

[Cite as *State v. DaRe*, 2017-Ohio-7585.]

STATE OF OHIO, BELMONT COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO	)	CASE NO. 16 BE 0011
	)	
PLAINTIFF-APPELLEE	)	
	)	
VS.	)	OPINION
	)	
ALEX DaRE	)	
	)	
DEFENDANT-APPELLANT	)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from the County Court,  
Eastern Division, of Belmont County,  
Ohio  
Case No. 15 CRB 749

JUDGMENT: Vacated and Remanded.

APPEARANCES:  
For Plaintiff-Appellee: Atty. Daniel P. Fry  
Belmont County Prosecutor  
Atty. Scott A. Lloyd  
Assistant Prosecuting Attorney  
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For Defendant-Appellant: Atty. Valerie Brandenburg  
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Cleveland Heights, Ohio 44118

Atty. Loreen Robinson  
29550 Shaker Blvd.,  
Pepper Pike, Ohio 44124

JUDGES:  
Hon. Cheryl L. Waite  
Hon. Gene Donofrio  
Hon. Mary DeGenaro

Dated: September 8, 2017

[Cite as *State v. DaRe*, 2017-Ohio-7585.]  
WAITE, J.

{¶1} Appellant Alexander DaRe appeals the judgment of the Belmont County Court, Eastern Division, denying his application to have his record sealed. Appellant raises four assignments of error. However, it is apparent that a procedural error occurred earlier in this case. Because it appears there was no written motion by the state to dismiss certain charges and it appears the trial court failed to make certain findings required by law, the attempt to dismiss Appellant's charge in this matter was improperly entered. Therefore, the judgment of the trial court must be vacated and the matter remanded to the trial court to make the appropriate findings on the record.

#### Factual and Procedural History

{¶2} Appellant was charged with menacing by stalking on December 27, 2011 in Belmont County based on statements from various individuals in the community that Appellant had followed them in his vehicle, accusing them of spying on him and tampering with propane tanks at his home. There were also statements made concerning the sound of gunshots coming from Appellant's property. On January 6, 2012 the trial court issued two judgment entries. The first entry ordered all firearms to be removed from Appellant's home. The second entry journalized Appellant's plea of not guilty and ordered Appellant to have a psychological evaluation and comply with any recommendations stemming from this evaluation. The second entry also ordered Appellant to have no contact with any of the victims.

{¶3} On January 18, 2012 the court filed another entry sustaining a joint motion for a continuance and memorializing Appellant's waiver of speedy trial. The no-contact order regarding the victims was reiterated. Continuing psychological

evaluations were ordered and the court ordered that a status report concerning these evaluations be submitted to the court. Finally, the weapons ban against Appellant was to remain in effect.

{¶4} It is on March 21, 2012, that a problem occurred. The trial court issued a judgment entry on that date sustaining, without prejudice, an apparent motion to *nolle prosequi* filed by the state. Based on the record before us, there is no record of the state filing a written motion and no transcripts of any proceeding where an oral motion would have been made. Despite the entry purporting to dismiss the criminal charges, the parties proceeded as though a criminal case remained active. On May 21, 2012 the court issued another entry setting a June 6, 2012 hearing date on the issue of the return of Appellant's weapons. An entry dated June 6, 2012 stated that Appellant appeared in court with his counsel and a hearing on "Review of Weapons Disposition" was continued until November 14, 2012, at which time Appellant was to submit a status report on his psychiatric condition.

{¶5} On November 13, 2012 Appellant's counsel filed a motion for extension of time of 90 days for the disposition hearing and for submission of Appellant's status report, stating that requirements of Appellant's medical insurance coverage necessitated an extension and that counsel was not available on the scheduled hearing date. Appellant's counsel also stated in this motion that "[c]ounsel for the Defendant has been advised by the Defendant that all weapons currently in the possession of the Court should be permanently retained by the Court or its agents and disposed of in a manner in the sole discretion of the Court." (11/13/12 Motion for

Extension of Time.) On November 13, 2012, the trial court granted the extension of time and set the weapons disposition hearing for February 6, 2013.

{¶16} On February 4, 2013, Appellant's trial counsel filed a second motion for extension of time to submit the psychiatric status report, citing the need for Appellant to obtain additional information from his psychologist to complete the report. The state did not oppose the motion. That same day the trial court granted the extension and set the weapons hearing for April 3, 2013. On April 3, 2013, a judgment entry was issued ordering Appellant to continue counseling and provide the court with a status report and also that: "By agreement of both parties, all guns ordered forfeited to the State of Ohio. Defendant is prohibited from purchasing any weapons in the future. Defendant will not possess any weapons." (4/3/13 J.E.) Two days later on April 5, 2013, a *nunc pro tunc* judgment entry was issued ordering the guns forfeited to "Belmont County Sheriff's Office" rather than "State of Ohio" as indicated in the April 3rd entry.

{¶17} On August 2, 2013, Appellant's counsel submitted a copy of Appellant's most recent psychological evaluation:

which evaluation was ordered by the Court prior to the dismissal of all charges brought against Defendant. Defendant has fully complied with all requests by the court for continuing medical evaluation, will continue to take all required medications and to consult medical professionals annually or as often as needed and has previously agreed to (1) release all claims to any ammunition, guns, pistols or other bows used

for hunting and (2) to refrain from applying for a permit for any type of gun, pistol or other bows used for hunting.

(8/2/13 Entry for Review.)

{¶18} On August 7, 2013, the trial court issued a judgment entry simply stating, “Attorney Loreen M. Robinson appeared on behalf of the Defendant. Review held. Defendant is prohibited from using any type of social media. Case closed.”

{¶19} Subsequently, on November 24, 2015, Appellant filed a motion to seal his record pursuant to R.C. 2953.52(A)(1). A hearing on the motion was set for December 23, 2015. However, on December 22, 2015, the case was transferred from the Belmont County Court, Northern Division to the Eastern Division and a new hearing date of January 7, 2016 was set. A judgment entry dated January 7, 2016, indicated the hearing was held, that Appellant appeared with counsel and that the matter would be taken under advisement. The court also ordered counsel to submit briefs for a hearing to be held on February 18, 2016. The state did not submit a brief. On March 8, 2016, the trial court issued a judgment entry in which the judge concluded:

[Appellant’s] interest in having the record pertaining to this case sealed are [sic] outweighed by the legitimate government need to maintain such records so as to preserve the order of the Court regarding the prohibition on the [Appellant’s] ability to own, purchase and possess weapons. Therefore, the Application for Sealing of the Record is denied.

(3/8/16 J.E., p. 5.)

{¶10} Appellant filed this timely appeal. His third assignment of error, relating to the jurisdiction of the trial court, will be addressed first as it involves a threshold question in this matter.

ASSIGNMENT OF ERROR NO. 3

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN RELYING ON AN ORDER THAT WAS VOID AB INITIO FOR WANT OF JURISDICTION.

{¶11} In his third assignment, Appellant contends the trial court erred in denying his motion to seal the record because the court relied on a void judgment entry. Specifically, Appellant contends the trial court lacked subject matter jurisdiction when it issued any order after the underlying charges were dismissed. Hence, Appellant urges that every order filed after March 21, 2012 was void. It appears that Appellant is partially correct, but in regard to the wrong order(s). Our review of this record reveals that it is the March 21, 2012 entry purporting to dismiss the underlying criminal charges against Appellant that is erroneous.

{¶12} An appellate court reviews *de novo* the question of whether a court of common pleas possesses subject matter jurisdiction. *State v. Conway*, 10th Dist. No. 12AP-412, 2013-Ohio-3741, ¶ 9, citing No. 15AP-810 4 *Clifton Care Ctr. v. Ohio Dept. of Job & Family Servs.*, 10th Dist. No. 12AP-709, 2013- Ohio-2742, ¶ 9.

{¶13} Generally, a void judgment is one that has been imposed by a court that lacks subject matter jurisdiction over a case and, thus, the authority to act. *State*

*v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, 873 N.E.2d 306, ¶ 27. Once the trial court properly dismisses all criminal charges in a matter, that case is at end. The question here becomes whether the criminal charge was properly dismissed.

{¶14} Crim.R. 48(A) provides that the state, by leave of court and in open court, may file an entry of dismissal which will terminate the prosecution. R.C. 2941.33 provides that the prosecuting attorney may enter a *nolle prosequi* with leave of court on good cause shown and in open court. These provisions are essentially identical, except that R.C. 2941.33 provides that a *nolle prosequi* entered contrary to these provisions is void. Where the state's motion for a *nolle prosequi* meets the good cause and open court requirements of Crim.R. 48(A) it should be granted. *State v. Sutton*, 64 Ohio App.2d 105, 411 N.E.2d 818 (1979). Notably, once an indictment is *nolled*, the court loses jurisdiction and the case ends. *Id.*

{¶15} In the instant case, no written motion by the state was submitted. Any motion made would have been verbal. This motion was still subject to the requirements of statute, however. It must be made (1) with permission of the court (2) for good cause shown and (3) in open court. The purported motion in this matter fails on all three prongs. There was no hearing held on March 21, 2012, the date of the entry purporting to grant the motion. The entry is silent as to how and when such a motion was made, but clearly it was not made in open court. In addition, no reasons at all are stated in the entry, in direct contravention of the requirement that "good cause must be shown. R.C. 2941.33 mandates that: "The prosecuting attorney shall not enter a *nolle prosequi* in any cause without leave of the court, on

good cause shown, in open court. A nolle prosequi entered contrary to this section is invalid.”

{¶16} Prior to purportedly granting the *nolle prosequi*, the trial court issued a judgment entry on January 18, 2012 where it granted a motion for continuance filed by Appellant’s counsel, ordered Appellant to have no contact with the victims without the court’s consent, ordered psychological evaluations and ordered that “Defendant will not possess any weapons.” (1/18/12 J.E.)

{¶17} The very next judgment entry from the court is dated March 21, 2012. In this entry the trial court states that it is granting the state’s motion to *nolle prosequi* without prejudice, but also without explanation. Following this, the court ordered no contact with the victims without the court’s consent, continued counseling and ordered Appellant to pay court costs. This entry is clearly erroneous in several respects, not the least of which is that once the trial court would have properly dismissed the criminal charge against Appellant there would not be any victims to protect. There would be no jurisdiction for the court to order ongoing psychological evaluations. Missing from this order is any disposition with regard to Appellant’s weapons and his ability to possess any weapons in the future. The single most important thing missing in this order, however, are that the state met its requirements for requesting this dismissal and the court’s reasons for granting the *nolle prosequi*, with an averment of the statutory requirements of good cause being shown in open court.



{¶18} Despite the apparent belief of the court, state and counsel that dismissal of the criminal charges against Appellant had been granted, the court issued several more entries, not only attempting to resolve the issue of weapons disposition, but ordering further psychological evaluations and ordering Appellant to abstain from social media.

{¶19} Appellant asserts that when the trial court issued its March 21, 2012, entry granting the state's motion to *nolle prosequi*, the jurisdiction of the court ended. Ordinarily, we would agree with Appellant. Dismissal of the criminal charge, properly requested and properly granted, would end the trial court's jurisdiction over a defendant. However, this record reflects that the trial court failed to follow the mandatory proper procedure to grant the state's (apparent) motion to *nolle* in this matter. There is no motion stating the grounds for the state's request in the record before us, nor was there any hearing or session of court where there could have been a discussion of the motion or the reasons for granting such a motion. The trial court entry purports to grant the "motion" without prejudice, which would mean that the particular indictment at issue was withdrawn but would leave open the opportunity for reindictment in the future. *State v. Eberhardt*, 56 Ohio App.2d 193, 381 N.E.2d 1357 (1978). Since the "motion" was not properly made or granted, here, the order dismissing the criminal charge was invalid the original charge is still pending in the trial court.

{¶20} The trial court's ban on possession of weapons forms the crux of Appellant's appeal. He sought to have the record in this criminal case sealed,

particularly as it affected his right to possess weapons. Appellant's actual issue on appeal cannot be properly addressed, however, because this record reflects that the *nolle prosequi* was not properly made and was not properly accepted. Hence, the trial court's entry of March 21, 2012 purporting to dismiss these charges appears contrary to law and is reversed and vacated. We must remand the matter to the trial court for the appropriate disposition of this matter. Appellant's third assignment of error is sustained.

ASSIGNMENT OF ERROR NO. 1

THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION WHEN IT DENIED APPELLANT'S EXPUNGEMENT MOTION WHERE APPELLANT'S CHARGE OF MENACING BY STALKING WAS DISMISSED BY A *NOLLE PROSEQUI* WITHOUT PREJUDICE AND FAILED TO CONSIDER APPELLANT'S UNIQUE CIRCUMSTANCES.

ASSIGNMENT OF ERROR NO. 2

THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION WHEN IT DENIED APPELLANT'S MOTION TO EXPUNGE HIS RECORD WHEN THE BENCH CONFERENCE WAS NOT FULLY RECORDED.

ASSIGNMENT OF ERROR NO. 4

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN GRANTING A NUNC PRO TUNC JUDGMENT ENTRY WITHOUT EXPLANATORY LANGUAGE.

{¶21} In his first assignment of error, Appellant contends the trial court erred in denying his motion to seal the record without considering Appellant's "unique circumstances."

{¶22} In his second assignment of error Appellant asserts the trial court erred by not holding a full hearing on the record precluding a full appellate review.

{¶23} In his fourth assignment of error, Appellant contends the trial court erred in issuing the April 5, 2016 *nunc pro tunc* judgment entry when the trial court did not provide explanatory language for the *nunc pro tunc* entry.

{¶24} Because the trial court failed to correctly dismiss Appellant's criminal charge, Appellant's first, second and fourth assignments are moot. The matter must be remanded for the trial court to make proper findings based on an appropriate motion or to otherwise dispose of this matter pursuant to law.

{¶25} Based on the above, although the March 21, 2012 judgment entry indicates the trial court granted some motion by the state to *nolle prosequi*, the motion was not properly made in open court and trial court failed to follow the statutory requirements for granting this apparent motion. Therefore, the criminal charge has not been properly dismissed. In addition, the trial court continued to make several more dispositional rulings and hold hearings although Appellant's weapons ban was not addressed in the *nolle prosequi* order. As the *nolle* was not properly granted, Appellant's assignments of error relating to trial court action taken after the void dismissal entry are moot. The trial court's March 21, 2012 entry is

vacated and the matter is remanded to the trial court for further action pursuant to this Opinion.

Donofrio, J., concurs.

DeGenaro, J., concurs.