NO. COA09-940

NORTH CAROLINA COURT OF APPEALS

Filed: 6 July 2010

STATE OF NORTH CAROLINA

v. Forsyth County
No. 08 CRS 62344

DAVID ALLEN MESSICK

Appeal by the State from Order entered 29 January 2009 by Judge Edgar B. Gregory in Superior Court, Forsyth County. Heard in the Court of Appeals 14 January 2010.

Attorney General Roy Cooper, by Assistant Attorney General Chris Z. Sinha, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Daniel Shatz, for Defendant.

STEPHENS, Judge.

I. Procedural History

On 14 April 2008, the grand jury in Forsyth County, North Carolina returned a bill of indictment charging Defendant with two counts of first degree sex offense with a child and indecent liberties with a child. The indictment, bearing file number 08 CRS 51121, alleged the dates of the offenses to be 28 September through 2 October 2007. On 12 May 2008, Defendant filed a notice of alibi defense and a demand for a speedy trial.

On 10 November 2008, a hearing was held in Forsyth County Superior Court, the Honorable L. Todd Burke presiding, to address

the State's filing of a superseding indictment. The State informed the trial court that a superseding indictment was presented to the grand jury that morning which contained the same charges but expanded the alleged dates of the offenses to 25 August through 2 October 2007. Defense counsel made a motion to strike the superseding indictment as an abuse of process which the trial court allowed. The State did not appeal Judge Burke's order striking the superseding indictment. Thereafter, the State took a voluntary dismissal of case number 08 CRS 51121.

That same day, the State obtained and served a new warrant charging Defendant with the same offenses as in case number 08 CRS 51121 but alleging the expanded dates of offense as contained in the stricken superseding indictment. On 15 December 2008, the grand jury returned a bill of indictment ("the second indictment") on these charges containing the expanded dates of the alleged offenses, and the case was given a new file number, 08 CRS 62344.

At a hearing held 26 and 27 January 2009, the Honorable Edgar B. Gregory presiding, Defendant made a motion to dismiss the second indictment based, *inter alia*, on collateral estoppel. The trial court granted Defendant's motion upon finding "that the indictment in file number 08 CRS 62344 is collaterally estopped." On 29 January 2009, the trial court entered a written order dismissing the second indictment with prejudice "as the prosecution is barred by N.C.G.S. § 15A-954(a)(7), collateral estoppel, and double jeopardy." The State filed a notice of appeal from this order on 29 January 2009.

On 5 November 2009, Defendant filed a motion to dismiss the State's appeal due to several violations of the North Carolina Rules of Appellate Procedure. By order entered 26 January 2010, this Court denied Defendant's motion. Accordingly, we address the merits of the State's appeal below.

II. Discussion

N.C. Gen. Stat. § 15A-954(a)(7) provides that "[t]he court on motion of the defendant must dismiss the charges stated in a criminal pleading if it determines that . . . [a]n issue of fact or law essential to a successful prosecution has been previously adjudicated in favor of the defendant in a prior action between the parties." N.C. Gen. Stat. § 15A-954(a)(7) (2009). This statute is a codification of the common law principle of collateral estoppel as it is applied in criminal cases. *State v. Parsons*, 92 N.C. App. 175, 177, 374 S.E.2d 123, 124 (1988). "[T]he doctrine of collateral estoppel operates, following a final judgment, to establish conclusively a matter of fact or law for the purposes of a later lawsuit on a different cause of action between the parties to the original action." *Id.* (internal citations and quotation marks omitted). Our Supreme Court has established the following test for whether collateral estoppel applies to a given issue:

> (1) The issues to be concluded must be the same as those involved in the prior action; (2) in the prior action, the issues must have been raised and actually litigated; (3) the issues must have been material and relevant to the disposition of the prior action; and (4) the determination made of those issues in the prior action must have been necessary and essential to the resulting judgment.

King v. Grindstaff, 284 N.C. 348, 358, 200 S.E.2d 799, 806 (1973).

The State contends that because the superseding indictment was never before Judge Burke, he did not have the authority to enter an order striking that indictment. Thus, the State argues that the issues alleged in the superseding indictment had not been "previously adjudicated" pursuant to N.C. Gen. Stat. § 15A-954(a)(7), and the doctrines of collateral estoppel and double jeopardy do not apply. The State, however, did not appeal from Judge Burke's order, and is therefore bound by that order. *Harris v. Family Med. Ctr.*, 38 N.C. App. 716, 719, 248 S.E.2d 768, 770 (1978) (where plaintiffs did not appeal from trial court's order of dismissal, plaintiffs were bound by that order); *see also* N.C. R. App. P. 4 (2008) (setting out required procedure and time limits for "[a]ny party entitled by law to appeal" in criminal cases).

Accordingly, the issue of whether Judge Burke erred in striking the superseding indictment is not before us. *See State v. Webber*, 190 N.C. App. 649, 650-51, 660 S.E.2d 621, 622 (2008) (The Court of Appeals lacked jurisdiction over appeal from convictions for various crimes, where defendant did not give oral notice of appeal or file written notice of appeal within 14 days of convictions.); *State v. Jones*, 158 N.C. App. 498, 500, 581 S.E.2d 103, 105 (A party is required to give oral notice of appeal at trial or file a written notice of appeal within 14 days after entry of the judgment in order to preserve the right of appeal under N.C. R. App. P. 4(a).), *cert. denied*, 357 N.C. 465, 586 S.E.2d 462 (2003). Moreover, the State does not argue that, despite its

failure to appeal from Judge Burke's order, good cause exists for this Court to entertain its argument regarding such order. *See Webber*, 190 N.C. App. at 650-51, 660 S.E.2d at 622. Nevertheless, even assuming *arguendo* that this issue was properly preserved for appellate review, we are not persuaded by the State's argument that Judge Burke lacked authority to rule on the superseding indictment.

At the beginning of the 10 November 2008 hearing, the State informed Judge Burke that "we went to the Grand Jury and took in a superseding indictment on this matter incorporating a change of dates, not the allegations." When discussing the superseding indictment with the trial court, defense counsel acknowledged that he had not seen that indictment, and he did not "know whether the Grand Jury [had] in fact returned it." However, neither party argued that the superseding indictment was not properly before Judge Burke at that time. Additionally, the cover page of the transcript from the hearing is entitled "MOTION ON SUPERSEDING INDICTMENT[,]" which indicates that the purpose of the hearing was to address the superseding indictment. The State's conduct from the outset of the hearing indicates that the State accepted Judge Burke's authority to address the superseding indictment, as shown by the following exchange:

> THE COURT: Now, when did the -- when was the superseding indictment, when did that come forward?
>
> [THE STATE]: I did that this morning, Your Honor.
>
> THE COURT: This morning.
>
> [THE STATE]: Your Honor, it was -- the

> information was Friday, I went for the superseding this morning. Again, it wasn't a deliberate delay.
>
> THE COURT: Uh-huh. Now, if I strike the superseding indictment the State may choose not to try the case anyway.
>
> [DEFENSE COUNSEL]: The State could take a dismissal. We are prepared for trial, Your Honor. We are ready to proceed.
>
> THE COURT: Uh-huh. I'm going to allow the Defense motion to strike the superseding indictment.
>
> [THE STATE]: Your Honor, the State will take a dismissal and re-indict.
>
> THE COURT: You're going to take a dismissal of the entire case?
>
> [THE STATE]: The whole entire case rests on those dates, Your Honor, that the State has. The only -- at this point, since they have not true billed (sic) it, I don't know if they have or not, I know that the detective has already presented it.
>
> THE COURT: Uh-huh. All right.
>
> [DEFENSE COUNSEL]: Mr. Messick[] is being held in custody on this charge[.] I ask that he be released.
>
> [THE STATE]: Well, Your Honor, if I may, if -- well, I'll just have a warrant re-drawn today.
>
> [DEFENSE COUNSEL]: Certainly. If they wish at the appropriate time we'll prepare the case again for trial.

As the foregoing colloquy establishes, the State did not object to Defendant's motion to strike the superseding indictment. Accordingly, we conclude that the superseding indictment was properly before Judge Burke when he allowed Defendant's motion to strike. We now address the State's remaining argument that case

number 08 CRS 62344 was not barred by N.C. Gen. Stat. § 15A-954(a)(7), collateral estoppel, or double jeopardy.

In *Parsons*, *supra*, the defendant was initially indicted "for the manslaughter of 'a nameless living female fetus which was in the body of its mother Brenda Watson Greer, and due to be delivered on or about November 6, 1986.'" *Parsons*, 92 N.C. App. at 175, 374 S.E.2d at 123. The trial court dismissed this indictment for failure "to allege a material element of the crime of manslaughter, that is, that the defendant did kill another living human being." *Id.* at 180, 374 S.E.2d at 126. The State appealed from the dismissal of the original indictment, but later filed a notice of dismissal of the appeal and the appeal was dismissed. *Id.* at 175-76, 374 S.E.2d at 123. Approximately two months after the appeal was dismissed, the State issued a new indictment, with a new file number, against the defendant for manslaughter. *Id.* at 176, 374 S.E.2d at 123. The new indictment alleged that the defendant "did 'kill and slay a living human being, Kandy Renae Greer, a viable but unborn female child.'" *Id.* The defendant filed a motion to dismiss the second indictment, and the trial court granted the defendant's motion "finding that the new indictment must be dismissed pursuant to N.C.G.S. § 15A-954(a)(7)." *Id.* at 176, 374 S.E.2d at 124. On appeal to this Court, we affirmed the trial court's dismissal of the second indictment as it was barred by collateral estoppel. *Id.* at 181, 372 S.E.2d at 126.

As in *Parsons*, we apply the *King* test to the case *sub judice* to determine whether the charges alleged in the second indictment

were barred by collateral estoppel. Applying the *King* factors, we find that the issue to be concluded under the superseding indictment, whether Defendant committed the charged offenses between 25 August and 2 October 2007, is the same as the issue to be concluded under the second indictment. *See King*, 284 N.C. at 358, 200 S.E.2d at 806. Second, we find that the issue of whether prosecuting Defendant under the expanded dates of offense would constitute an abuse of process was litigated before Judge Burke. Third, this issue was material and relevant to the disposition of the first indictment. Finally, Judge Burke's order striking the superseding indictment was necessary and essential to the outcome of that case. *See id.*; *see also Parsons*, 92 N.C. App. at 179, 374 S.E.2d at 125 (applying the *King* factors to determine whether the issue concluded in the second indictment was barred by collateral estoppel).

Accordingly, we affirm Judge Gregory's order dismissing this case as it was barred by N.C. Gen. Stat. § 15A-954(a)(7) and collateral estoppel. Having concluded that dismissal was proper on these grounds, we need not address the applicability of double jeopardy in this matter.

AFFIRMED.

Judges CALABRIA and GEER concur.

Report per Rule 30(e).