

[Cite as *State v. Benge*, 2015-Ohio-544.]

**IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY**

STATE OF OHIO	:	
	:	Appellate Case No. 26342
Plaintiff-Appellee	:	
	:	Trial Court Case No. 14-CR-993
v.	:	
	:	(Criminal Appeal from
MICHAEL C. BENGE	:	Common Pleas Court)
	:	
Defendant-Appellant	:	
	:	

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OPINION

Rendered on the 13th day of February, 2015.

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HALL, J.

{¶ 1} Michael C. Bengé appeals from his conviction and sentence on one count of assault on a peace officer, a fourth-degree felony.

{¶ 2} Bengé advances two related assignments of error challenging the trial court's failure to dismiss his indictment on double-jeopardy grounds. First, he contends dismissal was required because he previously had been convicted of disorderly conduct, a lesser-included offense, involving the same incident. Second, he claims dismissal was required because his prosecution for assault on a peace officer required replication of the evidence used to convict him of disorderly conduct.

{¶ 3} The record reflects that Bengé was indicted on March 27, 2014 on one count of assault on a peace officer. The charge stemmed from his encounter with deputy Noel Meyer outside of Diamonds nightclub in the early morning hours of September 15, 2013. Meyer had been called to the location on a report of Bengé fighting and causing a disturbance both inside and outside of Diamonds. (Motion to Dismiss Tr. at 9-10). As Meyer was in the process of "trespassing" Bengé from Diamonds' property, Bengé hit the officer in the chest and attempted to run away. (*Id.* at 13-15). Bengé elbowed Meyer several times as the officer tried to control him. (*Id.* at 15). Meyer then forced Bengé to the ground and arrested him. (*Id.* at 16). Taking Bengé to the ground resulted in a minor injury to the officer. (*Id.* at 11). Meyer then discovered that Bengé, who was only twenty years old, had used another person's identification to drink inside Diamonds. (*Id.* at 17-18). As a result, Bengé was arrested for three offenses: assault on a peace officer, underage possession/consumption of alcohol, and using false identification to purchase alcohol.

(Tr. at 18-19; Doc. #14 at exhibits).

{¶ 4} On September 16, 2013, misdemeanor complaints were filed in Kettering Municipal Court, charging Bengé with violating R.C. 4301.634 (false identification) and R.C. 4301.69(E) (underage possession/consumption of alcohol). On January 23, 2014, the underage possession/consumption charge was amended to disorderly conduct and the false-identification charge was dismissed. See Kettering Mun. Ct. Case 13CRB01932-A and Kettering Mun. Ct. Case 13CRB01932-B. That same day, Bengé pled guilty to disorderly conduct in Kettering Municipal Court and received a \$100 fine. *Id.*

{¶ 5} As noted above, a Montgomery County grand jury subsequently indicted Bengé for assault on a peace officer in the present case on March 27, 2014. (Doc. #2). The indictment alleged that he knowingly had caused or attempted to cause physical harm to Meyer on September 15, 2013. (*Id.*). Bengé moved to dismiss the indictment on double-jeopardy grounds. (Doc. #10). He argued (1) that the present case was an unconstitutional successive prosecution for the same conduct because he already had been convicted of disorderly conduct, a lesser-included offense and (2) that the present prosecution was unlawful because it required replication or re-litigation of the evidence underlying the disorderly-conduct conviction. (*Id.*). At the conclusion of a June 12, 2014 evidentiary hearing, the trial court denied Bengé's motion. It reasoned:

The Court finds here that you have separate offenses with separate animus. The—the false identification occurred earlier in time before the officer arrived, it occurred 4:00, 3:30, 2:30, some time prior to the call. Then, likewise, the consumption occurred prior to the officer being called. The officer testified that when he arrived his observation of Mr. Bengé he had a

strong odor of alcohol about his person and his eyes were glassy, so by inference we know that the consumption of alcohol by someone who is less than twenty-one, that is Mr. Bengé, occurred prior to Officer Meyer even being at the scene. To do that he had presented the false ID in order to be served so these are separate acts occurred earlier than five a.m.

Now, if we don't consider these original charges and consider the disorderly conduct, disorderly conduct occurred by the yelling and insulting that went on before Officer Meyer engaged in an encounter with Mr. Bengé. The---there was the fighting in the club with the customers which would be disorderly conduct because there was a causing or attempting to cause physical harm to other persons, and the officer testified to various elements of disorderly conduct that he observed arriving there in the parking lot and before he actually had the encounter with the defendant.

The assault on an officer occurred when Mr. Bengé attempted to escape or get away from Officer Meyer. We have the two incidents of pushing off and then the---the grabbing of one arm and the swinging of that one arm that then came into contact with Officer Meyer and then the swinging of both arms in an attempt to run. These are separate acts.

We have this disorderly conduct which primarily occurs between Mr. Bengé and other customers of Diamonds, between Mr. Bengé and the employees of Diamonds, and then the separate conduct later involving Officer Meyer and Mr. Bengé, so the Court finds in this case that there are offenses committed separately. Whichever the three would be appropriately

applied here, whether it be the false identification, false---consumption underage, or disorderly conduct, those three acts are separate from the attempt by Mr. Bengé to either avoid being served with a no trespass order or being arrested. It probably was at that point arrested for the underage consumption, of course, the IDs were later so it would appear to me that what was happening was that Mr. Bengé had animus to escape to avoid either illegal---underage consumption or the citation for the no trespass order and with the serving of a no trespass order, that was his reason to break away or attempt to break away from Officer Meyer, not to go into his cruiser; so I think we've got separate animus, separate acts and thus he could be prosecuted for the assault on an officer even though he has pled in the municipal court to the disorderly conduct.

(Tr. at 29-31).

{¶ 6} Following the denial of his motion, Bengé pled no contest to assault on a peace officer, a fourth-degree felony. (Doc. #19). The trial court accepted the plea and found him guilty. It sentenced him to community control. This appeal followed.

{¶ 7} In his first assignment of error, Bengé contends his assault conviction constituted a double-jeopardy violation because he previously had been convicted of disorderly conduct, a lesser-included offense, based on the same conduct.

{¶ 8} It is beyond dispute that “the double jeopardy clause generally forbids successive prosecutions and cumulative punishments for a greater and lesser included offense involving the same conduct.” *State v. Donaldson*, 2d Dist. Montgomery No. 24911, 2012-Ohio-5792, ¶ 11, quoting *State v. Sturgell*, 2d Dist. Darke No. 1751,

2009-Ohio-5628, ¶ 10. Thus, “[c]onviction on a lesser included offense generally bars subsequent prosecution for a greater offense.” *Id.* This court also has recognized that under certain circumstances disorderly conduct can be a lesser-included offense of assault. *State v. Daniels*, 2d Dist. Greene No. 06-CA-093, 2008-Ohio-2236, ¶ 55. We need not dwell on whether disorderly conduct was a lesser-included offense of assault here, however, because Bengé’s double-jeopardy argument fails for another reason, to wit: the record does not establish that his disorderly conduct and assault convictions involved “the same conduct.”

{¶ 9} Bengé engaged in acts meeting the statutory definition of disorderly conduct both inside and outside of Diamonds *before* Meyer’s arrival. (Tr. at 9-10). That conduct included fighting and being verbally assaultive to Diamonds’ staff and patrons by taunting and insulting them. See R.C. 2917.11 (identifying various forms of behavior that qualify as disorderly conduct). Admittedly, Bengé continued to act in a disorderly manner in Meyers’ presence. (Tr. at 10-11, 21). He also assaulted the officer when Meyers attempted to have him wait in a police cruiser while trespass paperwork was completed. (*Id.* at 14-15).

{¶ 10} On the facts before us, we conclude that Bengé engaged in distinct criminal acts by (1) committing disorderly conduct with Diamonds’ staff and patrons before Meyers’ arrival and (2) later assaulting Meyers when the officer tried to detain him in a police cruiser. Double-jeopardy principles did not prohibit Bengé from being convicted in successive prosecutions for these separate offenses, which involved different conduct. In reaching this conclusion, we recognize that Bengé’s assault on Meyers also might qualify as an act of disorderly conduct itself. We find nothing in the record, however, establishing that Bengé’s disorderly-conduct conviction encompassed that assault as opposed to his

prior behavior toward Diamonds' staff and patrons. Therefore, Bengé cannot establish a double-jeopardy violation.¹

{¶ 11} Our conclusion is consistent with *State v. Dixon*, 2d Dist. Montgomery No. 24281, 2011-Ohio-5290. In *Dixon*, the defendant was arrested and charged with misdemeanor possession of drugs and drug paraphernalia after various pills, powder, marijuana, scales, snorting straws, a plate, and a marijuana pipe were found in a residence where he was present. He later pled guilty to the misdemeanor possession charge, which did not specify a particular type of drug. *Id.* at ¶ 6. Thereafter, the defendant was indicted for felony possession of oxycodone and drug paraphernalia based on the same incident. He moved to dismiss the indictment on double-jeopardy grounds. *Id.* at ¶ 9-10. The trial court overruled the motion with respect to possession of oxycodone and possession of drug paraphernalia based on the plate. The defendant then pled no contest to aggravated drug possession. *Id.* at ¶ 11. This court affirmed on appeal, reasoning:

* * * Dixon claims that the municipal court charges were based solely

¹ We note that a statute, R.C. 2941.25, “codifies the protections of the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution and Section 10, Article I of the Ohio Constitution, which prohibits multiple punishments for the same offense.” *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923, ¶ 23. In *State v. Washington*, 137 Ohio St.3d 427, 2013-Ohio-4982, 999 N.E.2d 661, the Ohio Supreme Court recently made clear that a defendant bears the burden of establishing his entitlement to R.C. 2941.25’s protection against multiple punishments for the same conduct. *Id.* at ¶ 18. We recognize that the statute ordinarily applies to multiple punishments imposed in the same proceeding (i.e., allied offenses) as opposed to multiple punishments imposed in successive proceedings. *State v. Washington*, 137 Ohio St.3d 427, 2013-Ohio-4982, 999 N.E.2d 661, ¶10-11. The same double-jeopardy protections apply in both situations, however, and we see no principled reason why the burden of proof would be different in a multiple-punishment “successive prosecution” case than a multiple-punishment “single prosecution” case. In both situations, multiple punishments are permitted if they involve different conduct. Therefore, we believe Bengé bore the burden of establishing a double-jeopardy violation here.

on his admission to possessing a plate and the straw and the drug in powder form that were on the plate. However, the misdemeanor possession of drug paraphernalia charge, which was dismissed as part of the municipal court plea, charged Dixon with possession of a marijuana smoking pipe, a digital scale, snorting straw and rolling papers, which were beyond the scope of Dixon's admission. The misdemeanor drug possession charge also could have been based on the non-powder prescription pills that were located in the apartment; Kowalski testified that the misdemeanor drug possession charge was, in fact, based on the pills that were lying around the apartment.

As stated above, the criminal complaint for drug possession that was filed in the municipal court did not specify the "scheduled prescription medication" that formed the basis for the misdemeanor drug possession charge. Dixon has not offered a transcript of the plea hearing, an affidavit from him or his counsel in the misdemeanor case, or any other evidence which might have clarified the specific drug upon which the misdemeanor drug possession charge was based. There was no evidence before the common pleas court to support Dixon's contention that the misdemeanor drug possession charge was based on his possession of the powder located on the plate on the dining room table. See *State v. Barr*, 178 Ohio App.3d 318, 2008-Ohio-4754 (finding that the trial court did not err in denying motion to dismiss the indictment on double jeopardy grounds where defendant "[put] forward no facts demonstrating that he could

reasonably rely on his [municipal court] plea to terminate any additional criminal liability” and the record did not “contain evidence of a plea agreement or similar implied promise by the prosecution * * *”).

Because Dixon’s conviction for drug possession in the municipal court could have been based on pills other than oxycodone and the record does not establish that his plea in municipal court was intended to encompass the oxycodone, the trial court did not err in concluding that the prosecution for aggravated drug possession in common pleas court was not a second prosecution for the same offense to which Dixon pled guilty in municipal court.

Id. at ¶ 18-20.

{¶ 12} We reach the same conclusion here. The record contains no evidence to support a finding that Benge’s assault conviction was based on the same conduct that led to his disorderly-conduct conviction. In fact, the evidence suggests the opposite. As noted above, Benge originally was charged with underage possession/consumption of alcohol and using a false identification. The possession/consumption charge was amended to disorderly conduct and the false-identification charge was dismissed. It is reasonable to conclude that the disorderly-conduct charge related factually to the possession/consumption charge from which it resulted. Notably, each of the municipal-court charges involved conduct that occurred prior to Meyer’s arrival and that had nothing to do with Benge’s subsequent assault on the officer. Therefore, the trial court did not err in finding the existence of separate offenses based on separate conduct.²

² Benge claims the trial court erred in finding separate offenses by focusing on the

The first assignment of error is overruled.

{¶ 13} In his second assignment of error, Benge claims dismissal of his indictment was required because his prosecution for assault on a peace officer necessitated replication of the evidence used to convict him of disorderly conduct.

{¶ 14} We find this argument unpersuasive. Benge's premise is flawed because he assumes his disorderly-conduct conviction was based on his interaction with Meyer rather than his earlier behavior toward Diamonds' staff and patrons. (Appellant's brief at 10-11). We rejected that proposition above. Based on our resolution of the first assignment of error, we conclude that Benge's prosecution for assaulting Meyer would not require replication of the evidence needed to convict him of disorderly conduct in municipal court.

{¶ 15} In connection with his second assignment of error, Benge also engages in a lengthy discussion of *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061. "*Johnson* was concerned with how the 'same conduct' constitutes allied offenses of similar import for purposes of R.C. 2941.25(A), which requires that allied offenses of similar import be merged for purposes of sentencing." *State v. Turner*, 2d Dist. Montgomery No. 24421, 2011-Ohio-6714, ¶ 25. But "R.C. 2941.25(B) provides an exception to the merger requirement when the allied offenses were committed separately or with a separate animus as to each." *Id.* Notably, *Johnson* recognized that "if the [allied]

false-identification and underage possession/consumption charges rather than the amended disorderly-conduct charge to which he pled. (Appellant's brief at 8). Contrary to Benge's argument, however, the trial court did consider whether disorderly conduct and assault were separate offenses based on separate conduct. In its oral ruling, the trial court explicitly found that disorderly conduct had occurred inside and outside of Diamonds before Benge's assault on Meyer. (Tr. at 30-31). Based on the reasoning set forth above, we agree with that determination.

offenses are committed separately, or if the defendant has separate animus for each offense, then, according to R.C. 2941.25(B), the offenses will not merge.” *Johnson* at ¶ 51. To the extent that *Johnson* has applicability here, it does not assist Bengé because we have found that his disorderly conduct and assault offenses involved separate conduct. Accordingly, the second assignment of error is overruled.

{¶ 16} The trial court’s judgment is affirmed.

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FROELICH, P.J., and FAIN, J., concur.

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