

COURT OF APPEALS  
LICKING COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

KIMBERLY BEEM

Defendant-Appellant

JUDGES:

Hon. William B. Hoffman, P.J.

Hon. Sheila G. Farmer, J.

Hon. John W. Wise, J.

Case No. 15-CA-76

O P I N I O N

CHARACTER OF PROCEEDING:

Appeal from the Licking County Municipal  
Court, Case No. 15CRB00147

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

December 30, 2015

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

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*Hoffman, P.J.*

{¶1} Defendant-appellant Kimberly Beem appeals her convictions on five counts of telecommunication harassment entered by the Licking County Municipal Court via Judgment Entry filed September 25, 2015. The state of Ohio is plaintiff-appellee.

STATEMENT OF THE CASE<sup>1</sup>

{¶2} On January 23, 2015, the Ohio Bureau of Criminal Identification and Investigation filed six criminal complaints of telecommunication harassment against Appellant. The charges were prosecuted by the Ohio Attorney General's office rather than the Newark City Law Department.

{¶3} On August 18, 2015, Appellant filed a Motion to Dismiss the charges based upon her claim of selective enforcement. The trial court denied her motion.

{¶4} A trial to the court was held on September 25, 2015. Appellant was found guilty on five of the six counts and acquitted on one other.

{¶5} Appellant prosecutes this appeal assigning as error:

{¶6} "I. THE TRIAL COURT ERRED WHEN IT DENIED THE APPELLANT'S MOTION TO DISMISS BASED ON SELECTIVE PROSECUTION. "

{¶7} This case comes to us on the accelerated calendar and is governed by App.R. 11.1, which states the following, in pertinent part:

**{¶8} "(E) Determination and judgment on appeal**

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<sup>1</sup> A rendition of the facts underlying the charges is unnecessary for our disposition of this appeal.

The appeal will be determined as provided by App. R. 11.1. It shall be sufficient compliance with App. R. 12(A) for the statement of the reason for the court's decision as to each error to be in brief and conclusionary form.

The decision may be by judgment entry in which case it will not be published in any form.

{¶9} This case shall be decided in accordance with that rule.

{¶10} We begin by noting Appellant has not provided this Court a transcript of the bench trial held on September 25, 2015. Instead, Appellant relies upon the allegations set forth in her Motion to Dismiss and her Defense Exhibit A (a letter from Assistant Law Director, Amy S. Davison, to Chief Barry Cornell/Officer Barelsey) attached thereto. We note Appellant did not submit any affidavit in support of her motion. Further, Appellant's Defense Exhibit A was not authenticated and the record does not reflect it was ever offered into evidence.

{¶11} In *State v. Flynt*, (1980), 63 Ohio St.2d 132, the Ohio Supreme Court addressed the elements for establishing a selective-prosecution claim:

To support a defense of selective or discriminatory prosecution, a defendant bears the heavy burden of establishing, at least prima facie, (1) that, while others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against him, he has been singled out for prosecution and (2) that the government's discriminatory selection of him for prosecution, has been invidious or in bad faith, i.e., based upon such impermissible considerations

as race, religion, or the desire to prevent his exercise of constitutional rights.

These two essential elements are sometimes referred to as intentional and purposeful discrimination. *Id.*, at 134.

{¶12} A mere showing another person similarly situated was not prosecuted is not enough. A defendant must demonstrate actual discrimination due to invidious motives or bad faith. *State v. Freeman*, (1985) 20 Ohio St.3d. 55, 58. The prosecutor enjoys a presumption his or her actions were non-discriminatory in nature. *State v. Keen*, (1998) 81 Ohio St.3d. 646, 653.

{¶13} Appellant relies upon the letter from Ms. Davison to establish her claim of selective prosecution. She argues because the facts in her case allegedly were very similar to the case wherein Ms. Davison elected not to prosecute, prosecution of her by the Ohio Attorney General's Office proves she has been singled out.

{¶14} We find her argument fails to show the cases were sufficiently similar to support a claim of selective prosecution, particularly in light of the absence of a transcript of the trial. Furthermore, the fact different prosecuting entities were involved defeats her claim. We note nowhere does Appellant cite us to where she objected to the Ohio Attorney General's Office representation of the state of Ohio.

{¶15} Appellant also alleges the prosecution was conducted in bad faith to punish Appellant for exercising her constitutional right of free speech because of her being a "well-known...outspoken antagonist of elected and appointed officials in Licking County, Ohio." (Appellant's brief at p. 10). Such claim echoes that made in her Motion to Dismiss. This allegation was supported by affidavit and remains the mere opinion of Appellant. Such opinion or allegation is insufficient to support her claim of bad faith.

{¶16} Appellant's assignment of error is overruled.

{¶17} The judgment of the Licking County Municipal Court is affirmed.

By: Hoffman, P.J.

Farmer, J. and

Wise, J. concur