

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
	:	Case No. 2016-440
Plaintiff-Appellee,	:	
	:	On Appeal from the Scioto County
vs.	:	Court of Appeals
	:	Fourth Appellate District
MELVIN MUTTER,	:	
	:	C.A. Case No. 15-CA-3691
Defendant-Appellant.	:	

**MELVIN MUTTER'S
MERIT BRIEF**

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INTRODUCTION

Plea bargains are essential and encouraged. See *Santobello v. New York*, 404 U.S. 257, 261, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971); *State v. Carpenter*, 68 Ohio St.3d 59, 61, 623 N.E.2d 66 (1993). Because that reality “presuppose[s] fairness in securing an agreement between an accused and a prosecutor,” “effect must be given to the intention of the state and the defendant in their plea bargain, and courts should enforce what they perceive to be the terms of the original agreement.” *Santobello* at 261; *State v. Dye*, 127 Ohio St.3d 357, 2010-Ohio-5728, 939 N.E.2d 1217, ¶ 22. Consequently, when agreement is reached to resolve all criminal conduct surrounding a particular incident through specific pleas, double-jeopardy-like¹ protection ensures that the agreement is enforced. See generally *State v. Bridges*, 10th Dist. Franklin No. 14AP-602, 2015-Ohio-4480, ¶ 11; *Bridges* at ¶ 35-38 (Brunner, J., concurring in judgment only); *State v. Church*, 10th Dist. Franklin No. 12AP-34, 2012-Ohio-5663, ¶ 8-18; *State v. Edwards*, 8th Dist. Cuyahoga Nos. 94568 and 94929, 2011-Ohio-95, ¶ 18-25; *Dye* at ¶ 20-28; *State v. Lloyd*, 8th Dist. Cuyahoga No. 86501, 2006-Ohio-1356, ¶ 24-28; *Carpenter* at syllabus; *State v. Tolbert*, 60 Ohio St.3d 89, 91, 573 N.E.2d 617 (1991); *State v. Thomas*, 61 Ohio St.2d 254, 261-262, 400 N.E.2d 897 (1980); *Brown v. Ohio*, 423 U.S. 161, 166-167, 53 L.Ed.2d 187, 97 S.Ct. 2221 (1977), fn. 6; *Harris v. Oklahoma*, 433 U.S. 682, 97 S.Ct. 2912, 53 L.Ed.2d 1054 (1977); *Ashe v. Swenson*, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970). In other words, a negotiated plea bars

¹ All of the negotiated-plea cases from this Court are grounded in contractual protections that are tantamount to double-jeopardy protections. See generally *Carpenter*; *Dye*.

successive prosecutions where the defendant would reasonably believe that the plea would preclude further prosecutions for any greater offense related to the same factual scenario. *See Dye* at ¶ 20-28; *see also Bridges* at ¶ 11; *Church* at ¶ 8; *Edwards* at ¶ 23; *Carpenter* at syllabus.

Here, the Portsmouth Municipal Prosecutor and Melvin Mutter agreed to resolve all of his criminal conduct stemming from events on a single day through two no-contest pleas. *See* Feb. 20, 2015 Judgment Entry. One of the pleaded charges, menacing by stalking, specifically reduced the felony-ethnic-intimidation charge through dismissal of the latter. *See State v. Mutter*, 4th Dist. Scioto No. 15-CA-3690, 2016-Ohio-512, ¶ 4-5. The Scioto County Prosecutor then breached when it indicted Mr. Mutter for felony ethnic intimidation based upon the same incident, the very charge that was, as required by the agreement, reduced through dismissal. *See* Feb. 20, 2015 Judgment Entry.

The trial court understood all of this and properly applied Mr. Mutter's double-jeopardy-like rights to preclude the county prosecutor's attempt to run Mr. Mutter through the gauntlet a second time. *See* Feb. 20, 2015 Judgment Entry; Tr. 11-12. When the appellate court reversed, it improperly shifted the State's appellate burdens and manipulated double jeopardy in the process. *See Mutter* at ¶ 27-29. Accordingly, the decision below should be vacated and the trial court's dismissal reinstated.

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; Tr. 11-12. 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 Mutter* at ¶ 6-8. The felony charge of ethnic intimidation filed in the municipal court was dismissed, and a no-contest plea to menacing by stalking was entered in exchange for that dismissal. *See Mutter* at ¶ 4-5. 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. Mr. Mutter moved the 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.*; *see also* Tr. 11-12.

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 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 mishandled double jeopardy and improperly shifted Ohio’s

record burdens from the State to Mr. Mutter. *Id.* at ¶ 27-29. This Court accepted Mr. Mutter’s discretionary appeal. *State v. Mutter*, 146 Ohio St.3d 1414, 2016-Ohio-3390, 51 N.E.3d 659.

ARGUMENT

Because a negotiated plea bars successive prosecutions where the defendant would reasonably believe that the plea would prohibit further prosecutions for any greater offense related to the same factual scenario, and because the appellate court improperly shifted the State’s appellate burdens and misused double jeopardy in the process, the decision below should be vacated and the trial court’s dismissal reinstated.

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.

I. Double Jeopardy.

Double jeopardy protects against multiple prosecutions.² *See State v. Ruff*, 143 Ohio St.3d 114, 2015-Ohio-995, 34 N.E.3d 892, ¶ 10. It has two considerations in this context—elements and conduct.

A. The “elements” approach.

What has been termed the “elements” approach, in all circumstances, protects against successive prosecutions for greater- and lesser-included offenses, no matter the

² It also protects against multiple punishments, but that aspect is not implicated in this case. *See Ruff* at ¶ 10.

sequence. *See Brown* at 169; *see also United States v. Dixon*, 509 U.S. 688, 709, 113 S.Ct. 2849, 125 L.Ed.2d 556. Greater- and lesser-included offenses are determined by comparing the elements. *See generally Brown* at 168-169; *see also State v. Evans*, 122 Ohio St.3d 381, 2009-Ohio-2974, 911 N.E.2d 889, at ¶ 26. Absent a negotiated plea or acquittal, this is the only applicable approach. *See Dixon* at 711.

B. The “conduct” approach.

For a time, double-jeopardy protection also applied under what was known as the “conduct” approach. *See Grady v. Corbin*, 495 U.S. 508, 697, 110 S.Ct. 2084, 109 L.Ed.2d 548 (1990). This approach, which is grounded in the concept of collateral estoppel, precluded second prosecutions “if, to establish an essential element of an offense charged * * * the [prosecution] will prove conduct that constitutes an offense for which the defendant has already been prosecuted.” *Grady* at 510. Unless an acquittal is involved, the “conduct” approach has been abandoned. *See Dixon* at 705, 711.

C. The impact of plea bargains.

When negotiated pleas are at play, however, this Court has prudently applied the equivalent of the “conduct” approach. *See generally Bridges* at ¶ 11; *Bridges* at ¶ 35-38 (Brunner, J., concurring in judgment only); *Church* at ¶ 8-18; *Edwards* at ¶ 18-25; *Dye* at ¶ 20-28; *Carpenter* at syllabus; *see also Lloyd* at ¶ 24-28; *Tolbert* at 91; *Thomas* at 261-262; *Brown* at 166-167, fn. 6; *Harris*; *Ashe*. This method flows directly from the contractual nature of plea bargains and is in place to ensure that promises made by the prosecutor are not broken. *Dye* at ¶ 22.

II. The negotiated plea is dispositive in this case.

Here, the trial court determined 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. In other words, Mr. Mutter pleaded no contest to—and was sentenced for—misdemeanor charges to resolve *all* of the criminal conduct that he committed on October 17, 2014. See *id.*; see also Tr. 11-12. Under this Court’s required approach, those convictions preclude *any* future prosecution for said conduct. See generally *Bridges* at ¶ 11; *Bridges* at ¶ 35-38 (Brunner, J., concurring in judgment only); *Church* at ¶ 8-18; *Edwards* at ¶ 18-25; *Dye* at ¶ 20-28; *Carpenter* at syllabus; see also *Lloyd* at ¶ 24-28; *Tolbert* at 91; *Thomas* at 261-262; *Brown* at 166-167, fn. 6; *Harris*; *Ashe*. The menacing-by-stalking charge was an explicit reduction of the felony-ethnic-intimidation charge via dismissal of the latter. See *Mutter* at ¶ 4-5. Thus, there is no doubt that this plea agreement was a negotiated plea under *Carpenter*. See *Dye* at ¶ 23-27. Moreover, the municipal and county prosecutors constitute one entity—the State of Ohio. See *State v. Best*, 42 Ohio St.2d 530, 533, 330 N.E.2d 530 (1975); see also *Waller v. Florida*, 397 U.S. 387, 392, 90 S.Ct. 1184, 25 L.Ed.2d 435. Accordingly, the negotiated plea is dispositive in this case, and the trial court’s dismissal should be reinstated.

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 dismissal. *Mutter* at ¶ 1, 29. But, because an appellant bears the burden of showing error, the appellate record is the appellant's responsibility. *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). And a reviewing court is constrained to the appellate record. *Id.* Thus, 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). Moreover, it is axiomatic that trial courts are in the best position to weigh credibility. *See State v. Geeslin*, 116 Ohio St.3d 252, 2007-Ohio-5239, 878 N.E.2d 1, ¶ 14. Finally, when a state grants appellate review, in implementing that procedure, due process is required. *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 pleaded charges] 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 Knapp* at 199; App.R. 9; App.R. 12(A). Furthermore, the State did not make the full

municipal court files and dockets part of the appellate record. *Id.* at ¶ 11, 29. The trial court stated that it had “reviewed the dockets of [the] Portsmouth Municipal Court.” Feb. 20, 2015 Judgment Entry. On its face, that assertion implies that the court looked at the actual court dockets, which very well may be more accurate and include more detail than the “publicly accessible” dockets that the appellate court referenced. *See id.; Mutter* at ¶ 29.

Regardless, again, the municipal court dockets and files are not part of the record because the State failed to include them. *See Knapp* at 199; App.R. 9; App.R. 12(A). Moreover, there is sound precedent from this Court supporting the trial court’s dismissal. *See First Proposition of Law, supra*. Because the trial court considered information that the State failed to include in the appellate record, because the trial court was in the best position to weigh the credibility of the arguments presented, and because there is sound precedent from this Court supporting the dismissal in this case, 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; *Geeslin* at ¶ 14.

CONCLUSION

The decision below should be vacated and the trial court’s dismissal reinstated because: (1) a negotiated plea bars successive prosecutions where the defendant would reasonably believe that the plea would forbid further prosecutions for any greater offense related to the same factual scenario, (2) the trial court considered information that the State failed to include in the appellate record, (3) the trial court was in the best

position to weigh the credibility of the arguments presented, (4) there is sound precedent from this Court supporting the dismissal in this case, and (5) 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.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of **Melvin Mutter's Merit Brief** was sent by regular U.S. mail to Jay Willis, Assistant Scioto County Prosecutor, Scioto County Courthouse, 602 7th Street, Room 310, Portsmouth, Ohio 45662, this 28th day of July, 2016.

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COUNSEL FOR MELVIN MUTTER

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
	:	Case No. 2016-440
Plaintiff-Appellee,	:	
	:	On Appeal from the Scioto County
vs.	:	Court of Appeals
	:	Fourth Appellate District
MELVIN MUTTER,	:	
	:	C.A. Case No. 15-CA-3691
Defendant-Appellant.	:	

APPENDIX TO

MELVIN MUTTER'S MERIT BRIEF

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
MELVIN MUTTER,	:	
	:	C.A. Case No. 15-CA-3691
Defendant-Appellant.	:	

APPELLANT MELVIN MUTTER'S
NOTICE OF APPEAL

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APPELLANT MELVIN MUTTER'S NOTICE OF APPEAL

Appellant, Melvin Mutter, hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Scioto County Court of Appeals, Fourth Appellate District, entered in Court of Appeals Case No. 15-CA-3691 on February 8, 2016.

This case raises substantial constitutional questions, involves a felony, and is of public or great general interest.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A true copy of the foregoing **Appellant Melvin Mutter's Notice of Appeal** 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.

/s/Peter Galyardt

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IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
SCIOTO COUNTY

2016 FEB -8 AM 10: 56

STATE OF OHIO,

Plaintiff-Appellant,

v.

BUDDY C. MUTTER
and
MELVIN MUTTER,

Defendants-Appellees.

Case Nos. 15CA3690
15CA3691

Lisa Younger
CLERK OF COURTS

DECISION AND
JUDGMENT ENTRY

APPEARANCES:

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Eddie Edwards, Portsmouth, Ohio, for appellee Buddy Mutter.

Matthew F. Loesch, Portsmouth, Ohio, for appellee Melvin Mutter.
Harsha, J.

{¶1} The State of Ohio appeals from dismissals, based on double jeopardy, of ethnic intimidation indictments against brothers Buddy and Melvin Mutter. The brothers originally faced felony ethnic intimidation charges in municipal court, but pled no contest there to misdemeanor offenses. The state asserts that the court of common pleas erred in dismissing the subsequent indictment charging the Mutters with ethnic intimidation because jeopardy never attached to their municipal court misdemeanor convictions. We agree.

{¶2} The common pleas court determined that the Mutters pleaded no contest in municipal court to reduced misdemeanor offenses in return for the dismissal of the felony ethnic intimidation charges, and that the convictions for lesser included misdemeanor offenses barred subsequent prosecution for the underlying incident.

1 to Ct. of Appis

However, 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. Instead, the charge was amended to menacing by stalking, which is not a lesser included offense of ethnic intimidation. Therefore, Buddy Mutter's conviction for menacing by stalking did not bar his subsequent indictment for ethnic intimidation.

Likewise, the trial court found that Melvin Mutter pleaded guilty to menacing by stalking as a reduction of his ethnic intimidation charge. But again, because menacing by stalking is not a lesser included offense of ethnic intimidation, his conviction for this misdemeanor did not bar his subsequent indictment for ethnic intimidation.

{13} The trial court erred in dismissing the indictment against the Mutters based on the record before it. We sustain the state's second assignment of error, reverse the judgment dismissing the indictment, and remand the cause for further proceedings on the indictment. Our holding renders the state's remaining assignments of error moot.

I. FACTS

A. Melvin Mutter Municipal Court Criminal Cases

{14} On October 20, 2014, Portsmouth Municipal Court Case No. 1401576, charged Melvin Mutter with ethnic intimidation. On October 23, 2014, the municipal court dismissed that case without prejudice. On the same date that the municipal court dismissed the ethnic intimidation charge, the state filed Case No. 1401599 charging Melvin Mutter with menacing by stalking under R.C. 2903.211. On October 29, 2014, the municipal court convicted him on his no contest plea, sentenced him to a suspended sentence of 180 days in jail, and placed him on probation.

{15} On October 20, 2014 in Case No. 1401577, the state also charged Melvin Mutter with aggravated menacing under R.C. 2903.21 and public indecency under R.C. 2907.09(A)(1). On October 29, 2014, the municipal court convicted him on his no contest plea to aggravated menacing, sentenced him to 180 days in jail, suspended 150 days of the jail term, placed him on probation, and fined him \$50. The court dismissed his public indecency charge.

B. Buddy Mutter Municipal Court Criminal Cases

{16} On October 20, 2014, Portsmouth Municipal Court Case No. 1401578, charged Buddy Mutter with ethnic intimidation in violation of R.C. 2927.12. The complaint alleged that on or about October 17, 2014, Buddy Mutter "did knowingly violate Section 2903.21, 2903.22, 2909.66, 2909.07 or 2917.21 of the ORC by reason of the race or national origin of another person to wit: intimidating victim Robert Booker by insulting his race and ethnicity." A notation on the complaint stated that the charge was reduced to "M1 2903.21" on October 23, that Buddy Mutter pleaded no contest, and that he was sentenced.

{17} Notwithstanding the notation on the complaint, the official docket for Case No. 1401578 establishes that the ethnic intimidation charge was instead amended to a charge of menacing by stalking in violation of R.C. 2903.211, a misdemeanor of the first degree. After Buddy Mutter pleaded no contest to that charge on October 23, 2014, the municipal court sentenced him to a suspended 180-day jail term and placed him on probation.

{18} A separate municipal court criminal case, Case No. 1401579, also filed on October 20, 2014, charged Buddy Mutter with aggravated menacing in violation of R.C.

2903.21, a misdemeanor of the first degree. On October 23, 2014, the municipal court convicted him upon his no contest plea, sentenced him to a suspended 180-day jail term, and placed him on probation.

C. Common Pleas Court Case

{¶19} Following the municipal court criminal proceedings, on November 4, 2014, the Scioto County Grand Jury returned an indictment charging Buddy and Melvin Mutter with one count each of ethnic intimidation in violation of R.C. 2927.12. The indictment alleged that “[o]n or about October 17, 2014, at Scioto County, Ohio, Buddy C. Mutter (A), Melvin L. Mutter (B), unlawfully, did violate Section 2903.21 of the Revised Code, Aggravated Menacing, by reason of race, color, religion, or natural origin of another person or group of persons.” The state later filed a bill of particulars which reiterated the allegations of the indictment.

{¶10} Melvin Mutter filed a motion to dismiss the case based on double jeopardy. In his motion counsel argued that he had pleaded guilty¹ to the charges of aggravated menacing and menacing by stalking in the municipal court and that he had served his sentence on those matters. He further argued the parties had agreed that the ethnic intimidation charge would be dismissed as part of the plea agreement, so that the subsequent indictment on that charge violated his double jeopardy rights.

{¶11} Buddy Mutter also filed a motion to dismiss based on double jeopardy. He argued that the municipal court’s amendment of his ethnic intimidation charge to aggravated menacing and his conviction upon his no contest plea precluded the subsequent indictment on the ethnic intimidation charge. He attached a copy of the

¹ He actually pleaded no contest to these charges.

ethnic intimidation complaint in municipal court Case No. 1401578, which included the handwritten notation suggesting that the charge was reduced to aggravated menacing on October 23, 2014. But he did not include the sentencing entry from that case. Instead, he included his sentencing entry from Case No. 1401579, which addresses a separate aggravated menacing charge.

{¶12} The state submitted a written response arguing that the Mutters' motions were meritless because the predicate offense of aggravated menacing was not a lesser included offense of ethnic intimidation and could not support their double jeopardy claim.

{¶13} The trial court conducted a hearing on the motions but none of the parties submitted evidence. Melvin Mutter's counsel argued that the state had amended an ethnic intimidation charge in the municipal court to menacing by stalking and that he pleaded no contest to the amended charge and a separate aggravated menacing charge with the understanding that it would resolve the case. He claimed that he pled to lesser included offenses of ethnic intimidation, which under the prohibition against double jeopardy precluded the indictment. Buddy Mutter's counsel also argued that his client's ethnic intimidation charge had been reduced to a lesser included offense, which barred his subsequent indictment by double jeopardy.

{¶14} The state countered that the Mutters had pleaded no contest to predicate offenses, rather than lesser included offenses, to the ethnic intimidation charges in the municipal court and that the municipal court exceeded its authority by accepting pleas that reduced the felony offenses to misdemeanor offenses.

{¶15} The trial court entered judgments granting the Mutters' motions and dismissing the indictment charging them with ethnic intimidation. The trial court found that in Portsmouth Municipal Court Case No. 1401578, Buddy Mutter was charged with ethnic intimidation and that "[t]his case alleged the same violation on October 17, 2014, which is the same factual situation as contained in the present indictment." The trial court determined that this charge had been reduced to aggravated menacing and the municipal court found him guilty upon his no-contest plea to that charge and sentenced him. The trial court concluded that Buddy Mutter's conviction of the aggravated menacing charge in Case No. 1401578, which constituted a predicate offense for his ethnic intimidation charge, precluded his subsequent indictment for ethnic intimidation.

{¶16} The trial court noted the municipal court had dismissed Melvin Mutter's ethnic intimidation charge and on the same day, a menacing by stalking charge was filed against him in a separate municipal court case. The trial court concluded that "it was the intent of the State of Ohio and defendant in the Portsmouth Municipal Court to plead to a charge of Aggravated Menacing by Stalking as a reduction to the offense of Ethnic Intimidation (F5)", barring his subsequent indictment on the ethnic intimidation charge.

{¶17} The state appeals the judgments dismissing the indictment against the Mutters as a matter of right.² We consolidated these appeals for purposes of decision.

II. ASSIGNMENTS OF ERROR

{¶18} The state assigns the following errors for our review:

² R.C. 2945.67(A) provides that "[a] prosecuting attorney, village solicitor, city director of law, or the attorney general may appeal as a matter of right any decision of a trial court in a criminal case, *** which decision grants a motion to dismiss all or any part of an indictment ***."

1. THE TRIAL COURT ERRED BY NOT CONDUCTING AN EVIDENTIARY HEARING TO DETERMINE THE FACTS AND CIRCUMSTANCES SURROUNDING THE PROCEDURES UTILIZED BY THE PORTSMOUTH MUNICIPAL COURT IN REDUCING, OR AMENDING THE FELONY ETHNIC INTIMIDATION CHARGES.
2. THE TRIAL COURT'S DISMISSAL OF THE INDICTMENT FOR ETHNIC INTIMIDATION WAS ERROR AS JEOPARDY NEVER ATTACHED AND THE COURT OF COMMON PLEAS DOES HAVE JURISDICTION TO PROCEED.
3. THE DISMISSAL OF THE INDICTMENT IN THIS INSTANCE BY THE COURT OF COMMON PLEAS WAS BOTH PLAIN ERROR, AND AN ABUSE OF DISCRETION PURSUANT TO THE FACTS AND THE RELEVANT CASELAW.

III. STANDARD OF REVIEW

{¶19} We apply a de novo standard of review to a lower court's ruling on a motion to dismiss an indictment based on double jeopardy. *See State v. Trimble*, 4th Dist. Pickaway No. 13CA8, 2013-Ohio-5094, ¶ 5; *State v. Hill*, 2015-Ohio-2389, 37 N.E.3d 822, ¶ 17 (8th Dist.) ("We review a trial court's judgment on a motion to dismiss an indictment de novo"). However, insofar as the trial court was required to make certain factual findings, we are bound to accept them if they are supported by competent, credible evidence. *State v. O'Neal*, 12th Dist. Warren No. CA2014-08-104, 2015-Ohio-1096, ¶ 15.

IV. LAW AND ANALYSIS

Double Jeopardy

{¶20} Because it is dispositive we start with the state's second assignment of error, which asserts that the trial court erred in granting the Mutters' motions to dismiss the indictment based on double jeopardy.

{¶21} The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution provides that no person shall “be subject for the same offence to be twice put in jeopardy of life or limb.” “This protection applies to Ohio citizens through the Fourteenth Amendment to the United States Constitution, *Benton v. Maryland*, 395 U.S. 784, 794, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969), and is additionally guaranteed by the Ohio Constitution, Article I, Section 10.” *State v. Ruff*, 143 Ohio St.3d 114, 2015-Ohio-995, 34 N.E.3d 892, ¶ 10. “The Double Jeopardy Clause protects against three abuses: (1) ‘a second prosecution for the same offense after acquittal,’ (2) ‘a second prosecution for the same offense after conviction,’ and (3) ‘multiple punishments for the same offense’ ” in a single prosecution. *Id.* quoting *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), *overruled on other grounds*, *Alabama v. Smith*, 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989). It is the second protection—a second prosecution for the same offense after conviction—that is pertinent here.

{¶22} The successive prosecution branch of the Double Jeopardy Clause prohibits the state from trying a defendant for a greater offense after a conviction of a lesser included offense and from twice trying a defendant for the same offense. *State v. Moore*, 8th Dist. Cuyahoga Nos. 100483 and 1000484, 2014-Ohio-5682, ¶ 36, quoting *State v. Mullins*, 5th Dist. Fairfield No. 12 CA 17, 2013-Ohio-1826, ¶ 12; *State v. Bentley*, 4th Dist. Athens No. 01CA13, 2001 WL 1627645, *3 (Dec. 6, 2011), quoting *State v. Bickerstaff*, 10 Ohio St.3d 62, 64, 461 N.E.2d 892 (1984) (“the successive prosecution branch of the Double Jeopardy Clause ‘prohibits the state from trying a defendant for a greater offense after a conviction of a lesser included offense’ and from

twice trying a defendant for the same offense"). Consequently, "[w]hatever the sequence may be, the Fifth Amendment forbids successive prosecution and cumulative punishment for a greater and lesser included offense." *Brown v. Ohio*, 423 U.S. 161, 169, 53 L.Ed.2d 187, 97 S.Ct. 2221 (1977).

{123} 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.

{124} Similarly, in Melvin Mutter's case, the common pleas court relied on the filing of a new charge of menacing by stalking, filed in a separate case on the same date that the ethnic intimidation charge was dismissed, to conclude that the ethnic intimidation charge had been reduced to the menacing by stalking charge.

{125} The ethnic intimidation charge that was the subject of the grand jury indictment was premised on the predicate offense of aggravated menacing as proscribed by R.C. 2903.21, not menacing by stalking as proscribed by R.C. 2903.211. R.C. 2927.12(A) defines ethnic intimidation stating that "[n]o 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."

{¶126} The predicate offenses identified in R.C. 2927.12, including aggravated menacing under R.C. 2903.21, constitute lesser included offenses of ethnic intimidation.³ *State v. Wyant*, 64 Ohio St.3d 566, 580, 597 N.E.2d 450 (1992), *vacated on other grounds*, *Ohio v. Wyant*, 508 U.S. 969, 125 L.Ed.2d 656, 113 S.Ct. 2954 (1993); *State v. McCoy*, 1st Dist. Hamilton No. C-090599, 2010-Ohio-5810, fn. 26, citing *Wyant* for the proposition that "in the context of the ethnic-intimidation statute, a specifically mentioned predicate offense is a lesser-included offense." The dispositive issue here is whether the menacing by stalking offenses, which the ethnic intimidation charges were reduced to in the municipal court, constitute lesser included offenses of the ethnic intimidation charges of the indictments.

{¶127} "In determining whether an offense is a lesser included offense of another, a court shall consider whether one offense carries a greater penalty than the other, whether some element of the greater offense is not required to prove commission of the lesser offense, and whether the greater offense as statutorily defined cannot be committed without the lesser offense as statutorily defined also being committed." *State v. Evans*, 122 Ohio St.3d 381, 2009-Ohio-2974, 911 N.E.2d 889, paragraph two of the syllabus, clarifying *State v. Deem*, 40 Ohio St.3d 205, 533 N.E.2d 294 (1988); *see also State v. Deanda*, 136 Ohio St.3d 18, 2013-Ohio-1722, 989 N.E.2d 986, ¶ 10-13.

³ The state argues that predicate offenses like aggravated menacing are not lesser included offenses of ethnic intimidation because the United States Supreme Court held in *Garrett v. United States*, 471 U.S. 773, 85 L.Ed.2d 764, 105 S.Ct. 2407 (1985) that prosecution for the crime of continuing criminal enterprise (CCE), after an earlier prosecution for a predicate offense, did not violate double jeopardy because Congress intended that CCE be a separate offense and to permit prosecution for both predicate offenses and CCE. The state is incorrect. *Garrett* is not applicable here because that holding "merely adhered to [the Supreme Court's] understanding that legislatures have traditionally perceived a qualitative difference between conspiracy-like crimes and the substantive offenses upon which they are predicated." *Rutledge v. United States*, 517 U.S. 292, 300, 134 L.Ed.2d 419, 116 S.Ct. 1241, fn. 12 (1996). This case does not involve any conspiracy or comparable charge.

{128} Menacing by stalking is not a predicate offense of ethnic intimidation. See R.C. 2927.12(A) and 2903.211. Nor is it a lesser included offense of ethnic intimidation because the greater offense—ethnic intimidation—can be committed without the lesser offense—menacing by stalking—being committed. In fact, the indictment here specified aggravated menacing as the predicate offense for the ethnic intimidation charge against the Mutters, not menacing by stalking.

{129} 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. Thus, we sustain the state's second assignment of error, albeit for reasons other than the primary contentions it raises. Our holding renders the state's remaining arguments moot. *State v. Brigner*, 4th Dist. Athens No. 14CA19, 2015-Ohio-2526, ¶ 16, citing App.R. 12(A)(1)(c).

V. CONCLUSION

{130} The trial court erred in dismissing the indictment charging the Mutters with ethnic intimidation based on prior municipal court cases in which the court convicted them on reduced charges of menacing by stalking. Menacing by stalking does not constitute a lesser included offense of ethnic intimidation and thus a conviction for that misdemeanor cannot bar a subsequent prosecution for ethnic intimidation based on double jeopardy. We sustain the state's second assignment of error, reverse the trial

court's judgments dismissing the indictment against Buddy and Melvin Mutter, and remand the cause for further proceedings.

**JUDGMENT REVERSED
AND CAUSE REMANDED.**

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS REVERSED and that the CAUSE IS REMANDED. Appellees shall pay the costs.

The Court finds there were reasonable grounds for this appeal.

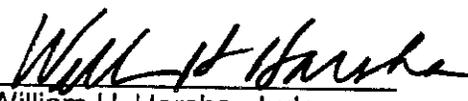
It is ordered that a special mandate issue out of this Court directing the Scioto County Court of Common Pleas to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

McFarland, J.: Concurs in Judgment and Opinion.
Hoover, J.: Concurs in Judgment Only.

For the Court

BY: 
William H. Harsha, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.

IN THE COURT OF COMMON PLEAS
SCIOTO COUNTY, OHIO

SCIOTO COUNTY
FILED
2015 FEB 20 AM 10:32
Diana M. [unclear]
CLERK OF COURTS

STATE OF OHIO

*

Plaintiff

*

Case No. ~~14~~-CR-828A AND

14-CR-828B

Vs.

*

Judge Howard H. Harcha, III

BUDDY C. MUTTER

*

MELVIN MUTTER

*

Defendants

JUDGMENT ENTRY

This matter comes before the Court on the defendants' Motion to Dismiss the Indictment and the State of Ohio's memorandum in opposition. The underlying indictment in this case charges each defendant with the offense of ethnic intimidation, a felony of the 5th degree, in violation of O.R.C. 2927.12(A) and 2927.12(B). The indictments against the defendants allege an incident that occurred on or about October 17, 2014 in Scioto County, Ohio.

The defendants were originally charged with offenses in the Portsmouth Municipal Court regarding this same incident. The cases against the 2 defendants in Municipal Court involved the same fact situation as this indictment but the cases involving the defendants took different procedural paths.

Defendant, Melvin Mutter, had cases filed against him in Portsmouth Municipal Court on October 20, 2014. The defendant was charged with Ethnic Intimidation (F5), being case number CRA

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1401576 and he was also charged with the offense of Aggravated Menacing (M1), case number CRB 1401577. October 3, 2014 the records of the Portsmouth Municipal Court reflect the felony charge of Ethnic Intimidation was dismissed without prejudice. On that same date, a new charge of Aggravated Menacing by Stalking, case number CRB 1401599 was filed. On October 29, 2014, the defendant, Melvin Mutter, pled to both the Aggravated Menacing (CRB 1401577A) and Aggravated Menacing by Stalking (CRB 1401599).

The defendant, Buddy Mutter, had a charge of Ethnic Intimidation filed against him in the Portsmouth Municipal Court on October 20, 2014 as case number CRB 1401578. This case alleged the same violation on October 17, 2014, which is the same factual situation as contained in the present indictment. On October 23, 2014, the defendant's file in Municipal Court shows the Ethnic Intimidation charge (F5) was reduced to a misdemeanor charge of Aggravated Menacing. The defendant was found guilty by the Court and sentenced to probation on October 23, 2014.

The defendants now claim their pleas in the Portsmouth Municipal Court prevent them from being tried under the present indictment. The defendants argue the grounds of double jeopardy and the State of Ohio has filed a memorandum in opposition to the defendants' position.

This Court has been cited to the case of State v. Buehner, 110 Ohio St.3d 403, 2006-Ohio-4707 (2006). The issue presented in Buehner was whether an indictment that follows the language of the charged offense must also list each element of an underlying offense identified in the indictment. This case had more to do with putting a defendant on notice who was charged with Ethnic Intimidation rather than answering the question presented in this case. It is clear that the offense of Aggravated Menacing is a predicate offense of Ethnic Intimidation.

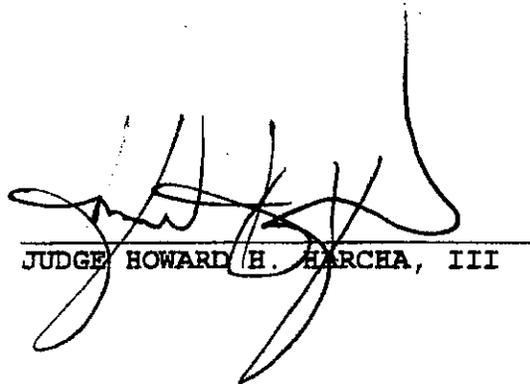
It is quite clear from the file in Buddy Mutter's case that the Ethnic Intimidation charged was reduced to the offense of Aggravated Menacing. This fact can clearly be seen on the Municipal Court complaint which states there was a reduction to a Misdemeanor 1 from the offense of Ethnic Intimidation (F5).

The case of Melvin Mutter is not as clear. Melvin Mutter was charged in Municipal Court with both the offense of Ethnic Intimidation (F5) and Aggravated Menacing on October 20, 2014. Portsmouth Municipal Court paperwork shows that the Ethnic Intimidation charge was dismissed on October 23, 2014 and a charge of Aggravated Menacing by Stalking was simultaneously filed as case number CRB 1401599. This Court has reviewed the dockets of Portsmouth Municipal Court and finds that it was the intent of the State of Ohio and defendant in the Portsmouth

Municipal Court to plead to a charge of Aggravated Menacing by Stalking as a reduction to the offense of Ethnic Intimidation (F5).

This Court finds the Motions to Dismiss filed by both Buddy Mutter and Melvin Mutter are well taken and sustained. It is **ORDERED** these indictments shall be dismissed as these cases were previously resolved with convictions in the Portsmouth Municipal Court.

IT IS SO ORDERED.



JUDGE HOWARD H. HARCHA, III

cc:
Julie Hutchinson
Assistant Scioto County Prosecutor

Eddie Edwards
Attorney for Defendant Buddy C. Mutter

Matt Loesch
Attorney for Defendant Melvin Mutter

AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim or the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

CONSTITUTION OF THE STATE OF OHIO

ARTICLE I: BILL OF RIGHTS

§ 10 [Trial of accused persons and their rights; depositions by state and comment on failure to testify in criminal cases.]

Except in cases of impeachment, cases arising in the army and navy, or in the militia when in actual service in time of war or public danger, and cases involving offenses for which the penalty provided is less than imprisonment in the penitentiary, no person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury; and the number of persons necessary to constitute such grand jury and the number thereof necessary to concur in finding such indictment shall be determined by law. In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process to procure the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed; but provision may be made by law for the taking of the deposition by the accused or by the state, to be used for or against the accused, of any witness whose attendance can not be had at the trial, always securing to the accused means and the opportunity to be present in person and with counsel at the taking of such deposition, and to examine the witness face to face as fully and in the same manner as if in court. No person shall be compelled, in any criminal case, to be a witness against himself; but his failure to testify may be considered by the court and jury and may be made the subject of comment by counsel. No person shall be twice put in jeopardy for the same offense. (As amended September 3, 1912.)

CONSTITUTION OF THE STATE OF OHIO

ARTICLE I: BILL OF RIGHTS

§ 16 REDRESS FOR INJURY; DUE PROCESS

All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay. Suits may be brought against the state, in such courts and in such manner, as may be provided by law.

Ohio App. Rule 9

Rules current through rule amendments received through May 12, 2016

Ohio Court Rules > Ohio Rules Of Appellate Procedure > Title II. Appeals from judgments and orders of court of record

Rule 9. The record on appeal

(A) Composition of the record on appeal; recording of proceedings.

- (1) The original papers and exhibits thereto filed in the trial court, the transcript of proceedings, if any, including exhibits, and a certified copy of the docket and journal entries prepared by the clerk of the trial court shall constitute the record on appeal in all cases.
- (2) The trial court shall ensure that all proceedings of record are recorded by a reliable method, which may include a stenographic/shorthand reporter, audio-recording device, and/or video-recording device. The selection of the method in each case is in the sound discretion of the trial court, except that in all capital cases the proceedings shall be recorded by a stenographic/shorthand reporter in addition to any other recording device the trial court wishes to employ.

(B) The transcript of proceedings; discretion of trial court to select transcriber; duty of appellant to order; notice to appellee if partial transcript is ordered.

- (1) Except as provided in App.R. 11.2(B)(3)(b), it is the obligation of the appellant to ensure that the proceedings the appellant considers necessary for inclusion in the record, however those proceedings were recorded, are transcribed in a form that meets the specifications of App. R. 9(B)(6).
- (2) Any stenographic/shorthand reporter selected by the trial court to record the proceedings may also serve as the official transcriber of those proceedings without prior trial court approval. Otherwise, the transcriber of the proceedings must be approved by the trial court. A party may move to appoint a particular transcriber or the trial court may appoint a transcriber sua sponte; in either case, the selection of the transcriber is within the sound discretion of the trial court, so long as the trial court has a reasonable basis for determining that the transcriber has the necessary qualifications and training to produce a reliable transcript that conforms to the requirements of App.R. 9(B)(6).
- (3) The appellant shall order the transcript in writing and shall file a copy of the transcript order with the clerk of the trial court.
- (4) If no recording was made, or when a recording was made but is no longer available for transcription, App.R. 9(C) or 9(D) may be utilized. If the appellant intends to present an assignment of error on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the weight of the evidence, the appellant shall include in the record a transcript of proceedings that includes all evidence relevant to the findings or conclusion.
- (5) Unless the entire transcript of proceedings is to be included in the record, the appellant shall file with the notice of appeal a statement, as follows:
 - (a) If the proceedings were recorded by a stenographic/shorthand reporter, the statement shall list the assignments of error the appellant intends to present on the appeal and shall either describe the parts of the transcript that the appellant intends to include in the record or shall indicate that the appellant believes that no transcript is necessary.

Ohio App. Rule 9

- (b) If the proceedings were not recorded by any means, or if the proceedings were recorded by non-stenographic means but the recording is no longer available for transcription, or if the stenographic record has become unavailable, then the statement shall list the assignments of error the appellant intends to present on appeal and shall indicate that a statement under App.R. 9(C) or 9(D) will be submitted.

The appellant shall file this statement with the clerk of the trial court and serve the statement on the appellee.

If the appellee considers a transcript of other parts of the proceedings necessary, the appellee, within ten days after the service of the statement of the appellant, shall file and serve on the appellant a designation of additional parts to be included. The clerk of the trial court shall forward a copy of this designation to the clerk of the court of appeals.

If the appellant refuses or fails, within ten days after service on the appellant of appellee's designation, to order transcription of the additional parts, the appellee, within five days thereafter, shall either order the parts in writing from the reporter or apply to the court of appeals for an order requiring the appellant to do so. At the time of ordering, the party ordering the transcript of proceedings shall arrange for the payment to the transcriber of the cost of the transcript of proceedings.

- (6) A transcript of proceedings under this rule shall be in the following form:
- (a) The transcript of proceedings shall include a front and back cover; the front cover shall bear the title and number of the case and the name of the court in which the proceedings occurred;
 - (b) The transcript of proceedings shall be firmly bound on the left side;
 - (c) The first page inside the front cover shall set forth the nature of the proceedings, the date or dates of the proceedings, and the judge or judges who presided;
 - (d) The transcript of proceedings shall be prepared on white paper eight and one-half inches by eleven inches in size with the lines of each page numbered and the pages sequentially numbered;
 - (e) An index of witnesses shall be included in the front of the transcript of proceedings and shall contain page and line references to direct, cross, re-direct, and re-cross examination;
 - (f) An index to exhibits, whether admitted or rejected, briefly identifying each exhibit, shall be included following the index to witnesses reflecting the page and line references where the exhibit was identified and offered into evidence, was admitted or rejected, and if any objection was interposed;
 - (g) Exhibits such as papers, maps, photographs, and similar items that were admitted shall be firmly attached, either directly or in an envelope to the inside rear cover, except as to exhibits whose size or bulk makes attachment impractical; documentary exhibits offered at trial whose admission was denied shall be included in a separate envelope with a notation that they were not admitted and also attached to the inside rear cover unless attachment is impractical;
 - (h) No volume of a transcript of proceedings shall exceed two hundred and fifty pages in length, except it may be enlarged to three hundred pages, if necessary, to complete a part of the voir dire, opening statements, closing arguments, or jury instructions; when it is necessary to prepare more than one volume, each volume shall contain the number and

Ohio App. Rule 9

name of the case and be sequentially numbered, and the separate volumes shall be approximately equal in length;

- (i) An electronic copy of the written transcript of proceedings should be included if it is available;
- (j) The transcriber shall certify the transcript of proceedings as correct and shall state whether it is a complete or partial transcript of proceedings, and, if partial, indicate the parts included and the parts excluded.

(7) The record is complete for the purposes of appeal when the last part of the record is filed with the clerk of the trial court under App.R. 10(A).

(C) Statement of the evidence or proceedings when no recording was made, when the transcript of proceedings is unavailable, or when a recording was made but is no longer available for transcription.

- (1) If no recording of the proceedings was made, if a transcript is unavailable, or if a recording was made but is no longer available for transcription, the appellant may prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection. The statement shall be served on the appellee no later than twenty days prior to the time for transmission of the record pursuant to App.R. 10 and the appellee may serve on the appellant objections or propose amendments to the statement within ten days after service of the appellant's statement; these time periods may be extended by the court of appeals for good cause. The statement and any objections or proposed amendments shall be forthwith submitted to the trial court for settlement and approval. The trial court shall act prior to the time for transmission of the record pursuant to App.R. 10, and, as settled and approved, the statement shall be included by the clerk of the trial court in the record on appeal.
- (2) In cases initially heard in the trial court by a magistrate, a party may use a statement under this division in lieu of a transcript if the error assigned on appeal relates solely to a legal conclusion. If any part of the error assigned on appeal relates to a factual finding, the record on appeal shall include a transcript or affidavit previously filed with the trial court as set forth in Civ.R. 53(D)(3)(b)(iii), Juv.R. 40(D)(3)(b)(iii), and Crim.R. 19(D)(3)(b)(iii).

(D) Agreed statement as the record on appeal.

- (1) In lieu of the record on appeal as defined in division (A) of this rule, the parties, no later than ten days prior to the time for transmission of the record under App.R. 10, may prepare and sign a statement of the case showing how the issues raised in the appeal arose and were decided in the trial court and setting forth only so many of the facts averred and proved or sought to be proved as are essential to a decision of the issues presented. If the statement conforms to the truth, it, together with additions as the trial court may consider necessary to present fully the issues raised in the appeal, shall be approved by the trial court prior to the time for transmission of the record under App.R. 10 and shall then be certified to the court of appeals as the record on appeal and transmitted to the court of appeals by the clerk of the trial court within the time provided by App.R. 10.
- (2) In cases initially heard in the trial court by a magistrate, a party may use a statement under this division in lieu of a transcript if the error assigned on appeal relates to a legal conclusion. If the error assigned on appeal relates to a factual finding, the record on appeal shall include a transcript or affidavit previously filed with the trial court as set forth in Civ.R. 53(D)(3)(b)(iii), Juv.R. 40(D)(3)(b)(iii), and Crim.R. 19(D)(3)(b)(iii).

(E) Correction or modification of the record. If any difference arises as to whether the record truly discloses what occurred in the trial court, the difference shall be submitted to and settled by the

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trial court and the record made to conform to the truth. If anything material to either party is omitted from the record by error or accident or is misstated, the parties by stipulation, or the trial court, either before or after the record is transmitted to the court of appeals, or the court of appeals, on proper suggestion or of its own initiative, may direct that omission or misstatement be corrected, and if necessary that a supplemental record be certified, filed, and transmitted. All other questions as to the form and content of the record shall be presented to the court of appeals.

History

Amended, eff 7-1-77; 7-1-78; 7-1-88; 7-1-92; 7-1-11; 7-1-13; 7-1-14; 7-1-15.

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Ohio App. Rule 12

Rules current through rule amendments received through May 12, 2016

Ohio Court Rules > Ohio Rules Of Appellate Procedure > Title II. Appeals from judgments and orders of court of record

Rule 12. Determination and judgment on appeal

(A) Determination.

- (1) On an undismissed appeal from a trial court, a court of appeals shall do all of the following:
 - (a) Review and affirm, modify, or reverse the judgment or final order appealed;
 - (b) Determine the appeal on its merits on the assignments of error set forth in the briefs under App.R. 16, the record on appeal under App.R. 9, and, unless waived, the oral argument under App.R. 21;
 - (c) Unless an assignment of error is made moot by a ruling on another assignment of error, decide each assignment of error and give reasons in writing for its decision.
- (2) The court may disregard an assignment of error presented for review if the party raising it fails to identify in the record the error on which the assignment of error is based or fails to argue the assignment separately in the brief, as required under App.R. 16(A).

(B) Judgment as a matter of law. When the court of appeals determines that the trial court committed no error prejudicial to the appellant in any of the particulars assigned and argued in appellant's brief and that the appellee is entitled to have the judgment or final order of the trial court affirmed as a matter of law, the court of appeals shall enter judgment accordingly. When the court of appeals determines that the trial court committed error prejudicial to the appellant and that the appellant is entitled to have judgment or final order rendered in his favor as a matter of law, the court of appeals shall reverse the judgment or final order of the trial court and render the judgment or final order that the trial court should have rendered, or remand the cause to the court with instructions to render such judgment or final order. In all other cases where the court of appeals determines that the judgment or final order of the trial court should be modified as a matter of law it shall enter its judgment accordingly.

(C) Judgment in civil action or proceeding when sole prejudicial error found is that judgment of trial court is against the manifest weight of the evidence

- (1) In any civil action or proceeding that was tried to the trial court without the intervention of a jury, and when upon appeal a majority of the judges hearing the appeal find that the judgment or final order rendered by the trial court is against the manifest weight of the evidence and have not found any other prejudicial error of the trial court in any of the particulars assigned and argued in the appellant's brief, and have not found that the appellee is entitled to judgment or final order as a matter of law, the court of appeals shall reverse the judgment or final order of the trial court and either weigh the evidence in the record and render the judgment or final order that the trial court should have rendered on that evidence or remand the case to the trial court for further proceedings.
- (2) In any civil action or proceeding that was tried to a jury, and when upon appeal all three judges hearing the appeal find that the judgment or final order rendered by the trial court on the jury's verdict is against the manifest weight of the evidence and have not found any other prejudicial error of the trial court in any of the particulars assigned and argued in the

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appellant's brief, and have not found that the appellee is entitled to judgment or final order as a matter of law, the court of appeals shall reverse the judgment or final order of the trial court and remand the case to the trial court for further proceedings.

- (D) All other cases.** In all other cases where the court of appeals finds error prejudicial to the appellant, the judgment or final order of the trial court shall be reversed and the cause shall be remanded to the trial court for further proceedings.

History

Amended, eff 7-1-73; 7-1-92; 7-1-15.

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