

IN THE SUPREME COURT OF OHIO

13-1614

STATE OF OHIO,

Appellant,

v.

JASON RYBARCZYK,

Appellee.

On Appeal from the
Wood County Court
of Appeals, Sixth
Appellate District

Court of Appeals
Case No. WD-12-009

MEMORANDUM IN SUPPORT OF JURISDICTION

OF APPELLANT STATE OF OHIO

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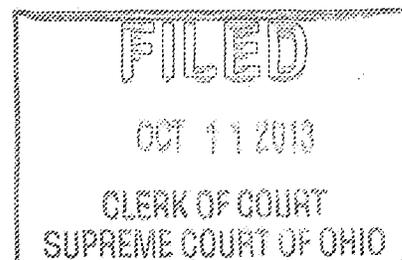


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**EXPLANATION OF WHY THIS CASE IS A CASE OF
GREAT PUBLIC OR GENERAL INTEREST**

The instant case presents a question of such great public interest as would warrant further review by this Court.

The State of Ohio, by and through the Wood County Prosecuting Attorney, asks this Court to review the rule of law in Ohio regarding the separation of powers doctrine that grants discretion to the county prosecutor to proceed with prosecution. In addition, it logically follows that the same authority would grant him the discretion on use of evidence in the case. The Sixth District Court of Appeals opinion was contrary to law by determining the State *would* use a confession to convict Appellee of a charge that carries mandatory prison time when the interrogating police officers stated he may receive probation. While the State agrees that lying to a defendant to elicit a confession by the use of misstatements of the law is improper, here there was not a conviction contrary to the statements of the officers. The incorrect implication leads to a material alteration of the final analysis of the State's case, and ultimate prejudice because the prosecutor, pursuant to R.C. 309.08, has final say in the charges brought against a defendant.

If allowed to stand, the decision of the Sixth District would alter the standard of interrogation tactics that police use thousands of times each year and on a daily basis in an effort to elicit information about a crime. Police officers are allowed to mislead a defendant in their search for answers, and absent a relied upon misstatement of the law, a confession should stand.

STATEMENT OF WHY THIS COURT SHOULD ALLOW APPEAL

The case at hand represents a major injustice by a reviewing court that if allowed to stand would set a precedent in which the manner of police interrogation and prosecutorial discretion would forever be changed. The Sixth District Court of Appeals improperly has set forth a new standard in prosecutorial discretion analysis, contrary to the separation of powers doctrine. In

addition, it made a presumptive assumption that added facts not in the record, then decided the case upon that presumption. The determination to charge a defendant lies with the prosecuting attorney. In this case the ultimate outcome was not decided, as there was no conviction. Here the proceedings were derived from a suppression hearing, not a final conviction. There can be no misstatement of law *if the purported violation has yet to occur*. The court of appeals could not assume how the State may ultimately use a defendant's confession and work backwards to draw a conclusion of a misstatement of the law. At the time of the confession, there was no grand jury presentation, final verdict or facts to review about a possible lack of probation. There cannot be a misstatement of the law when there was no charge levied against Appellee when he spoke to the interrogating officers, nor a final resolution of the case to review if in fact, the officers misled him.

STATEMENT OF THE CASE AND FACTS

This case arises from the Wood County Common Pleas Court, Case No. 2011-CR-0519, suppression hearing, in favor of the defendant/Appellee. In the Sixth District Court of Appeals Case No. WD-12-009, the court affirmed the findings of the trial court, and declined the State's motion for reconsideration. See *State v. Rybarezyk*, 6th Dist. No. WD-12-009, 2013-Ohio-2943, 2013 Ohio App. LEXIS 2985. The State contends that the ultimate holding of the appellate court was not in line with Ohio law and further in violation of the duties conferred upon the county prosecutor in R.C. 309.08 in violation of the separation of powers doctrine.

In support of its position on this issue, the appellant, State of Ohio, presents the following argument.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. I: IT IS A VIOLATION OF SEPARATION OF POWERS FOR A REVIEWING COURT TO PRESUMPTIVELY DECIDE THE USE OF EVIDENCE AND WHETHER OR NOT TO PROCEED WITH PROSECUTION, USURPING THE AUTHORITY OF THE COUNTY PROSECUTOR.

The court of appeals

In its denial of the State's motion for reconsideration, the 6th District summarized its key finding in this case;

In *Rybarczyk*, we held, "It is clear from the record that the combination of the persistent lies regarding physical evidence linking Appellee to the child and the threat of prison versus the hope of probation overcame appellee's free will and improperly coerced his confession." The State contends that there was no evidence of police overreaching in this case because the officers' statements regarding the possibility of probation were factually accurate. We disagree.

This court has stated, "[a] defendant's will is not overborne simply because he is led to believe that the government's knowledge of his guilt is greater than it actually is." *State v. Bays*, 87 Ohio St. 3d 15, 23, 1999-Ohio-216, 716 N.E.2d 1126, 1999 Ohio LEXIS 3224 (Ohio 1999), citing *Ledbetter v. Edwards* (C.A.6, 1994), 35 F.3d 1062, 1070.

The 6th District went on to add:

As we recognized in our decision, appellee was charged with a rape of a child in violation of R.C. 2907.02(A)(1)(b) and (B), which carries a mandatory prison term. The state argues that Appellee could have been charged with gross sexual imposition in violation of R.C. 2907.05(A)(4) or (B), which carries only a presumption of prison. However, R.C. 2907.05(C)(2)(a) provides that for a

violation of 2907.05(A)(4) or (B), prison is mandatory where there is “[e]vidence other than the testimony of the victim * * * corroborating the violation.” Here, appellee’s confession is other evidence that would have been used to corroborate the victim’s testimony. (Emphasis added.) Thus, there was no possibility of probation. See *State v. Bevely*, 10th Dist. No. 12AP-471, 2013-Ohio-1352 (evidence of defendant’s confession was corroborating evidence that mandated a prison term). Moreover, the officers pressured Appellee by telling him there was DNA evidence linking him to the crime. Thus, even under the scenario presented to Appellee by the officers, probation would not have been an option.

Decision and Judgment, journalized August 27, 2013, page 2-3.

A review of the law of Ohio is clear about the use of non-truths. The use of deceit is merely “* * * a factor bearing on voluntariness.” *State v. Cooney*, 46 Ohio St. 3d 20, 27, 544 N.E.2d 895, 1989 Ohio LEXIS 258 (Ohio 1989), citing, *Schmidt v. Hewitt* (C.A. 3, 1978), 573 F. 2d 794, 801. See *Frazier v. Cupp* (1969), 394 U.S. 731, 739. However, the resolution by the court implies that the State *would have used the confession* for one possible outcome—mandatory prison. Rather, the State would be free to use a defendant’s confession as leverage in a plea negotiation, or other way at a later time. This case was not final. There is no fact in this case that allows the 6th District to draw the conclusion that the final charge against Appellee was not going to include probation as a sentencing option.

However, that is the conclusion drawn, to the prejudice of the State, thereby removing the power to charge as granted by R.C. 309.08. (Revised Code 309.08(A) states, “The prosecuting attorney may inquire into the commission of crimes within the county. The prosecuting attorney shall prosecute, on behalf of the state, all complaints, suits, and controversies in which the state

is a party * * *.”) Further, this court has clearly set forth the rule of prosecutorial discretion in *State v. LaMar*, 95 Ohio St. 3d 181, 192, 2002-Ohio-2128, 767 N.E.2d 166, 2002 Ohio LEXIS 1125 (Ohio 2002), “[t]he decision whether to prosecute a criminal offense is generally left to the discretion of the prosecutor.” Citing *United States v. Armstrong*, 517 U.S. at 464, 116 S. Ct. 1480, 134 L. Ed. 2d 687 (1996). See also, *Wayte v United States*, 470 U.S. 598, 105 S. Ct. 1524, 84 L. Ed. 2d 547 (1985). By doing so, the court violated the separation of powers doctrine by taking away the prosecutorial discretion in violation of Ohio law.

During direct appeal oral argument, the State was asked about the possibility of a plea deal that may allow for Appellee to be given probation. The State reiterated that a count of GSI, in violation of R.C. 2907.05, if proper, would carry that possibility. The 6th District has, in its denial for Reconsideration, specifically rejected that possibility by quoting R.C. 2907.05(C)(2)(a), which states prison is mandatory where there is other evidence (the confession by the defendant) than the victim’s testimony. See 2907.05(A)(4) or (B). While the State agrees, it cannot be said that this is what a jury, or plea agreement would have ultimately found defendant guilty of. The 6th District cannot determine if there was a misstatement of law made *before* a final determination of guilty of those specific sections is found or what the State *would* have done.

The court appeals may not presumptively decide the case for the State. It may not determine, what Revised Code Section the State has to charge or what evidence it must use during the pendency of the case. The 6th District has used reverse logic where the facts do not allow them to do so, as it has concluded that a confession made to the interrogating officers—before presentation to the grand jury—and before the final resolution of the case, was a misstatement of the law regarding the possibility of a sentence of probation.

The court of appeals has drawn a conclusion that is contrary to law and in violation of the separation of powers, to the prejudice of the State. The State's first proposition of law should be found well-taken.

**Proposition of Law No. II: THE COURT OF APPEALS
CANNOT CREATE A RECORD THAT IS NOT
SUPPORTED BY THE FACTS AVAILABLE TO IT.**

The court of appeals stated that the State *would use* appellee's confession to police officers to convict him of R.C. 2907.05(A)(4) or (B), under the direction of R.C. 2907.05(C)(2)(a). This would make the police officers representation that probation may be possible as a resolution, a misstatement of the law. This is not a possible conclusion where the case was never concluded and thus no code section to compare the appellate court's conclusion to.

A court of appeals is bound by the record before it and may not consider facts extraneous thereto. *Paulin v. Midland Mutual Life Ins. Co.*, 37 Ohio St. 2d 109, 307 N.E.2d 908. It would logically follow that the court may not determine what evidence the State "*would have used*" or how it would have used it. Those are facts not of the record before it.

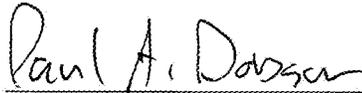
This court in *State v. Phillips*, 74 Ohio St. 3d 72, 80, 1995-Ohio-171, 656 N.E.2d 643 (1995), "A reviewing court cannot add matter to the record before it, which was not a part of the trial courts proceedings, and then decide the appeal on the basis of the new matter." Citing *State v. Ishmail*, 54 Ohio St. 2d 402, 8 Ohio Op. 3d 405, 377 N.E.2d 500 (1978), paragraph one of the syllabus. This is what the 6th District did when it made the presumption that the State would use section (C)(2)(a), to later convict Appellee, would then face mandatory prison, when he was told that the possibility of probation was being considered. Such a result is not proper under Ohio rules of review.

Because the 6th District used facts not on the record, its decision was contrary to law.

CONCLUSION

For the reasons discussed above, this case involves a matter of great public interest. The appellant requests this court accept jurisdiction in this case so that the important issues presented will be reviewed.

Respectfully submitted,



PAUL A. DOBSON 0064126
Prosecuting Attorney

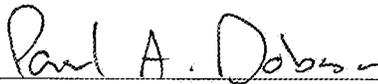


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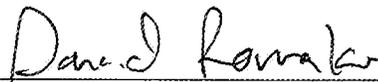
Counsel for Appellant

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was sent by regular U.S. Mail, this day, October 11, 2013, to counsel for Appellee, Thomas A. Sobecki, 405 Madison Ave., Suite 910, Toledo, OH 43604.



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WOOD COUNTY, OHIO

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SIXTH DISTRICT
COURT OF APPEALS
CINDY A. HOFNER, CLERK

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
WOOD COUNTY

State of Ohio

Court of Appeals No. WD-12-009

Appellant

Trial Court No. 2011CR0519

v.

Jason Rybarczyk

DECISION AND JUDGMENT

Appellee

Decided: AUG 27 2013

This matter is before the court on the App.R. 26(A) application of appellant, the state of Ohio, for reconsideration of our decision in *State v. Rybarczyk*, 6th Dist. Wood No. WD-12-009, 2013-Ohio-2943. In that decision, we affirmed the trial court's judgment granting appellee's, Jason Rybarczyk, motion to suppress incriminating statements that he made involuntarily. Appellee has filed a response in opposition to the state's application. For the reasons that follow, we deny the state's application.

When ruling on an application for reconsideration, we examine "whether the motion calls to the attention of the court an obvious error in its decision or raises an issue

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AUG 27 2013

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for consideration that was either not considered at all or was not fully considered by the court when it should have been. (App.R. 26, construed.)” *Matthews v. Matthews*, 5 Ohio App.3d 140, 450 N.E.2d 278 (10th Dist.1981), paragraph two of the syllabus.

In its application, the state argues that the two-pronged basis for our holding was “factually misunderstood.” In *Rybarczyk*, we held, “It is clear from the record that the combination of the persistent lies regarding physical evidence linking appellee to the child and the threat of prison versus the hope of probation overcame appellee’s free will and improperly coerced his confession.” *Rybarczyk* at ¶ 15. The state contends that there was no evidence of police overreaching in this case because the officers’ statements regarding the possibility of probation were factually accurate. We disagree.

As we recognized in our decision, appellee was charged with rape of a child in violation of R.C. 2907.02(A)(1)(b) and (B), which carries a mandatory prison term. The state argues that appellee could have been charged with gross sexual imposition in violation of R.C. 2907.05(A)(4) or (B), which carries only a presumption of prison. However, R.C. 2907.05(C)(2)(a) provides that for a violation of R.C. 2907.05(A)(4) or (B), prison is mandatory where there is “[e]vidence other than the testimony of the victim * * * corroborating the violation.” Here, appellee’s confession is other evidence that would have been used to corroborate the victim’s testimony. Thus, there was no possibility of probation. See *State v. Bevely*, 10th Dist. Franklin No. 12AP-471, 2013-Ohio-1352 (evidence of defendant’s confession was corroborating evidence that mandated a prison term). Moreover, the officers pressured appellee by telling him there

was DNA evidence linking him to the crime. Thus, even under the scenario presented to appellee by the officers, probation would not have been an option. As discussed at length in our decision,

Where an accused's decision to speak was motivated by police officers' statements constituting "direct or indirect promises" of leniency or benefit and other representations regarding the possibility of probation which were misstatements of the law, his incriminating statements, not being freely self-determined, were improperly induced, involuntary and inadmissible as a matter of law. *Rybarczyk* at ¶ 13, quoting *State v. Arrington*, 14 Ohio App.3d 111, 470 N.E.2d 211 (6th Dist.1984), paragraph two of the syllabus.

Alternatively, the state argues that even if the officers' conduct was coercive, appellee's confession was nonetheless voluntary under the totality of the circumstances. However, we fully considered this issue in our decision, and the state has not called to our attention an obvious error. Instead, the state merely disagrees with our conclusion, which is not a proper reason to grant an application for reconsideration. *State v. Owens*, 112 Ohio App.3d 334, 336, 678 N.E.2d 956 (11th Dist.1996) ("An application for reconsideration is not designed for use in instances where a party simply disagrees with the conclusions reached and the logic used by an appellate court.").

Accordingly, upon due consideration, the state's application for reconsideration is denied.

State v. Rybarczyk
C.A. No. WD-12-009

Mark L. Pietrykowski, J.

Thomas J. Osowik, J.

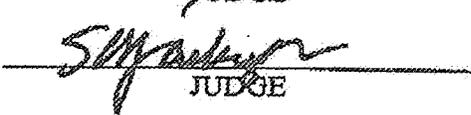
Stephen A. Yarbrough, J.
CONCUR.



JUDGE



JUDGE



JUDGE

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AUG 27 2013