IN THE SUPREME COURT OF OHIO

STATE OF OHIO

Plaintiff-Appellee,

-vs-

BUDDY MUTTER,

Defendant-Appellant,

CASE NO.: 2016-0441

On Appeal from the Scioto County Court of Appeals
Fourth Appellate District

C.A. Case No. 15-CA-3690

APPELLEE'S MERIT BRIEF

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Melvin Mutter Charges in Portsmouth Municipal Court

On October 20, 2014, the following charges were filed in the Portsmouth Municipal Court against Melvin Mutter:

- Case #1401577A-Aggravated Menacing: M1 in violation of R.C.§2903.21;
- Case#1401577B-Public Indecency: M4 in violation of R.C.§2907.09(A)(1);
- Case #1401576-Ethnic Intimidation: F5 in violation of R.C.§2927.12

On October 23, 2014, Case#1401599, a charge of Aggravated Menacing by Stalking, M1 in violation of R.C§2903.211(A)(1) was filed against Melvin Mutter in the Portsmouth Municipal Court.

On October 29, 2014, Melvin Mutter appeared in Portsmouth Municipal Court and entered a No Contest Plea on the Aggravated Menacing charge and was found Guilty. On the same date, Melvin Mutter pled No Contest, and was found Guilty of Menacing by Stalking. The Public Indecency charge was dismissed without prejudice. Most importantly, the same date, the Felony Ethnic Intimidation charge was dismissed without prejudice.

Buddy Mutter Charges in Portsmouth Municipal Court

On October 20, 2014, the following charges were filed in the Portsmouth Municipal Court against Buddy Mutter:

- Case #1401579-Aggravated Menacing: M1 in violation of R.C.§2903.21;
- Case #1401578-Ethnic Intimidation: F5 in violation of R.C.§2927.12

On October 23, 2014, Buddy Mutter appeared in Portsmouth Municipal Court and entered a No Contest Plea on the Aggravated Menacing charge and was found Guilty. The same date, the Felony Ethnic Intimidation charge was “amended”, or “reduced” to Menacing by Stalking, upon which a No Contest Plea was entered with a Guilty finding. There is no record of Portsmouth

Municipal Court conducting a hearing, evidence being presented, or making any finding that probable cause existed to believe that no felonies had been committed, but misdemeanors had been committed. No new Complaint was filed against Buddy Mutter.

Felony Ethnic Intimidation Indictments for Both Melvin and Buddy Mutter

The Ethnic Intimidation felony charges for both Melvin and Buddy Mutter were presented to the Scioto County Grand Jury on October 31, 2014, which returned Indictments against both Melvin and Buddy Mutter for Ethnic Intimidation, in violation of R.C.§2927.12(A), 2927.12(B) filed November 4, 2014.

In the Court of Common Pleas, both Defendants filed Motions to Dismiss. After a brief hearing allowing only the arguments of counsel and the consideration of briefs, the trial court filed a Judgment Entry February 20, 2015 sustaining the Motions to Dismiss of both Defendants and both Indictments were dismissed. The trial court did not conduct an evidentiary hearing and no evidence was properly submitted regarding the facts and circumstances of the alleged "reduction", or "amendment" of the felony Ethnic Intimidation charges against either Defendant in Portsmouth Municipal Court.

ARGUMENT

APPELLANT'S 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.

Appellants ignore The Portsmouth Municipal Court's lack of jurisdiction and failure to adhere to statutory authority and the Criminal Rules of Procedure

The Municipal Court's authority regarding the handling of felony charges is governed by Criminal Rule 5(B) and R.C.§1901.20.

Pursuant to Crim. R. 5(B), R.C. §1901.20, and §1901.34 (See Appendix), the Portsmouth Municipal Court lacked jurisdiction and did not follow the appropriate procedure in order to "reduce" the Felony of Ethnic Intimidation in violation of R.C. § 2927.12(A) and (B) to a charge of Aggravated Menacing and/or Aggravated Menacing by Stalking. The Municipal Court has no jurisdiction to decide felonies.

The Scioto County Prosecutor in no way disputes Appellants' assertion the municipal and county prosecutors constitute one entity-the State of Ohio. (Appellant's Merit Brief, p.6) The Supreme Court of Ohio has made this clear:

> Both the state and municipal corporations derive their authority from the same organic authority -- the Ohio Constitution. Ordinances and statutes enacted by the legislative bodies of the state and its municipalities are enforced through judicial tribunals created by the state. There is no dual sovereignty between the state and municipal governments. (*Waller v. Florida*, 397 U.S. 387 followed.) *State v. Best*, 42 Ohio St. 2d 530; 330 N.E.2d 421; 1975 Ohio LEXIS 528; 71 Ohio Op. 2d 51at Syllabus 1.

However, both the Scioto County Prosecutor and the Portsmouth City Solicitor are still limited by both their own statutory authority and the constraints imposed upon the Municipal Court's authority. Specifically, R.C.§1901.34 provides authority for the Portsmouth City Solicitor to prosecute cases brought before the Municipal Court. Notably, R.C§1901.34 does not extend the jurisdiction of the Municipal Court which is governed by R.C.§1901.20. Though the City Solicitor is authorized to perform the same duties as are required of the County Prosecutor as they apply to City Solicitor, that provision in no way expands the scope of authority beyond the jurisdiction of the Municipal Court and properly handling felony cases. In other words, the City Solicitor is only authorized to bind the State of Ohio by entering into proper plea agreements authorized pursuant to the procedures detailed in Criminal Rule 5(B) and R.C.§1901.20.

The Municipal Court may do three things at the conclusion of a preliminary hearing:

> (a) Find that there is probable cause to believe the crime alleged or another felony has been committed and that the defendant committed it, and bind the defendant over to the court of common pleas of the county or any other county in which venue appears.
> (b) Find that there is probable cause to believe that a misdemeanor was committed and that the defendant committed it, and retain the case for trial or order the defendant to appear for trial before an appropriate court.
> (c) Order the accused discharged. See Crim. R. 5(B)

Only upon conducting a preliminary hearing, finding probable cause to believe that a misdemeanor was committed instead of a felony, upon substantial credible evidence, can a Municipal Court then consider "reducing" a Felony to a misdemeanor. Even then, Crim. R. 5 requires a specific procedure by which to accomplish this. The Portsmouth Municipal Court did not comply with this procedure. Therefore, the Portsmouth Municipal Court lacked jurisdiction to accept a plea upon a misdemeanor and had no authority to dispose of the Ethnic Intimidation Felony in the way it did so for both these Defendants.

The proper procedure to accomplish the acceptance of a plea on an Aggravated Menacing and/or Aggravated Menacing by Stalking misdemeanor "reduced" from an Ethnic Intimidation, felony is as follows:

> (1) The court must determine from substantial credible evidence at the preliminary hearing that there is probable cause to believe that a felony had not been committed but that a misdemeanor was committed and that the defendant committed it.
>
> (2) The court must cause a complaint charging such misdemeanor offense to be filed against the defendant.
>
> (3) The court or the clerk must within seven days cause docket entries to be made and filed with the clerk together with the complaint and including "entry of reason for changes in the docket."
>
> (4) An order setting recognizance, if any, must be filed.
>
> (5) The said papers shall be transmitted to and filed with the "clerk of the court in which defendant is to appear." See Crim. R.5(B)(4)

In the matters sub judice, no preliminary hearings were held and no evidence was taken. There was never a finding of probable cause in either case, and no new Complaints were ever

prepared, or filed charging the misdemeanor upon which these Defendants pled no contest and were found guilty. Arguably, a new Complaint for Aggravated Menacing by Stalking was filed against Melvin Mutter. However, there was no hearing and no probable cause determination to justify the same.

Further, there is no indication of any "entry of reason for changes in docket" filed with the Municipal Court clerk. In fact, none of the procedures required by the Criminal Rules were followed. Clearly, Portsmouth Municipal Court lacked jurisdiction to take these pleas.

In *State v. Nelson (1977), 51 Ohio App.2d 31, 5 O.O.3d 158, 365 N.E.2d 1268* the 8th District Court of appeals did not uphold convictions on a misdemeanor offense even after a preliminary hearing was held and the Municipal Court found probable cause existed to charge the defendants with a misdemeanor instead because the court did not file an affidavit and cause a new complaint to be filed.

The 7th District in *State v. Padgett*, 99-LW-5773 (7th) applied the analysis conducted by the 8th District in *State v. Nelson*:

> In ruling that double jeopardy did not bar the defendants from being held for trial under the felony charge, the court of appeals determined that the municipal court had been without jurisdiction to hear the matter, in part because it had overstepped its jurisdiction in accepting a plea at the preliminary hearing. In so ruling the court discussed the appropriate role of the municipal court in a preliminary hearing to determine bindover. The court reiterated that the municipal court at a preliminary hearing has one of the three choices discussed earlier herein, but emphasized that the municipal court has no power or ability to determine guilt or innocence at a preliminary hearing. Quoting *Jones v. Wells* (1931), 123 Ohio St. 516, the Nelson court stated that, "[t]he sole purpose and effect of [the municipal court's] inquiry is to determine whether the accused shall be retained in custody or under bond, or whether he shall be released from custody or bond. By such hearing the accused is not placed in jeopardy..." *Nelson, supra*, at 36.
>
> In emphasizing the truly *preliminary* nature of the bindover hearing, the court then held that while a municipal court may find probable cause that a misdemeanor has been committed and may thus dismiss the felony charge, it must then cause a new complaint for a misdemeanor to issue before it has jurisdiction to do anything further on the matter. *State v. Padgett*, id.

To reiterate, in the cases at bar, there were no preliminary hearings, nor were there probable cause findings. Simply put, the Portsmouth Municipal Court did not comply with Crim. R. 5(B) and R.C.§1901.20 and jeopardy did not attach to bar prosecution for the Ethnic Intimidation charges against these Defendants. Accordingly, the Indictments for Ethnic Intimidation were proper against both Defendants as jeopardy never attached and the Court of Common Pleas did have jurisdiction to proceed. Furthermore, the trial court's finding that jeopardy attached and the Indictments were barred because of the "reduction" of the Ethnic Intimidation charges against these Defendants was error.

The Judgment entered by The Portsmouth Municipal Court amending Buddy Mutter's felony charge to a misdemeanor was Void and Jeopardy never attached.

"As the trial court exceeded its authority, its judgment of conviction is void and jeopardy has not attached. See, generally, *State v. Jordan, 104 Ohio St.3d 21, 2004 Ohio 6085, at P25, 817 N.E.2d 864* (noting that a sentence entered without statutory authority is void and that jeopardy does not attach to such a sentence)." *State v. Zilka,* 2007-Ohio-6206; 2007 Ohio App. LEXIS 5462

This court has held that if an imposed sentence is not authorized by law, it is void. *State v. Billiter,* 134 Ohio St.3d 103, 2012-Ohio-5144, 980 N.E.2d 960, ¶10. See also *State v. Rogers,* 8th Dist. Cuyahoga No. 98059, 2012-Ohio-4598 and *State v. Thomas,* 1st Dist. Hamilton Nos. C-100411, C-100412, 2011-Ohio-1331*; State v. Pippen,* 4th Dist. Scioto No. 14CA3595, 2014-Ohio-4454; 2014 Ohio App. LEXIS 4366

"The effect of determining that a judgment is void is well established. It is as though such proceedings had never occurred; the judgment is a mere nullity and the parties are in the same position as if there had been no judgment.'" *Billiter at ¶10,* quoting *State v. Bezak,* 114 Ohio St.3d 94, 2007-Ohio-3250, 868 N.E.2d 961, ¶12, quoting *Romito v. Maxwell,* 10 Ohio St.2d 266,

267-268, 227 N.E.2d 223 (1967). Regarding Buddy Mutter, the trial court failed to recognize this fact and relied upon a void judgment in dismissing the Indictments against Buddy Mutter.

The Defendants/Appellants lacked a reasonable belief that the purported negotiated pleas in the Municipal Court would preclude further prosecution upon the felony Ethnic Intimidation charge.

Given the fact the Portsmouth Municipal Court exceeded its jurisdiction and lacked the authority to proceed in the fashion it did to "reduce" the felony charges, the beliefs of both Melvin and Buddy Mutter were simply not reasonable. Indeed, "[a] defendant should be aware that a plea taken before a municipal judge with limited criminal jurisdiction might not dispose of the matter fully." *State v. Zima*, 102 Ohio St. 3d 61, 2004 Ohio 1807, at P14, 806 N.E.2d 542. . . . Therefore, a defendant may not simply rely on a representation by a city prosecutor that further charges will not be brought against her; rather, the defendant "must articulate the circumstances showing why her belief was reasonable in this case." Id. *State v. Sims*, 9th Dist. Case No. 22677, 2006-Ohio-2415

In the cases at bar, the trial court did not properly evaluate the facts. Had it done so, the proper determination would have been made that the judgment of Portsmouth Municipal Court reducing Buddy Mutter's felony to a misdemeanor was void and Melvin Mutter's plea to Menacing by Stalking and Aggravated Menacing did not attach jeopardy precluding prosecution of the Ethnic Intimidation charge upon its dismissal without prejudice. Further, the 4th District sustained the State's Second Assignment of Error: "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." *State v. Mutter*, 4th Dist. Scioto No. 15-CA-3690, 2016-Ohio-512

The 4th District's decision was based upon the fact Menacing by Stalking does not constitute a lesser included offense of Ethnic Intimidation and a conviction for that misdemeanor

cannot bar a subsequent prosecution for Ethnic Intimidation based on Double Jeopardy. *State v. Mutter*, ¶30. The State of Ohio posits this decision remains correct and further contends that jeopardy did not attach regarding Buddy Mutter due to the void judgment as argued supra. Nor did jeopardy attach regarding Melvin Mutter due to Municipal Court's lack of jurisdiction.

Second prosecutions are only barred when they require the relitigation of factual issues already resolved by negotiated pleas accepted by courts having jurisdiction and acting in compliance with both statute and the Criminal Rules of Procedure.

The Supreme Court of Ohio previously addressed the issue of successive prosecutions and the Double Jeopardy Clause in *State v. Zima*, 102 Ohio St.3d 61, 2004-Ohio-1807, 806 N.E.2d 542. In *Zima*, the Defendant entered a no-contest plea to a "driving under the influence" charge in a Municipal Court and was subsequently indicted for a felony Aggravated Vehicular Assault. This Court held in *Zima* that the "…principles of double jeopardy do not apply to bar successive prosecutions for the offense of driving under the influence in violation of R.C. 4511.19(A) (or a substantially equivalent municipal ordinance) and the offense of aggravated vehicular assault under R.C. 2903.08(A)(2)." *Zima*, ¶33.

Likewise, the Defendant in *State v. Workman*, 4th Dist. No. 14CA25, 2015-Ohio-4483 pled guilty to the charge of unauthorized use of a motor vehicle in violation of R.C. 2913.03(A) and was subsequently indicted for receiving stolen property, in violation of R.C. 2913.51(A). In *Workman*, the Fourth District pointed back to the Supreme Court of Ohio's prior pronouncements about the proper standards stating: "[t]o determine whether the Double Jeopardy Clause bars a second, or successive, prosecution, a court must apply the test set forth in *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932). *State v. Fairbanks*, 117 Ohio St.3d 543, 2008-Ohio-1470, 885 N.E.2d 888, ¶6 (explaining that *Blockburger* governs analysis when determining if Double Jeopardy Clause bars successive prosecution); *State v. Zima*, 102 Ohio St.3d 61, 2004-Ohio-1807, 806 N.E.2d 542, ¶¶18-20 and fn. 3 (stating that *Blockburger* supplies

appropriate test when considering if Double Jeopardy Clause bars successive prosecution); *State v. Tolbert*, 60 Ohio St.3d 89, 573 N.E.2d 617 (1991), paragraph one of the syllabus (applying *Blockburger* test in subsequent prosecution context.)

"The *Blockburger* test inquires whether each offense contains an element not contained in the other; if not, they are the same offense and double jeopardy bars additional punishment and successive prosecution." *See Zima*, Headnote 4.

A review of the offenses at issue shows Aggravated Menacing, Menacing by Stalking, and Ethnic Intimidation each have separate and distinctive elements:

> Menacing by Stalking: R.C.§2903.211(A)(1) -No person by engaging in a pattern of conduct shall knowingly cause another person to believe that the offender will cause physical harm to the other person or cause mental distress to the other person. In addition to any other basis for the other person's belief that the offender will cause physical harm to the other person or the other person's mental distress, the other person's belief or mental distress may be based on words or conduct of the offender that are directed at or identify a corporation, association, or other organization that employs the other person or to which the other person belongs.
>
> Aggravated Menacing: R.C.§ 2903.21 (A)(1)- No person shall knowingly cause another to believe that the offender will cause serious physical harm to the person or property of the other person, the other person's unborn, or a member of the other person's immediate family. In addition to any other basis for the other person's belief that the offender will cause serious physical harm to the person or property of the other person, the other person's unborn, or a member of the other person's immediate family, the other person's belief may be based on words or conduct of the offender that are directed at or identify a corporation, association, or other organization that employs the other person or to which the other person belongs.
>
> Ethnic Intimidation: R.C.§ 2927.12 (A)- No 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.

Additionally, Aggravated Menacing is a predicate offense of Ethnic Intimidation. See *State v. Buehner*, 110 Ohio St.3d 403, 2006-Ohio-4707 (2006). While Ethnic Intimidation necessarily includes the elements of the predicate offense, in this case Aggravated Menacing, Ethnic Intimidation requires proof of the additional element that the Defendant's actions were

motivated by race, color, religion, or national origin. The only conclusion under *Blockburger* is Ethnic Intimidation, and Aggravated Menacing, contain separate and distinct elements and are separate offenses for purposes of successive prosecutions under Double Jeopardy. Furthermore, by statute, Menacing by Stalking is not a predicate offense of Ethnic Intimidation. See R.C.§2927.12(A) and 2903.211. See also *State v. Mutter*, at ¶28. Thus prosecutions on each of the aforementioned charges were permissible.

The proper constitutional analysis and result was reached by the Fourth District in their decision and Double Jeopardy did not preclude the prosecution of Appellants upon the Ethnic Intimidation charge. That decision rendered the State of Ohio's remaining arguments moot. (See App. R. 12(A)(1)(c); see also *Mutter,*at ¶29) Those arguments remain applicable to the propositions of law submitted by Appellants. Based upon the foregoing, the trial court's dismissal of the Indictment was error, the Fourth District's reversal and remand was proper, and the First Proposition of Law should be denied as applied to the facts in these matters and refined as suggested supra.

SECOND PROPOSITION OF LAW

An appellate court may not shift the burden established by App. R. 9 and App. R. 12(A) in Ohio's Rules of Appellate Procedure. Fourteenth Amendment, United States Constitution; Section 10, Article I, Ohio Constitution.

The initial burden of proof in the trial court rested with the Defendant/Appellants on their Motions to Dismiss.

Appellants allege the Appellate Court impermissibly shifted the burden to provide the record of the trial court's proceedings to Appellants. However, Appellants ignore the fact the burden of proof on the Motions to Dismiss which were granted by the trial court rested with the Appellants initially.

In the trial court, the Appellants provided nothing other than their filed motions to the trial court and the trial court did not conduct an evidentiary hearing in order to determine the Motions to Dismiss. To be fair however, the record in the Portsmouth Municipal Court regarding the proceedings there is minimal at best.

In the matters sub judice, no preliminary hearing was held and no evidence was taken at the Portsmouth Municipal Court. There was never a finding of probable cause and no new Complaint was ever prepared, or filed charging the misdemeanor upon which these Defendants pled no contest and were found guilty. Arguably, a new Complaint for Aggravated Menacing by Stalking was filed against Melvin Mutter. However, there was no hearing and no probable cause determination to justify the same.

Further, there is no indication of any "entry of reason for changes in docket" filed with the Municipal Court clerk. In fact, none of the procedures required by the Criminal Rules were followed. Portsmouth Municipal Court lacked jurisdiction to take these pleas purportedly reducing a felony charge.

The trial court erred to the prejudice of the State of Ohio by not requiring an evidentiary hearing and holding the Defendants to their burden of proof

The State of Ohio submits that any determination regarding the intent of the parties requires an evidentiary hearing. Generally, the moving party has the burden of going forward with evidence supporting his motion. *Xenia v. Wallace (1988), 37 Ohio St.3d 217, 220*, cited by *State v. Pocius*, 1992 Ohio App. LEXIS 6204 (11th Dist. 1992) In the matters sub judice, the Defendant/Appellants argued to the trial court that a plea agreement had been entered into for pleas on misdemeanors and the felony charge against each Defendant would be dismissed and not prosecuted. The trial court essentially agreed and dismissed the Indictments without conducting an evidentiary hearing relying solely upon arguments of counsel and its own review of

unspecified records of Portsmouth Municipal Court not subject to cross-examination, and not subject to proper judicial procedure pursuant to Crim. R.12(F) (See Appendix).

The Defendants clearly had the burden of proof, which was not met. Appellant submits that considering written memoranda and unsworn statements of counsel are not sufficient for the trial court to prejudice the State of Ohio by making factual findings that led the trial court to dismiss Felony Indictments particularly in light of the trial court's purported finding regarding the intent of the State of Ohio and the Defendants in entering into a plea agreement.

The State's right to Due Process, basic notice, and opportunity to be heard were denied by the trial court's failure to conduct a proper hearing and the ultimate determination of these matters was directly impacted to the State's detriment.

The United States Supreme Court has held that an evidentiary hearing is necessary for a determination whether there has been compliance with a plea agreement. *Santobello v. New York (*1971), 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427. See also *State v. Curry*, 49 OA2d 180, 359 NE2d 1379, (9th Dist. 1979).

> We submit that it is the duty of the trial court as a trier of fact, not the prosecutor's office or the police department, to determine whether there has been compliance with a plea bargaining agreement. This can only come about at a hearing for that purpose. The prosecutor's assertions without further evidence are insufficient to set aside an agreement. The proceeding should be evidentiary in nature and the defendant should be afforded the opportunity to cross-examine and call witnesses and have all other due process requirements. *Santobello v. New York (*1971), 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427. See also *State v. Curry*, 49 OA2d 180, 359 NE2d 1379, (9th Dist. 1979)

The reasoning in *Santobello* and *Curry* stands despite the fact this matter involves an instance whereby the Defendants are in essence alleging that the State of Ohio has not fulfilled its part of the plea agreement. The same procedure should be required and the State of Ohio should be afforded the same rights as the accused. The trial court erred to the prejudice of the State of Ohio by not holding Defendants to a burden of proof, not requiring a preponderance of the

evidence, and not conducting an evidentiary hearing. The assertions of the Defendants without further evidence are insufficient to establish there was an agreement.

The Fourth District in no way shifted the burden, but decided the appeal by the State of Ohio on Assignment of Error 2 rendering the State's other assignments moot. *Mutter,* at ¶30. The Fourth District made no finding that the record before it was deficient. Rather, the appellate court found "…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." *Mutter,* at ¶2 The appellate court went on to find "[t]he trial court erred in dismissing the indictment against the Mutters based on the record before it." *Mutter,* at ¶3

In fact, the appellate court analyzed what record does exist and made specific findings of factual mistakes in the trial court's findings:

> 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. *Mutter*, at ¶23

Finally, the appellate court made the following determination:

> 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. *Mutter,* at ¶29

The State contends this finding in no way shifts the appellate burden back to the Mutters. Rather, this finding clarifies the Defendants did not meet their burden in the trial court.

There was no burden shifting by the appellate court. The Defendants failed to prove the reasonableness of their expectation that a negotiated plea in the Municipal Court would preclude prosecution on the Felony Ethnic Intimidation charge.

The appellate court reversed the trial court's dismissal on other grounds and did not consider the issues of the existence of a negotiated plea, or the reasonableness of Defendants' expectations pertaining to their pleas. However, in reviewing the Second Proposition of Law offered herein, a review of these issues is necessary to understand and explain the entire framework of both these cases.

> The court in *Zima* focused on "the reasonableness of the defendant's expectation" in cases where "all of the facts underlying the greater offense [are] known at the time of the plea.'" Id. The court indicated 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." Id. Nevertheless, this does not mean there can never be circumstances where a plea negotiation in a municipal court cannot be binding upon a court of common pleas. . . .
>
> The facts of each case must be evaluated to determine whether a defendant has a reasonable basis to believe that a plea agreement entered in a municipal court would include the dismissal of charges brought in a court of common pleas. We find that where a defendant articulates circumstances showing the reasonableness of his belief that no further charges would be pursued after his negotiated plea was entered, the administration of justice requires the dismissal of all charges related to the incident. *State v. McDonough*, 8th Dist. No. 84766, 2005-Ohio-1315, at ¶9-10.

This court and several appellate courts across Ohio have considered, on a case-by-case basis, whether negotiated plea agreements existed which would preclude subsequent prosecution based upon Double Jeopardy. In *State v. Carpenter*, 68 Ohio St.3d 59, 1993-Ohio-226, 623 NE2d 66, this court held a guilty plea to a lesser offense when the victim later died of injuries sustained in the crime precluded an indictment for murder because the prosecution had not expressly reserved the right to file additional charges on the record at the time of the plea.

In *State v. Harrison*, 122 Ohio St.3d 512, 2009-Ohio-3547, ¶ 52-60, 912 N.E.2d 1106, this court held the defendant expressed a reasonable expectation that the guilty plea would preclude further prosecution because "the defendant signed a negotiated plea agreement on the same day the bill of information was filed, agreeing to plead guilty to all counts set forth in the

bill of information, and because both the prosecutor and the court that accepted the guilty plea had jurisdiction over all of the actual and potential charges." *State v. Bridges,* 10th Dist. Franklin, No. 14AP-602, 2015-Ohio-4480; 2015 Ohio App. LEXIS 4370; 2015 WL 6522860 at ¶14

As previously referenced, in *State v. Zima*, id at ¶14, this court held that the defendant failed to show why her belief that a guilty plea precluded further prosecution was reasonable when the defendant had already been indicted on felony charges and neither the municipal court, nor the city prosecutor had authority to dismiss said pending charges.

In *Cleveland v. Evans,* 8th Dist. No. 100721, 2014-Ohio-4567, the 8th District appellate court held the defendant's belief his guilty plea would dispose of all charges was unreasonable where he had pled no contest to driving under a suspended license, but the plea in no way addressed OVI charges and a common pleas court case number had been assigned for OVI charges and grand jury proceedings were pending.

In *State v. Sims,* id at ¶24, the 9th District appellate court held the defendant's belief that a plea to three misdemeanor charges precluded subsequent prosecution on felony charges was not reasonable in part because "a municipal court does not have jurisdiction over felony offenses, see R.C.§1901.20(B), and a city prosecutor does not have the authority to handle the final disposition of the felony cases."

In *State v. Church,* 10th Dist. Franklin No. 12AP-34, 2012-Ohio-5663, the 10th District appellate court found the municipal court dismissed a possession of marijuana charge as part of a negotiated plea agreement when the trial court stated on the record "the offer is to allow you to plead to the jaywalking violation and dismiss the drug abuse. . . .Your guilty plea is accepted to the jaywalking violation and the other matter is dismissed as part of the plea agreement." *Church*, at ¶15.

Subsequent to *State v. Church*, the 10th District found in *State v. Bridges,* id at ¶20,

"Appellant has failed to articulate circumstances demonstrating why his asserted belief that his guilty plea would prevent further prosecution was reasonable. Therefore, we conclude that the trial court did not err by denying appellant's motion to dismiss, albeit for a different reason than the one articulated by the trial court." The 10th District found several important distinctions between the facts in *Church,* and the facts in *Bridges*:

> In *Church,* nearly six weeks passed between the guilty plea and the subsequent indictment; whereas, in this case, the felony indictment was issued on December 20, 2012, only one day after appellant entered his guilty plea in the municipal court proceeding. Moreover, the *Church* decision does not suggest that there was any discussion of possible felony charges at the municipal court plea hearing. By contrast, in this case, the statements by the municipal court prosecutor and judge indicated that felony proceedings were under consideration and, in fact, that the case was "on track" to lead to a felony indictment. As explained above, these comments signaled that felony prosecution was possible and undermine appellant's claim that he believed his plea would preclude further prosecution. *State v. Bridges*, at ¶19

Appellee contends the Mutter cases are both similar to the fact patterns presented in *Zima, Evans, Sims,* and *Bridges*. First, as argued supra, the Appellants failed to meet any burden of proof and the trial court failed to hold an evidentiary hearing. Second, the Municipal Court and City Solicitor both lacked authority and did not adhere to the appropriate procedures to effectuate the disposition of the felony charges. Third, the felony charge against Melvin Mutter was dismissed without prejudice, and the felony charge against Buddy Mutter, amended to Menacing by Stalking, was a void judgment. Finally, the Municipal Court record, such as it is, reflects no indication there was any agreement on the part of the State of Ohio to preclude prosecution of the Ethnic Intimidation charges. The Mutters pled on the predicate offense of Aggravated Menacing, and as was stated supra, Menacing by Stalking is not a lesser included, or predicate offense and a conviction on the same cannot bar prosecution for Ethnic Intimidation based upon Double Jeopardy. Further, both cases were under consideration by the Scioto County Grand Jury and presented a mere two weeks from the dates of arrest, eight days after Buddy Mutter entered a No

Contest plea to an "amended" Ethnic Intimidation charge of Menacing by Stalking, and only two days after Melvin Mutter pled No Contest on the improperly filed Menacing by Stalking Complaint.

Appellee contends there is no indication that the appellate court improperly shifted the burden in the appeal to the Defendants/Appellants below. Furthermore, Appellants herein offer no suggestion as to what part of the record that exists was not provided by the State below, or in what way the appellate court shifted the burden of showing error.

CONCLUSION

WHEREFORE, based upon the foregoing, the State of Ohio respectfully requests this Court affirm the 4th District Court of Appeals decision in these matters, find the Propositions of Law inapplicable to the facts in these cases, and uphold the appellate court's reversal and remand to the trial court for trial on the Indictments.

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CERTIFICATE OF SERVICE

A copy of the foregoing was served upon Peter Galyardt, counsel for Appellants, 250 E. Broad St., Suite 1400, Columbus, Ohio 43215, and Amicus Curiae Michael Walton, Asst. Prosecutor Franklin County, Criminal Division-Appellate Unit, 373 S. High St., 13th Floor, Columbus, Ohio 43215 by ordinary mail, this 26th day of August, 2016.

By: _____

Jay S. Willis, #00664884
Assistant Prosecuting Attorney

IN THE SUPREME COURT OF OHIO

STATE OF OHIO	**CASE NO.: 2016-0441**
Plaintiff-Appellee,	**On Appeal from the Scioto County Court of Appeals** **Fourth Appellate District**
-vs-	**C.A. Case No. 15-CA-3690**
BUDDY MUTTER,	
Defendant-Appellant,	

APPENDIX

Ohio Statutes
Title 19. COURTS - MUNICIPAL - MAYOR'S - COUNTY
Chapter 1901. MUNICIPAL COURT
Current with legislation effective through 9/1/2016
§ 1901.20. Criminal and traffic jurisdiction
(A)(1) The municipal court has jurisdiction to hear misdemeanor cases committed within its territory and has jurisdiction over the violation of any ordinance of any municipal corporation within its territory, unless the violation is a civil violation based upon evidence recorded by a traffic law photo-monitoring device and issued pursuant to division (B)(3) of section 4511.093 of the Revised Code or the violation is required to be handled by a parking violations bureau or joint parking violations bureau pursuant to Chapter 4521. of the Revised Code . However, the municipal court has jurisdiction over the violation of a vehicle parking or standing resolution or regulation if a local authority, as defined in division (D) of section 4521.01 of the Revised Code, has specified that it is not to be considered a criminal offense, if the violation is committed within the limits of the court's territory, and if the violation is not required to be handled by a parking violations bureau or joint parking violations bureau pursuant to Chapter 4521. of the Revised Code.
The municipal court, if it has a housing or environmental division, has jurisdiction over any criminal action over which the housing or environmental division is given jurisdiction by section 1901.181 of the Revised Code, provided that, except as specified in division (B) of that section, no judge of the court other than the judge of the division shall hear or determine any action over which the division has jurisdiction. In all such prosecutions and cases, the court shall proceed to a final determination of the prosecution or case.

(2) A judge of a municipal court does not have the authority to dismiss a criminal complaint, charge, information, or indictment solely at the request of the complaining witness and over the objection of the prosecuting attorney, village solicitor, city director of law, or other chief legal officer who is responsible for the prosecution of the case.

(B) The municipal court has jurisdiction to hear felony cases committed within its territory. In all felony cases, the court may conduct preliminary hearings and other necessary hearings prior to the indictment of the defendant or prior to the court's finding that there is probable and reasonable cause to hold or recognize the defendant to appear before a court of common pleas and may discharge, recognize, or commit the defendant.

(C)(1) A municipal court has jurisdiction over an appeal from a judgment or default judgment entered pursuant to Chapter 4521. of the Revised Code, as authorized by division (D) of section 4521.08 of the Revised Code. The appeal shall be placed on the regular docket of the court and shall be determined by a judge of the court.

(2) A municipal court has jurisdiction over an appeal of a written decision rendered by a hearing officer under section 4511.099 of the Revised Code if the hearing officer that rendered the decision was appointed by a local authority within the jurisdiction of the court.

Cite as R.C. § 1901.20
History. Amended by 130th General Assembly File No. TBD, SB 342, §1, eff. 3/23/2015.
Effective Date: 03-17-1998

Ohio Statutes
Title 19. COURTS - MUNICIPAL - MAYOR'S - COUNTY
Chapter 1901. MUNICIPAL COURT
Current with legislation signed by the Governor as of 5/12/2015
§ 1901.34. Criminal prosecutions - compensation of prosecuting officers
(A) Except as provided in divisions (B) and (D) of this section, the village solicitor, city director of law, or similar chief legal officer for each municipal corporation within the territory of a municipal court shall prosecute all cases brought before the municipal court for criminal offenses occurring within the municipal corporation for which that person is the solicitor, director of law, or similar chief legal officer. Except as provided in division (B) of this section, the village solicitor, city director of law, or similar chief legal officer of the municipal corporation in which a municipal court is located shall prosecute all criminal cases brought before the court arising in the unincorporated areas within the territory of the municipal court.

(B) The Auglaize county, Brown county, Clermont county, Hocking county, Holmes county, Jackson county, Morrow county, Ottawa county, and Portage county prosecuting attorneys and, effective January 1, 2011, the Putnam county prosecuting attorney shall prosecute in municipal court all violations of state law arising in their respective counties. The Carroll county, Crawford county, Hamilton county, Madison county, and Wayne county prosecuting attorneys and beginning January 1, 2008, the Erie county prosecuting attorney shall prosecute all violations of state law arising within the unincorporated areas of their respective counties. The Columbiana county prosecuting attorney shall prosecute in the Columbiana county municipal court all violations of state law arising in the county, except for violations arising in the municipal corporation of East Liverpool, Liverpool township, or St. Clair township. The Darke county prosecuting attorney shall prosecute in the Darke county municipal court all violations of state law arising in the county, except for violations of state law arising in the municipal corporation of Greenville and violations of state law arising in the village of Versailles. The Greene county board of county commissioners may provide for the prosecution of all violations of state law arising within the territorial jurisdiction of any municipal court located in Greene county. The Montgomery county prosecuting attorney shall prosecute in the Montgomery county municipal court all felony, misdemeanor, and traffic violations arising in the unincorporated townships of Jefferson, Jackson, Perry, and Clay and all felony violations of state law and all violations involving a state or county agency arising within the jurisdiction of the court. All other violations arising in the territory of the Montgomery county municipal court shall be prosecuted by the village solicitor, city director of law, or similar chief legal officer for each municipal corporation within the territory of the Montgomery county municipal court.
The prosecuting attorney of any county given the duty of prosecuting in municipal court violations of state law shall receive no additional compensation for assuming these additional duties, except that the prosecuting attorney of Hamilton, Portage, and Wayne counties shall receive compensation at the rate of four thousand eight hundred dollars per year, and the prosecuting attorney of Auglaize county shall receive compensation at the rate of one thousand eight hundred dollars per year, each payable from the county treasury of the respective counties in semimonthly installments.

(C) The village solicitor, city director of law, or similar chief legal officer shall perform the same duties, insofar as they are applicable to the village solicitor, city director of law, or similar chief legal officer, as are required of the prosecuting attorney of the county. The village solicitor, city director of law, similar chief legal officer or any assistants who may be appointed shall receive for such services additional compensation to be paid from the treasury of the county as the board of county commissioners prescribes.

(D) The prosecuting attorney of any county, other than Auglaize, Brown, Clermont, Hocking, Holmes, Jackson, Morrow, Ottawa, or Portage county or, effective January 1, 2011, Putnam county, may enter into an agreement with any municipal corporation in the county in which the prosecuting attorney serves pursuant to which the prosecuting attorney prosecutes all criminal cases brought before the municipal court that has territorial jurisdiction over that municipal corporation for criminal offenses occurring within the municipal corporation. The prosecuting attorney of Auglaize, Brown, Clermont, Hocking, Holmes, Jackson, Morrow, Ottawa, or Portage county or, effective January 1, 2011, the prosecuting attorney of Putnam county may enter into an agreement with any municipal corporation in the county in which the prosecuting attorney serves pursuant to which the respective prosecuting attorney prosecutes all cases brought before the Auglaize county, Brown county, Clermont county, Hocking county, Holmes county, Jackson county, Morrow county, Ottawa county, Portage county, or Putnam county municipal court for violations of the ordinances of the municipal corporation or for criminal offenses other than violations of state law occurring within the municipal corporation. For prosecuting these cases, the prosecuting attorney and the municipal corporation may agree upon a fee to be paid by the municipal corporation, which fee shall be paid into the county treasury, to be used to cover expenses of the office of the prosecuting attorney.

Cite as R.C. § 1901.34

History. Amended by 128th General Assembly File No.52, HB 338, §1, eff. 1/1/2011.
Amended by 128th General Assembly File No.37, HB 238, §1, eff. 9/8/2010.
Effective Date: 12-18-2002; 06-17-2004; 11-15-2005; 2006 HB336 01-01-2007; 2006 SB 171 01-02-2007; 01-18-2007; 2007 HB119 09-29-2007

Ohio Statutes
Title 29. CRIMES - PROCEDURE
Chapter 2903. HOMICIDE AND ASSAULT
Current with legislation effective through 9/1/2016
§ 2903.21. Aggravated menacing

(A) No person shall knowingly cause another to believe that the offender will cause serious physical harm to the person or property of the other person, the other person's unborn, or a member of the other person's immediate family. In addition to any other basis for the other person's belief that the offender will cause serious physical harm to the person or property of the other person, the other person's unborn, or a member of the other person's immediate family, the other person's belief may be based on words or conduct of the offender that are directed at or identify a corporation, association, or other organization that employs the other person or to which the other person belongs.

(B) Whoever violates this section is guilty of aggravated menacing. Except as otherwise provided in this division, aggravated menacing is a misdemeanor of the first degree. If the victim of the offense is an officer or employee of a public children services agency or a private child placing agency and the offense relates to the officer's or employee's performance or anticipated performance of official responsibilities or duties, aggravated menacing is a felony of the fifth degree or, if the offender previously has been convicted of or pleaded guilty to an offense of violence, the victim of that prior offense was an officer or employee of a public children services agency or private child placing agency, and that prior offense related to the officer's or employee's performance or anticipated performance of official responsibilities or duties, a felony of the fourth degree.

(C) As used in this section, "organization" includes an entity that is a governmental employer.

Cite as R.C. § 2903.21
History. Amended by 130th General Assembly File No. TBD, HB 129, §1, eff. 9/17/2014.
Effective Date: 04-10-2001

Ohio Statutes
Title 29. CRIMES - PROCEDURE
Chapter 2903. HOMICIDE AND ASSAULT
Current with legislation effective through 9/1/2016

§ 2903.211. *[Effective Until 8/16/2016]* Menacing by stalking

(A)(1) No person by engaging in a pattern of conduct shall knowingly cause another person to believe that the offender will cause physical harm to the other person or cause mental distress to the other person. In addition to any other basis for the other person's belief that the offender will cause physical harm to the other person or the other person's mental distress, the other person's belief or mental distress may be based on words or conduct of the offender that are directed at or identify a corporation, association, or other organization that employs the other person or to which the other person belongs.

(2) No person, through the use of any electronic method of remotely transferring information, including, but not limited to, any computer, computer network, computer program, or computer system, shall post a message with purpose to urge or incite another to commit a violation of division (A)(1) of this section.

(3) No person, with a sexual motivation, shall violate division (A)(1) or (2) of this section.

(B) Whoever violates this section is guilty of menacing by stalking.

(1) Except as otherwise provided in divisions (B)(2) and (3) of this section, menacing by stalking is a misdemeanor of the first degree.

(2) Menacing by stalking is a felony of the fourth degree if any of the following applies:

(a) The offender previously has been convicted of or pleaded guilty to a violation of this section or a violation of section 2911.211 of the Revised Code.

(b) In committing the offense under division (A)(1), (2), or (3) of this section, the offender made a threat of physical harm to or against the victim, or as a result of an offense committed under division (A)(2) or (3) of this section, a third person induced by the offender's posted message made a threat of physical harm to or against the victim.

(c) In committing the offense under division (A)(1), (2), or (3) of this section, the offender trespassed on the land or premises where the victim lives, is employed, or attends school, or as a result of an offense committed under division (A)(2) or (3) of this section, a third person induced by the offender's posted message trespassed on the land or premises where the victim lives, is employed, or attends school.

(d) The victim of the offense is a minor.

(e) The offender has a history of violence toward the victim or any other person or a history of other violent acts toward the victim or any other person.

(f) While committing the offense under division (A)(1) of this section or a violation of division (A)(3) of this section based on conduct in violation of division (A)(1) of this section, the offender had a deadly weapon on or about the offender's person or under the offender's

control. Division (B)(2)(f) of this section does not apply in determining the penalty for a violation of division (A)(2) of this section or a violation of division (A)(3) of this section based on conduct in violation of division (A)(2) of this section.

(g) At the time of the commission of the offense, the offender was the subject of a protection order issued under section 2903.213 or 2903.214 of the Revised Code, regardless of whether the person to be protected under the order is the victim of the offense or another person.

(h) In committing the offense under division (A)(1), (2), or (3) of this section, the offender caused serious physical harm to the premises at which the victim resides, to the real property on which that premises is located, or to any personal property located on that premises, or, as a result of an offense committed under division (A)(2) of this section or an offense committed under division (A)(3) of this section based on a violation of division (A)(2) of this section, a third person induced by the offender's posted message caused serious physical harm to that premises, that real property, or any personal property on that premises.

(i) Prior to committing the offense, the offender had been determined to represent a substantial risk of physical harm to others as manifested by evidence of then-recent homicidal or other violent behavior, evidence of then-recent threats that placed another in reasonable fear of violent behavior and serious physical harm, or other evidence of then-present dangerousness.

(3) If the victim of the offense is an officer or employee of a public children services agency or a private child placing agency and the offense relates to the officer's or employee's performance or anticipated performance of official responsibilities or duties, menacing by stalking is either a felony of the fifth degree or, if the offender previously has been convicted of or pleaded guilty to an offense of violence, the victim of that prior offense was an officer or employee of a public children services agency or private child placing agency, and that prior offense related to the officer's or employee's performance or anticipated performance of official responsibilities or duties, a felony of the fourth degree.

(C) Section 2919.271 of the Revised Code applies in relation to a defendant charged with a violation of this section.

(D) As used in this section:

(1) "Pattern of conduct" means two or more actions or incidents closely related in time, whether or not there has been a prior conviction based on any of those actions or incidents, or two or more actions or incidents closely related in time, whether or not there has been a prior conviction based on any of those actions or incidents, directed at one or more persons employed by or belonging to the same corporation, association, or other organization. Actions or incidents that prevent, obstruct, or delay the performance by a public official, firefighter, rescuer, emergency medical services person, or emergency facility person of any authorized act within the public official's, firefighter's, rescuer's, emergency medical services person's, or emergency facility person's official capacity, or the posting of messages or receipt of information or data through the use of an electronic method of remotely transferring information, including, but not limited to, a computer, computer network, computer program, computer system, or telecommunications device, may constitute a "pattern of conduct."

(2) "Mental distress" means any of the following:

(a) Any mental illness or condition that involves some temporary substantial incapacity;
(b) Any mental illness or condition that would normally require psychiatric treatment, psychological treatment, or other mental health services, whether or not any person requested or received psychiatric treatment, psychological treatment, or other mental health services.

(3) "Emergency medical services person" is the singular of "emergency medical services personnel" as defined in section 2133.21 of the Revised Code.

(4) "Emergency facility person" is the singular of "emergency facility personnel" as defined in section 2909.04 of the Revised Code.

(5) "Public official" has the same meaning as in section 2921.01 of the Revised Code.

(6) "Computer," "computer network," "computer program," "computer system," and "telecommunications device" have the same meanings as in section 2913.01 of the Revised Code.

(7) "Post a message" means transferring, sending, posting, publishing, disseminating, or otherwise communicating, or attempting to transfer, send, post, publish, disseminate, or otherwise communicate, any message or information, whether truthful or untruthful, about an individual, and whether done under one's own name, under the name of another, or while impersonating another.

(8) "Third person" means, in relation to conduct as described in division (A)(2) of this section, an individual who is neither the offender nor the victim of the conduct.

(9) "Sexual motivation" has the same meaning as in section 2971.01 of the Revised Code.

(10) "Organization" includes an entity that is a governmental employer.

(E) The state does not need to prove in a prosecution under this section that a person requested or received psychiatric treatment, psychological treatment, or other mental health services in order to show that the person was caused mental distress as described in division (D)(2)(b) of this section.

(F)(1) This section does not apply to a person solely because the person provided access or connection to or from an electronic method of remotely transferring information not under that person's control, including having provided capabilities that are incidental to providing access or connection to or from the electronic method of remotely transferring the information, and that do not include the creation of the content of the material that is the subject of the access or connection. In addition, any person providing access or connection to or from an electronic method of remotely transferring information not under that person's control shall not be liable for any action voluntarily taken in good faith to block the receipt or transmission through its service of any information that it believes is, or will be sent, in violation of this section.

(2) Division (F)(1) of this section does not create an affirmative duty for any person providing access or connection to or from an electronic method of remotely transferring information not under that person's control to block the receipt or transmission through its service of any information that it believes is, or will be sent, in violation of this section except as otherwise provided by law.

(3) Division (F)(1) of this section does not apply to a person who conspires with a person actively involved in the creation or knowing distribution of material in violation of this section or who knowingly advertises the availability of material of that nature.

Cite as R.C. § 2903.211

History. Amended by 130th General Assembly File No. TBD, HB 129, §1, eff. 9/17/2014.
Effective Date: 08-29-2003; 2007 SB10 01-01-2008

Note: *This section is set out twice. See also § 2903.211 , as amended by 131st General Assembly File No. TBD, HB 151, §1, eff. 8/16/2016.*

Ohio Statutes
Title 29. CRIMES - PROCEDURE
Chapter 2927. MISCELLANEOUS OFFENSES
Current with legislation effective through 9/1/2016

§ 2927.12. Ethnic intimidation

(A) No 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.

(B) Whoever violates this section is guilty of ethnic intimidation. Ethnic intimidation is an offense of the next higher degree than the offense the commission of which is a necessary element of ethnic intimidation.

Cite as R.C. § 2927.12
History. Effective Date: 03-19-1987

Ohio Rules
RULES OF CRIMINAL PROCEDURE
As amended through April 14, 2015

Criminal Rule 5. Initial Appearance, Preliminary Hearing

(A) Procedure upon initial appearance. When a defendant first appears before a judge or magistrate, the judge or magistrate shall permit the accused or the accused's counsel to read the complaint or a copy thereof, and shall inform the defendant:

(1) Of the nature of the charge against the defendant;

(2) That the defendant has a right to counsel and the right to a reasonable continuance in the proceedings to secure counsel, and, pursuant to Crim.R. 44, the right to have counsel assigned without cost if the defendant is unable to employ counsel;

(3) That the defendant need make no statement and any statement made may be used against the defendant;

(4) Of the right to a preliminary hearing in a felony case, when the defendant's initial appearance is not pursuant to indictment;

(5) Of the right, where appropriate, to jury trial and the necessity to make demand therefor in petty offense cases.
In addition, if the defendant has not been admitted to bail for a bailable offense, the judge or magistrate shall admit the defendant to bail as provided in these rules.
In felony cases the defendant shall not be called upon to plead either at the initial appearance or at a preliminary hearing.
In misdemeanor cases the defendant may be called upon to plead at the initial appearance. Where the defendant enters a plea the procedure established by Crim.R. 10 and Crim.R. 11 applies.

(B) Preliminary hearing in felony cases; procedure.

(1) In felony cases a defendant is entitled to a preliminary hearing unless waived in writing. If the defendant waives preliminary hearing, the judge or magistrate shall forthwith order the defendant bound over to the court of common pleas. Except upon good cause shown, any misdemeanor, other than a minor misdemeanor, arising from the same act or transaction involving a felony shall be bound over or transferred with the felony case. If the defendant does not waive the preliminary hearing, the judge or magistrate shall schedule a preliminary hearing within a reasonable time, but in any event no later than ten consecutive days following arrest or service of summons if the defendant is in custody and not later than fifteen consecutive days following arrest or service of summons if the defendant is not in custody. The preliminary hearing shall not be held, however, if the defendant is indicted. With the consent of the defendant and upon a showing of good cause, taking into account the public interest in the prompt disposition of criminal cases, time limits specified in this division may be extended. In the absence of such consent by the defendant, time limits may be extended only as required by law, or upon a showing that extraordinary circumstances exist and that delay is indispensable to the interests of justice.

(2) At the preliminary hearing the prosecuting attorney may state orally the case for the state, and shall then proceed to examine witnesses and introduce exhibits for the state. The defendant and the judge or magistrate have full right of cross-examination, and the defendant has the right of inspection of exhibits prior to their introduction. The hearing shall be conducted under the rules of evidence prevailing in criminal trials generally.

(3) At the conclusion of the presentation of the state's case, defendant may move for discharge for failure of proof, and may offer evidence on the defendant's own behalf. If the defendant is not represented by counsel, the court shall advise the defendant, prior to the offering of evidence on behalf of the defendant:

(a) That any such evidence, if unfavorable to the defendant in any particular, may be used against the defendant at later trial.

(b) That the defendant may make a statement, not under oath, regarding the charge, for the purpose of explaining the facts in evidence.

(c) That the defendant may refuse to make any statement, and such refusal may not be used against the defendant at trial.

(d) That any statement the defendant makes may be used against the defendant at trial.

(4) Upon conclusion of all the evidence and the statement, if any, of the accused, the court shall do one of the following:

(a) Find that there is probable cause to believe the crime alleged or another felony has been committed and that the defendant committed it, and bind the defendant over to the court of common pleas of the county or any other county in which venue appears.

(b) Find that there is probable cause to believe that a misdemeanor was committed and that the defendant committed it, and retain the case for trial or order the defendant to appear for trial before an appropriate court.

(c) Order the accused discharged.

(d) Except upon good cause shown, any misdemeanor, other than a minor misdemeanor, arising from the same act or transaction involving a felony shall be bound over or transferred with the felony case.

(5) Any finding requiring the accused to stand trial on any charge shall be based solely on the presence of substantial credible evidence thereof. No appeal shall lie from such decision and the discharge of defendant shall not be a bar to further prosecution.
(6) In any case in which the defendant is ordered to appear for trial for any offense other than the one charged the court shall cause a complaint charging such offense to be filed.

(7) Upon the conclusion of the hearing and finding, the court or the clerk of such court, shall, within seven days, complete all notations of appearance, motions, pleas, and findings on the criminal docket of the court, and shall transmit a transcript of the appearance docket entries, together with a copy of the original complaint and affidavits, if any, filed with the complaint, the journal or docket entry of reason for changes in the charge, if any, together with the order setting bail and the bail including any bail deposit, if any, filed, to the clerk of the court in which defendant is to appear. Such transcript shall contain an itemized account of the costs accrued.

(8) A municipal or county court retains jurisdiction on a felony case following the preliminary hearing, or a waiver thereof, until such time as a transcript of the appearance, docket entries, and other matters required for transmittal are filed with the clerk of the court in which the defendant is to appear.

History. Effective: July 1, 1973; amended effective July 1, 1975; July 1, 1976; July 1, 1982; July 1, 1990; July 1, 2012; July 1, 2014.

Ohio Rules
RULES OF CRIMINAL PROCEDURE
As amended through December 1, 2015

Criminal Rule 12.Pleadings and Motions Before Trial: Defenses and Objections

(A) Pleadings and motions. Pleadings in criminal proceedings shall be the complaint, and the indictment or information, and the pleas of not guilty, not guilty by reason of insanity, guilty, and no contest. All other pleas, demurrers, and motions to quash, are abolished. Defenses and objections raised before trial which heretofore could have been raised by one or more of them shall be raised only by motion to dismiss or to grant appropriate relief, as provided in these rules.

(C) Pretrial motions. Prior to trial, any party may raise by motion any defense, objection, evidentiary issue, or request that is capable of determination without the trial of the general issue. The following must be raised before trial:

(1) Defenses and objections based on defects in the institution of the prosecution;

(2) Defenses and objections based on defects in the indictment, information, or complaint (other than failure to show jurisdiction in the court or to charge an offense, which objections shall be noticed by the court at any time during the pendency of the proceeding);

(3) Motions to suppress evidence, including but not limited to statements and identification testimony, on the ground that it was illegally obtained. Such motions shall be filed in the trial court only.

(4) Requests for discovery under Crim. R. 16;

(5) Requests for severance of charges or defendants under Crim. R. 14.

(D) Motion date. All pretrial motions except as provided in Crim. R. 7(E) and 16(M) shall be made within thirty-five days after arraignment or seven days before trial, whichever is earlier. The court in the interest of justice may extend the time for making pretrial motions.

(F) Ruling on motion. The court may adjudicate a motion based upon briefs, affidavits, the proffer of testimony and exhibits, a hearing, or other appropriate means. A motion made pursuant to divisions (C)(1) to (C)(5) of this rule shall be determined before trial. Any other motion made pursuant to division (C) of this rule shall be determined before trial whenever possible. Where the court defers ruling on any motion made by the prosecuting attorney before trial and makes a ruling adverse to the prosecuting attorney after the commencement of trial, and the ruling is appealed pursuant to law with the certification required by division (K) of this rule, the court shall stay the proceedings without discharging the jury or dismissing the charges. Where factual issues are involved in determining a motion, the court shall state its essential findings on the record.

(J) Effect of determination. If the court grants a motion to dismiss based on a defect in the institution of the prosecution or in the indictment, information, or complaint, it may also order that the defendant be held in custody or that the defendant's bail be continued for a specified time not exceeding fourteen days, pending the filing of a new indictment, information, or complaint. Nothing in this rule shall affect any statute relating to periods of limitations. Nothing in this rule shall affect the state's right to appeal an adverse ruling on a motion under divisions (C)(1) or (2) of this rule, when the motion raises issues that

were formerly raised pursuant to a motion to quash, a plea in abatement, a demurrer, or a motion in arrest of judgment.

(K) Appeal by state. When the state takes an appeal as provided by law from an order suppressing or excluding evidence, or from an order directing pretrial disclosure of evidence, the prosecuting attorney shall certify that both of the following apply:

(1) the appeal is not taken for the purpose of delay;

(2) the ruling on the motion or motions has rendered the state's proof with respect to the pending charge so weak in its entirety that any reasonable possibility of effective prosecution has been destroyed, or the pretrial disclosure of evidence ordered by the court will have one of the effects enumerated in Crim. R. 16(D).

The appeal from an order suppressing or excluding evidence shall not be allowed unless the notice of appeal and the certification by the prosecuting attorney are filed with the clerk of the trial court within seven days after the date of the entry of the judgment or order granting the motion. Any appeal taken under this rule shall be prosecuted diligently.

If the defendant previously has not been released, the defendant shall, except in capital cases, be released from custody on the defendant's own recognizance pending appeal when the prosecuting attorney files the notice of appeal and certification.

This appeal shall take precedence over all other appeals.

If an appeal from an order suppressing or excluding evidence pursuant to this division results in an affirmance of the trial court, the state shall be barred from prosecuting the defendant for the same offense or offenses except upon a showing of newly discovered evidence that the state could not, with reasonable diligence, have discovered before filing of the notice of appeal.

History. Effective: July 1, 1973; amended effective July 1, 1975; July 1, 1980; July 1, 1995; July 1, 1998; July 1, 2001; July 1, 2010; July 1, 2011; July 1, 2013.