

**IN THE SUPREME COURT OF OHIO**

**STATE OF OHIO**

**CASE NO.: 2016-0440**

**Plaintiff-Appellant,**

**On Appeal from the Scioto County Court  
of Appeals  
Fourth Appellate District**

**-vs-**

**C.A. Case No. 15-CA-3691**

**MELVIN MUTTER,**

**Defendant-Appellee,**

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**APPELLEE'S MEMORANDUM IN OPPOSITION TO JURISDICTION**

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## **SUBSTANTIAL CONSTITUTIONAL QUESTION/PUBLIC OR GENERAL INTEREST/LEAVE TO APPEAL**

The issues raised by Appellants do not involve substantial constitutional questions, and are not of public or general interest and leave to appeal should be denied. The propositions as set forth by Appellants are addressed by previous decisions of this Court and other appellate courts and this case does not set forth a distinct set of facts substantially distinguishing this case from previous decisions.

### **STATEMENT OF THE CASE**

On October 20, 2014, the following charges were filed in the Portsmouth Municipal Court against Melvin Mutter:

- Case #1401577A-Aggravated Menacing: M1 in violation of R.C.§2903.21;
- Case#1401577B-Public Indecency: M4 in violation of R.C.§2907.09(A)(1);
- Case #1401576-Ethnic Intimidation: F5 in violation of R.C.§2927.12

On October 23, 2014, Case#1401599, a charge of Aggravated Menacing by Stalking, M1 in violation of R.C§2903.211(A)(1) was filed against Melvin Mutter in the Portsmouth Municipal Court.

On October 20, 2014, the following charges were filed in the Portsmouth Municipal Court against Buddy Mutter:

- Case #1401579-Aggravated Menacing: M1 in violation of R.C.§2903.21;
- Case #1401578-Ethnic Intimidation: F5 in violation of R.C.§2927.12

On October 29, 2014, Melvin Mutter appeared in Portsmouth Municipal Court and entered a No Contest Plea on the Aggravated Menacing charge and was found Guilty. On the same date, Melvin Mutter pled No Contest, and was found Guilty of Menacing by Stalking. The Public Indecency charge was Dismissed without prejudice.

Most importantly, the same date, the Felony Ethnic Intimidation charge was Dismissed without prejudice.

On October 23, 2014, Buddy Mutter appeared in Portsmouth Municipal Court and entered a No Contest Plea on the Aggravated Menacing charge and was found Guilty. Most importantly, the same date, the Felony Ethnic Intimidation charge was “amended”, or “reduced” to Menacing by Stalking, upon which a No Contest Plea was entered with a Guilty finding. There is no record of Portsmouth Municipal Court conducting a hearing, hearing evidence, making any finding that probable cause existed to believe that no felonies had been committed, but misdemeanors had been committed. No new Complaint was filed against Buddy Mutter. Despite the fact no hearing took place and there was no finding of probable cause, a Menacing by Stalking Complaint was filed October 23, 2014.

The Ethnic Intimidation felony charges for both Melvin and Buddy Mutter were presented to the Scioto County Grand Jury which returned Indictments against both Melvin and Buddy Mutter for Ethnic Intimidation, in violation of R.C. §2927.12(A), 2927.12(B).

In the Court of Common Pleas, both Defendants filed Motions to Dismiss. After a brief hearing allowing only the arguments of counsel and the consideration of briefs, the trial court filed a Judgment Entry February 20, 2015 sustaining the Motions to Dismiss of both Defendants and both Indictments were dismissed. The trial court did not conduct an evidentiary hearing and no evidence was properly submitted surrounding the facts and circumstances of the alleged “reduction”, or “amendment” of the felony Ethnic Intimidation charge in Portsmouth Municipal Court.

## ARGUMENT IN OPPOSITION TO JURISDICTION

### Proposition of Law No. 1: 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 Supreme Court of Ohio previously addressed the issue of successive prosecutions and the Double Jeopardy Clause in *State v. Zima*, 102 Ohio St.3d 61, 2004-Ohio-1807, 806 N.E.2d 542. In *Zima*, the Defendant entered a no-contest plea to a “driving under the influence” charge in a Municipal Court and was subsequently indicted for a felony Aggravated Vehicular Assault. This Court held in *Zima* that the “...principles of double jeopardy do not apply to bar successive prosecutions for the offense of driving under the influence in violation of R.C. 4511.19(A) (or a substantially equivalent municipal ordinance) and the offense of aggravated vehicular assault under R.C. 2903.08(A)(2).” *Zima*, ¶33.

Likewise, the Defendant in *State v. Workman*, 4<sup>th</sup> Dist. No. 14CA25, 2015-Ohio-4483 pled guilty to the charge of unauthorized use of a motor vehicle in violation of R.C. 2913.03(A) and was subsequently indicted for receiving stolen property, in violation of R.C. 2913.51(A). In *Workman*, the Fourth District pointed back to the Supreme Court of Ohio’s prior pronouncements about the proper standards stating: “[t]o determine whether the Double Jeopardy Clause bars a second, or successive, prosecution, a court must apply the test set forth in *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932). *State v. Fairbanks*, 117 Ohio St.3d 543, 2008-Ohio-1470, 885 N.E.2d 888, ¶6 (explaining that *Blockburger* governs analysis when determining if Double Jeopardy Clause bars successive prosecution); *State v. Zima*, 102 Ohio St.3d 61, 2004-

Ohio-1807, 806 N.E.2d 542, ¶¶18-20 and fn. 3 (stating that *Blockburger* supplies appropriate test when considering if Double Jeopardy Clause bars successive prosecution); *State v. Tolbert*, 60 Ohio St.3d 89, 573 N.E.2d 617 (1991), paragraph one of the syllabus (applying *Blockburger* test in subsequent prosecution context.)

“The *Blockburger* test inquires whether each offense contains an element not contained in the other; if not, they are the same offense and double jeopardy bars additional punishment and successive prosecution.” See *Zima* Headnote 4. A review of the offenses at issue shows Aggravated Menacing, Menacing by Stalking, and Ethnic Intimidation each have separate and distinctive elements:

Menacing by Stalking: R.C. §2903.211(A)(1) -No person by engaging in a pattern of conduct shall knowingly cause another person to believe that the offender will cause physical harm to the other person or cause mental distress to the other person. In addition to any other basis for the other person's belief that the offender will cause physical harm to the other person or the other person's mental distress, the other person's belief or mental distress may be based on words or conduct of the offender that are directed at or identify a corporation, association, or other organization that employs the other person or to which the other person belongs.

Aggravated Menacing: R.C. § 2903.21 (A)(1)- No person shall knowingly cause another to believe that the offender will cause serious physical harm to the person or property of the other person, the other person's unborn, or a member of the other person's immediate family. In addition to any other basis for the other person's belief that the offender will cause serious physical harm to the person or property of the other person, the other person's unborn, or a member of the other person's immediate family, the other person's belief may be based on words or conduct of the offender that are directed at or identify a corporation, association, or other organization that employs the other person or to which the other person belongs.

Ethnic Intimidation: R.C. § 2927.12 (A)- No person shall violate section 2903.21, 2903.22, 2909.06, or 2909.07, or division (A)(3), (4), or (5) of section 2917.21 of the Revised Code by reason of the race, color, religion, or national origin of another person or group of persons.

Additionally, Aggravated Menacing and/or Menacing by Stalking are predicate offenses of Ethnic Intimidation. See *State v. Buehner*, 110 Ohio St.3d 403, 2006-Ohio-

4707 (2006). While Ethnic Intimidation necessarily includes the elements of the predicate offense, in this case Aggravated Menacing, Ethnic Intimidation requires proof of the additional element that the Defendant's actions were motivated by race, color, religion, or national origin. The only conclusion under *Blockburger* is Ethnic Intimidation, Aggravated Menacing, and Menacing by Stalking all contain separate and distinct elements and are three separate offenses for purposes of successive prosecutions under Double Jeopardy. Thus prosecutions on each are permissible.

Appellant asserts that collateral estoppel operates to bar a successive prosecution in this matter and the Fourth District Court of Appeals erred by not applying this standard. Appellee respectfully disagrees.

In the matter sub judice, the Defendant/Appellants entered no contest pleas and were found Guilty of Menacing by Stalking and Aggravated Menacing charges. No trial was held and the State of Ohio therefore prevailed in the Municipal Court proceeding. Given these facts, this Court has previously held collateral estoppel to be inapplicable. "Collateral estoppel may be used to bar a later prosecution for a separate offense only where the government loses in the first proceeding. See *United States v. Dixon* (1993), 509 U.S. 688, ---, 113 S.Ct. 2849, 2860, 125 L.Ed.2d 556, 573. *State v. Phillips*, 74 Ohio St.3d 72, 80, 656 N.E.2d 643 (1995).

Assuming arguendo collateral estoppel were applicable, a factual determination is required. In *Phillips*, this court held "...in order to consider a claim of collateral estoppel, this court must examine the record of the earlier proceeding in order to determine which issues were actually decided therein. *Sealfon v. United States* (1948), 332 U.S. 575, 68 S.Ct. 237, 92 L.Ed. 180. A court cannot perform that function unless one of the parties

brings the previous trial's record before it.” *State v. Phillips*, 74 Ohio St.3d 72, 80, 656 N.E.2d 643 (1995).

The Fourth District’s decision in *State v. Mutter*, 4<sup>th</sup> Dist. 15CA3690, 15CA3691, 2016-Ohio-512, specifically addressed the availability of evidence before the trial court:

The common pleas court erred in relying upon the purported reduction of the ethnic intimidation charges to menacing by stalking to make its finding of double jeopardy. Although separate aggravated menacing charges were filed against the Mutters in the municipal court in separate cases, the trial court could not properly rely on these charges to support its dismissal of the indictment. There is no evidence in the record or the municipal court’s publicly accessible dockets to determine whether these charges arose from the same incident as in the indictment. *Mutter*, at ¶29

Based upon the foregoing, Appellee contends the Fourth District was correct in not applying collateral estoppel. The proper constitutional analysis and result was reached by the Fourth District in their decision and Double Jeopardy did not preclude the prosecution of Appellants upon the Ethnic Intimidation charge. The trial court’s dismissal of the Indictment was error and the Fourth District’s reversal and remand was proper.

Accordingly, Appellee argues there is no substantial constitutional question implicated by the Appellant’s First Proposition of Law. Further, the question proposed regarding the application of collateral estoppel principles impacting Double-Jeopardy has already been addressed by prior decisions in this Court and various Courts of Appeals. Therefore, further review by this court is not warranted and jurisdiction should be denied.

**Proposition of Law No. 2: An appellate court may not shift the burden established by App. R. 9 and App. R. 12(A) in Ohio’s Rules of Appellate Procedure. Fourteenth Amendment, United States Constitution; Section 10, Article I, Ohio Constitution.**

Appellants allege the Appeals Court impermissibly shifted the burden to provide the record of the trial court’s proceedings to Appellants. However, Appellants ignore the

fact the burden of proof on the Motions to Dismiss which were granted by the trial court rested with the Appellants initially.

Below, the Appellants provided nothing other than their filed motions to the trial court and the trial court did not conduct an evidentiary hearing in order to determine the Motions to Dismiss. To be fair however, the record in the Portsmouth Municipal Court regarding the proceedings there is minimal at best.

In the matters sub judice, no preliminary hearing was held and no evidence was taken. There was never a finding of probable cause and no new Complaint was ever prepared, or filed charging the misdemeanor upon which these Defendants pled no contest and were found guilty. Arguably, a new Complaint for Aggravated Menacing by Stalking was filed against Melvin Mutter. However, there was no hearing and no probable cause determination to justify the same.

Further, there is no indication of any “entry of reason for changes in docket” filed with the Municipal Court clerk. In fact, none of the procedures required by the Criminal Rules were followed. Clearly, Portsmouth Municipal Court lacked jurisdiction to take these pleas purportedly reducing a felony charge.

Regardless, the Fourth District made no finding that the record before it was deficient. Rather, the appellate court found “...the trial court’s finding that Buddy Mutter’s ethnic intimidation charge had been reduced to the lesser included offense of aggravated menacing is not supported by the record.” *Mutter*, at ¶2 The appellate court went on to find “[t]he trial court erred in dismissing the indictment against the Mutters based on the record before it.” *Mutter*, at ¶3

In fact, the appellate court analyzed what record does exist and made specific findings of factual mistakes in the trial court's findings:

The common pleas court determined that in Case No. 1401578, the municipal court reduced Buddy Mutter's ethnic intimidation charge to aggravated menacing and that this misdemeanor offense constituted a lesser included offense of ethnic intimidation, thus barring the subsequent indictment for the felony offense. Nevertheless, the record for that case, which is accessible online as a public record, disproves this factual determination. Instead, the record for Case No. 1401578 explicitly indicates that the ethnic intimidation charge was not reduced or amended to a charge of aggravated menacing, but was amended to a charge of menacing by stalking. *Mutter*, at ¶23

Finally, as referenced supra, the appellate court made the following determination:

The common pleas court erred in relying upon the purported reduction of the ethnic intimidation charges to menacing by stalking to make its finding of double jeopardy. Although separate aggravated menacing charges were filed against the Mutters in the municipal court in separate cases, the trial court could not properly rely on these charges to support its dismissal of the indictment. There is no evidence in the record or the municipal court's publicly accessible dockets to determine whether these charges arose from the same incident as in the indictment. *Mutter*, at ¶29

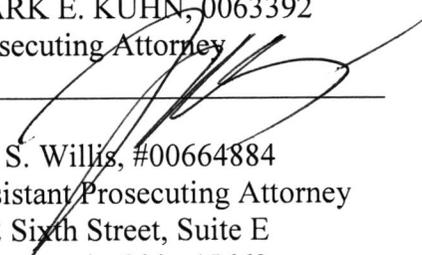
Appellee contends there is no indication that the appellate court improperly shifted the burden in the appeal to the Defendants/Appellees below. Furthermore, Appellants herein offer no suggestion as to what part of the record that exists was not provided by the State below, or in what way the appellate court shifted the burden of showing error.

## **CONCLUSION**

WHEREFORE, based upon the foregoing the State of Ohio respectfully requests this Court decline jurisdiction over this matter. Collateral estoppel is inapplicable in these matters, the appellate court in no way shifted the burden of showing error, and Appellants have failed to show a public or general interest sufficient for this court to accept jurisdiction.

ATTORNEYS FOR APPELLANT

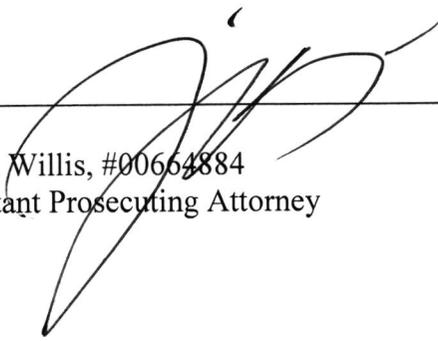
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**CERTIFICATE OF SERVICE**

A copy of the foregoing was served upon Peter Galyardt, counsel for Appellants, 250 E. Broad St., Suite 1400, Columbus, Ohio 43215 by ordinary mail, this 14<sup>th</sup> day of April, 2016.

By: \_\_\_\_\_

  
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