[Cite as *State v. Melton*, 2010-Ohio-3187.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93542

STATE OF OHIO

PLAINTIFF-APPELLANT

vs.

DWIGHT MELTON

DEFENDANT-APPELLEE

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-520403

BEFORE: McMonagle, J., Kilbane, P.J., and Cooney, J.

RELEASED: July 8, 2010

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B)and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), or a motion for consideration en banc with supporting brief, per Loc.App.R. 25.1(B)(2), is filed within ten days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

CHRISTINE T. McMONAGLE, J.:

{¶ 1} The state of Ohio appeals from the trial court's judgment dismissing the indictment against defendant-appellee, Dwight Melton. We affirm.

I

{¶ 2} According to police reports, Melton and Tianna Chatman were involved in an altercation on January 7, 2009. Melton allegedly called Chatman several times and threatened to harm her, and subsequently went to her residence and disconnected her phone line.

{¶ 3} On January 9, 2009, Melton was charged in Cleveland Municipal Court with aggravated menacing, in violation of Cleveland Codified Ordinances 621.06, and criminal damaging, in violation of Cleveland Codified Ordinances 623.02, arising from the January 7 incident. Subsequently, on January 12, 2009, a felony charge of disrupting public services, based on the same criminal conduct, was bound over to the grand jury.

{¶ 4} On January 20, 2009, Melton negotiated a plea agreement in municipal court. He pled no contest to aggravated menacing, and the prosecutor dismissed the criminal damaging charge. The trial court found

him guilty of aggravated menacing and sentenced him to 180 days in jail and a $1,000 fine.

{¶ 5} Ten days later, on January 30, 2009, the State indicted Melton in this case on one count of disrupting public services in violation of R.C. 2909.04 (a fourth degree felony), and one count of menacing in violation of R.C. 2903.22 (a fourth degree misdemeanor). The new charges also arose out of the January 7, 2009 incident between Melton and Chatman.

{¶ 6} Melton filed a motion to dismiss the indictment, which the trial court granted after a hearing. The trial court found that the State's prosecution of the menacing charge was barred by double jeopardy principles, because menacing is a lesser included offense of aggravated menacing, to which Melton had already pled no contest.

{¶ 7} The trial court also found that the indictment should be dismissed because Melton had a reasonable expectation when he pled no contest in municipal court that his plea and conviction disposed of all charges relating to the incident. Finally, the trial court found that the indictment should be dismissed "in the interest of justice," because the State knew of the pending charges during the municipal court proceedings and could have bound over the entire case to common pleas court at any time. The trial court found that another prosecution based upon the same incident would involve litigation of the same facts presented in the municipal court case and

the State should not be given "multiple opportunities to try the defendant for the same conduct." The State appeals from the trial court's judgment.

II

{¶ 8} In its single assignment of error, the State argues that the trial court erred in finding that Melton's prosecution for disrupting public services and menacing was barred by double jeopardy principles. The State does not challenge the trial court's other bases for dismissing the indictment, i.e., that Melton had a reasonable belief that no further charges would be pursued after his negotiated plea, and that the indictment should be dismissed in the interest of justice, and accordingly, has waived any argument relating to them on appeal.

{¶ 9} The Double Jeopardy Clause of the Fifth Amendment, applicable to the States through the Fourteenth Amendment, provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." The constitutional guarantee protects against a second prosecution for the same offense after acquittal or conviction, and against multiple punishments for the same offense. *N. Carolina v. Pearce* (1969), 395 U.S. 711, 717, 89 S.Ct. 2072, 23 L.Ed.2d 656. Where successive prosecutions are at stake, the guarantee serves "a constitutional policy of finality for the defendant's benefit." *Brown v. Ohio* (1977), 432 U.S. 161, 166, 97 S.Ct. 2221, 53 L.Ed.2d 187.

{¶ 10} The established test for determining whether two offenses constitute the "same offence" under the Double Jeopardy Clause was set forth in *Blockburger v. United States* (1932), 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306. "[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact which the other does not." Thus, under *Blockburger*, multiple punishments and prosecutions are prohibited if one offense is a greater or lesser included offense of the other. *Brown*, 432 U.S. at 168-69.

{¶ 11} Menacing is a lesser included offense of aggravated menacing; the only difference between the two offenses is the degree of harm threatened. *State v. Striley* (1985), 21 Ohio App.3d 300, 303, 488 N.E.2d 499; *State v. Britton*, 181 Ohio App.3d 415, 2009-Ohio-1282, 909 N.E.2d 176, ¶50 and 56. Accordingly, because Melton pled guilty to the greater offense of aggravated menacing in municipal court, based on conduct that occurred on January 7, 2009, the State is barred by principles of double jeopardy from prosecuting him in common pleas court for the lesser included offense of menacing relating to the same incident. Therefore, the trial court did not err in dismissing this charge.[1]

[1]Our review of the double jeopardy issue is de novo because it involves purely legal and constitutional issues.

{¶ 12} With respect to the charge of disrupting public services, the trial court conceded that a "strict application of the *Blockburger* test to the counts of disrupting public services and criminal endangering might permit the State to go forward with the charge of disrupting public services." Nevertheless, the trial court dismissed the indictment "in the interest of justice" and because Melton had a reasonable expectation that no further charges relating to the incident would be brought after his negotiated plea was entered. Although the State has waived any argument relating to these bases for the trial court's judgment, we specifically find that the trial court did not abuse its discretion in dismissing the indictment for these reasons.[2]

{¶ 13} In *State v. McDonough*, 8th Dist. No. 84766, 2005-Ohio-1315, ¶10, this court held 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 further charges related to the incident.

{¶ 14} Further, in *State v. Lloyd*, 8th Dist. Nos. 86501 and 86502, 2006-Ohio-1356, this court dismissed a second indictment against several defendants where "the state possessed all the evidence and information it would use in its second indictment prior to the time that the appellees

[2]These findings were discretionary with the trial court; hence, we review for abuse of discretion. *State v. Tankersley* (Apr. 23, 1998), 8th Dist. Nos. 72398 and 72399.

entered their pleas to the first indictment." Id. at ¶28. The court found that "[t]he state should not be allowed multiple tries at convicting these appellees when it had the means and opportunity to address all issues with a single prosecution." Id.

{¶ 15} Here, the sequence of events supports the trial court's findings that Melton had a reasonable expectation that his plea agreement would dispose of the entire matter and that the State was aware of all the facts leading to the second indictment prior to Melton's plea. The record demonstrates that a felony charge of disrupting public services, based on the same criminal conduct that led to the charges in municipal court, was bound over to the grand jury on January 12, 2009, several days after Melton had been charged in municipal court. Because all of the charges arose out of the same criminal conduct, of which the State was aware, the State could have bound over the entire case to common pleas court prior to Melton's negotiated plea in municipal court. It chose not to do so, but waited until ten days after Melton entered his plea in municipal court to indict him.

{¶ 16} Melton should not be forced to "run the gauntlet" a second time for charges arising from the same incident and involving the same conduct as the charges to which he pled in municipal court. *Brown*, 432 U.S. at 166. And the State should not be allowed multiple tries at convicting him when it could have addressed all issues in a single prosecution. Accordingly, the trial

court did not abuse its discretion in holding that the "interest of justice" required dismissal of the felony indictment.

Affirmed.

It is ordered that appellee recover from appellant 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 common pleas court to carry this judgment into execution.

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

CHRISTINE T. McMONAGLE, JUDGE

MARY EILEEN KILBANE, P.J., and
COLLEEN CONWAY COONEY, J., CONCUR