IN THE SUPREME COURT OF OHIO
2016

STATE OF OHIO, Plaintiff-Appellee, -vs- MELVIN MUTTER, Defendant-Appellant.	Case No. 2016-440 On Appeal from the Scioto County Court of Appeals, Fourth Appellate District Court of Appeals Case No. 15CA3691

BRIEF OF AMICUS CURIAE FRANKLIN COUNTY PROSECUTOR RON O'BRIEN IN SUPPORT OF PLAINTIFF-APPELLEE STATE OF OHIO

RON O'BRIEN 0017245
Franklin County Prosecuting Attorney

MICHAEL P. WALTON 0087265
Assistant Prosecuting Attorney
(Counsel of Record)

373 South High Street, 13th Floor
Columbus, Ohio 43215
614-525-3555

Counsel for Amicus Curiae Franklin County Prosecutor Ron O'Brien

OFFICE OF THE OHIO PUBLIC DEFENDER

PETER GALYARDT 0085439
Assistant State Public Defender
(Counsel of Record)

250 E. Broad Street, Ste 1400
Columbus, Ohio 43215
614-466-5394

Counsel for Defendant-Appellant

MARK KUHN 0063392
Scioto County Prosecutor
JAY WILLIS 0064884
Assistant Prosecuting Attorney
(Counsel of Record)
612 6th Street, Suite E
Portsmouth, Ohio 45662
740-981-3112

Counsel for Plaintiff-Appellee

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STATEMENT OF *AMICUS* INTEREST

Franklin County Prosecutor Ron O'Brien offers this amicus brief in support of plaintiff-appellee State of Ohio. Each year, the Franklin County Prosecutor's Office prosecutes thousands of criminal cases, including cases that begin as felony-level charges in Franklin County Municipal Court and are subject to proceedings in that court. Franklin County Prosecutor Ron O'Brien therefore has a strong interest in the correct resolution of issues related to the authority of a municipal prosecutor and a municipal court to dispose of felony-level charges without an agreement with the county prosecutor to do so. Therefore, in the interest of aiding this Court's review of this appeal from Scioto County, Franklin County Prosecutor Ron O'Brien offers this brief in support of the State of Ohio.

STATEMENT OF THE CASE AND FACTS

Amicus accepts the statement of the case and facts set forth in the brief of plaintiff-appellee State of Ohio.

ARGUMENT

RESPONSE TO FIRST PROPOSITION OF LAW

> A MUNICIPAL PROSECUTOR DOES NOT GENERALLY HAVE ACTUAL OR APPARENT AUTHORITY TO ENTER INTO A PLEA AGREEMENT ON BEHALF OF A COUNTY PROSECUTOR THAT WOULD PRECLUDE OR DISPOSE OF ONE OR MORE FELONY CHARGES. (*State v. Billingsley*, 133 Ohio St.3d 277, 2012-Ohio-4307, 978 N.E.2d 135, followed).

Through his first proposition of law, defendant asserts that he entered into a negotiated plea agreement in Portsmouth Municipal Court with a municipal prosecutor that precluded a felony prosecution in Scioto County Common Pleas Court by the Scioto County Prosecutor. Defendant concedes that the Scioto County Prosecutor was not involved in the municipal proceeding against defendant. (Def. Brief, p. 2) Instead, defendant asserts that it was the intent of both he and the municipal prosecutor to forego any felony-level charges in exchange for defendant's plea in Portsmouth Municipal Court to the misdemeanor-level charge of menacing by stalking.

There are two main problems with defendant's argument. First, defendant failed to produce evidence of a negotiated plea agreement. Second, in light of *State v. Billingsley*, 133 Ohio St.3d 277, 2012-Ohio-4307, 978 N.E.2d 135, defendant failed to show that the municipal prosecutor had any authority to reach a plea agreement that would bind the county prosecutor as to felony-level charges.

A. Defendant failed to produce evidence of a negotiated plea agreement

First, despite defendant's argument to the contrary (Def. Brief, p. 6), there is substantial doubt that his plea in Portsmouth Municipal Court was the result of a negotiated plea agreement. In fact, there is no evidence in the record to support a conclusion that defendant entered into a plea agreement of any kind in municipal court. Even if there had been a plea agreement of some

kind, there is no indication that it should be considered a "negotiated plea agreement" under *State v. Carpenter*, 68 Ohio St.3d 59, 1993-Ohio-226, 623 N.E.2d 66.

As this Court has held, not every plea of guilty is a negotiated guilty plea within the meaning of *Carpenter*. *See State v. Dye*, 127 Ohio St.3d 357, 2010-Ohio-5728, 939 N.E.2d 1217, at ¶25. In *Dye*, this Court stated that "[i]n order for a guilty plea to be a 'negotiated guilty plea' within the meaning of *State v. Carpenter*, the record must show the existence of the elements of a contract (the plea agreement)." *Id.* at ¶23. "The essential elements of a contract are an offer, acceptance, contractual capacity, consideration (the bargained for legal benefit and/or detriment), manifestation of mutual assent, and legality of the object and consideration." *State v. Moore*, 4th Dist. No. 13CA965, 2014-Ohio-3024, ¶15.

In the instant matter, the record does not show the existence of any of the elements of a contract. There is no evidence to support a conclusion regarding if there was an offer to begin with, what the offer was, who made the offer, the capacity of the municipal prosecutor to enter into an agreement beyond his jurisdictional authority, or what the consideration for the bargain was. In the trial court, defendant merely asserted that the terms of a purported agreement had been violated by the felony indictment. In fact, the record supports the conclusion that defendant did not enter into a plea agreement of any kind. Defendant entered a plea of no contest to a "reduced" [1] offense of menacing by stalking, and received a jail sentence.

Furthermore, it must be noted that the portion of the analysis of *Carpenter* and *Dye* relied upon by defendant – regarding promises made by a prosecutor in exchange for a defendant's plea – should not apply in this case. *Carpenter* and *Dye* each involved only a single prosecuting authority. In those cases, a single prosecuting authority was deemed to be bound by a defendant's

[1] Defendant maintains that the menacing by stalking charge arose as a result of the same conduct for which he was eventually indicted. However, as noted by the Fourth District, such a conclusion was unsupported by the record. *State v. Mutter & Mutter*, 4th Dist. Nos. 15CA3690/3691, 2016-Ohio-512, ¶29.

unspoken, subjective expectation that a plea bargain in a first prosecution would conclude all prosecution for the entire incident, regardless of the victim's death post-plea.

There is no basis to extend that portion of the analysis to defendant's case, because this case involved an entirely separate prosecutor's office that played no role whatsoever in the creation of the plea agreement[2] in municipal court. As a result, there was no opportunity for the Scioto County Prosecutor to reserve the right to bring felony-level charges against defendant as was held to be necessary in *Carpenter* and *Dye*. Because the record of the trial court's proceeding does not support a finding that he entered into a negotiated plea agreement in Portsmouth Municipal Court, the Fourth District properly reversed the trial court's decision dismissing the case.

B. A county prosecutor is not bound by a plea agreement reached between a defendant and a municipal prosecutor that purports to dispose of a felony-level charge

Defendant's argument conflicts with this Court's precedent regarding the ability of separately-elected prosecutors to bind one another to plea agreements. Even if it is assumed that defendant and the municipal prosecutor entered into a plea agreement, and even if it is assumed that the agreement purported to dispose of a felony-level charge, the relevant inquiry becomes whether the Scioto County Prosecutor is bound to the agreement. Stated differently, defendant's argument can only succeed if the Scioto County Prosecutor and the municipal prosecutor, although separately-elected and different prosecuting authorities, are considered to be the "same party" for purposes of the plea agreement and thus have the ability to bind one another absent any actual or apparent authority.

As the following discussion shows, the Scioto County Prosecutor as a non-party to the plea agreement was not bound by that agreement. This conclusion flows directly from this Court's decision in *Billingsley*.

[2] Again, this assumes that an actual plea agreement was reached in the municipal court. But, as noted above, such a conclusion is not supported by the record.

1. As a non-party, the Scioto County Prosecutor is not bound by the plea agreement

It is axiomatic that only parties to an agreement are bound by it. *See E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 294, 122 S.Ct. 754, 151 L.Ed.2d 755 (2002) ("It goes without saying that a contract cannot bind a nonparty."). *See also Ohio Sav. Bank v. H.L. Vokes Co.*, 54 Ohio App.3d 68, 560 N.E.2d 1328 (8th Dist.1989) ("It is well established that a contract is binding only upon the parties to the contract[.]") citing *Cincinnati, Hamilton & Dayton R.R. Co. v. Bank*, 54 Ohio St. 60, 42 N.E. 700 (1896). This prevents a non-party from being bound to an agreement of which he was unaware or to which he had no intention to be bound.

Double jeopardy and plea agreements are two separate issues. Defendant's argument wrongly conflates the two concepts, resulting in a flawed conclusion that double jeopardy somehow prevented a second prosecution in his case, based upon an agreement between defendant and the municipal prosecutor. The areas of double jeopardy and contract law are entirely separate and should not be confused with one another.

"Principles of contract law are generally applicable to the interpretation and enforcement of plea agreements." *Billingsley*, ¶26 quoting *State v. Bethel*, 110 Ohio St.3d 416, 2006-Ohio-4853, 854 N.E.2d 150. Though not a direct admission or concession, defendant appears to agree that plea agreements are generally governed by principles of contract. (Def. Brief, p. 1, 5). As made clear by this Court, just as the principles of contract apply to plea agreements in criminal cases, the concepts of agency, actual authority, and apparent authority apply, as well. *Billingsley*, ¶26.

In *Billingsley*, the defendant entered into a plea agreement with the Summit County Prosecutor. *Id.* at ¶¶2-5. As part of the agreement, the Summit County Prosecutor promised that the defendant's guilty plea would preclude subsequent prosecution for related crimes committed

wholly outside Summit County. *Id.* The defendant was subsequently indicted in Portage County based upon those related crimes committed wholly outside Summit County. *Id*. at ¶6. His motion to dismiss the charges based upon the plea agreement in Summit County was denied, and the Eleventh District affirmed. *Id.* at ¶¶17, 19.

On further appeal, this Court held that, because the Portage County Prosecutor was not a party to the Summit County plea agreement, any promises therein were not binding upon the Portage County Prosecutor. *Id*. at ¶36. In short, absent actual or apparent authority to enter into the plea agreement, or subsequent ratification, the Portage County Prosecutor could not be bound by the promise of a separately-elected prosecutor.

Consistent with the general principles of contract and agency, the *Billingsley* decision recognized that, absent actual or apparent authority, separately-elected prosecutors cannot bind one another to a plea agreement simply because of a common source of prosecutorial authority. *Billingsley*, at ¶¶26-36. In so holding, this Court rejected the "single sovereignty" approach – the same approach urged by defendant here – that the "state" and the "city" were the same party for purposes of the plea agreement. Indeed, if this Court had applied a pure "single sovereignty" test, *Billingsley* would have been decided in favor of the defendant, not the Portage County Prosecutor.

In applying the reasoning of *Billingsley* to the instant matter, amicus submits that the municipal prosecutor required actual or apparent authority in order to enter into an agreement that would have prevented the Scioto County Prosecutor from bringing a felony-level charge. Defendant provided no evidence of actual or apparent authority. Further, because there was no actual or apparent authority, the record cannot support any finding that the Scioto County

Prosecutor somehow ratified the agreement, again, assuming that an agreement was even formed in municipal court.

Actual authority is that which is expressly conferred upon an agent by a principal. *See Young v. Internatl. Bhd. of Locomotive Engineers*, 114 Ohio App.3d 499, 507, 683 N.E.2d 420 (8th Dist.1996). Express authority extends no further than the power directly given by the principal to his agent. *Damon's Missouri, Inc. v. Davis*, 63 Ohio St.3d 605, 608, 590 N.E.2d 254 (1992) (citations and quotes omitted).

In this case, defendant has not claimed that the municipal prosecutor was acting as the agent of the Scioto County Prosecutor. Defendant never alleged, nor established, that the municipal prosecutor had actual authority to enter into a plea agreement on behalf of the Scioto County Prosecutor. Even if he would make such a claim now for the first time, there is no evidence whatsoever in the record to show any grant of actual authority by the Scioto County Prosecutor to the municipal prosecutor to dispose of felony-level charges.

Similarly, there is no evidence in the record to show the existence of apparent authority. Apparent authority exists where two conditions are met. First, a principal must hold the agent out to the public as possessing sufficient authority to embrace the particular act in question, or knowingly permit him to act as though the agent had such authority. *See Master Consol. Corp. v. BancOhio Natl. Bank*, 61 Ohio St.3d 570, 575 N.E.2d 817 (1991), at syllabus. Second, the person dealing with the agent must know of those facts and, acting in good faith, have reason to believe that the agent had the necessary authority. *Id.* The acts of an agent cannot create apparent authority "where there is no evidence that the principal permitted the agent to act as if she had authority." *Billingsley*, at ¶39 citing *Master Consol. Corp.*, *supra*. Neither of the conditions for apparent authority can be met by the record in this case.

There is no evidence in the record that the Scioto County Prosecutor held the municipal prosecutor out to the public as having authority to enter into plea agreements on his behalf with the ability to resolve potential felony-level charges. Nor can it be shown that the Scioto County Prosecutor knowingly permitted the municipal prosecutor to act as if he had such authority. Further, defendant failed to show that he thought those facts existed and, acting in good faith, had reason to believe that the municipal prosecutor had the authority to resolve potential felony-level charges on behalf of the Scioto County Prosecutor.

Ratification is the only remaining possibility that would allow the Scioto County Prosecutor to be bound by the municipal plea agreement. Indeed, "[a] well-settled doctrine of the law of agency is that a principal may ratify the acts of its agent performed beyond the agent's scope of authority[.]" *State v. Warner*, 55 Ohio St.3d 31, 49, 564 N.E.2d 18 (1990). However, the agency relationship must first exist before an act can be ratified. *See Wells Fargo Bank, N.A. v. Sessley*, 10th Dist. No. 09AP-178, 2010-Ohio-2902, ¶14 citing *Wells Fargo Bank, N.A. v. Byrd*, 1st Dist. Nos. C-070889/070890, 2008-Ohio-4603. Because no agency relationship existed between the municipal prosecutor and the Scioto County Prosecutor, ratification is not even a legal possibility. Even if this Court were to determine that some agency relationship did exist, there is no evidence that any promise made by the municipal prosecutor as part of the purported plea agreement was ever ratified by the Scioto County Prosecutor. Rather, the record indicates precisely the opposite of ratification, as the Scioto County Prosecutor actively pursued a felony-level charge.

2. *State v. Church* is factually distinguishable

Defendant relies heavily on a decision from the Tenth District, *State v. Church*, 10th Dist. No. 12AP-34, 2012-Ohio-5663. However, this reliance is misplaced for several reasons.

First, amicus submits that *Church* is factually distinguishable and thus, does not even apply to this case. In *Church*, the defendant was originally charged in municipal court with two offenses: jaywalking and misdemeanor drug possession. Church and the Columbus City Attorney reached an agreement in municipal court whereby the possession charge would be dismissed in exchange for his plea of guilty to jaywalking. Church's plea was accepted and the municipal court imposed sentence. Subsequently, Church was indicted for a felony-level trafficking charge, which was based, in part, upon the possession charge that was dismissed in municipal court.

Church filed a motion to dismiss, which was based exclusively upon his claim of double jeopardy. His motion was denied. Church then entered a plea of no-contest. On appeal, the Tenth District reversed. The court held that, based upon the municipal court transcript in the record, Church had entered into a negotiated plea agreement with the Columbus City Attorney in municipal court regarding the disposition of two charges, and that Church had a reasonable expectation based upon that negotiated plea agreement that he would face no further prosecution. *Church*, ¶17.

As noted above in section (A), the record of this case does not support a finding that defendant entered into a negotiated plea agreement. In the absence of any evidence to support such a conclusion, *Church* is factually distinguishable. *Church* is also deeply flawed because it does not take into account this Court's decision in *Billingsley*. [3]

3. A plea agreement does not create a double jeopardy bar

Church misapplied double jeopardy principles. The key component of the *Church* decision was the Tenth District's opinion that the Columbus City Attorney and the Franklin

[3] Notably, the Tenth District did not address *Billingsley* in any manner whatsoever in *Church*, despite a specific request by the State to do so on reconsideration. Likewise, the court failed to address *Billingsley* in *State v. Bridges*, 10th Dist. No. 14AP-602, 2015-Ohio-4480.

County Prosecutor were both part of a "single sovereignty." *Church*, ¶14 citing *State v. McDonough*, 8th Dist. No. 54766, 2005-Ohio-1315. From this premise, the *Church* court concluded that any promise made by the Columbus City Attorney to forever abandon the possession charge automatically bound the Franklin County Prosecutor merely by virtue of a common source of prosecutorial authority. *Church*, ¶17.

But this "single sovereignty" conclusion flows from a principle related to double jeopardy, not plea agreements. Indeed, *McDonough* – the authority relied upon by the Tenth District for the proposition – cited *State v. Best*, 42 Ohio St.2d 530, 330 N.E.2d 421 (1975), which did not involve a plea agreement. Rather, the issue in *Best* was whether a prosecution in municipal court was barred by double jeopardy where Best had already been prosecuted and convicted of offenses related to the same incident in common pleas court. *Id*. at 532.

The Eighth District subsequently recognized in *State v. Dunbar*, 8th Dist. No. 87317, 2007-Ohio-3261, ¶21, that "the Supreme Court in *Best* was referring to double jeopardy, not plea agreements." In *Dunbar*, the defendant beat and kicked his fiancée in the presence of the couple's two minor children. *Id.* at ¶2. When the children attempted to intervene, Dunbar pushed them away. *Id.* After the incident, Dunbar prevented his fiancée from leaving so others would not see what he had done to her. *Id.* Dunbar eventually entered a plea of no contest to one count of domestic violence in Cleveland Municipal Court on December 7, 2004. *Id.* at ¶3.

Dunbar was later indicted on three counts of abduction and one count of domestic violence. *Id.* at ¶4. Subsequently, Dunbar entered a plea of guilty to one count of abduction in exchange for a nolle of the remaining counts and a recommendation by the prosecution for community control. *Id*. at ¶¶5-7.

On appeal, Dunbar claimed that the municipal court conviction prevented further prosecution based upon the same incident. He argued that "'the state' possessed all of the information that it needed to prosecute the case either as a misdemeanor domestic violence or a felony abduction at the time he entered a no-contest plea in municipal court." *Id*. at ¶20. Based upon *Carpenter*, he asserted that the city was required to reserve the right to bring additional charges and had failed to do so. Id.

After determining that "the state" and "the city" were not the same parties concerning a plea agreement, the Eighth District rejected Dunbar's argument, stating that Dunbar presented no evidence concerning what "the actual terms of the plea in municipal court were[.]" *Id*. at ¶¶21-22. The court further determined that, even if Dunbar were relying on an implied promise by the city prosecutor that he would not face more serious charges, his claim would still fail. *Id*. at ¶22, quoting *State v. Zima*, 102 Ohio St.3d 61, 2004-Ohio-1807, 806 N.E.2d 542, at ¶14 ("a defendant should be aware that a plea taken before a municipal court judge with limited criminal jurisdiction might not dispose of the matter fully."). In the absence of any evidence concerning the terms of the plea agreement, Dunbar's belief that he would face no further charges was not reasonable, even where the felony charges arose from the same incident and even involved the same victim.

In so holding, the *Dunbar* court reached the opposite conclusion that the *McDonough* court had reached only two years earlier. While the *Church* court cited *McDonough* in support of its conclusion that the city and the State were the same party for purposes of a plea agreement, it ignored a clear rejection of this premise by the very same court only two years later. Amicus respectfully urges this Court to follow the Eighth District in recognizing the same critical difference and to hold that a municipal prosecutor and a county prosecutor are not the same party

for purposes of a plea agreement, as shown by this Court's decision in *Billingsley*, which rejected the "single sovereignty" principle as to plea agreements and held that prosecutors have no actual or apparent authority to bind "the state" to a plea agreement with respect to crimes committed outside their jurisdiction. *Billingsley*, ¶¶30-31.

4. The *Zima* problem

Church also misapplied this Court's decision in *State v. Zima*. This Court has made exceedingly clear that "[a] defendant should be aware that a plea taken before a municipal judge with limited criminal jurisdiction might not dispose of the matter fully." *Zima*, ¶14. This proposition is well-established in district appellate courts, as well. *See State v. Barr*, 4th Dist. No. 07CA34, 2008-Ohio-4754, ¶¶20-21 (where Barr only established that he entered a guilty plea in municipal court, his belief he would not face further prosecution for felony-level charges out of the same incident was unreasonable); *State v. Mullins*, 5th Dist. No. 12 CA 17, 2013-Ohio-1826 (without any evidence of a promise, a defendant's belief that a municipal court plea would resolve all possible felony charges arising from the same incident is unreasonable; defendant's argument further "diminished" by *Billingsley*); *see also Dunbar*, *supra* (Dunbar's reliance on implied promise of no further prosecution by city attorney was not reasonable due to lack of prosecutor's authority and court's lack of jurisdiction concerning final disposition of felony charges).

The Ninth District has taken it one step further in holding that, even where a municipal prosecutor explicitly promises no further prosecution on felony-level charges in exchange for a plea to a misdemeanor, a defendant's reliance is unreasonable. *State v. Sims*, 9th Dist. No. 22677, 2006-Ohio-2415, ¶¶21-24. These cases all support a conclusion that reliance on a municipal court plea and/or promises of a municipal prosecutor to resolve felony-level charges is unreasonable as a matter of law.

The undersigned amicus respectfully submits that, even in the absence of *Billingsley*, the conflict between *Church* and *Zima*, as well as the conflict between *Church* and the appellate court decisions referenced above, diminishes any of the conclusions reached in *Church* on this issue. Based upon these fundamental problems with *Church*, it should not be applied to the instant matter.

C. Conclusion

Based upon *Billingsley*, contract law, and agency law, the Scioto County Prosecutor was not a party to the purported plea agreement. Thus, there is a complete lack of his "intent" regarding the terms of an agreement about which he was unaware and to which he was not a party. Further, the Scioto County Prosecutor did not participate in the municipal court proceedings and never even had the opportunity to object to the purported agreement or to "reserve" the ability to prosecute a future charge. Simply put, a county prosecutor is not bound by a routine plea agreement in municipal court, especially where there is no evidence that the county prosecutor was involved in the agreement and no evidence that the county prosecutor had any intent to be part of it.

When neither the prosecutor nor court involved in a plea bargain in a case has jurisdiction over all actual and potential charges, a defendant cannot expect that the plea bargain will conclude all potential charges, especially those that could be brought by a different prosecutor in a different court. *See Zima*, *Sims*. A defendant should be aware that a plea taken before a municipal judge with limited criminal jurisdiction might not dispose of the matter fully, *see id.*, and this is particularly true when a municipal prosecutor has no actual or apparent authority to dispose of felony charges and no actual authority to bind the county prosecutor. *Sims*; *Billingsley*. The Fourth District's decision should be affirmed.

RESPONSE TO SECOND PROPOSITION OF LAW

Amicus supports the State's response to the second proposition of law and has nothing to add to it.

CONCLUSION

For the foregoing reasons, amicus curiae Franklin County Prosecutor Ron O'Brien supports plaintiff-appellee State of Ohio and urges this Court to affirm the judgment of the Fourth District Court of Appeals.

Respectfully submitted,

RON O'BRIEN 0017245
Prosecuting Attorney

/s/ M. Walton
MICHAEL P. WALTON 0087265
Assistant Prosecuting Attorney
373 South High Street, 13th Floor
Columbus, Ohio 43215
614-525-3555

Counsel for Amicus Curiae Franklin County Prosecutor Ron O'Brien

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was sent by regular U.S. Mail, this day, August 26, 2016, to Peter Galyardt, 250 E. Broad Street, Suite 1400, Columbus, Ohio 43215; Counsel for Defendant-Appellant, and upon Jay Willis, 612 Sixth Street, Suite E, Portsmouth, Ohio 45662; Counsel for Plaintiff-Appellee, State of Ohio.

/s/ M. Walton
MICHAEL P. WALTON 0087265
Assistant Prosecuting Attorney