

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
	:	On Appeal from the Wood County
Appellant,	:	Court of Appeals,
	:	Sixth Appellate District
v.	:	
	:	Supreme Court Case No. 2013-1614
JASON RYBARCZYK,	:	
	:	Court of Appeals
Appellee.	:	Case No. WD-12-009

APPELLEE JASON RYBARCZYK'S MEMORANDUM IN RESPONSE TO
APPELLANT'S MEMORANDUM IN SUPPORT OF JURISDICTION

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**EXPLANATION OF WHY THIS IS NOT A CASE OF PUBLIC OR
GREAT GENERAL INTEREST**

This is an action in which the Court of Appeals upheld a decision by the Wood County Court of Common Pleas, granting to Appellee Jason Rybarczyk, defendant in the trial court, his motion to suppress his confession. Rybarczyk was charged with one count of rape in violation of R.C. § 2907.02(A)(1)(b), which carries a mandatory prison sentence. The trial court held that, under the totality of the circumstances, Rybarczyk's confession was coerced where, during a nearly two hour interrogation, he was repeatedly led to falsely believe that officers had DNA evidence against him, and thus "knew" that he had touched the vagina of the alleged victim, and was repeatedly given implicit assurances of probation if he would confess to that fact, and threats of long prison terms if he did not confess, by detectives who explicitly held themselves out as friends of Rybarczyk who only wanted to help him.

Appellant, the State, presents two propositions of law as follows:

- 1) It is a violation of separation of powers for a reviewing court to presumptively decide the use of evidence or whether or not to proceed with prosecution, usurping the authority of the county prosecutor, and
- 2) The Court of Appeals cannot create a record that is not supported by the facts available to it.

As will be discussed in detail below, whether the propositions of law as stated are correct is almost irrelevant, because the premises upon which they are founded are false. The State's highly abbreviated Statement of the Case and Facts, indeed devoid of the facts of the case, utterly fails to inform this Court of the true basis of the trial court's decision, and of the true basis of the Court of Appeals' affirmance of the trial court's decision. Quite to the contrary of the State's contention, the Court of Appeals did not presumptively decide the use of evidence or whether or not to proceed with prosecution, and thus did not usurp the authority of the county prosecutor, nor did the Court of Appeals create a record that is not supported by the facts available to it.

Before those propositions of law are discussed, however, there is another important reason why this Court should not accept jurisdiction in this case. That is that the State is raising these issues now for the very first time, despite having ample opportunity to do so before the lower courts. At no time before the trial court or the Court of Appeals did the State raise the issues that it now does before this Court. It wasn't for lack of opportunity that it failed to do so. Following a suppression hearing, the State filed a memorandum in opposition to defendant's motion to suppress in the trial court. When the trial court issued its order suppressing the confession, the State appealed. At this point the factual record and the suppression proceedings in the trial court were complete. Any supposed violation of separation of powers necessarily had already occurred. The Court of Appeals affirmed the decision of the trial court on exactly the same grounds, both legal and factual, upon which the trial court itself rested its decision. If it was a violation of separation of powers for the reviewing court to determine that the trial court properly suppressed the coerced confession, then it was a violation of separation of powers for the trial court to suppress the coerced confession in the first place. Yet in its appeal brief to the Court of Appeals, the State never suggested that the trial court had violated separation of powers, but only argued that the confession was not coerced.

In Appellee's brief to the Court of Appeals, Rybarczyk specifically argued that the assurances of probation were false assurances, because any crime with which Rybarczyk might reasonably expect to be charged, carried a mandatory prison sentence:

[N]o credible real-world charge could be brought against Rybarczyk which would allow for a sentence of probation. The crimes of rape, gross sexual imposition when the victim is less than 13 or 12 years of age (depending upon the subsection violated), and sexual battery when the victim is less than 13 years of age, all carry mandatory prison terms. See R.C. § 2907.02(B), R.C. § 2907.05(C)(2), and R.C. § 2907.03(B), respectively.

Brief of Appellee, p. 16.

Rybarczyk in his brief went on to argue:

[T]he State may attempt to argue that acting within its discretion, the prosecutor could have charged Rybarczyk with some lesser, probationable offense. For example, while the allegations against Rybarczyk as a minimum meet all the elements of a

charge of gross sexual imposition, an examination of the simple sexual imposition statute suggests that the prosecutor could theoretically have charged Rybarczyk with simple sexual imposition, which would appear to be a probationable offense. The problem with this argument, were it to be made, is that it would entirely vitiate the long-held rule, discussed in detail in the next section, that one cannot obtain a confession by false promises of leniency. After all, virtually any offense – rape, murder, treason, arson – could potentially be reduced to some offense for which a sentence of probation would be a legal possibility. But no prosecutor, confession in hand, is going to bring a simple charge of sexual imposition against an adult defendant believed to have molested a small child.

Brief of Appellee, p. 17.

Thus the argument that the Court of Appeals ultimately adopted, that the assurances of probation were false because no credible real-world charge could be brought against Rybarczyk which would allow for a sentence of probation, had been squarely placed before both the Court of Appeals and the State. If the Court of Appeals, in assuming that the State would act in a credible, real-world way, was thereby violating the separation of powers doctrine, that was a good time to say so. The case having been placed upon the Court of Appeals' regular docket, the State was entitled to file a reply brief, but chose not to do so.

But the appeal brief and the never-filed reply brief were not the final opportunities of the State to raise the issue of separation of powers, or to charge the Court of Appeals with creating a record not supported by the facts available to it. After briefing was completed, the Court of Appeals issued a written opinion upholding the determination of the trial court. There the court carefully laid out both the factual and legal basis for its determination that the trial court had properly suppressed the confession on the basis that it had been coerced. At this point in time, then, the State knew exactly the basis for the Court of Appeals' ruling, including the assumption that the prosecution would act in a credible, real-world way, and that the court would not assume that merely because a theoretical possibility of a particular course of action existed, that the State would act in this manner. If the State believed that the court's opinion impermissibly violated separation of powers, or that the court had somehow impermissibly created a record that was not supported by the facts available to it, it could have filed a motion for reconsideration. And the State indeed did file a motion for reconsideration. But the State did not raise the issues it now raises before this Court, but merely re-

argued the facts of the case, arguing, as it did before the trial court and in its appeal brief, that under the facts of the case, the lies concerning the presence of Rybarczyk's DNA on the alleged victim, and the assurances that if he confessed, he would likely receive probation, did not amount to coercion. The State did assert that under R.C. § 2907.05, "prison was not a mandatory result of Rybarczyk's suspected actions with the victim." State's Motion for Reconsideration, p.4. In his response to the Motion for Reconsideration, Rybarczyk pointed out that prison is mandatory where there is evidence corroborating the testimony of the victim, and that because his confession was corroborating evidence, there was no possibility of probation.

Thus again, this time with even more specificity, the precise argument that the State now for the first time contends violates separation of powers, was placed squarely before it. And again, the State chose not to file a reply brief, though the Court of Appeals had explicitly authorized the filing of a reply brief. (Decision and Judgment filed July 29, 2013, granting Appellee an extension of time to respond to State's motion for reconsideration, and allowing State seven days after service of the response to file its reply). Thus the facts and arguments and decisions which the State now for the first time says amounts to a separation of powers violation, were all available to it prior to the decision from which the State now appeals, and yet the State never made the slightest effort to bring its proposition of law either to the trial court or to the Court of Appeals.

This Court has repeatedly made it clear that the Ohio Supreme Court is not the place to raise new issues that could and should have been brought before the lower courts. Rybarczyk respectfully suggests that the State's failure to raise these issues below provides an independent basis for this Court to deny jurisdiction. Indeed, to grant jurisdiction in this case, in which the State has raised for the first time issues which it had numerous opportunities to bring before the lower courts, would send the wrong message to future litigants.

But even if this Court were to overlook the State's failure to raise these issues before either the trial court or the Court of Appeals, there is still no sound reason for this Court to allow appeal. The State's first proposition of law states as follows: "It is a violation of separation of powers for

a reviewing court to presumptively decide the use of evidence or whether or not to proceed with prosecution, usurping the authority of the county prosecutor.”

The State’s argument can be boiled down as follows: The lower courts’ findings of coercion under the totality of the circumstances, included the finding that the State’s assurances of probation were false. But the court could not properly make such a finding, because there was a theoretical possibility that the State would charge the defendant with some probationable offense, or could theoretically decline to make use of this hard-won confession, or use it in some entirely different way that would have the *post hoc* effect of rendering the assurances of probation true.

In other words, the State in effect argues that, until there has been a final disposition of the case, the court as a matter of law can never suppress a confession obtained by false promises of leniency, since until trial and conviction, there will always be a theoretical possibility that what appears false on its face, will be made true by some wholly unlikely but theoretically possible decision of the prosecutor. The unworkableness of such a proposition is clear on its face. In the instant case, there was no doubt as to what the charge would be, since at the time of the suppression hearing and subsequent determination of the suppression motion, Rybarczyk had already been charged with rape, a non-probationable offense. Yet the State argues that it could have charged Rybarczyk with some other offense. If this possibility is sufficient to preclude the court from suppressing the confession, then it follows that the confession could never be suppressed until absolutely all possibility of the prosecutor revising the charges had been foreclosed.

The State itself concedes that under its theory, such a suppression motion could not be determined until the defendant is convicted:

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.

Memorandum in Support of Jurisdiction of Appellant State of Ohio, at 3.

If the case goes to trial, says the State, the motion to suppress cannot be decided until after the jury verdict:

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.

Memorandum in Support of Jurisdiction of Appellant State of Ohio, at 6. (Emphasis in the original).

Again, the unworkability of such a process is palpable, and the waste of the trial court's resources would be staggering. Surely there is a reason that the rules of criminal procedure require that suppression issues be determined before trial, yet the State would require that, in opposition to those rules, the determination not be made until after the conclusion of the trial.

The State's proposal that suppression motions in such cases be delayed until the conclusion of trial and conviction of the defendant, leaves many important questions completely unaddressed. For example, at page 6 of its memorandum, the State repeatedly speaks of the Court of Appeals making a suppression determination. Does the State envision that the trial court shall no longer have any role in determining the outcome of motions to suppress confessions, at least where alleged false promises of leniency are involved? R.C. § 2945.67 provides for interlocutory appeals by the State, of suppression of evidence. Is this statute mere surplusage when confessions are suppressed? If trial is held, the confession is admitted, and the defendant is convicted, and then the trial court or the Court of Appeals, at last authorized to rule on the suppression motion, determines that the confession should have been suppressed, what happens? Is the defendant automatically entitled to a new trial? Or is the State permitted to argue that the jury would have ruled the same way anyway, even without the confession?

For the reasons stated above, the State's theory of how confessions based upon alleged false promises of leniency should be handled would make an unworkable and wasteful mess of things. For that reason alone, this case should be found to be not one of public or great general interest. But there is another reason this appeal should not be allowed, and that is that neither the trial court nor the Court of Appeals in any way interfered with the prerogatives of the prosecutor to charge and conduct his case however he wants, except as the granting of any motion to suppress any evidence necessarily and by its very nature interferes with those prerogatives. The court did not force the prosecutor to present the grand jury with any particular charge against Rybarczyk; the prosecutor made that choice himself. The prosecutor's decision not to present the grand jury with a probationable offense to bring against Rybarczyk was his alone. All of those decisions were made long before the court granted the suppression motion. The simple fact of the matter is this: this case involves nothing more than a routine suppression of evidence which was in every way carried out according to law. The fact that the State has at the 11th hour raised the issue of "separation of powers" has nothing at all to do with the facts and law of the case, and everything to do with the fact that this Court does not sit as a court of super review of routine cases which do not involve matters of public or great general interest.

The State's second proposition of law states as follows: "The Court of Appeals Cannot Create a Record That Is Not Supported by the Facts Available to It."

Obviously the statement itself is true beyond debate, but the premise is entirely false. The Court of Appeals created no record not supported by the facts available to it. Even the most cursory reading of the State's brief exposition of its second proposition of law reveals that it is no more than a restatement of the State's arguments in support of its first proposition of law. Because there had not yet been a trial and conviction, the State argues in its memorandum, the court could not find that the detectives' assurances of probation were false. But trial courts are not required to indulge the State's speculations as to what it might theoretically do sometime in the future, and enter into an unworkable and wasteful *post hoc* process of determination of suppression issues.

For the above reasons, this Court should decline to hear the State's appeal of this case.

STATEMENT OF THE CASE AND FACTS

On September 15, 2011, Justin White, who was a detective in the Bowling Green Police Department, and Doug Hartman, a Detective Sergeant in the Department, interrogated Rybarczyk regarding allegations that he had inappropriately touched the vagina of a young child. The interrogation lasted about two hours, with all but a few minutes of those two hours taking place in detective White's unmarked car, with White and Rybarczyk sitting in the front seat, and Detective Sgt. Hartman sitting in the rear. The interrogation was recorded and transcribed, and a written transcript of the interrogation was before both the trial court and the Court of Appeals.

According to detectives' testimony presented to the court at the suppression hearing, while Rybarczyk was already the focus of the investigation at the time of the interrogation, they did not have probable cause to arrest him, having nothing more than an unsubstantiated report that the child had allegedly made to her grandmother. Police had no physical evidence that Rybarczyk had molested the child. An interview of the child by a children's services worker failed to confirm the child's alleged report to the grandmother.

During the interrogation of Rybarczyk, Detective White, aided from time to time by Detective Hartman, engaged in a pattern of "persistent lies regarding physical evidence linking appellee to the child." Decision and Judgment of the Court of Appeals dated July 5, 2013, p. 10. Such false statements included telling Rybarczyk, "we know that your DNA is there," and "I still have the physical evidence saying it happened." (Transcript of Interview of Jason Rybarczyk, at 42, 48).

Woven throughout the interrogation of Rybarczyk was the other theme of the day, namely repeated suggestions of calamity in the form of lengthy prison sentences if Rybarczyk did not confess, and suggestions of probation if he did confess:

. . . This could be something that could blow up into something a lot bigger than it needs to be.

. . . .

. . . I have also dealt with a lot of people that have had an incident like this, have never before had an incident like this, it was based off of a stress or being drunk or whatever the case may be, and there is two groups of those people. The group that talked to me. We work it out, we get some counseling, some services, things like that. They do probation or things along those lines –

....

What I am saying is is that is a minor. I am talking this is something you can go to prison for for 15 to 20 years, all right? And we have got the two groups of people. We have got the group of people beside – two groups of normal people. We have got the group that is honest and forthright and apologizes for what happened and it was a mistake or it was an accident and it was taken the wrong way. Or we got the group of people that say, No, nothing ever happened. I never did that. And this group of people is the one that, for the most part, end up doing the 15 – 10 to 15 years. I just had one I did where the grandfather, you know, had a situation with a relative, okay, and he lied about it and he is doing 10 to 15 years. And I have plenty of other situations where I am sitting in a car with somebody, they are honest. They are like, yeah, I have been drinking this and that, it shouldn't have happened, it was a mistake and they end up getting probation services to help themselves. And as long as they don't get in trouble on that probation – it is not a free ride. As long as they don't get in trouble on that probation, they end up to be able to clear up their lives and go on with their lives.

....

I am throwing you a lifeline possibly on the difference between large amount of years in prison or just getting on probation or something or having your probation extended.¹

(Transcript of Interview of Jason Rybarczyk, at 51, 58-60, 64).

Finally, Detective White falsely spoke of “multiple witnesses” and of evidence gained from his purported own interview of the child. (Transcript of Interview of Jason Rybarczyk, at 24, 46-47).

Toward the end of the interview, Rybarczyk twice expressed his understanding, based upon the things he was told by the detectives, that if he confessed to the alleged crime, he would merely receive probation or an extension of his current probation:

I could – I mean, you guys say if I tell you the truth now my probation is going to be extended, so I am really trying to think.

I rather just extend my probation so I don't have to talk to my folks.

(Transcript of Interview of Jason Rybarczyk, at 102, 116).

¹ Rybarczyk was on probation at the time of the interrogation, for theft.

LAW AND ARGUMENT

I. APPELLANT IS IMPROPERLY RAISING NEW ISSUES WHICH SHOULD HAVE FIRST BEEN BROUGHT BEFORE THE LOWER COURTS

“The general rule is that ‘an appellate court will not consider any error which counsel for a party complaining of the trial court’s judgment could have called but did not call to the trial court’s attention at a time when such error could have been avoided or corrected by the trial court.’” *State v. 1981 Dodge Ram Van*, 36 Ohio St.3d 168, 170, 522 N.E.2d 524 (1988), quoting *State v. Awan*, 22 Ohio St.3d 120, 122, 489 N.E.2d 277 (1986). “Ordinarily, reviewing courts do not consider questions not presented to the court whose judgment is sought to be reversed.” *Goldberg v. Indus. Comm.*, 131 Ohio St. 399, 404, 3 N.E.2d 364 (1936).

These rules are deeply embedded in a just regard to the fair administration of justice. They are designed to afford the opposing party a meaningful opportunity to respond to issues or errors that may affect or vitiate his or her cause. Thus, they do not permit a party to sit idly by until he or she loses on one ground only to avail himself or herself of another on appeal. In addition, they protect the role of the courts and the dignity of the proceedings before them by imposing upon counsel the duty to exercise diligence in his or her own cause and to aid the court rather than silently mislead it into the commission of error. *Id.*, 51 Ohio St.2d at 117, 5 O.O.3d at 101, 364 N.E.2d at 1367.

State ex rel. Quarto Mining Co. v. Foreman, 79 Ohio St.3d 78, 81, 679 N.E.2d 706 (1997), citing *State v. Williams*, 51 Ohio St.2d 112, 117, 364 N.E.2d 1364 (1977).

The error now complained of by the State, a purported violation of the separation of powers, was never brought to the attention of either the trial court or the Court of Appeals, whose judgment the State seeks to reverse, in spite of the State having had numerous opportunities to do so. Similarly, the error now complained of in the State’s second proposition of law, that by failing to defer ruling on the suppression motion until after trial and conviction, the Court of Appeals was creating a record not supported by the facts available to it, was never argued before either the trial court or the Court of Appeals.

In its motion for reconsideration to the Court of Appeals, the State did hint that some “lower-level felony offense,” presumably one that would be probationable, was in fact possible. The State

made no suggestion, however, as to what this “lower-level felony offense” might be, and even now, in its Memorandum in Support of Jurisdiction, the State provides not even the most remote suggestion as to what it might have in mind. These vague references to the possible existence of unspecified statutes under which

Rybarczyk could theoretically have been charged, hardly constitutes the raising of the issues before the trial court or Court of Appeals, that it now brings before this Court.

Because the State raises these issues only now for the first time, they should not be considered by this Court.

II. RESPONSE TO PROPOSITION OF LAW NO. I

The State’s first proposition of law reads: *It is a violation of separation of powers for a reviewing court to presumptively decide the use of evidence or whether or not to proceed with prosecution, usurping the authority of the county prosecutor.*

The separation of powers doctrine requires that each branch of government be permitted to exercise its constitutional duties without interference from the other two branches of government. *State ex rel. Dann v. Taft*, 109 Ohio St.3d 364, 2006–Ohio–1825, 848 N.E.2d 472, ¶ 56. But this does not mean that no branch of government can in any way influence another branch of government:

[The separation-of-powers doctrine] recognizes that our government is composed of equal branches that must work collectively toward a common cause. And in doing so, the Constitution permits each branch to have some influence over the other branches in the development of the law. For example, the legislative branch plays an important and meaningful role in the criminal law by defining offenses and assigning punishment, while the judicial branch has its equally important role in interpreting those laws.

As the Supreme Court has explained, the Madisonian vision of the separation of powers did not contemplate three branches operating in isolation, each without influence over the others. Rather, the doctrine was designed to protect against “ ‘the whole power of one department [being] exercised by the same hands which possess the whole power of another department,’ ” in which case “ ‘the fundamental principles of a free constitution, are subverted.’ ” (Emphases sic.) *Mistretta v. United States* (1989), 488 U.S. 361, 380–382, 109 S.Ct. 647, 102 L.Ed.2d 714, quoting *The Federalist* No. 47 (J. Cooke Ed.1961) 325–326.

State v. Bodyke, 126 Ohio St.3d 266, 2010-Ohio-2424, 933 N.E.2d 753, ¶ 48, 49.

Rybarczyk has already discussed the complete unworkability of the State's contention that motions to suppress, at least when they involve confessions allegedly coerced by false promises of leniency, can only be granted following trial and conviction of the defendant. But just as the State's propositions fail from a workability perspective, so they fail from a legal perspective.

It is obvious that every time a court suppresses otherwise-admissible evidence in a criminal trial, the judicial branch of the government to some degree impedes the executive branch of the government. Such an interference with the duties of the executive branch of the government does not constitute violation of the separation of powers doctrine, because it does not serve to administer the powers of the executive branch, and any interference is limited to the extent necessary for the court to carry out its own responsibilities.

The State argues at pages 5 and 6 of its brief, respectively, that the court's determination that the detectives' assurances of probation were false thereby "remov[ed] the power to charge as granted by R.C. 309.08" and "[took] away the prosecutorial discretion in violation of Ohio law."

The court, of course, did no such thing. Proof that the court did no such thing is that the prosecutor had in fact exercised the power to charge as granted by that statute, by charging Rybarczyk with rape. Furthermore, both before and after the suppression motion was granted, the prosecutor's power to reduce charges or to present new charges to the grand jury remained undiminished. Likewise, the ruling only prohibited the State from using evidence of Rybarczyk's confession at trial, not from using it as leverage in a plea negotiation. Obviously, any leverage which might be obtained from its use would be diminished after the granting of the motion to suppress, but the State was still free to use it however it might, including representing to the defendant that the trial court's decision might be reversed on appeal by the State. In any event, any diminishment of the value of the confession was only of the sort of diminishment of the value of any piece of evidence that has been suppressed by the court. Unless this Court holds that every grant of a suppression

motion is *ipso facto* an unlawful interference with the powers and duties of the prosecutor, then the grant of the motion in the instant case in no way violated the separation of powers doctrine.

The only impingement on the prosecutor's exercise of his powers was to take away his power to make evidentiary use at trial of an illegally obtained confession, an impingement unavoidably inherent in every exercise of the court's power (and indeed, the court's obligation) to suppress illegally obtained evidence. If every such impingement on the prosecutor's exercise of his powers constitutes a violation of the separation of powers doctrine, then the courts are necessarily without power to suppress evidence. And this surely cannot be the law.

In short, the State's contention that suppression of the evidence violated the separation of powers doctrine, is completely without foundation in either fact or law.

Rybarczyk must comment on the State's brief forays into the substantive law of coerced confessions at pages 4 and 5 of its memorandum. The State points out, quite correctly, that the use of deceit to obtain a confession does not automatically equate to coercion, but is merely a factor bearing on voluntariness. Both the trial court and the Court of Appeals recognized this, and applied a totality of the circumstances analysis. But this Court has made it very clear that "confessions of guilt made through the influence of hopes or fears, induced by promises or threats of temporal benefit or disadvantage, are wholly inadmissible." *State v. Chase*, 55 Ohio St.2d 237, 246, 378 N.E.2d 1064 (1978), quoting *Rufer v. State*, 25 Ohio St. 464, 470 (1874).

Neither the trial court nor the Court of Appeals took a cookie-cutter approach to this case, but rather carefully analyzed all of the factors present during the confession, and determined that, under the totality of the evidence, the combination of pervasive lies as to evidence against Rybarczyk, true threats of lengthy incarceration, and false assurances that Rybarczyk would receive probation if he would confess, were coercive and overcame Rybarczyk's will. Except to the degree and in the manner of any suppression of evidence, neither the trial court's grant of the motion to suppress, nor the Court of Appeals' affirmance of the trial court's determination, in any way interfered with the prosecutor's conduct of his case. He remained free to bring such charges against

Rybarczyk as he saw fit. He remained free to take the take the case to trial. He remained free to attempt to enter into a plea agreement with Rybarczyk. The only thing he did not remain free to do was to use illegally obtained evidence at trial. The doctrine of separation of powers was not thereby violated.

Accordingly, Appellee Jason Rybarczyk respectfully requests that this Honorable Court deny jurisdiction over this case.

III. RESPONSE TO PROPOSITION OF LAW NO. 2

The State's second proposition of law reads: *The Court of Appeals cannot create a record that is not supported by the facts available to it.*

The argument purporting to support this proposition of law simply recasts the arguments under the first proposition of law, as the creation of a record not supported by the facts available to it. Specifically, argues the State, it was impermissible for the trial court and the Court of Appeals to find that probation was not a possible outcome of any credible charge that might have been brought against Rybarczyk, because, in spite of the fact that the State had already actually charged Rybarczyk with rape, there was always at least a theoretical possibility that the State could come up with some charge that carried at least the possibility of probation. Furthermore, this possibility would remain until trial was completed and defendant was convicted. Thus, argues the State, the falsity of the detectives' representations to Rybarczyk were not "facts" upon which the courts could rely.

Suffice it to say that the arguments already made by Rybarczyk apply with equal force here. The State's contention that the trial court was obligated to defer its suppression determination until trial was held and the defendant convicted, would be wholly unworkable and finds no support in law. Accordingly, Appellee Jason Rybarczyk respectfully requests that this Honorable Court deny jurisdiction over this case.

CONCLUSION

Neither of the State's propositions of law have any legal basis, and the State's proposition that motions to suppress confessions should under these circumstances be deferred until trial and

conviction of defendant, is wholly unworkable and would waste valuable judicial resources. Despite the State's efforts to frame the issues otherwise, the case is and remains a garden-variety suppression of evidence case, and does not involve a matter of public or great general interest. For that reason, Appellee respectfully requests that the Court deny jurisdiction and decline the State's invitation to review this case.

Respectfully submitted,



Thomas A. Sobecki
Attorney For Appellee Jason Rybarczyk

CERTIFICATION

I hereby certify that a copy of this Memorandum in Response to Appellant's Memorandum in Support of Jurisdiction was sent by ordinary U.S. Mail, postage prepaid, on this 11th day of November 2013, to Paul A. Dobson, Wood County Prosecuting Attorney, and David E. Romaker Jr., Assistant Prosecuting Attorney, One Court House Square, Bowling Green, OH 43402.



Thomas A. Sobecki
Attorney For Appellee Jason Rybarczyk