-718, 951 N.E.2d 794, ¶28. The State also offers to have the testifying agent read the alcohol content from the label on the bottle. (Tr. 123).

Further discussion regarding Cindy Armsey's practices in driving samples to Columbus and receiving reports occurs from pages 123-124. Counsel for Kareski again restates the hearsay objection, and the State again defends on the basis that the report is self-authenticating. (Tr. 125). The State then argues that Kareski could have had testing done himself, which counsel for Kareski points out is not his burden. (Tr. 125-126). Further discussion is had regarding Cindy Armsey's evidence practices, then attention is turned to labels on the bottle. (Tr. 127-128). The State indicates that the ingredients are on the bottle, under the evidence label. (Tr. 128). An effort is then made to remove the evidence label, and the agent on the stand indicates that there are government warnings on the label. (Tr. 128).

Thus pages 116-128 are not any form of evidence, those pages contain a

discussion about what evidence may exist and the admissibility of that potential evidence. In order to secure a conviction, the State was obligated to prove the underage sale of beer. Under R.C. §4301.01(B)(2), "'beer' includes all beverages brewed or fermented wholly or in part from malt products and containing one-half of one per cent or more, but not more than twelve per cent, of alcohol by volume." Pages 116-128 are silent as to the ingredients in the beer, and as to the alcohol content. So these pages do not provide any evidence on this critical element of the alleged crime.

The State next claims that it attempted to put on more evidence regarding the ingredients on the bottle, and that the trial court would not let the State do so. When the State's selective quotation is examined, this allegation does not bear scrutiny. At page 128, after the agent on the stand reads a government warning but indicates that no ingredients label is on the bottle, the Counsel for the State notes that "[o]n the front of the label, there should also be the alcoholic content." The trial court then responds:

**Why don't you point that out.** Let's move on. I'll take this matter under advisement, and so move to another area.

The bold language was omitted from the State's quotation of this discussion. (Tr. 128, City of Akron's Brief at p. 12). Thus the State was encouraged to have the testifying agent read whatever information from the label on the bottle that would support its contention that the bottle contained a malt beverage with a certain alcohol content. The label apparently did not contain that information, as the State did not pursue that line of questioning any further.

The State next suggests that it was prepared to call another witness on the alcohol content of the beer. (City of Akron's Brief at p. 13). But the discussion at page 130 of the transcript reveals that the additional witness was another **agent**, not

laboratory personnel who did the testing of the liquid. This female agent is presumably Cindy Armsey, an agent stationed in Akron, who drove samples to and from Columbus. (Tr. 123-124). Again, evidence regarding chain of custody or authentication would not resolve the hearsay objection. *Stevenson*, 193 Ohio App. 3d 234, ¶28. So the fact that the agent who acted as the evidence officer was available to testify is meaningless.

The State then argues that it rested its case in reliance upon the trial court's decision to take judicial notice that the liquid in the bottle was "beer" under the statutory definition. (City of Akron's Brief at p. 14). But the record, at page 140, reflects that the State asks "is the court taking judicial notice that Bud Lite is beer?" The trial court responds: "I'll do that, **but it seems to me that the argument is going to be was there any testimony about what percentage of alcohol it contained.**" (Tr. 140, emphasis added). In making this announcement, the trial court clearly invited the State to put on any evidence of alcohol content it could muster.

Thereafter, if the State had any evidence of the alcohol content other than the excluded report, it should have offered it. If there was, in fact, a witness available on the issue of alcohol content, the State should have offered the witness. If the witness was in Columbus, the State should have asked for a continuance to secure attendance of the witness. It did neither. The State immediately rested, even with the open issue of alcohol content unresolved. (Tr. 141). Thus there is no meaningful distinction between this case and *State v. Lovejoy*, 79 Ohio St. 3d 440, 683 N.E.2d 1112 (1997).

The State then sets up a straw man to knock about by misquoting Kareski's Brief. At page of 13 of the City of Akron's Brief, the State states, without citation, that Kareski claimed that the State "did not proffer any evidence." The State then goes on to cite its

proffer of the report, appearing at page 202 of the transcript. But what Kareski actually argued, at pages 2 and 9 of his Brief, is that the State did not proffer any *admissible* evidence. In other words, the State did not proffer any evidence other than the plainly inadmissible report.

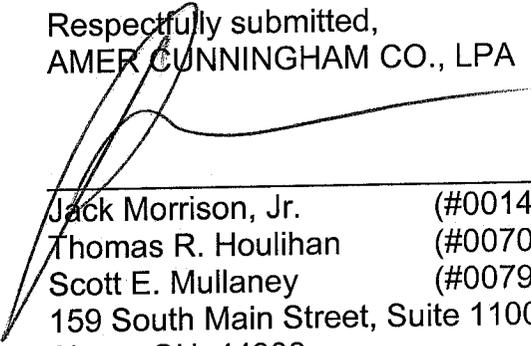
Because the State did not cross-appeal the exclusion of the report, the State's proffer of the report is entirely meaningless. The fact that the report was inadmissible is not subject to review by this Court. The fact that the State points to this meaningless proffer is consistent with its strategy of conflating the admission of inadmissible evidence, (which can be considered by a reviewing court in determining whether sufficient evidence exists to allow a retrial, pursuant to *State v. Brewer*, 121 Ohio St. 3d 202, 2009-Ohio-593, 903 N.E.2d 28), with the trial court's taking of judicial notice in the absence of admissible evidence, (which plainly does not allow a retrial under *State v. Lovejoy*, 79 Ohio St. 3d 440, 683 N.E.2d 1112 (1997)).

Other than the report, there was no evidence offered or proffered that would prove that the liquid in the bottle was beer according to the statutory definition. The trial court's taking of judicial notice filled a hole in the State's evidence, when the State came to trial unprepared to prove the case with admissible evidence. Accordingly, Double Jeopardy prohibits a retrial of Kareski.

#### IV. CONCLUSION

"The Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding." *Burks v. United States*, 437 U.S. 1, 11, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978). In this case, it is clear that the State appeared at trial without any admissible evidence to prove the alcohol content and nature of the liquid in the bottle, which was a required element of the offense. Therefore, this Honorable Court should REVERSE the Ninth District Court of Appeals' May 16, 2012 Decision insofar as it remands the case for a retrial.

Respectfully submitted,  
AMER CUNNINGHAM CO., LPA



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## V. CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was served via ordinary United

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