[Cite as *State v. Houk*, 2020-Ohio-1547.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
WASHINGTON COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellant,	:	Case No. 19CA02
vs.	:	
BRANDA HOUK,	:	DECISION AND JUDGMENT ENTRY
Defendant-Appellee.	:	

APPEARANCES:

Paul Bertram, III, Marietta City Law Director, and Daniel Everson, Marietta City Assistant Law Director, Marietta, Ohio, for appellant.

Timothy Young, Ohio Public Defender, and Jonathan Tewart, Assistant State Public Defender, Columbus, Ohio, for appellee.[1]

CRIMINAL APPEAL FROM MUNICIPAL COURT
DATE JOURNALIZED: 4-10-20
ABELE, J.

{¶ 1} This is an appeal from a Marietta Municipal Court judgment that granted a motion for a mistrial and dismissal with prejudice requested by Branda Houk, defendant below and appellee herein.

The State of Ohio, plaintiff below and appellant herein, assigns three errors for review:

> FIRST ASSIGNMENT OF ERROR:
>
> "WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN GRANTING DEFENDANT-APPELLEE'S ORAL MOTION FOR A MISTRIAL."
>
> SECOND ASSIGNMENT OF ERROR:

[1] Different counsel represented appellee during the trial court proceedings.

"WHETHER THE TRIAL COURT ERRED AS A MATTER OF LAW WHEN IT DISMISSED DEFENDANT-APPELLEE'S CASE."

THIRD ASSIGNMENT OF ERROR:

"WHETHER THE TRIAL COURT ABUSED ITS DISCRETION BY SIGNING THE ENTRY OF DISMISSAL PROFFERED UNILATERALLY BY DEFENDANT-APPELLEE OVER PROSECUTORIAL OBJECTION, AND WITHOUT ALLOWING THE STATE TO BE HEARD ON THE RELEVANT LEGAL PRINCIPLES."

{¶ 2} Appellee, the alleged driver in a single vehicle accident, left the accident scene before police arrived. Subsequently, law enforcement authorities filed a complaint and alleged that appellee: (1) operated a vehicle while under the influence of alcohol and/or drugs in violation of R.C. 4511.19(A)(1)(a); (2) left the scene of an accident in violation of R.C. 4549.03(A); and (3) failed to maintain control of her vehicle. Appellee pleaded not guilty, appealed her administrative license suspension and demanded a jury trial.

{¶ 3} On September 17, 2018, appellant, the State of Ohio, filed a pre-trial Evid.R. 404(B) notice of evidence and request for a special limiting instruction. The state provided notice that its witness, Adam Muntz, stated that appellee spoke to him at the accident scene and indicated that she had one or more prior OVIs. The state thus indicated that the evidence in question consists of appellee's "criminal history, revealing two previous convictions for OVI dating November 1, 2013 and December 10, 2008 (convictions for prior acts)." The state further indicated it anticipated that appellee may "seek to dispute the credibility of eyewitness Adam Muntz on the veracity of his testimony that she stated to him that he should not report the accident because it would be her third OVI. This evidence of prior convictions would tend to show proof of the matters covered by Crim.R. 404(B)(motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of

mistake or accident) in corroboration with Mr. Muntz's testimony."

{¶ 4} Prior to the start of the February 5, 2019 jury trial, the parties discussed with the court issues concerning the appellee's prior OVI convictions. During that conference, the prosecutor stated that he would not discuss the prior OVI evidence during opening statement. Apparently, the parties and the court planned to address the issue when Muntz testified. However, after the court empaneled the jury and during opening statement, the prosecutor mentioned Muntz's anticipated testimony and explicitly stated "Mr. Muntz tells the Trooper that the woman tells him not to call the police because she cannot afford another DUI." Appellee thereupon requested a mistrial. The prosecutor responded "I did not agree not to mention the prior convictions from her statements, which are statements against interest, which may be proved by extrinsic evidence when it comes up."

{¶ 5} After a lengthy discussion, the trial court listened to the parties' recorded statements about any mention of appellee's prior OVI convictions during opening statement. That in-chambers discussion included the following dialogue:

DEFENSE COUNSEL:	Yes, I have a question. First of all, I need to ask the Court, since the Court is not making a ruling about this prior coming in, at this point, then that should not be talked about in opening?
COURT:	I don't know what his witness is going to say. If his witness says that, I mean, it is.
DEFENSE COUNSEL:	Right. But I don't think it would be appropriate for the state in its opening to tell the jury that she has a prior conviction.
PROSECUTOR:	To allay [Defense Counsel's] concerns, that was never part of the opening and will not be.

After consideration, the trial court granted appellee's motion for a mistrial. The court's entry

provides:

> the parties agreed that the prior OVI convictions of the Defendant would not be communicated to the jury during opening statements or otherwise until testimony from witnesses for the State was received by the Court and jury. Contrary to the agreement of counsel, the Assistant Law Director informed the jury during his opening statement that there would be evidence that the Defendant had prior convictions of OVI. At the conclusion of the attorney's opening statement, counsel for the Defendant made a motion for a mistrial.

The trial court concluded that, based upon "argument of counsel, the review of the record and it appearing proper to do so," the court granted appellee's motion for mistrial and subsequently dismissed the complaints with prejudice. This appeal followed.

I.

{¶ 6} In its first assignment of error, appellant asserts that the trial court abused its discretion by granting appellee's motion for a mistrial.

{¶ 7} Appellant argues that the prior OVI conviction evidence would: (1) support the witness's claim that he spoke with appellee at the scene; (2) establish appellee's identity as the vehicle's driver; and (3) show a motive for leaving the scene of the accident. Appellant claims that the witness, Muntz, heard the appellee's spontaneous admission about being in a similar condition in the past and this statement is strong evidence of the appellee's belief about her impairment. Appellant then contends that the "Defendant's statement was not necessarily an admission to having been charged with or convicted of anything: the charges/conviction would have become relevant only in the event of a dispute about whether this statement was made in the first place." Apparently, prosecutor appears to distinguish between extrinsic evidence of conviction that it anticipated it may use if cross-examination of the witness went a certain way, and the use of the statement that appellee allegedly made to that witness. Appellant also contends that the trial court's non-journalized oral

decision did not give the prosecutor notice that a decision had been made, nor clarified the particulars of that ruling.

{¶ 8} Appellee, however, asserts that the prior convictions are not an element of the offense in the case at bar and the jury "would tend I believe to convict her of this case, based on her prior OVI rather than the facts as they would come out." Appellee further argues that the obvious prejudicial nature of the prior conviction evidence, and risk of the improper use of that evidence, reasonably supports the trial court's decision to prohibit any mention of appellee's prior convictions, at least until the witness who allegedly heard the accused's statement testifies about the exact nature of the alleged conversation.

{¶ 9} In general, the grant or denial of a motion for a mistrial rests in a trial court's sound discretion and should not be disturbed on appeal absent an abuse of that discretion. *State v. Treesh*, 90 Ohio St.3d 460, 480, 739 N.E.2d 749 (2001). To establish an abuse of discretion by failing to grant a mistrial, a defendant must demonstrate material prejudice. *See State v. Adams*, 144 Ohio St.3d 429, 2015-Ohio-3954, 45 N.E.3d 127, ¶ 198. "Mistrials need be declared only when the ends of justice so require and a fair trial is no longer possible." *State v. Franklin*, 62 Ohio St.3d 118, 127, 580 N.E.2d 1 (1991).

{¶ 10} In support of its argument that the trial court's grant of the appellee's motion for mistrial constitutes an abuse of discretion the state cites *Columbus v. Miller*, 10th Dist. Franklin No. 89AP-111, 89AP-112, and 89AP-113, 1989 WL 104381. In *Miller*, the defendant allegedly stated that he would not take a breathalyzer test because he did not have a license to lose. During opening statement, after the prosecutor referred to Miller's statement, Miller objected and requested a mistrial. The court concluded that "it is not clear on this record that the prosecutor's misquotation

of defendant's alleged statement was a deliberate attempt to sway the jury with prejudicial information." *Id.* at *2. The court also noted that the statement had previously been ruled admissible. By contrast, in the case at bar the trial court reserved ruling as to whether this information would be admissible. Moreover, on the morning of trial defense counsel inquired about the court's ruling and appellant replied, "To allay concerns, that was never part of the opening and will not be." Nevertheless, during opening statement appellant mentioned the prospective witness's expected testimony concerning appellee's alleged statement about her prior convictions. Thus, unlike *Miller,* in the instant case appellant's opening statement included information that should not have been conveyed to the jury.

{¶ 11} Appellant also cites *Harwin v. Jaguar Cleveland Motors, Inc.*, 8th Dist. Cuyahoga No. 40578, 1980 WL 354603, a civil case irrelevant to our analysis of whether the trial court abused its discretion in determining that appellant's opening statement prejudiced a criminal defendant. While it is true that, generally, counsel enjoys wide latitude during opening statement, that latitude does not include the mention of prejudicial and inadmissible evidence. As the trial court stated here, "[t]he parties agreed that the prior OVI convictions of the Defendant would not be communicated to the jury during opening statements or otherwise until testimony from witnesses for the State was received by the Court and jury. Contrary to the agreement of counsel, [appellant] informed the jury during his opening statement that there would be evidence that the Defendant had prior convictions of OVI."

{¶ 12} Appellant also cites *State v. Leasure,* 2015-Ohio-5327, 43 N.E.3d 477 (4th Dist.), a case that involved R.C. 4511.19(A)(2) and a prior OVI conviction as an element of the offense. We concluded in *Leasure* that the trial court's decision to admit evidence of the prior conviction did not

violate the defendant's due process rights because in that case the prior offense was an element of the charged offense. In the case sub judice, however, a prior conviction is not an element of the charged offense.

{¶ 13} Also of note is *State v. Williamson*, 3d Dist. Crawford No. 3-04-06, 2004-Ohio-3545, in which the defendant, charged with OVI, stated to the arresting officer that he had "two prior DUIs." Williamson requested the state not to be permitted to comment upon the prior convictions and, after a hearing, the trial court agreed that these statements were overly prejudicial and prohibited the state from comment on the prior OVIs in its case in chief. The court of appeals agreed, and concluded that prior OVI conviction evidence in a OVI case is overly prejudicial and the state's case in chief must rest on the facts of the present case, not prior convictions. *Id.* at ¶ 5.

{¶ 14} In the case sub judice, our review reveals that the prosecutor explicitly and unequivocally informed the court and opposing counsel that he would not mention during opening statement appellee's alleged statement concerning her prior convictions. However, during opening statement the prosecutor explicitly mentioned the appellee's statement concerning her prior OVI convictions. Based on this fact, and the prejudicial nature of the evidence, we cannot conclude that the trial court exhibited an unreasonable, arbitrary or unconscionable attitude in this matter. Although the prosecutor argues that he did not intend to prejudice the appellee, that statement is nevertheless improper and prejudicially affected the accused's substantial rights. *Drummond, supra,* at ¶ 226. Again, we recognize that the prosecutor maintains that he did not intend to run afoul of his earlier statement, and the trial court's wishes, and in support of this claim he advances a nuanced argument concerning extrinsic evidence. Nevertheless, after our review of the record we conclude that the trial court's decision to grant appellee's motion for mistrial did not constitute an

abuse of discretion.

{¶ 15} Accordingly, based upon the foregoing reasons, we overrule appellant's first assignment of error.

II.

{¶ 16} Because appellant's second and third assignments of error raise related issues, we consider them together. Appellant asserts that the trial court erred when it (1) dismissed the case with prejudice to refiling; and (2) did not provide the state the opportunity to again address the court and to provide it rationale for the mention of appellee's prior OVI convictions during its opening statement.

{¶ 17} Appellant urges us to follow *State v. Vogt,* 4th Dist. Washington No. 17CA17, 2018-Ohio-4457, in which this court considered whether a mistrial, declared due to the prosecutorial misconduct of withholding evidence until the date of trial, prevented retrial on Double Jeopardy grounds. In *Vogt*, we concluded that the state's misconduct could have been the product of negligence and not intended to invite a mistrial. *Id.* at ¶ 51.

{¶ 18} The Double Jeopardy Clauses of the Fifth Amendment to the United States Constitution, applicable to the states through the Fourteenth Amendment, and Article I, Section 10 of the Ohio Constitution, protects a criminal defendant against repeated prosecutions for the same offense. *Oregon v. Kennedy*, 456 U.S. 667, 671, 102 S.Ct. 2083, 72 L.Ed.2d 416 (1982); *State v. Kareski*, 137 Ohio St.3d 92, 2013-Ohio-4008, 998 N.E.2d 410, ¶ 14. The policy underlying this protection is to ensure that:

> the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state

> of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

U.S. v. Jorn, 400 U.S. 470, 479, 91 S.Ct. 547, 27 L.Ed.2d 543 (1971), quoting *Green v. U.S.*, 355 U.S. 184, 187-188, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957).

{¶ 19} We recognize that the circumstances in which Double Jeopardy will bar a retrial after a defendant requests a mistrial are limited. Generally, when a trial court grants a defendant's request for a mistrial, the Double Jeopardy clause will not bar a re-trial. However, courts have distinguished between mistrials that resulted from prosecutorial misconduct versus negligence. When prosecutorial misconduct is designed to provoke mistrial, Double Jeopardy will bar retrial. *State v. Anderson,* 148 Ohio St.3d 74, 80; *State v. Glover*, 35 Ohio St.3d 18, 517 N.E.2d 900 (1988), syllabus; *see also Oregon v. Kennedy*, 456 U.S. 667, 676, 102 S.Ct. 2083, 72 L.Ed.2d 416 (1982). "This court has also noted that the prohibition against double jeopardy precludes a second trial absent (1) a mistrial justified by a 'manifest necessity' or (2) consent to the mistrial by the defendant." *Vogt*, *id*., at ¶ 50. "A retrial is not barred on double jeopardy grounds where the state's mere negligence, rather than intentional misconduct, required the trial court to grant a mistrial on a defense motion." *Vogt* at ¶ 51, citing *State v. Hodges,* 7th Dist. Mahoning No. 17MA0025, 2018-Ohio-447.

{¶ 20} In the case sub judice, obviously the chain of events and the timing of the prosecutor's transgression greatly concerned the trial court. Almost immediately after the in-chambers conference, when the prosecutor advised and assured the court that reference to the defendant's alleged statement regarding prior OVI convictions "was never part of the opening and will not be," the prosecutor, instead, explicitly referred to the defendant's statement during its opening statement.

We point out that, generally, a trial court's determination as to whether a prosecuting attorney intended to cause a mistrial is a finding of fact that must be accorded great deference. *State v. Betts*, 8th Dist. Cuyahoga No. 88607, 2007-Ohio-5533, 2007 WL 3027063. Here, we fully understand the trial court's concerns and we defer to the court's apparent finding of fact. Here, in view of the blatant and obvious nature of the transgression, especially after the assurance provided to the court, we do not believe it necessary for the trial court to hear additional evidence or argument.

{¶ 21} Accordingly, based upon the foregoing reasons, we overrule appellant's second and third assignments of error and we affirm the trial court's judgment.

JUDGMENT AFFIRMED.

Hess, J., dissenting.

{¶ 22} Respectfully, I dissent. In my view, after the trial court granted Branda Houk's second motion for a mistrial, it erred by dismissing the complaints against her with prejudice. The record does not demonstrate that the motion was precipitated by prosecutorial misconduct that was intentionally calculated to cause or invite a mistrial, so double-jeopardy principles do not bar retrial, and dismissal was inappropriate.

{¶ 23} The Fifth Amendment to the United States Constitution guarantees that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." The Ohio Constitution contains a similarly worded guarantee: "No person shall be twice put in jeopardy for the same offense." Ohio Constitution, Article I, Section 10. In the past, the Supreme Court of Ohio has "treated the two guarantees as 'coextensive.' " *State v. Soto*, ___ Ohio St.3d ___, 2019-Ohio-4430, ___ N.E.3d ___, ¶ 12, fn. 1, quoting *State v. Gustafson*, 76 Ohio St.3d 425, 432, 668 N.E.2d 435 (1996).

{¶ 24} "The Double Jeopardy Clause of the Fifth Amendment protects a criminal defendant from repeated prosecutions for the same offense," and "[a]s a part of this protection * * * affords a criminal defendant a 'valued right to have his trial completed by a particular tribunal.' " (Footnote omitted.) *Oregon v. Kennedy*, 456 U.S. 667, 671-672, 102 S.Ct. 2083, 72 L.Ed.2d 416 (1982), quoting *Wade v. Hunter*, 336 U.S. 684, 689, 69 S.Ct. 834, 93 L.Ed. 974 (1949). "The Double Jeopardy Clause, however, does not offer a guarantee to the defendant that the State will vindicate its societal interest in the enforcement of the criminal laws in one proceeding." *Id.* at 672.

{¶ 25} "Generally, '[w]hen a trial court grants a criminal defendant's request for a mistrial, the Double Jeopardy Clause does not bar a retrial.' " *State v. Kitchen*, 4th Dist. Ross No. 18CA3640,

2018-Ohio-5244, ¶ 27, quoting *State v. Loza*, 71 Ohio St.3d 61, 70, 641 N.E.2d 1082 (1994), citing *Oregon* at 673. "A narrow exception lies where the request for a mistrial is precipitated by prosecutorial misconduct that was intentionally calculated to cause or invite a mistrial." *Loza* at 70, citing *Oregon* at 678-679. "In such a case, the defendant's valued right to complete his trial before the first jury would be a hollow shell if the inevitable motion for mistrial were held to prevent a later invocation of the bar of double jeopardy in all circumstances." *Oregon* at 673.

{¶ 26} "Prosecutorial conduct that might be viewed as harassment or overreaching, even if sufficient to justify a mistrial on defendant's motion, * * * does not bar retrial absent intent on the part of the prosecutor to subvert the protections afforded by the Double Jeopardy Clause." *Id.* at 675-676. "Only where the prosecutorial conduct in question is intended to 'goad' the defendant into moving for a mistrial may [the] defendant raise the bar of double jeopardy to a second trial after having succeeded in aborting the first on his own motion." *Loza* at 70, quoting *Oregon* at 676. "This determination requires the trial court to examine the totality of the circumstances to make a factual finding of the prosecutor's intent; it is entitled to great deference on appeal notwithstanding our general de novo review" of a ruling on a motion to dismiss based on double-jeopardy grounds. *Kitchen* at ¶ 28. On appeal, in determining whether the requisite intent existed, a reviewing court may consider

> "(1) whether there was a sequence of overreaching prior to the single prejudicial incident; (2) whether the prosecutor resistend or was surprised by the defendant's motion for a mistrial; and (3) the findings of the trial *** court [] concerning the intent of the prosecutor."

Id. at ¶ 29, quoting *State v. Betts*, 8th Dist. Cuyahoga No. 88607, 2007-Ohio-5533, ¶ 27. *See also Oregon* at 680 (Powell, J., concurring.)

{¶ 27} Regarding the first factor, the record does not show a sequence of overreaching by the prosecutor prior to the incident that prompted a mistrial, i.e., the prosecutor telling the jury, during his opening statement, that he expected Adam Muntz to testify that the alleged driver of the crashed vehicle, i.e., Houk, told him "not to call the police because she cannot afford another DUI." There was an incident during voir dire in which a prospective juror expressed concern about being a juror because she was "supposed to be out of town as of Friday," and the prosecutor said, "I'll tell you, I don't know what the defense is in terms of what they're going to present, but I would think that for my part, we'll be done today. So does that assuage your concern any?" After the jury had been impaneled and sworn, defense counsel made his first motion for a mistrial, arguing the prosecutor had improperly commented on Houk's rights to remain silent and not present any evidence. Nothing in the record indicates that was the prosecutor's intent. The court concluded that the prosecutor's comment "may be a thoughtless comment" that warranted a curative instruction but not a mistrial.

{¶ 28} Regarding the second factor, the record demonstrates that the prosecutor resisted both motions for a mistrial. The prosecutor successfully defended against the first motion for a mistrial based on the comment he made during voir dire. The prosecutor unsuccessfully defended against the second motion for mistrial based on the comment he made during opening statement.

{¶ 29} Regarding the final factor, although the trial court's implicit finding that the prosecutor intended to goad Houk into moving for a mistrial is ordinarily entitled to great deference, in this instance, the finding is not supported by the record. When defense counsel moved for a mistrial based on the comment during opening statement, the prosecutor explained that he had understood the discussion regarding opening statements to relate to documentary evidence of a prior

conviction and not the anticipated testimony of Muntz. The prosecutor pointed out that earlier discussions between the parties and court focused on the admissibility of documentary evidence to corroborate Muntz's anticipated testimony and that "[t]here was never any – at least, no intention of any suggestion that the party opponent admissions * * * would not be part of the state's case in chief." Even though the trial court stated it felt "a little sandbagged by the careful parsing," it acknowledged the prosecutor "may not have understood it the way I understood it, 'cause you're deeply involved with the case, so I mean, each piece is an individual crystal, and I'm just seeing the entire piece of it or whatever." While the prosecutor may have been negligent in failing to realize his promise to not mention Houk's prior convictions during his opening statement could be construed to include Muntz's anticipated testimony, which implied the existence of such convictions, " '[a] retrial is not barred on double jeopardy grounds where the state's mere negligence, rather than intentional misconduct, required the trial court to grant a mistrial on a defense motion.' " *State v. Vogt*, 4th Dist. Washington No. 17CA17, 2018-Ohio-4457, ¶ 51, quoting *State v. Hodges, 7th Dist. Mahoning No. 17 MA 0025, 2018-Ohio-447, ¶ 18.*

{¶ 30} Even if the prosecutor had intended to carefully parse his words about the content of his opening statement, such intent is insufficient to invoke the exception to the general rule that the prosecution may retry a defendant after the court grants the defendant's motion for a mistrial. Again, the prosecutorial conduct must have been "intended to 'goad' the defendant into moving for a mistrial." *Loza*, 71 Ohio St.3d at 70, 641 N.E.2d 1082, quoting *Oregon*, 456 U.S. at 676, 102 S.Ct. 2083, 72 L.E.2d 416. The record provides no basis for a finding of such intent. There is no apparent advantage the prosecutor had to gain from intentionally causing a mistrial during his opening statement. *See State v. Schall*, 4th Dist. Vinton No. 14CA695, 2015-Ohio-2962, ¶ 42

(considering the lack of an "apparent advantage to the State to obtain a mistrial" in concluding prosecutor's conduct was not intended to provoke the defendant into moving for a mistrial). As the state points out "no evidence had yet been presented and nothing had gone 'wrong' in the trial which would point toward likely acquittal * * *." Although Houk suggests the prosecutor might have orchestrated a mistrial because Muntz did not appear for trial, the prosecutor represented to the court that all his witnesses were present, and nothing in the record contradicts that representation. Moreover, Houk's suggestion that the prosecutor might have orchestrated a mistrial because he "would not be able to elicit the anticipated testimony from" Muntz is speculative. Notably, the record includes a statement, purportedly signed by Muntz, stating that the driver of the crashed vehicle told him "not to call the cops that this was her 3rd DUI."

{¶ 31} The record does not demonstrate that Houk's motion for a mistrial based on the prosecutor's opening statement was precipitated by prosecutorial misconduct that was intentionally calculated to cause or invite a mistrial. Accordingly, I would conclude that double-jeopardy principles do not bar retrial, sustain the second assignment of error, reverse the trial court's decision to dismiss the complaints with prejudice,[2] and remand for a new trial. I would conclude that the first assignment of error, in which the state asserts the trial court abused its discretion by granting a mistrial, is moot because the only remedy for this alleged error would be a new trial. I would also conclude that the third assignment of error, in which the state asserts the trial court abused its

[2] Even if the trial court could dismiss on double-jeopardy grounds the complaints for operating a vehicle under the influence of alcohol, a drug of abuse, or a combination of them and failure to stop after an accident involving the property of others, it could not dismiss the complaint for operating a motor vehicle without being in control of it in violation of R.C. 4511.202, a minor misdemeanor, on such grounds because that complaint was never tried. The jury trial did not include that complaint; the parties agreed it was subject to a bench trial. *See* R.C. 2945.17(B)(1) ("The right to be tried by a jury that is granted under division (A) of this section does not apply to a violation of a statute * * * that is * * * [a] violation that is a minor misdemeanor").

discretion by dismissing the case without allowing the state to "be heard on the relevant legal principles," is also moot.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed and appellant shall pay the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Marietta Municipal Court to carry this judgment into execution.

A certified copy of this entry shall constitute that mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Smith, P.J.: Concurs in Judgment Only
Hess, J.: Dissents with Dissenting Opinion

For the Court

BY: _____
Peter B. Abele, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.