

OPINIONS OF THE SUPREME COURT OF OHIO

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The State of Ohio, Appellee v. Harman, Appellant.

[Cite as State v. Harman (1993), Ohio St.3d .]

Prohibition -- Writ will not issue to prohibit trial court from rehearing voluntary manslaughter conviction reversed on appeal for denial of right to confront witnesses and remanded for a new trial, when.

(No. 92-1112 - - Submitted May 18, 1993 - -
Decided August 4, 1993.)

Appeal from the Court of Appeals for Mahoning County, No. 89 C.A. 105.

Appellant, Donald A. Harman, was convicted of voluntary manslaughter. He appealed to the Court of Appeals for Mahoning County. That court reversed the conviction and remanded the case for a new trial. Appellant then filed a "petition" for a writ of prohibition in the court of appeals under the same case number, attempting to prohibit the trial court from rehearing the case. He contended that the court of appeals reversed the conviction for insufficient evidence and that retrial is barred by the Double Jeopardy Clause of the Fifth Amendment.

The court of appeals held that its reversal was not based on insufficiency of the evidence and denied the writ. The cause is before this court upon an appeal as of right.

James A. Philomena, Mahoning County Prosecuting Attorney, and Kathi McNabb Welsh, Assistant Prosecuting Attorney, for appellee.

Stuart J. Banks, for appellant.

Per Curiam. On appeal the parties have filed memoranda supporting and opposing jurisdiction. Since this is an appeal as of right under Section 2(B)(2)(a)(i), Article IV, Ohio Constitution, such memoranda are unnecessary. We treat them as briefs on the merits.

Reviewing the decision of the court of appeals on appeal from the conviction, we find that the judge writing the "majority" opinion voted to reverse for denial of the right to confront witnesses and insufficiency of the evidence, one judge concurred only on the confrontation issue, and one judge

dissented from the majority opinion, but concurred in the concurring opinion. Therefore, appellant's conviction was reversed for denial of the right to confront witnesses and not for insufficiency of the evidence. Accordingly, the Double Jeopardy Clause is not implicated pursuant to *Burks v. United States* (1978), 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1, and the court of appeals correctly denied the writ.

The judgment of the court of appeals is affirmed.

Judgment affirmed.

Moyer, C.J., A.W. Sweeney, Douglas, Wright, Resnick, F.E. Sweeney and Pfeifer, JJ., concur.