

**ORIGINAL**

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	Case Number: 2013-0807
Appellant,	:	On Appeal from the Richland County Court of Appeals,
v.	:	Fifth Appellate District
BYRON YAMBRISAK,	:	Court of Appeals
Appellee.	:	Case No. 2012-CA-50

APPELLANT, STATE OF OHIO'S  
 NOTICE OF DENIAL OF MOTION TO CERTIFY A CONFLICT

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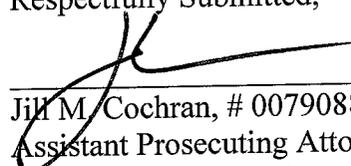
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 MAY 28 2013  
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 SUPREME COURT OF OHIO

**NOTICE OF DENIAL OF MOTION TO CERTIFY A CONFLICT**

Appellant, State of Ohio, hereby gives notice that the Fifth District Court of Appeals issued a judgment entry denying the State's motion to certify a conflict on May 20, 2013. {See attached.}

Therefore, the State respectfully requests that the Court consider the jurisdictional memorandum filed in its discretionary appeal.

Respectfully Submitted,



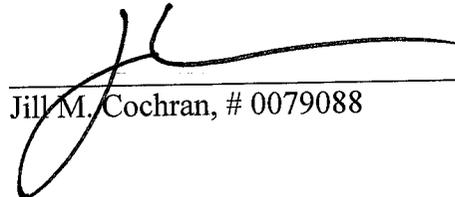
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Jill M. Cochran, # 0079088  
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Richland County, Ohio

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**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing Notice of Denial of Motion to Certify a Conflict was sent to Attorney R. Paul Cushion, II, 75 Public Square, Suite 1111, Cleveland, Ohio 44113, by U.S. Mail this, 22nd day of May, 2013.



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Jill M. Cochran, # 0079088

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RICHLAND COUNTY OHIO  
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LINDA H. FRARY  
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IN THE COURT OF APPEALS FOR RICHLAND COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

BYRON YAMBRISAK

Defendant-Appellant

JUDGMENT ENTRY

CASE NO. 2012-CA-50

Appellee the State of Ohio has filed a Motion to Certify the decision entered in this case on April 5, 2013 in *State v. Yambrisak*, 5th Dist. No. 2012-CA-651, 2013-Ohio-1406, as being in conflict with the decision from the Ninth Appellate District in *State v. Price*, 69 Ohio App.3d 243, 590 N.E.2d 758(9th Dist. 1990); *State v. Smith*, 9th Dist. No. 25069, 2010-Ohio-3983, from the Eight District in *State v. Novak*, 8th Dist. No. 78482, 2001 WL 777023(July 5, 2001); from the Eleventh District in *State v. Ott*, 11th Dist. No. 2007-P-0093, 2008-Ohio-4049; and from the First District in *State v. Simms*, 1st Dist. Nos. C-030138, C-03-0211, 2004-Ohio-652. Appellant did not file a response.

Certification of a conflict is governed by Section 3(B)(4), Article IV of the Ohio Constitution, which reads as follows: "Whenever the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other court of appeals of the state, the judges shall certify the record of the case to the supreme court for review and final determination." See, also, *Whitelock v. Gilbane Bldg. Co.*, 66 Ohio St.3d 594, 613 N.E.2d 1032(1993),

*syllabus, rehearing denied by, Whitelock v. Cleveland Clinic Found.*, 67 Ohio St.3d 1420, 616 N.E.2d 504(1993); App.R. 25; and S.Ct.Prac.R. IV.

Before and during the certification of a case to the Supreme Court of Ohio, pursuant to Section 3(B) (4), Article IV, Ohio Constitution, three conditions must be met. *Whitelock*, at 596, 613 N.E.2d 1032. The *Whitelock* court instructed: “\* \* \* First, the certifying court must find that its judgment is in conflict with the judgment of a court of appeals of another district and the asserted conflict *must* be ‘upon the same question.’ Second, the alleged conflict must be on a rule of law--not facts. Third, the journal entry or opinion of the certifying court must clearly set forth that rule of law which the certifying court contends is in conflict with the judgment on the same question by other district courts of appeals \* \* \*.”

*Whitelock*, 66 Ohio St.3d at 596.

App.R. 25 states, in pertinent part,

A motion to certify a conflict under Article IV, Section 3(B) (4) of the Ohio Constitution shall be made in writing before the judgment or order of the court has been approved by the court and filed by the court with the clerk for journalization or within ten days after the announcement of the court's decision, whichever is the later. The filing of a motion to certify a conflict does not extend the time for filing a notice of appeal. A motion under this rule shall specify the issue proposed for certification and shall cite the judgment or judgments alleged to be in conflict with the judgment of the court in which the motion is filed.

In the case at bar, Appellee's motion was timely filed.

The court in *State v. Price* relied upon by the appellee provided no analysis. In *Price*, the defendant made threatening remarks as he was being booked into jail. 69 Ohio App.3d at 244. Accordingly, the Court in *Price* reached different results based upon facts not present in appellant's case. Therefore, the decision does not conflict with our decision in this case.

In *State v. Smith*, the defendant conceded that letters he had sent to various public officials contained "various threats of harm to the recipient." *Smith*, 2010-Ohio-3983, ¶23. In the case at bar, we held that the state failed to prove beyond a reasonable doubt the statements made by appellant were directed at Detective Smith because of her prior involvement with Yambrisak in 2009. *State v. Yambrisak*, ¶38. Besides immediacy, we also found that the statements were "too unequivocal, [and] unconditional."

Accordingly, the Court in *Smith* reached different results based upon facts not present in appellant's case. Therefore, the decision does not conflict with our decision in this case.

In *State v. Novak*, the defendant was being evicted from his home. Upon forcibly entering the home four deputies,

forced the door open and immediately saw a device that looked like a bomb set up on an interior stairway.

The device consisted of a propane tank that appeared to be connected to an electrical outlet, possibly through an electrical conduit that also employed an unidentified black box and a computer keyboard. A

flexible gas pipe also extended from the propane tank and extended up the side of the wall. The deputies immediately left the house and called a bomb specialist, who subsequently determined that the device was inoperable.

On appeal, Novak contended, among other things, that the evidence was insufficient to support the charges against him and that the intimidation statute, R.C. 2921.03, is intended to protect witnesses, and not the deputies serving the eviction notice here. The Court found "[t]he deputies were public servants performing their duties, and R.C. 2921.03 surely is intended to protect them." The court in *Novak* held "The evidence adequately showed a threat of harm to all four deputies, and created an inference that Novak constructed the device in a knowing attempt to hinder the eviction process." Thus, a nexus was proven in *Novak* between the actions of the defendant in the construction and placement of a bomb and the attempt by the deputies to evict him. Therefore, the evidence in *Novak* was sufficient to establish that Novak attempted to influence, intimidate, or hinder a public servant, i.e. the deputies in the discharge of the deputies' duty.

In the case at bar, in order to convict Yambrisak of retaliation the state was required to prove that Yambrisak threatened harm to Detective Smith because of her involvement with him in 2009. We held the state failed in this respect,

However, in the case at bar, in order to convict Yambrisak of retaliation, the evidence must prove that any threat of unlawful harm be directed at Detective Smith because of her prior involvement with him in 2009.

We find under the facts of this case that this "nexus" between Yambrisak and Detective Smith is lacking. Detective Smith testified that her involvement with Yambrisak in 2009 was uneventful. No threats, accusations or problems ensued between her investigation of the allegations and serving the arrest warrant in October 2009 and her chance meeting him on July 15, 2011. Those charges were dismissed in their entirety by the prosecuting attorney. In addition, the occurrence in July 2011 happened in broad daylight in full view of not only Deputy Smith's acquaintance, but also other persons in and around the street. Once identified, Yambrisak sped away.

We find based upon all the surrounding circumstances, Yambrisak's words were too unequivocal, unconditional, not immediate and not specific enough to convey to Detective Smith that he was retaliating for her involvement with him two years earlier.

We find there was insufficient evidence in the record that Yambrisak purposefully or unlawfully threatened Detective Smith in retaliation for her involvement with his 2009 criminal matter.

2013-Ohio- 1406, ¶¶37-40.

Accordingly, the Court in *Novak* reached different results based upon facts not present in appellant's case. Therefore, the decision does not conflict with our decision in this case.

In *State v. Ott*, the defendant was convicted of retaliation arising out of a threatening telephone call he made to police chief after learning he had been charged with impersonating a police officer. 2008-Ohio-4049, ¶4.

Ott was originally indicted on four counts, including two counts of intimidation, in violation of R.C. 2921.03 and third-degree felonies, and two counts of retaliation, in violation of R.C. 2921.05(A) and third-degree felonies. One retaliation count and one intimidation count related to Officer Adkins. The remaining counts of retaliation and intimidation concerned Ott's phone call on January 11, 2007 to Chief Blough. *Id.* at ¶16.

In telephone calls to the police station,

Ott requested that Sergeant Reece drop the impersonating a police officer charge. He also told Sergeant Reece that he knew where Officer Adkins and Chief Blough lived. Ott also asked Sergeant Reece for other officers' license plate numbers so he could find out where they lived and indicated that, if the plate numbers were not provided, he would wait outside the police station for the officers to leave. In addition, Ott told Sergeant Reece that he would go to Chief Blough's, Sergeant Reece's, and Officer Adkins' houses, that he would find the officers, and that he would "take care" of the situation. Eventually, Ott hung up on Sergeant Reece. Sergeant Reece called Chief Blough at home and informed him about the calls.

2008-Ohio-4049, ¶8.

In a 47 minute recorded telephone call made the next day Ott,

told Chief Blough that he was aware of prior police reports concerning disputes with Chief Blough and his ex-wife and another incident between the Chief and his current wife. Ott provided Chief Blough with the exact dates and addresses of these incidents. Further, Ott informed Chief Blough of the year the Chief filed for bankruptcy. Ott explained to Chief Blough his reasons for conducting the background check on Chief Blough: "I don't screw around. When someone comes after me, I go after them ten times. And so, that's why I have done a complete background check on you. Your bankruptcy and all this stuff."

Ott also threatened to go after the state's witnesses, including Officer Adkins, and stated he was going to go after them civilly. Specifically, he stated "[e]ven if the charges [are] dropped. I am going after that department. I am going after each and every officer, and I am going after every single witness. And if some stupid jury would find me guilty, I'll go after them. Because you've screwed with the wrong guy."

2008-Ohio-4049, ¶¶8, 9. In addition,

Ott also informed Chief Blough that there were housing violations on two properties owned by Chief Blough. Ott told Chief Blough of the specific violations at the houses and told him that inspectors were at the properties at 1:30 p.m. on that day. In fact, Chief Blough received housing violations from the city of Akron, which were anonymously reported. After being asked why he was looking up property records and initiating home

inspections of Chief Blough's residences, Ott replied, "[w]ell you're screwing with my life, so I'm screwing with yours."

Finally, towards the end of the conversation, the following colloquy occurred between Chief Blough and Ott:

"CHIEF BLOUGH: You have to be forewarned, please, I am imploring you don't come near our personal residences. This is a job. This is what we do for a living.

"OTT: Keep in mind that I will implore you, don't come to my residences."

Chief Blough responded that if any of the officers entered Ott's property, it would be to serve the arrest warrant. Thereafter, Ott responded, "this is my personal life, so what's fair is fair. So, if you come after me personally, I'm coming after you personally. If your department comes after me personally, I'm coming after the department."

2008-Ohio-4049, ¶¶10-14.

Ott elected a bench trial. At the conclusion of the case, the trial court found Ott not guilty of the counts relating to Officer Adkins. In addition, the trial court found Ott not guilty of the intimidation count pertaining to Chief Blough. However, the trial court found Ott guilty of the retaliation count pertaining to Chief Blough. *Id.* at ¶18.

The Court in *Ott* found that Ott made indefinite and definite specific threats of harm. Ott threatened to sue the officers, threatened to investigate prior conduct of the officers, threatened to wait outside the police station for the officers to leave, and threatened to show up at the officers' personal residences. Ott also provided the Chief

with specific information, including the names of Chief Blough's wife and ex-wife, and his address that the Court found indicated to Chief Blough that it was possible for Ott to carry out his threats. ¶35. In addition, the Court found that Ott made specific threats to enter the officers' properties. *Id.* at ¶36.

Further, the Court noted that Ott threatened Chief Blough with economic harm. Ott created a limited liability company containing the numbers of the Chief's badge number. He then submitted a Freedom of Information Act request via the limited liability company wherein he included the Chief's social security number six different times. The court found that Ott was making an implicit threat by taunting the Chief that Ott had obtained his social security number in an unauthorized way. *Id.* at ¶37.

Importantly, the Court observed Chief Blough testified that, because of Ott's telephone call, he removed his youngest children from school for more than one week. *Id.* at ¶30.

Whatever role Detective Smith played in the 2009 charges that were eventually dismissed, the record in appellant's case failed to prove beyond a reasonable doubt that Yambrisak remarks on July 15, 2011 were in any way related to the Detective's involvement with the 2009 case. Further the evidence failed to establish that Yambrisak was attempting to influence, intimidate, or hinder Deputy Smith in the discharge of her duties by making the statements, most of which, as we have said, were not threatening.

Accordingly, the Court in *Ott* reached different results based upon facts not present in appellant's case. Therefore, the decision does not conflict with our decision in this case.

In *State v. Simms*, the testimony at trial showed that Simms had confronted his stepsister's daughter on the street and followed her, shouting threats of physical harm. 2004-Ohio-652, ¶2. The daughter immediately called the police, as well as her mother, for help. The confrontation occurred subsequent to Simms's release from prison. After having been convicted of the rape of the daughter, who was thirteen years of age at the time, Simms had been sentenced to a five-year prison term.

On appeal, Simms contended that the trial court abused its discretion when it permitted the state to introduce evidence of the prior rape conviction, including irrelevant prejudicial details. *Id.* at ¶4.

In overruling his assignment of error, the Court noted,

The intimate nature of the prior crime, combined with Simms's threats at the prior proceedings, demonstrated more than the mere element of a prior conviction.

\* \* \*

The victim testified that Simms had made similar threats to her at the previous criminal proceedings and when he confronted her on the street after his release. This evidence appropriately demonstrated Simms's intent and motive.

2004-Ohio-652, ¶9.

In this case, we found

Detective Smith testified that her involvement with Yambrisak in 2009 was uneventful. No threats, accusations or problems ensued between her investigation of the allegations and serving the arrest warrant

in October 2009 and her chance meeting him on July 15, 2011. Those charges were dismissed in their entirety by the prosecuting attorney. In addition, the occurrence in July 2011 happened in broad daylight in full view of not only Deputy Smith's acquaintance, but also other persons in and around the street. Once identified, Yambrisak sped away.

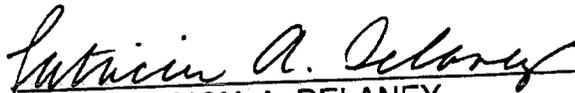
*Yambrisak*, 2013-Ohio-1406, ¶38. Thus, in the case at bar there were no prior threats or confrontations in 2009 at the time the charges were filed, at the time he was arrested, or at the time the charges were dismissed. The fact that the Detective investigated the 2009 allegations in and of itself is not enough to support a conviction for retaliation or intimidation.

Accordingly, the Court in *Simms* reached different results based upon facts not present in appellant's case. Therefore, the decision does not conflict with our decision in this case.

Appellee's Motion to Certify a Conflict is denied.

IT IS SO ORDERED.

  
HON. W. SCOTT GWIN

  
HON. PATRICIA A. DELANEY

  
HON. JOHN W. WISE

CC: PWS  
R. Paul Cushman