

[Cite as *State v. Sturgell*, 2009-Ohio-5628.]

IN THE COURT OF APPEALS OF DARKE COUNTY, OHIO

STATE OF OHIO	:	
	:	
Plaintiff-Appellant	:	C.A. CASE NO. 1751
vs.	:	T.C.CASE NO. 08CRB0010578
	:	
JOHN T. STURGELL	:	(Criminal Appeal from Municipal Court)
Defendant-Appellee	:	

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O P I N I O N

Rendered on the 23<sup>rd</sup> day of October, 2009.

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GRADY, J.:

{¶ 1} This appeal is brought by the State pursuant to R.C. 2945.67 from a judgment of the Municipal Court of Darke County that granted Defendant John Sturgell's Crim.R. 12(C)(1) motion to dismiss a complaint charging him with the offense of vehicular homicide in violation of R.C. 2903.06(A)(3)(a). The court ordered that charge dismissed on a finding that, because Defendant's conviction for vehicular homicide would necessarily

rely on facts on which the State had relied to obtain Defendant's conviction for a lesser lane-violation traffic offense, the vehicular homicide charge is subject to the bar against double jeopardy. We find that double jeopardy does not apply because a fact necessary to prove the vehicular homicide charge, the death of the victim, did not exist when Defendant was convicted of the lesser traffic offense. Therefore, we will reverse the dismissal and remand the case for further proceedings on the vehicular homicide charge.

{¶ 2} In the early morning hours of May 10, 2008, in very foggy conditions, Defendant inadvertently turned onto and drove north in the southbound lanes of U.S. Route 127 in Greenville Township in Darke County. Near the intersection of U.S. Route 127 and State Route 49, Defendant's vehicle collided head on with a motorcycle driven by Thomas Durr, who as a result sustained life threatening injuries. Thomas Durr was initially transported to Wayne Hospital in Greenville, and was then immediately transferred by Care Flight to Miami Valley Hospital in Dayton.

{¶ 3} One day after the accident occurred, on May 11, 2008, Defendant was issued a traffic citation for driving the wrong way on a divided highway in violation of R.C. 4511.35(A), a minor misdemeanor. On May 19, 2008, Defendant entered a plea of guilty to that traffic offense. The trial court fined

Defendant twenty-five dollars and ordered him to pay the court costs. Two days later, on May 21, 2008, Thomas Durr died from the injuries he sustained in the collision with Defendant's vehicle.

{¶ 4} On June 22, 2008, Defendant was charged by complaint in Darke County Municipal Court with vehicular homicide in violation of R.C. 2903.06(A)(3)(a), a first degree misdemeanor.

Defendant moved to dismiss that charge on double jeopardy grounds. Defendant argued that in order to prove the negligence element of vehicular homicide, that while operating a motor vehicle he negligently caused the death of Thomas Durr, the State necessarily must prove that he drove the wrong way on a divided highway, a lesser offense for which he had already been prosecuted and convicted. Under those circumstances, double jeopardy bars Defendant's subsequent prosecution on the charge for the greater offense of vehicular homicide.

{¶ 5} The State filed a memorandum in opposition to Defendant's motion to dismiss, arguing that an exception to the double jeopardy bar applies when an element of the greater offense, in this case Thomas Durr's death, did not occur until after the prosecution for the lesser offense had concluded.

Defendant filed a response to the State's memorandum, arguing that the exception to the double jeopardy bar that the State relied on applies only if the State is unable to proceed on

the greater offense because all of the essential facts supporting that charge have not occurred, or been discovered, despite the exercise of due diligence. Defendant contended that the exception does not apply in this case because the State could have anticipated and discovered, through the exercise of due diligence, that Thomas Durr's death was inevitable.

{¶ 6} On November 5, 2008, the trial court held a hearing on Defendant's motion to dismiss. The sheriff's deputy who investigated the accident and one member of the Darke County EMS team who responded to the accident scene testified at the hearing. Thomas Durr's hospital records and the coroner's report were also admitted into evidence. That testimony and other evidence demonstrates that the injuries Thomas Durr suffered were extensive and life-threatening, and subsequently resulted in his death.

{¶ 7} On November 24, 2008, the trial court granted Defendant's motion to dismiss the vehicular homicide charge on double jeopardy grounds. The court concluded that in order to prove the elements of the vehicular homicide charge, specifically that Defendant negligently caused the death of Thomas Durr, the State would have to prove that Defendant drove his vehicle on the wrong side of a divided highway, a lesser offense for which Defendant had already been prosecuted and convicted. Accordingly, double jeopardy bars prosecution of

Defendant on the greater offense of vehicular homicide.

{¶ 8} The State timely appealed to this court from the trial court's decision granting Defendant's motion to dismiss the vehicular homicide charge.

ASSIGNMENT OF ERROR

{¶ 9} "THE TRIAL COURT ERRED IN HOLDING THAT THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION PRECLUDES PROSECUTION UPON A CHARGE OF VEHICULAR HOMICIDE, WHERE, PRIOR TO THE VICTIM'S DEATH, THE DEFENDANT HAD PLEAD GUILTY TO THE UNDERLYING TRAFFIC VIOLATION."

{¶ 10} The double jeopardy clause protects against a second prosecution for the same offense after acquittal or conviction, and against multiple punishments for the same offense. *North Carolina v. Pearce* (1969), 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656. In that regard, the double jeopardy clause generally forbids successive prosecutions and cumulative punishments for a greater and lesser included offense involving the same conduct. *Brown v. Ohio* (1977), 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187. Conviction on a lesser included offense generally bars subsequent prosecution for a greater offense. *Id.*; *State v. Konicek* (1984), 16 Ohio App.3d 17.

{¶ 11} Each of the offenses at issue in this case requires proof of an additional fact the other does not. A violation of the divided roadways statute, R.C. 4511.35(A), requires proof

that a vehicle has been driven over, across or on the wrong side of a divided highway. Vehicular homicide in violation of R.C. 2903.06(A)(3)(a) has no such requirement. On the other hand, a violation of R.C. 2903.06(A)(3)(a) requires proof that the operator of a motor vehicle negligently caused the death of another. A violation of R.C. 4511.35(A) has no such requirement. Therefore, R.C. 4511.35(A) and 2903.06(A)(3)(a) do not constitute the same offense for double jeopardy purposes, and are sufficiently distinguishable to permit successive prosecutions and multiple punishments. *Blockburger v. United States* (1932), 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306.

{¶ 12} Notwithstanding application of the *Blockburger* test, even though the same act may constitute a violation of two distinct statutory provisions, and permit multiple punishments, successive prosecutions are barred in certain circumstances involving replication of the evidence. *State v. Kozar* (Feb. 20, 1986), Cuyahoga App. Nos. 50181, 50182. If the State cannot prove the greater offense without also proving the lesser offense, or relitigating material factual issues already resolved in the first prosecution, then double jeopardy bars subsequent prosecution on the greater offense. *Ashe v. Swenson* (1970) 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469; *Harris v. Oklahoma* (1977), 433 U.S. 682, 97 S.Ct. 2912, 53 L.Ed.2d 1054; *Illinois v. Vitale* (1980), 447 U.S. 410, 100 S.Ct.

2260, 65 L.Ed.2d 228; *State v. Thomas* (1980), 61 Ohio St.2d 254, reversed on other grounds, *State v. Crago* (1990), 53 Ohio St.3d 243; *Konicek*. A person may not be subjected to multiple prosecutions when proof of one offense is necessary, as a practical matter, to prove the other offense, and both offenses arise out of the same criminal conduct. *Thomas* at 261; *Harris v. Oklahoma*. Defendant argues that is the case here.

{¶ 13} Defendant was convicted and sentenced for driving the wrong way on a divided highway in violation of R.C. 4511.35(A), a minor misdemeanor. Defendant was subsequently charged with vehicular homicide in violation of R.C. 2903.06(A)(3)(a), a first degree misdemeanor, for negligently causing the death of Thomas Durr. Both offenses arise out of the same conduct. No other conduct by Defendant identified by either party could prove the negligent act necessary for purposes of the vehicular homicide charge. E.g., see *State v. Ahrns* (Aug. 15, 1985), Auglaize App. No. 2-84-11.

{¶ 14} We agree that in order to prove vehicular homicide, and more specifically that Defendant acted negligently in causing Thomas Durr's death, the State must as a practical matter prove that Defendant drove on the wrong side of a divided highway, conduct that constitutes the very offense for which Defendant was previously prosecuted and convicted. Under those circumstances, double jeopardy would ordinarily bar the

subsequent prosecution on the vehicular homicide charge. *Ashe v. Swenson; Harris v Oklahoma; Thomas; Kozar.*

{¶ 15} However, a well recognized exception to the double  
{¶ 16} jeopardy bar applies when one or more of the elements of the greater offense, such as the death of the victim, did not occur before the State concluded its prosecution on the lesser offense. In that circumstance, prosecution on the greater offense is not barred by double jeopardy. *Brown v. Ohio*, 432 U.S. at 169, fn7; *Diaz v. United States* (1912), 223 U.S. 442, 448-449, 32 S.Ct. 150, 56 L.Ed. 500; *Konicek* at 18; *Kozar*. In *Thomas*, the Ohio Supreme Court, quoting *Brown v. Ohio*, wrote:

{¶ 17} “‘An exception may exist where the State is unable to proceed on the more serious charge at the outset because the additional facts necessary to sustain that charge have not occurred or have not been discovered despite the exercise of due diligence. See *Diaz v. United States*, 223 U.S. 442, 448-449, 32 S.Ct. 250, 56 L.Ed. 500 (1912); *Ashe v. Swenson*, supra, 397 U.S. at 453, n. 7, 90 S.Ct. 1189 (Brennan, J., concurring).’

{¶ 18} “The courts have long held that where a fact necessary to the commission of one offense occurs after the defendant has been convicted of another offense, multiple prosecutions are not barred by the Double Jeopardy Clause. The cases seem to be unanimous on this point.” *Id.*, at 262.

{¶ 19} In *State v. Camden* (Oct. 14, 1980), Miami App. No. 80-CA-33, we applied the rule of *Thomas* to hold that prosecution for an R.C. 2903.07(A) vehicular homicide offense is not barred by double jeopardy arising from a prior conviction for reckless operation, R.C. 4511.20, arising from the same facts, when the homicide victim had not died when the prosecution for the reckless operation offense concluded. Other districts have likewise held: *Konicek; State v. Clark* (1984), 20 Ohio App.3d 266.

{¶ 20} Applying our holding in *Camden* to the facts of the present case, we find that Sturgell's prior conviction for a violation of R.C. 4511.35(A) does not bar his subsequent prosecution for vehicular homicide, R.C. 2903.06(A)(3)(a), because the victim of the homicide had not died when prior prosecution for the R.C. 4511.35(A) offense concluded, preventing the State from prosecuting Defendant at that time for the vehicular homicide offense that was subsequently charged.

{¶ 21} Defendant argues that, nevertheless, his prosecution for vehicular homicide is barred by double jeopardy pursuant to *Thomas*, because the State did not act with due diligence to discover the additional fact it needed for that prosecution, because Thomas Durr's death was reasonably foreseeable from the seriousness of his injuries. Defendant points to the

testimony of the sheriff's deputy and the EMT who responded to the May 10, 2008 accident, and the hospital records and coroner's report regarding Thomas Durr's death on May 21, 2008, to demonstrate how dire his condition was when the R.C. 4511.35(A) prosecution concluded on May 19, 2008, only two days prior to the victim's death.

{¶ 22} Defendant misconstrues the holding of *Thomas*. The State is required to have acted with due diligence to discover any facts that had then occurred which are necessary to prove the greater offense when the State obtained a conviction on the lesser offense. The State is not required to foresee that such facts may subsequently occur because, as Judge Markus wrote in *Konicek*, the State's duty of due diligence does not "include anticipatory speculation." 16 Ohio App.3d at 19. Therefore, notwithstanding Thomas Durr's dire condition when Defendant was convicted of the divided lanes violation, the fact that Thomas Durr was then alive permits application of the exception to the bar against double jeopardy.

{¶ 23} The State's sole assignment of error is sustained. The judgment of the trial court dismissing the vehicular homicide charge on double jeopardy grounds will be reversed, and this matter will be remanded to the trial court for further proceedings.

DONOVAN, P.J. And BROGAN, J. concur.

Copies mailed to:

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