Cite as 2012 Ark. App. 643

ARKANSAS COURT OF APPEALS

DIVISION III
No. CACR12-184

	Opinion Delivered NOVEMBER 7, 2012
LEONARD LEON BEAN APPELLANT	APPEAL FROM THE SEBASTIAN COUNTY CIRCUIT COURT, FORT SMITH DISTRICT [NO. CR-11-409]
V.	
STATE OF ARKANSAS APPELLEE	HONORABLE J. MICHAEL FITZHUGH, JUDGE
	AFFIRMED

CLIFF HOOFMAN, Judge

Appellant Leonard Bean appeals from the Sebastian County Circuit Court order denying his motion to dismiss the charge of second-degree sexual assault. He argues that Arkansas Rule of Criminal Procedure 21.3 and the doctrine of res judicata preclude his prosecution for this offense. We disagree and affirm.

Bean was charged in Sebastian County Circuit Court on May 5, 2011, with second-degree sexual assault. The affidavit for the warrant for his arrest alleged, in part, that between April 29, 2007, and April 28, 2008, Bean committed sexual assault in the second degree as he, being eighteen years of age or older, engaged in sexual contact with another person, T.H., who was less than fourteen years of age and not his spouse. The affidavit alleged that the sexual contact occurred at a residence on Blair Avenue in Fort Smith and in a car at a Walmart parking lot.

On October 20, 2011, Bean filed a motion to dismiss. He set out the following history to support his motion. On May 8, 2009, Bean was charged with rape of T.H. in Crawford County Circuit Court case CR-2009-192(I). The information alleged that the rape occurred on or between 2005 and April 28, 2009. Bean was tried before a jury on April 27 and 28, 2010, and he was found not guilty. A Crawford County bench warrant for Bean's arrest for two counts of second-degree sexual assault was filed on June 18, 2010. The affidavit for that arrest warrant alleged that between May 2005 and April 28, 2009, Bean engaged in sexual contact with T.H. that occurred separately from the offense of rape of which he was acquitted. This was case CR-2010-319(I).

On March 16, 2011, the Crawford County Circuit Court entered an order of dismissal in case CR-2010-319(I). The court found that the information supporting the charge of rape and the affidavit supporting the charge of sexual assault in the second degree alleged the same conduct arising out of the same criminal episode; that Bean timely filed a motion to dismiss alleging double jeopardy, res judicata, and violation of Rule 21.3; that the testimony adduced at the rape trial by the alleged victim included testimony in support of the charge of sexual assault in the second degree; and that pursuant to Rule 21.3, the State must charge a defendant with related offenses if they are within the jurisdiction and venue of the court and are based upon the same conduct or arise from the same criminal episode. The court found that the charge of sexual assault in the second degree was barred by Rule 21.3 and the doctrine of res judicata.

Bean argued in his current motion to dismiss that the Sebastian County charge of

sexual assault was allegedly committed during the same criminal episode as charged in both Crawford County cases. He claimed that because all of the alleged misconduct took place within the same criminal episode, venue and jurisdiction would be proper in either Crawford County or Sebastian County and the State should have brought all charges at the time the rape case was filed. He argued that Rule 21.3 and the doctrine of res judicata demanded that the current charge be dismissed. The State claimed that the alleged criminal conduct in the Sebastian County case could not have been joined in the Crawford County cases because the charges are in different counties that are not within the same judicial district. After a hearing, the court entered an order denying the motion to dismiss. Bean filed a timely notice of appeal.

Bean argues that in denying his motion to dismiss, the trial court misapplied Rule 21.3 and violated core constitutional and common-law principles and values. Arkansas Rule of Criminal Procedure 21.3 provides in part as follows:

> (a) Two (2) or more offenses are related offenses for the purposes of this rule if they are within the jurisdiction and venue of the same court and are based on the same conduct or arise from the same criminal episode.
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> (b) When a defendant has been charged with two (2) or more related offenses, his timely motion to join them for trial shall be granted unless the court determines that because the prosecuting attorney does not have sufficient evidence to warrant trying some of the offenses at that time, or for some other reason, the ends of justice would be defeated if the motion is granted. A defendant's failure to so move constitutes a waiver of any right of joinder as to related offenses with which the defendant knew he was charged.
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> (c) A defendant who has been tried for one (1) offense may thereafter move to dismiss a charge for a related offense, unless a motion for joinder of these offenses was previously denied or the right of joinder was waived as provided in subsection (b). The motion to dismiss must be made prior to the second trial, and shall be granted

> unless the court determines that because the prosecuting attorney did not have sufficient evidence to warrant trying this offense at the time of the first trial, or for some other reason, the ends of justice would be defeated if the motion were granted.

Thus, for Rule 21.3 to bar Bean's prosecution in Sebastian County for second-degree sexual assault, that offense must be "related," under the rule, to the Crawford County offenses.

Bean argues that the jurisdiction and venue component of Rule 21.3(a) is satisfied because circuit courts have jurisdiction for the trial of felonies exclusive of district courts. *See* Ark. Code Ann. § 16-88-101(a)(3). He claims that "because two separate felonies (second-degree sexual assault and rape) were at issue in the case below, each circuit court had statutorily conferred subject-matter jurisdiction over the crimes charged." Bean argues that Arkansas Code Annotated section 16-88-108 provides that either Crawford County or Sebastian County could have tried him for rape and sexual assault in one trial. This statute provides in part:

> (a) When any offense may be committed on the boundary of two (2) counties or where the person committing the offense may be on one side and the injury is done on the other side of the boundary, the indictment may be found and the trial and conviction thereon had in either of the counties. If it is uncertain where the boundary is, the indictment may be found and a trial had in either county.
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> . . . .
>
> (c) Where the offense is committed partly in one county and partly in another or the acts or effects thereof requisite to the consummation of the offense occur in two (2) or more counties, the jurisdiction is in either county.

We disagree with Bean's analysis. The terms "venue" and "jurisdiction" are often used interchangeably. *State v. Osborn*, 345 Ark. 196, 45 S.W.3d 373 (2001). Ordinarily, venue refers to the geographic area, like a county, where an action is brought to trial. *Id.*

In contrast, jurisdiction is generally thought of as the power of a court to decide cases, and it presupposes control over the subject matter and the parties. *Id.* One type of jurisdiction, local jurisdiction, is statutorily provided for in Arkansas Code Annotated section 16-88-105. Subsection (b) of that statute provides that the local jurisdiction of circuit courts "shall be of offenses committed within the respective counties in which they are held." Section 16-88-108(c) provides for local jurisdiction over those offenses that occur in more than one county. *Id.*

Here, pursuant to section 16-88-105, Sebastian County Circuit Court has jurisdiction over the alleged sexual assault that was committed in Sebastian County—specifically on Blair Avenue in Fort Smith. Section 16-88-108 is not applicable because the charged offense of sexual assault was alleged to have been committed entirely within Sebastian County—not partly in two counties. Thus, jurisdiction and venue were proper only in Sebastian County Circuit Court. As the offense of rape was within the jurisdiction and venue of the Crawford County Circuit Court, the two offenses are not within the jurisdiction and venue of the same court. Furthermore, there is no evidence that the sexual assault in Sebastian County arose from the same criminal episode as the similar offenses charged in Crawford County, which allegedly occurred within a span of four years. Rape is not a continuing offense, in that each act occurring as the result of a separate impulse constitutes a separate offense. *Ricks v. State*, 327 Ark. 513, 940 S.W.2d 422 (1997). As the offenses do not meet the definition of "related offenses," Rule 21.3 does not mandate dismissal.

Bean also argues that the Sebastian County charge is barred by res judicata. Res

judicata has two facets, one being issue preclusion, or collateral estoppel, and the other being claim preclusion. *Dilday v. State*, 369 Ark. 1, 250 S.W.3d 217 (2007). Bean asserts in his reply brief that issue preclusion is the operative facet here. Under issue preclusion, a decision by a court of competent jurisdiction on matters which were at issue, and which were directly and necessarily adjudicated, bars any further litigation on those issues. *Id*. Bean argues that the Crawford County Circuit Court correctly ruled that res judicata barred the subsequent sexual-assault charge in that county after his acquittal on rape. He claims that this decision is entitled to preclusive effect in the Sebastian County case.

Bean argues that even where the offense charged is not literally the same as the one previously tried, the principle of collateral estoppel bars relitigation between the same parties of issues actually determined at the previous trial. We find, however, that the issue actually determined at the previous trial only concerned Bean's alleged conduct in Crawford County. In the two cases filed in Crawford County, Bean was alleged to have committed rape and sexual assault in Crawford County. In its order of dismissal, the Crawford County Circuit Court found that both cases alleged conduct arising out of the same criminal episode. This finding, however, was made without any allegation of conduct that occurred in Sebastian County. The issue of sexual assault that occurred in Sebastian County was not before the Crawford County Circuit Court and is not affected by the acquittal and subsequent order of dismissal in Crawford County. Thus, res judicata does not bar the Sebastian County prosecution. We affirm the denial of Bean's motion to dismiss.

Affirmed.

ROBBINS and MARTIN, JJ., agree.
Ray Hodnett and *Brandon J. Harrison*, for appellant.

Dustin McDaniel, Att'y Gen., by: *Pamela A. Rumpz*, Ass't Att'y Gen., for appellee.