

IN THE SUPREME COURT OF OHIO

CITY OF GIRARD,	:	
	:	Case No. 2017-1069
Plaintiff-Appellant,	:	
	:	On Appeal from the Trumbull County
v.	:	Court of Appeals,
	:	Eleventh Appellate District
JOHN A. GIORDANO	:	Case No. 2016-T-0071
	:	
Defendant-Appellee.	:	

**MERIT BRIEF OF AMICUS CURIAE OFFICE OF THE OHIO PUBLIC DEFENDER
IN SUPPORT OF APPELLEE JOHN A. GIORDANO**

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INTRODUCTION

The court below refused the State's request to diminish the criminal justice system's procedural protections in favor of greater efficiency. This Court should too because efficiency, no matter its significance, cannot serve as the primary purpose of a system that deprives citizens of their liberty. Ohio law demands that reliable determinations of guilt control. The court below simply ensured that law was followed. There is no work left for this Court.

STATEMENT OF THE CASE AND FACTS

Amicus curiae hereby adopts the statement of the case and facts set forth in Appellee John Giordano's merit brief.

STATEMENT OF INTEREST OF AMICUS CURIAE **OFFICE OF THE OHIO PUBLIC DEFENDER**

The Office of the Ohio Public Defender (OPD) is a state agency designed to represent indigent criminal defendants and to coordinate criminal-defense efforts throughout Ohio. The OPD also plays a key role in the promulgation of Ohio statutory law and procedural rules. The primary focus of the OPD is on the appellate phase of criminal cases, including direct appeals and collateral attacks on convictions. The primary mission of the OPD is to protect and defend the rights of indigent persons by providing and supporting superior representation in the criminal and juvenile justice systems.

As amicus curiae, the OPD offers this Court the perspective of experienced practitioners who routinely handle criminal cases in Ohio courts. This work includes representation at both the trial and appellate levels. The OPD has an interest in the present case insofar as this Court will consider whether to alter the procedural protections afforded to municipal-court defendants. As amicus curiae, OPD urges this Court not to diminish the process by which misdemeanors are resolved in Ohio courts.

ARGUMENT

APPELLEE'S PROPOSITION OF LAW

A criminal defendant's conviction in a case involving a misdemeanor charge is not supported by sufficient evidence where the record reveals that the trial court was not presented with an explanation of the circumstances of the offense and did not indicate that it was relying upon any other materials in that regard prior to making a finding of guilt.

I. Society has an interest in the fair administration of justice.

The City's apparent presumption that all convictions, no matter their reliability, equate to justice fundamentally misconstrues the meaning and purpose of Ohio's justice system. Justice is served when criminal convictions, which may result in the deprivation of liberty, opportunity, financial resources, and public welfare benefits, are the result of a fair and meaningful process by which guilt can be reliably determined. If the City's request is honored, courts will be permitted to systematically operate in a way that does not always produce fair or reliable determinations of guilt.

Municipal courts are already subject to widespread criticism for a variety of systemic problems that raise concerns about the validity and reliability of the convictions those courts produce. The Supreme Court of the United States addressed this reality in *Argersinger v.*

Hamlin:

The District of Columbia Court of General Sessions had four judges to process the preliminary stages of more than 1,500 felony cases, 7,500 serious misdemeanor cases, and 38,000 petty offenses and an equal number of traffic offenses per year. An inevitable consequence of volume that large is the almost total preoccupation in such a court with the movement of cases. The calendar is long, speed often is substituted for care, and casually arranged out-of-court compromise too often is substituted for adjudication. Inadequate attention tends to be given to the individual defendant, whether in protecting his rights, sifting the facts at trial, deciding the social risk he presents, or determining how to deal with him after conviction. The frequent result is futility and failure.

407 U.S. 25, 34-35, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972), citing President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society* 128 (1967).

Ten years after *Hamlin*, Malcolm M. Feeley described his experience in New Haven's municipal courts:

Not one defendant in a sample of 1,640 cases insisted upon [trial by jury]...only one-half of all defendants journeyed through the criminal process with an attorney at their side. Even in those cases in which counsel was present, his contribution was questionable. "Interviews" with clients were often little more than quick, whispered exchanges in the corridor. There was little independent investigation of facts. Arrestees were arraigned in groups and informed of their rights en masse. At times the arrestees were not even aware that they are being addressed. Judges did not always look at them, and even if a judge made an effort to be heard, he could not always be understood over the constant din of the courtroom. While a few cases took up as much as a minute or two of the court's time, the overwhelming majority of cases took just a few seconds.

The Process Is the Punishment: Handling Cases in a Lower Criminal Court (1979). The National Association of Defense Lawyers issued a study of municipal courts in 2009 that found not much change since *Hamlin*. "[T]he same phenomena occur on a national scale: massive misdemeanor caseloads, lack of counsel, and quick pleas, with little regard for evidence or process." Natapoff, *Misdemeanors*, 85 S. Cal. L. Rev. 1313 (2013), citing NACDL, *Minor Crimes, Massive Waste* (2009). In sum, municipal courts are "a world largely lacking in a scrutinized evidentiary basis for guilt, and therefore one in which the risk of wrongful conviction is high." *Id.*

Ohio's General Assembly requires an explanation of circumstances to mitigate against this danger. See *Cuyahoga Falls v. Bowers*, 9 Ohio St.3d 148, 150, 459 N.E.2d 532 (1984). Nevertheless, the City asks this Court to ignore this existing protection in order to ease its burden in obtaining convictions. That invitation should be declined.

II. This is not simply “trial error.”

The City repeatedly refers to the absence of an explanation of circumstances as simply “trial error.” *See* City’s Merit Brief at 9. But, misdemeanor convictions flowing from a no-contest plea require “an explanation of the circumstances from the affiant or complainant.” R.C. 2937.07. Only then may “the judge or magistrate [] make a finding of guilty or not guilty from the explanation of the circumstances of the offense.” *Id.*

A plea of no contest is simply an “admission of the truth of the facts alleged in the complaint.” *Id.* It is the prosecutor’s duty to put forth an explanation of circumstances upon which the trial court can rely in determining whether the facts alleged constitute proof of the offense charged. If the prosecutor fails to do so, there cannot be enough evidence for a trial court to make a guilt determination. Thus, the error is not one of procedure, admissibility, or discretion. It is one of sufficiency—sufficiency that was lacking in this case because of the prosecution’s failure.

The purpose of the explanation is to ensure that courts do not render findings of guilt in a purely “perfunctory” fashion. *Bowers* at 150; *City of Columbus v. Kiner*, 10th Dist. No. 11AP-21, 2011-Ohio-4479, ¶ 8. The City seeks to eliminate this protection against perfunctory guilt. It cautions that a ruling in Mr. Giordano’s favor would “bog down the trial courts even further, negatively affecting the administration of justice.” City’s Brief at 11. But, as demonstrated above, that perspective is precisely the problem that plagues municipal courts: “The misdemeanor trial is characterized by insufficient and frequently irresponsible preparation on the part of the defense, the prosecution, and the court. Everything is rush, rush.” Hellerstein, *The Importance of the Misdemeanor Case on Trial and Appeal*, 28 *The Legal Aid Brief Case* 151, 152 (1970).

The City seeks to absolve itself of a responsibility instituted by Ohio's General Assembly. Further, appellate courts have consistently deemed that obligation necessary to ensure reliable guilt determinations are rendered after a no-contest plea. Given the reduced procedural safeguards in municipal courts, this Court should decline the City's invitation to further reduce the reliability of misdemeanor convictions.

III. The City has the power to eliminate its concern.

The City speculates that in the decades since *Bowers* was decided, defendants have been “wait[ing] in silence, fingers crossed, to mislead the trial courts into the error of passing over the explanation of circumstances, hoping to get their get out of jail free card.” City's Merit Brief at 20. Setting aside the lack of evidence supporting this proposition, the City already has an immediate remedy to eliminate its concern: compliance with R.C. 2937.07.

It is the City's responsibility to offer sufficient evidence of guilt, and therefore this error can be entirely resolved by acting in accordance with the mandate of R.C. 2937.07.

IV. Misdemeanor prosecutions do not deserve lessened double jeopardy protections.

Both the City and Mr. Giordano agree that what happened at his plea hearing was error. The City asks that the error be characterized simply as a “deviation from a legal rule” and that it be allowed a “do-over”—essentially, a second chance at convicting Mr. Giordano. But, this was not a simple procedural mistake. Instead, this was the failure to the City to put forth evidence of guilt. Put simply, the nature of this error prohibits such the remedy the City seeks.

“The Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding.” *State v. Calhoun*, 18 Ohio St.3d 373, 376, 481 N.E.2d 624 (1985), quoting *Burks v. United States*, 437 U.S. 1, 11, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978). Because the explanation of

circumstances gives the trial court the basis upon which it may issue a finding of guilt, the absence of the explanation results in the absence of an evidentiary basis. It is axiomatic that the City has one opportunity to prove the defendant's guilt. If it fails the first time, it is barred from trying again. There is no justification for treating misdemeanor prosecutions differently. Dismissal is the remedy.

CONCLUSION

The explanation of circumstances serves to ensure the reliability of guilt determinations following no-contest pleas. And because the explanation of circumstances is the basis upon which guilt is determined, an absence of the explanation requires a dismissal under the Double Jeopardy Clause. This Court should affirm the decision below.

Respectfully Submitted,

/s/ Nikki Trautman Baszynski

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **AMICUS CURIAE OFFICE OF THE OHIO PUBLIC DEFENDER'S MEMORANDUM OF APPELLEE JOHN A. GIORDANO** was sent by regular U.S. mail, postage prepaid, to Michael E. Bloom, 5603 Mahoning Avenue, Warren, Ohio 44483; and Michael A. Partlow, 112 S. Water Street – Suite C, Kent, Ohio 44240, on this 19th day of April 2018.

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