

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO

Appellant

v.

IBRAHIM IBRAHIM

Appellee

) SUPREME COURT  
) CASE NO. 2013-0676

) APPEAL FROM NINTH DISTRICT  
) COURT OF APPEALS  
) CASE NO. 12CA0048-M

) MEDINA COUNTY COMMON PLEAS  
) CASE NO. 08CR0433  
)

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MEMORANDUM OPPOSING JURISDICTION

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**EXPLANATION OF WHY THIS CASE IS NOT A CASE OF PUBLIC  
AND GREAT GENERAL INTEREST AND DOES NOT INVOLVE A SUBSTANTIAL  
CONSTITUTIONAL QUESTION**

This is a simple garden variety drug possession case involving a routine traffic matter where an illegal substance was found in the vehicle and each occupant was blanketly charged with possession. The State failed to present sufficient evidence that Ibrahim Ibrahim, a passenger, constructively possessed the substance. All the State showed was that Ibrahim was present in the vehicle with four other people at the same time the substance was. The facts are unremarkable and indistinguishable from similarly situated cases.

The trial court erroneously refused to grant a directed verdict upon the close of the State's case, but the 9th District Court of Appeals correctly reversed the trial court citing the insufficient evidence presented by the State to link Ibrahim to the substance.

The Court of Appeals did not create a new element to the offense of possession of drugs. It simply interpreted statutory law as written by the Ohio General Assembly. The legislature explicitly defined possession in ORC 2925.01(K). In this statute, the legislature said that possession "cannot be inferred by mere access to the thing or substance." ORC 2925.01(K). The Court of Appeals cited this statute when it made its interpretation that some authority over the item is required. Such an interpretation was perfectly reasonable and consistent with the statute and this Court's case law in *State v. Wolery*, 46 Ohio St.2d 316 (1976) and *State v. Hankerson*, 70 Ohio St.2d 87 (1982).

There is no substantial constitutional question to this case. It just simply involves the State failing to meet its burden of proof to present the minimal legally sufficient evidence required to charge a jury with. For the same reasons, there is no public or great general interest in this case.

## STATEMENT OF THE CASE AND FACTS

On May 30, 2008, a group of five people, including Ibrahim Ibrahim, all natives of Somalia, were traveling from Lewiston, Maine to Columbus, Ohio in a Honda Odyssey minivan. While traveling I-71 southbound near the OH 18 exit, the van crashed.

Trooper John Beeler responded to the scene shortly after 2:30 PM. Tr. 27. He determined that five people, four men and one woman, were in the minivan. Tr. 29. The five occupants were taken to the hospital for medical treatment. Tr. 29, 55. After clearing the interstate highway, the Trooper Beeler arranged for a tow truck to tow the minivan to a nearby Wendy's on OH 18. Tr. 30.

At the Wendy's parking lot, Trooper Beeler conducted an inventory search of the minivan. Tr. 32. None of the occupants were present at the inventory search. Tr. 56. He then found green plant-like material scattered all around the inside of the minivan. Tr. 33. In the back trunk area of the minivan, Trooper Beeler found a suitcase containing 37 individual bags of green plant-like material with women's clothing on top. Tr. 34. The suitcase was completely closed when it contained the substance and women's clothing. Tr. 63-64. Trooper Beeler had to open it to see what was inside. Tr. 63-64. He then found a cardboard box with 25 individual bags of green plant-like material and a white plastic shopping bag that contained a large open Ziploc bag. Tr. 34, 44. The box was initially closed with its flaps folded. Tr. 64. Trooper Beeler had to open it to see the contents. Tr. 64. Upon opening the box, he first saw women's clothing on top of the 25 bags. Tr. 64-66. He noted that more plant material was on the trunk floor. Tr. 34.

Trooper Beeler, from speaking with the minivan occupants, figured the occupants were of Somali descent. Tr. 37. Unsure of what the green plant-like material was, Trooper Beeler called his supervisors, who arrived to the scene. Tr. 36. The supervisor figured based on the occupants

being from Somalia, the material was perhaps khat, a plant commonly found in that region. Tr. 36.

Trooper Beeler later determined that Asha Sheikuna, the only female occupant, was the owner and the driver of the minivan. Tr. 39-40, 67. By virtue of this fact and that the 62 bags of plant-like material were packed with women's clothing, Trooper Beeler agreed that one could conclude that the 62 bags belonged solely to Sheikuna. Tr. 68. He never found Ibrahim to be the owner or driver of the minivan. Tr. 68-69. Fingerprints were taken from the 62 bags, but none were identified as Ibrahim's fingerprints. Tr. 69. None of the occupants implicated Ibrahim as having anything to do with green plant substance. Tr. 69. Ibrahim was not tested for any drugs and did not appear intoxicated at the scene. Tr. 70.

Trooper Beeler also took 17 photographs of the green plant-like substance inside the minivan. Tr. 43-47. In his view, some of the green plant-like substance was not freshly strewn about and had been in the vehicle for some time. Tr. 56. He noted that some of it was pressed into the cup holders and "worn" into the vehicle, including being grinded down within cracks. Tr. 56, 58. For several of the photos, Trooper Beeler could not discern what part of the minivan's interior they were taken. Tr. 60-62. He could not tell if the photos were taken of the front or back or what row in the back. Tr. 60-62.

Trooper Beeler stated that Abdi Aden, one of the minivan passengers, told him that they had stopped in Buffalo, New York along the way and picked up the plant material. Tr. 78.

None of the occupants, including Ibrahim, were advised at the scene that they would face criminal charges. Tr. 70. Ibrahim was never contacted about the green plant substance from the time of the incident until he was indicted. Tr. 71. No effort was made to discern who the green plant substance belonged to. Tr. 71. It was assumed that all occupants in the minivans were in

possession of the green plant substance. Tr. 71-72. No finding was made as to who in particular exercised dominion or control over the green plant substance. Tr. 72. Before October 2011, other than posting an arrest warrant, no effort was made by anyone in law enforcement to locate Ibrahim and bring him to court face the criminal possession charge. Tr. 72.

Brandon Werry, the crime lab director for the Ohio State Highway Patrol Crime Lab, testified that the green plant material was khat. Tr. 90. Werry stated that khat is a shrub native to eastern Africa and Middle East. Tr. 86. The primary active ingredient in khat is cathinone, which is an alkaloid stimulant. Tr. 86. Cathinone is an amphetamine type drug, but not as potent as other amphetamines. Tr. 102-103. Often times, khat is chewed like tobacco. Tr. 103.

Chewing the khat leaf is not the same as ingesting pure cathinone. Tr. 103. A similar comparison is chewing the coca leaf versus ingesting pure cocaine. Tr. 100. The effect of chewing the khat leaf is like drinking a cup of coffee or energy drink. Tr. 104.

After the khat plant is harvested, the cathinone, a Schedule I substance, degrades into cathine, a Schedule IV substance, within 24-48 hours unless intervening processes are applied. Tr. 101-102. This is critical because this means that one cannot tell if khat has cathinone by just looking at it. Tr. 105. The plant has to be tested. Tr. 105. Relevant to this case, the law banned cathinone, not the khat plant. Tr. 100-101.

Werry admitted that he did not test any fingerprints taken from the 62 bags packed with women's clothing and white shopping bag found in the back of the minivan. Tr. 105-106. He also stated that the only khat he tested was that found in the 62 bags packed with women's clothing and the white shopping bag. Tr. 106. He did not test any crumbs or grinded down plant material that was found elsewhere in the minivan. Tr. 107.

Ibrahim testified that he did not remember much of the trip from Lewiston to Columbus in May 2008. Tr. 133. He said he was familiar with one of the other vehicle passengers, Abdirizak Abdullah, but did not know any of the others. Tr. 133. Ibrahim rode along to go see his uncle in Columbus. Tr. 133. He was sleeping in the hours preceding the crash. Tr. 134. He does not recall stopping in Buffalo. Tr. 135. He thinks he may have been sleeping. Tr. 135. He did not bring any personal items other his wallet and ID. Tr. 144-145.

Ibrahim did not recall any green leafy substance in the minivan, the contents in the back of the van, or anyone chewing on khat. Tr. 136. He was never asked by the police about what was inside the van. Tr. 137. He was never advised that he would be charged with a crime. Tr. 137.

On October 8, 2008, Ibrahim was indicted for possession of cathinone, a fifth degree felony, in Medina County Court of Common Pleas. Ibrahim was not notified of this indictment until September 2011 when a police officer showed up to his residence in Lewiston to notify him of the warrant from Medina County. Tr. 137-138. He was arraigned on October 11, 2011 and served with the indictment the same day. Trial started on March 12, 2012.

At the close of the State's case, Ibrahim moved for an acquittal under Crim. R. 29, but was denied. Ibrahim renewed his motion after he rested his case, but was denied. The jury later found Ibrahim guilty. Twelve days after being found guilty by the jury, Ibrahim filed a written motion asking for a dismissal under Crim. R. 29(C). The motion was later denied.

The trial court sentenced Ibrahim to 48 days in jail with credit for time served.

## ARGUMENT ON PROPOSITIONS OF LAW

### I. REVIEW BY AN APPELLATE COURT WHETHER THERE WAS SUFFICIENT EVIDENCE OR WHETHER A MOTION FOR ACQUITTAL SHOULD BE GRANTED REQUIRES APPROPRIATE DEFERENCE, NOT DE NOVO REVIEW.

The State never argued deference in its brief to the 9th District Court of Appeals. It acknowledged that the standard of review in evaluating sufficiency of the evidence was de novo. The State never challenged that before the Court of Appeals. It then focused on the analysis of whether evidence in the case was sufficient to survive a motion to acquit under Crim. R. 29. The Court of Appeals, upon consideration of the parties' briefs and oral argument, determined that the State's evidence did not meet bare minimum legal threshold to warrant charging the jury.

To this end, the State waived its right to argue their deference position. This Court generally declines to review issues raised for the first time here. See *Sherman v. Haines*, 73 Ohio St.3d 125, 126, n.1 (1995); *State v. Martello*, 97 Ohio St.3d 398, 2002-Ohio-6661, ¶41, n.2. Therefore, on this point alone, this Court should decline jurisdiction of this case.

The State dresses up its argument in the cloak of "public or great general interest" by talking about "appropriate deference." Changing the review standard on sufficiency of the evidence under Crim. R. 29 would be very dangerous. It would unduly shift more power into the hands of the local trial court. It would greatly take away the Court of Appeals' necessary function as a review court removed from the local trial court scene. In turn, it would severely hinder the defendant's constitutional right to have his/her case duly reviewed on direct appeal.

The case the State cites to anchor its deference argument is *Cavazos v. Smith*, 130 S. Ct. 2 (2011). *Cavazos* has more to do with federalism and the spirited disagreements between the U.S. Supreme Court and the 9th Circuit Court of Appeals. In this case, Shirley Ree Smith was convicted of shaking her infant grandson to death in a California trial court. The conviction was

upheld at every level in the California court system. Smith then filed a writ of habeas corpus in U.S. District Court, but was denied, despite the Magistrate Judge's findings that the evidence against Smith "raises many questions." On appeal of the habeas corpus, the 9th Circuit reversed, citing insufficient evidence to convict Smith.

In a 6-3 decision, the U.S. Supreme Court reversed the 9th Circuit in a tersely worded unsigned opinion, calling the 9th Circuit "plainly wrong." The majority stated that the 9th Circuit, as a federal court, did not afford proper deference to the rulings of the California state courts. Thus, the deference standard has more to do with the relationship between federal and state courts, not among the levels of courts internally within the state system.

The dissent heavily criticized the majority's ruling. The dissent felt the majority's ruling had more to do with settling old scores with the 9th Circuit and its need to put the 9th Circuit in its place. The dissent stated that the case was the wrong one factually for the majority to rebuke the 9th Circuit because a plausibly innocent grandmother was going to pay the price with her freedom.<sup>1</sup>

Based on the facts and politics involved in the *Cavazos* case, it simply cannot be relied upon as good law for this Court to use to radically alter the paradigm all across Ohio to evaluate sufficiency of the evidence.

The State's shaky reliance on *Cavazos* reveals the true nature of its appeal to this Court. In essence, the State did not like losing in the Court of Appeals, so it now wants this Court to function as another review court and overturn the appellate ruling. However, it is not this Court's

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<sup>1</sup> On April 6, 2012, California Governor Jerry Brown, finding "significant doubts" in Shirley Ree Smith's guilt, commuted her sentence. *Brown Commutes Sentence of Woman Convicted of Killing Grandson*, Los Angeles Times (April 7, 2012) <http://articles.latimes.com/2012/apr/07/local/la-me-shaken-baby-clemency-20120407>

role to merely second guess the Court of Appeals. *Manigault v. Ford Motor Company*, 96 Ohio St.3d 431, 2002-Ohio-5057, ¶18 (Lundberg Stratton, J. dissenting). This Court should not merely serve as an additional court of appeal for an extra layer of review, but rather to clarify the rules of law arising in the appellate courts. *State v. Bartum*, 121 Ohio St.3d 148, 2009-Ohio-355, ¶31 (O'Donnell, J. dissenting).

The Court of Appeals did not usurp the role of the jury. It examined legal sufficiency under Crim. R. 29. In its brief, the State confuses the facts and the Court of Appeals' evaluation of them. It should be noted that the law banned cathinone, not the khat plant itself. Because cathinone rapidly deteriorates upon harvest and degrades into cathine, possessing the khat plant itself did not necessarily equate to possessing cathinone. For the State to prove cathinone, it had to test the plant. In this case, only the khat contained in boxes with women's clothing in the back of the van were tested.

This mere discussion of the facts shows that the State disagrees with the Court of Appeals and wants this Court to conduct its own de novo review. As previously discussed, that is not the role of this Court. If anything, this Court's review would show a lack of deference to the Court of Appeals.

Because the State's reliance on *Cavazos* is misplaced and the de novo standard of review on sufficiency of the evidence has proven to be workable all across Ohio, most often with results favorable to the State, there is no public or great general interest or substantial constitutional question in this case. Thus, this Court should decline jurisdiction.

II. THE COURT OF APPEALS FUNCTIONALLY ADDED AN ELEMENT TO THE OFFENSE OF POSSESSION OF DRUGS UNDER R.C. 2925.11 BY REQUIRING THE STATE TO SHOW AUTHORITY OVER THE CONTRABAND.

The State maintains that the Court of Appeals added an element to possession. This is patently false. By using the word “authority,” the Court of Appeals simply used a synonym of “dominion,” which was used by this Court in *State v. Wolery*, 46 Ohio St.2d 316 (1976) and *State v. Hankerson*, 70 Ohio St.2d 87 (1982) to define constructive possession.

In statutorily defining possession, the Ohio General Assembly stated that possession could not be inferred by mere access. ORC 2925.01(K). The Court of Appeals correctly applied this statute to guard against the absurdity and injustice of charging and convicting each and every occupant in a vehicle of possession just because one of them brought contraband along.

Again, the State is asking this Court to act as another appellate court to conduct its own review of the court of appeals. Because that is not this Court’s function and this proposition of law does not raise a public or great general interest or substantial constitutional question, this Court should decline jurisdiction.

III. A COURT OF APPEALS ERRS IN VIOLATION OF DEFENDANTS’ RIGHTS WHEN IT REQUIRES THE STATE TO INTERROGATE A SUSPECT, TAKE BLOOD SAMPLES TO SHOW LEVEL OF INTOXICATION, AND QUESTION SUSPECTED CO-DEFENDANTS FOR USE AT TRIAL IN ORDER TO SUSTAIN A CONVICTION.

This proposition is ironic because now the State is trying to use the defendants’ constitutional rights to not be compelled to self-incrimination and subject to unreasonable search and seizure to support its argument.

When one reads the Court of Appeals’ opinion, it becomes very clear that it was simply pointing out how insufficient the State’s evidence was. The Court of Appeals did not say what

the State should or should not have done. It simply pointed out the lack of possible evidence that could have implicated Ibrahim, but did not exist. This includes there being no evidence of Ibrahim being intoxicated, no evidence of where Ibrahim sat in the vehicle, no evidence of Ibrahim chewing khat, no evidence of Ibrahim's knowledge of khat that contained cathinone, and no evidence that Ibrahim had any dominion or control over the cathinone.

Of course, defendants have the right under the Fifth Amendment of the United States Constitution to not be compelled to incriminate themselves. This does not mean that law enforcement cannot approach potential suspects and talk to them. It just means that law enforcement has to take certain precautions, such as advising Miranda rights, if they engage in custodial interrogations.

The only credible evidence the State presented was that Ibrahim was a passenger in a minivan at the same time with four other people and cathinone. As this Court knows, the law on constructive possession requires much more than that. The Court of Appeals correctly saw this and reversed the injustice that occurred in the trial court. It did not fall for any "defense tactic" regarding lack of evidence. The Court of Appeals correctly concluded that the evidence actually presented by the State was woefully insufficient.

Given that this proposition of law has no merit, it clearly does not raise a public or great general interest or substantial constitutional question. Thus, this Court should decline jurisdiction.

### **CONCLUSION**

For the foregoing reasons, Ibrahim respectfully asks this Court to decline jurisdiction over this case. Although justice should have prevailed sooner in the trial court proceeding, it

nonetheless ultimately prevailed on appeal. This case should have an end and Ibrahim should be allowed to move on with his quiet law-abiding life in Maine where he works and supports his family.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

A true copy of the foregoing Memorandum Opposing Jurisdiction was personally delivered to the Medina County Prosecutor's Office, 72 Public Square, Medina, Ohio 44256 on May 30, 2013.



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Stephen P. Hanudel  
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