

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
REPLY BRIEF**

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INTRODUCTION

A negotiated plea is so sacrosanct that once sentence has been imposed, not even a defendant's own material breach will undo it. *State v. Gilbert*, 143 Ohio St.3d 150, 2014-Ohio-4562, 35 N.E.3d 493, ¶ 13. Here, the trial court heeded that truth based upon clear principles from this Court. *See State v. Carpenter*, 68 Ohio St.3d 59, 623 N.E.2d 66 (1993), syllabus; *State v. Dye*, 127 Ohio St.3d 357, 2010-Ohio-5728, 939 N.E.2d 1217, ¶ 20-28; Feb. 20, 2015 Judgment Entry. There was no compelling reason to interfere in this case, yet the appellate court did. All of the arguments supporting that interference fail because they do not negate the sanctity of negotiated pleas and the logic of deference to the trial court under these circumstances. Accordingly, the appellate decision below should be reversed.

STATEMENT OF THE CASE AND FACTS

Mr. Mutter relies upon the statement of the case and facts presented in his merit brief.

ARGUMENT

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.

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.

The trial court followed this Court's precedent when holding that there was a negotiated plea in the municipal court that precluded a second prosecution in the court of common pleas. And the omission of the municipal court file from this record required the appellate court to presume regularity in the trial proceedings. Because that was not done, the trial court's dismissal should be reinstated.

I. The minimal record establishes a negotiated plea under this Court's precedent, which is dispositive in this case.

The opposing briefs imply that the trial court conjured its negotiated-plea conclusion from thin air. Yet the assistant county prosecutor conceded to the common pleas court that there had been a negotiated plea in the municipal court—"The undersigned takes no issue with the facts relative to what transpired with this case at the [m]unicipal [c]ourt level as set forth in each defendant's motion." Feb. 6, 2015 State Response; *see also* Tr. 12. Moreover, despite having time to do so, there was no attempt

to disprove defense counsel's assertions on that issue.¹ *See id.*; *see also* Tr. 1. Thus, all arguments in the opposing briefs appear forfeited. *See State v. Rogers*, 143 Ohio St.3d 385, 2015-Ohio-2459, 38 N.E.3d 860, ¶ 21 (explaining that “an appellate court will not consider any error which counsel for a party complaining of the trial court’s judgment could have called but did not call to the trial court’s attention at a time when such error could have been avoided or corrected by the trial court”).

Regardless, there is no dispute that: (1) the conduct supporting all of the criminal charges in this case occurred on October 17, 2014, (2) Melvin Mutter pleaded no contest to two similar criminal charges, one of which was a reduction of the later-indicted felony, as evidenced by the dismissal of the felony charge and new filing of a misdemeanor, and (3) the assistant county prosecutor conceded that there was a negotiated plea in the municipal court. *See* Feb. 20, 2015 Judgment Entry; Feb. 6, 2015 State Response; Tr. 12. Interpreting those indisputable facts, the trial court—in the best position to determine credibility—heard the arguments and found that the misdemeanor conviction “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, the indisputable

¹ It is worth noting that if there was not a negotiated plea in the municipal court, logic and practice suggest the municipal prosecutor would have been readily available to share that information.

facts establish a negotiated plea warranting enforcement. *See Carpenter* at syllabus; *Dye* at ¶ 20-28.

In fact, under *Carpenter*, this is a clearer negotiated plea than one previously held to be so by this Court. In *Dye*, there was no reduction in charge or sentence for the defendant. *See Dye* at ¶ 23-26. Here, in exchange for his guilty plea and waiver of constitutional rights, Mr. Mutter received the benefit of a dismissed charge and limited sentencing exposure. Despite empty claims to the contrary, there is no doubt that this plea was negotiated. *See id.*

The opposing briefs also offer this Court's decisions in *State v. Zima*, 102 Ohio St.3d 61, 2004-Ohio-1807, 806 N.E.2d 542, and *State v. Billingsley*, 133 Ohio St.3d 277, 2012-Ohio-4307, 978 N.E.2d 135, to attack the effect of the negotiated plea here. Both challenges fail.

Zima is confined to its own facts. *See Zima* at ¶ 10. At a minimum, those facts are: (1) there were no felony charges filed in the municipal court, (2) there was no dismissal of a felony charge in the municipal court, (3) the defendant was indicted for related felonies in the court of common pleas *before* pleading and sentencing on the misdemeanor charges in the municipal court, and (4) the charges filed in the municipal court—all misdemeanors—and the timing of the felony indictment—*before* plea and sentencing in the municipal court—were dispositive because the municipal court never had jurisdiction over any felony charges. *Zima* at ¶ 1-2, 14. Here, Mr. Mutter's felony charge was initially filed in the municipal court granting it and the municipal prosecutor jurisdiction, and he was indicted in the court of common pleas *after* his

negotiated plea and sentence in the municipal court. *State v. Mutter*, 4th Dist. Scioto No. 15-CA-3690, 2016-Ohio-512, ¶ 6-7, 9; Feb. 20, 2015 Judgment Entry; *see also* R.C. 1901.20. Accordingly, *Zima* is inapplicable.

Moreover, *Billingsley* is inapposite, as it involved separate criminal conduct on distinct days in different counties with no overlapping jurisdiction, thereby “not implicat[ing] the Double Jeopardy Clause.” *Billingsley* at ¶ 3-19, 22. On the other hand, this case implicates double jeopardy and involves a single course of criminal conduct committed on one day in Portsmouth, Ohio, the seat of Scioto County, with overlapping jurisdiction for the Portsmouth Municipal Prosecutor and Scioto County Prosecutor. *Mutter* at ¶ 6-9; Feb. 20, 2015 Judgment Entry; *see also* R.C. 1901.34.

II. Without a record to demonstrate error, the appellate court was required to presume regularity in the trial proceedings.

The State makes many assertions about the municipal court proceedings and applies law to them. None of those assertions may be vetted because the State failed to include the municipal court file in this appellate record, and the applied law is far from steadfast.

For instance, the State relies on *State v. Nelson*, 51 Ohio App.2d 31, 365 N.E.2d 1268 (1977) to support its jurisdictional argument, which is—notably—an argument that the appellate court did not engage in any manner. *Mutter* at ¶ 19-30. But *Nelson* involved a full record. *See Nelson* at 33-34, 37 (providing a detailed statement of the factual events at issue, and an explicit assurance that no complaint was filed regarding the reduced misdemeanor offense). The lack of such a record here mandates a

presumption of regularity in the trial court proceedings. See *Jaffrin v. DiEgidio*, 152 Ohio St. 359, 365, 89 N.E.2d 459 (1949). Moreover, the felony was dismissed in this case and simultaneously replaced with a misdemeanor filing.²

As previously described, the reliance on *Zima* and *Billingsley* is unhinged from the factual moorings of those cases. See *Zima* at ¶ 1-2, 10, 14; see also *Billingsley* at ¶ 22-40. Whatever the jurisdictional and agency considerations in *Zima* and *Billingsley*, respectively, those simply are not applicable in this case and do not alter this Court's sound approach of presuming regularity in trial court proceedings when, as here, it is appropriate to do so. See *Jaffrin* at 365.

CONCLUSION

The decision below should be vacated and the trial court's dismissal reinstated because the trial court's holding is supported by this Court's precedent. As such, the appellate court should have presumed regularity and affirmed.

Respectfully submitted,

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² Additionally, *Nelson* has been criticized regarding its imputation of a court's filing failures to a defendant, and did not consider whether a municipal court inherently satisfies Crim.R. 5(B)(4)(b) when it reduces a felony to a misdemeanor upon recommendation from a municipal prosecutor. See *State v. Copley*, 72 Ohio App.3d 278, 280, 594 N.E.2d 648 (4th Dist.1991).

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A copy of **Melvin Mutter's Reply 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 13th day of September, 2016.

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