

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
	:	Case No.
Plaintiff-Appellee,	:	
	:	On Appeal from the Scioto County
vs.	:	Court of Appeals
	:	Fourth Appellate District
BUDDY MUTTER,	:	
	:	C.A. Case No. 15-CA-3690
Defendant-Appellant.	:	

**APPELLANT BUDDY MUTTER'S
MEMORANDUM IN SUPPORT OF JURISDICTION**

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INTRODUCTION

In short, Buddy Mutter, the municipal prosecutor, and the Portsmouth Municipal Court resolved all crimes surrounding criminal conduct he committed on October 17, 2014 through no-contest pleas. But the county prosecutor then indicted Mr. Mutter on a duplicative, felony charge in the Scioto County Court of Common Pleas. The trial court there recognized that Mr. Mutter's felony charge had already been resolved with misdemeanor convictions in the municipal court. As such, the trial court dismissed the felony charge on double-jeopardy grounds. Yet the appellate court applied the wrong double-jeopardy jurisprudence and shifted record burdens from the appellant to the appellee contrary to Ohio's Rules of Appellate Procedure. As such, Mr. Mutter now must run the gauntlet a second time.

EXPLANATION OF WHY THIS CASE IS ONE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

This case warrants review because after the trial court properly dismissed the successive prosecution, the appellate court applied an incorrect double-jeopardy analysis to reverse that dismissal. Moreover, the appellate court reversed the trial court based upon an inadequate, partial record provided by the State in its own appeal. Accordingly, jurisdiction should be granted to explain how collateral-estoppel principles impact double-jeopardy analysis, and to prevent burden shifting contrary to the obligations established by Ohio's Rules of Appellate Procedure.

STATEMENT OF THE CASE AND FACTS

The trial court held that multiple charges—misdemeanor aggravated menacing and felony ethnic intimidation—filed against Mr. Mutter in the Portsmouth Municipal Court stemmed from a single incident on October 17, 2014, which was the same incident supporting the felony-ethnic-intimidation charge for which Mr. Mutter was later indicted in the Scioto County Court of Common Pleas. *See* Feb. 20, 2015 Judgment Entry, at A-1 - A-4. Mr. Mutter pleaded no contest to two misdemeanor charges in the municipal court, aggravated menacing and menacing by stalking, in order to resolve all aspects of the criminal conduct he committed on October 17, 2014. *See id.*; *see also State v. Mutter*, 4th Dist. Scioto No. 15-CA-3690, 2016-Ohio-512, ¶ 6-8. The menacing-by-stalking charge reduced the felony charge of ethnic intimidation filed in the municipal court. *Mutter* at ¶ 6-7. The county prosecutor then indicted Mr. Mutter for felony ethnic intimidation based upon the same, single incident on October 17, 2014. *See* Feb. 20, 2015 Judgment Entry, at A-1 - A-4. Mr. Mutter moved the common pleas trial court to dismiss the felony-ethnic-intimidation charge on double-jeopardy grounds. *See id.* That court did so because the misdemeanor convictions “involved the same fact situation as this indictment” and “it was the intent of the State of Ohio and defendant in the Portsmouth Municipal Court to plead to a charge of menacing by stalking as a reduction to the offense of ethnic intimidation (F5).” *Id.*

The State appealed and argued that aggravated menacing is a predicate offense of ethnic intimidation, not a lesser-included offense, and that fact precluded the trial court’s double-jeopardy dismissal because jeopardy had never attached. *Mutter* at ¶ 1,

29. The appellate court rejected the State's specific arguments, but reversed the trial court's dismissal anyway after it applied the wrong double-jeopardy analysis, and shifted Ohio's record burdens from the appellant to the appellee. *Id.* at ¶ 27-29.

ARGUMENTS IN SUPPORT OF PROPOSITION OF LAW

FIRST PROPOSITION OF LAW

Second prosecutions are barred when they require relitigation of factual issues already resolved by a previous prosecution. Fifth and Fourteenth Amendments, United States Constitution; Section 10, Article I, Ohio Constitution.

The appellate court failed to apply the applicable double-jeopardy law in this case, which holds that successive prosecutions are barred in certain circumstances, such as here, where the second prosecution requires the relitigation of factual issues already resolved by the first.

Double jeopardy protects against multiple prosecutions.¹ *See State v. Ruff*, 143 Ohio St.3d 114, 2015-Ohio-995, 34 N.E.3d 892, ¶ 10. It does so in two ways. First, it protects against successive prosecutions for greater and lesser-included offenses, no matter the sequence. *See Brown v. Ohio*, 423 U.S. 161, 169, 53 L.Ed.2d 187, 97 S.Ct. 2221 (1977). Second, even if two offenses are not greater and lesser-included offenses, a person may not be subjected to multiple prosecutions when proof of one offense is necessary, as a practical matter, to prove the other, and both offenses arose from the same criminal conduct. *See Ashe v. Swenson*, 397

¹ It also protects against multiple punishments, but that aspect is not implicated in this case. *See id.*

U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970); *Harris v. Oklahoma*, 433 U.S. 682, 97 S.Ct. 2912, 53 L.Ed.2d 1054 (1977); *see also State v. Thomas*, 61 Ohio St.2d 254, 261-262, 400 N.E.2d 897 (1980); *State v. Lloyd*, 8th Dist. Cuyahoga No. 86501, 2006-Ohio-1356, ¶ 24-28.

The latter approach requires “a practical frame * * * viewed with an eye to all the circumstances of the [prior] proceedings.” (Citation omitted.) *Ashe* at 444. It functionally incorporates the principle of collateral estoppel into modern double-jeopardy analysis. *Id.* And its purpose is to determine “whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.” (Citation omitted.) *Id.*

Here, the appellate court failed to apply the second part of multiple-prosecution-double-jeopardy jurisprudence. *See Mutter* at ¶ 20-29. Yet the analyses are mutually exclusive. *See Ashe* at 444; *see also Thomas* at 261-263; *Lloyd* at ¶ 24-28. And the trial court applied the proper law, holding that the misdemeanor convictions “involved the same fact situation as this indictment” and “that it was the intent of the State of Ohio and defendant in the Portsmouth Municipal Court to plead to a charge of menacing by stalking as a reduction to the offense of ethnic intimidation (F5).” *See* Feb. 20, 2015 Judgment Entry, at A-1 – A-4. In other words, under the required approach, Mr. Mutter pleaded no contest to—and was sentenced for—misdemeanor charges for *all* of the criminal conduct that he committed on October 17, 2014. Those convictions preclude *any*

future prosecution for said conduct. *See generally Ashe* at 444; *Harris* at 682-683; *Thomas* at 261-263; *Lloyd* at ¶ 24-28.

SECOND PROPOSITION OF LAW

An appellate court may not shift the burdens established by App.R. 9 and App.R. 12(A) in Ohio's Rules of Appellate Procedure. Fourteenth Amendment, United States Constitution; Section 16, Article I, Ohio Constitution.

In effect, the appellate court required Mr. Mutter to demonstrate that the trial court did not err in its double-jeopardy dismissal. *Mutter* at ¶ 1, 29. But, because an appellant bears the burden of showing error, the appellate record is the appellant's responsibility, and a reviewing court is constrained to the appellate record. *Knapp v. Edwards Laboratories*, 61 Ohio St.2d 197, 199, 400 N.E.2d 384 (1980); *see also* App.R. 9; App.R. 12(A). Moreover, absent an appellant's demonstration of error supported by a *full* record, the judgment of a trial court receives a presumption of regularity and legality upon review. *See Jaffrin v. DiEgidio*, 152 Ohio St. 359, 365, 89 N.E.2d 459 (1949). Finally, when a state grants appellate review, in implementing that procedure, the state must comply with due-process requirements. *See Griffin v. Illinois*, 351 U.S. 12, 18, 76 S.Ct. 585, 100 L.Ed. 891 (1956).

Here, the appellate court rejected the State's argued grounds for reversal, instead reversing on other, related grounds. *Mutter* at ¶ 29. Yet the court held that "[t]here is no evidence in this record or the municipal court's publicly accessible dockets to determine whether [the separate aggravated menacing charge to which Mr. Mutter pleaded no contest] arose from the same incident as in the indictment." *Id.* But Mr. Mutter was the

appellee and had no burden. *See id.* at ¶ 1; *see also See Knapp* at 199; App.R. 9; App.R. 12(A). Moreover, the State did not make the full municipal court files part of the appellate record. *Id.* at ¶ 11, 29. As such, the appellate court was required to presume regularity in the trial court's dismissal and could not shift the State's appellant burdens to Mr. Mutter. *See Knapp* at 199; *see also* App.R. 9; App.R. 12(A); *Jaffrin* at 365.

CONCLUSION

Because the court below applied the wrong double-jeopardy analysis and shifted the State's appellant burdens to Mr. Mutter, this Court should grant jurisdiction to detail how collateral-estoppel principles impact double-jeopardy analysis, and to prevent burden-shifting in violation of Ohio's Rules of Appellate Procedure.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A true copy of the foregoing **Appellant Buddy Mutter's Memorandum in Support of Jurisdiction** was sent by regular U.S. mail to Joseph Hale, Assistant Scioto County Prosecutor, Scioto County Courthouse, 602 7th Street, Room 310, Portsmouth, Ohio 45662, this 23d day of March, 2016.

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APPENDIX TO

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