[Cite as *State v. McFarland*, 2012-Ohio-1991.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
ERIE COUNTY

State of Ohio	Court of Appeals No. E-11-048
Appellant	Trial Court No. 2010-CR-292
v.	
Jeffery L. McFarland	**DECISION AND JUDGMENT**
Appellee	Decided: May 4, 2012

* * * * *

Kevin J. Baxter, Erie County Prosecuting Attorney, and
Mary Ann Barylski, Assistant Prosecuting Attorney, for appellant.

Jeffrey J. Whitacre, Erie County Public Defender, for appellee.

* * * * *

HANDWORK, J.

{¶ 1} This is an appeal from a judgment issued by the Erie County Court of Common Pleas, dismissing charges against appellee on the basis of double jeopardy. Because we conclude that the trial court properly granted the motion to dismiss, the trial court's judgment is affirmed.

{¶ 2} On August 11, 2010, appellee, Jeffery L. McFarland, a resident of Erie County, Ohio, was indicted in Erie County on six counts of pandering obscenity

involving a minor, a violation of R.C. 2907.321(A)(5) and six counts of pandering sexually oriented matter involving a minor, a violation of R.C. 2907.322(A)(5). Each count was allegedly committed on February 28, 2010. Appellee filed a motion to dismiss on the basis of double jeopardy, asserting that he had already been prosecuted and convicted in Lucas County for the conduct which was the basis for the offenses charged in Erie County.

{¶ 3} During a hearing held on the motion, the Erie County trial court heard witness testimony and admitted a "joint stipulation," Exhibit A, which consisted of several documents, including a computer lab report. The following facts were presented during that hearing.

{¶ 4} On February 27, 2010, the Erie County Sheriff's Department ("ECSD") received information from the Whitehouse Police Department ("WPD") in Lucas County, Ohio, that as a result of an internet sting operation, appellee had been charged with allegedly using his computer in Erie County to meet and solicit sexual activity with a WPD officer posing as an underage girl in Lucas County. The ECSD was informed that appellee had been arrested and allegedly consented to a search of his computer. The next day, February 28, 2010, WPD officers, assisted by the ECSD, confiscated appellee's computer from his house in Erie County. WPD officers then took the computer back to Lucas County where it was turned over to the Toledo Police Department crime lab to search for evidence of child pornography. Meanwhile, appellee was charged in Maumee

Municipal Court, Lucas County, Ohio, case No. 10-CRA-00143, with two offenses: disseminating matter harmful to juveniles and importuning.

{¶ 5} Incident to appellee's written consent to seize and search his computer on the day of his arrest in February 2010, a crime lab detective searched to "determine the presence of evidence related to child enticement and child pornography." The crime lab report notes that the investigation took place on April 5, 2010, and initially found "several child pornography related thumbnails." The detective then obtained a search warrant and continued his search. According to the computer lab report, dated June 28, 2010, only the thumbnail images remained in a particular folder. The original full size images were no longer on the hard drive and were not recovered.

{¶ 6} Pursuant to a plea agreement in the Lucas County case, appellee pled "no contest" to and was found guilty of amended charges of attempted disseminating matter harmful to juveniles and attempted importuning. On June 11, 2010, appellee was sentenced to 180 days in jail, with 105 suspended, and placed on probation for three years with conditions that he participate in sex offender counseling and no use of a computer or internet access devices. Appellee also forfeited his computer and vehicle and was deemed to be a Tier 1 Child Victim Offender, requiring registration every year for 15 years. Two months later, appellee was indicted in the present Erie County case.

{¶ 7} After considering the evidence presented, the trial court in the present case granted appellee's motion to dismiss, ruling that double jeopardy had attached since Lucas County had pre-empted venue and jurisdiction over the charges filed in Erie

County. The court reasoned that, pursuant to *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, the new charges were allied offenses based on the same conduct as the convictions in Lucas County. Moreover, the trial court determined that, despite Lucas County's election to pursue only one of the allied offenses, jeopardy attached, precluding the additional charges sought in Erie County.

{¶ 8} Appellant, the state of Ohio, now appeals, arguing the following sole assignment of error:

> The trial court erred, thereby abusing its discretion, when the trial court granted appellee's motion to dismiss based on double jeopardy.

{¶ 9} On appeal a de novo standard of review is used when reviewing the grant or denial of a motion to dismiss a criminal indictment on the grounds of double jeopardy. *State v. Williams*, 6th Dist. No. WD-07-079, 2008-Ohio-2730, ¶ 7; *State v. Betts*, 8th Dist. No. 88607, 2007-Ohio-5533, ¶ 16; *State v. Mobus*, 12th Dist. No. CA2005-01-004, 2005-Ohio-6164, ¶ 25. When reviewing criminal prosecutions, including double jeopardy dispositions, the state will be considered as a single entity whether acting through one or the other of its subordinate units, i.e., in this case, Lucas or Erie Counties. *See State v. Collins*, 12th Dist. No. CA2007-01-010, 2007-Ohio-5392, ¶ 21, citing *Waller v. Florida*, 397 U.S. 387, 392, 90 S.Ct. 1184, 25 L.Ed.2d 435 (1970) and *Reynolds v. Sims*, 377 U.S. 533, 575, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964).

{¶ 10} R.C. 2901.12 provides that when several offenses are committed in Ohio in different jurisdictions as "part of a course of criminal conduct," the venue may be lodged

for all the offenses in any one jurisdiction where "one such offense or any element thereof occurred." Nevertheless, as noted by the trial court in this case, the state may not, "either by design or inadvertence, separate charges originating in one 'course of criminal conduct' and pursue them separately in the courts of more than one county even though the venue could be laid in any of the counties under R.C. 2901.12(H)." *State v. Urvan*, 4 Ohio App.3d 151, 157-158, 446 N.E.2d 1161 (8th Dist.1982), limited by *State v. Mutter*, 14 Ohio App.3d 356, 357, 471 N.E.2d 782 (8th Dist.1983). Prosecution in two different counties may be pursued only for separate and distinct acts committed on different dates. *State v. Barnett*, 124 Ohio App.3d 746, 750, 707 N.E.2d 564 (2d Dist.1998).

{¶ 11} Although limited to its facts, we find *Urvan* to be instructive in this case. In *Urvan*, the defendant, who had committed offenses in both Medina and Cuyahoga Counties, agreed to a plea based upon a sentence which included an early diversion program for offenses initially charged in Medina County. *Urvan, supra*, at 157. Later, Cuyahoga County sought to charge the defendant with additional offenses. *Id*. The *Urvan* court noted that "when Medina County took jurisdiction, that county * * * elected on behalf of the state to pursue only one of the two allied offenses involved, i.e., receipt of stolen property rather than grand theft." *Id*.

{¶ 12} The *Urvan* court noted that permitting successive prosecutions was contrary to the purpose of the diversion program. *Urvan*, *supra*, at 157. In other words, splitting venue and permitting a second venue to prosecute for crimes which the state, in

the first venue, did not pursue is prejudicial to the defendant's terms of sentence and "violates the spirit and letter of the constitutional Double Jeopardy policy and the spirit of the legislative policy of the state as represented in the venue and allied offense statutes." *Id.* at 158. *See also State v. Walker*, 6th Dist. WD-86-32, 1987 WL 12155 (June 5, 1987) (kidnapping and rape of three persons in course of criminal conduct could have been tried in either Wood or Lucas Counties, but pursuant to R.C.2901.12(H), all separate offenses had to be brought in same jurisdiction to avoid double jeopardy issues). The *Mutter* court still noted that *Urvan* "seems to emphasize that the prosecutor cannot play 'dirty pool' where a person is in a diversion program." *Mutter*, *supra*.

{¶ 13} In this case, the WPD from Lucas County conducted the internet sting operation, arrested appellee, and then went to Erie County and seized his computer, all in connection with the purpose to find evidence to support charges related to "child enticement and pornography." In an affidavit by an ECSD deputy dated May 27, 2010, to procure an additional warrant to search appellee's computer, prior to the computer being sent to the Toledo Crime Lab, appellee admitted during an interview with Officer Carpenter of the WPD that his computer had child pornography on its hard drive. In addition, according to an investigative report from the ECSD, that department was made aware on May 19, 2010 that, as early as May 5, 2010, the crime lab in Toledo had found actual evidence of child pornography on appellee's computer.

{¶ 14} Moreover, the Erie County offenses were alleged to have occurred on February 28, 2010, the day the computer was seized by police as a result of and related to

appellee's arrest for the conduct and crimes charged in Lucas County. At the outset, appellee readily acknowledged the existence of child pornography on his computer. Therefore, both the WPD and the ECSD were aware of evidence of child pornography prior either to appellee's plea or sentencing for the charges brought in Lucas County. Contrary to appellant's suggestion, pursuant to R.C. 2901.12(H), appellee could have been tried in either Erie County or Lucas County for any charges relating to the sting or the computer, including the thumbnail images, since venue would have been proper in either county.

{¶ 15} We do not negate the serious nature of appellee's acts, but, like the defendant in *Urvan*, appellee pled "no contest" in reliance on his plea agreement in the Lucas County case for crimes connected with his use of a computer to commit sex crimes against minors. As part of his sentence he was placed on probation, with the condition that he complete a Community Based Correctional Facility program in Lucas County. His computer and vehicle were both forfeited.

{¶ 16} Nothing in the record indicates that appellee had any notice from either the Maumee Municipal Court, the Maumee Municipal prosecutor, or any Erie County officials that any other charges for offenses connected with his computer use for child sex offenses were still lingering. Like the defendant in *Urvan*, appellee's Lucas County sentence would be rendered meaningless by piecemeal prosecution of crimes which were known but uncharged by the prosecution in Lucas County at the time of the plea. Under the limited facts of this case, any successive prosecution for additional child sex crimes

related to the seizure of his computer, which *could* have been brought in the Lucas County case but were not, frustrates the purpose and intent of the plea agreement and sentencing in the Lucas County case and is unduly prejudicial to appellee. We conclude, therefore, under the facts of this case, that the trial court properly granted appellee's motion to dismiss.

{¶ 17} Accordingly, appellant's sole assignment of error is not well-taken.

{¶ 18} The judgment of the Erie County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____
JUDGE

Arlene Singer, P.J. _____
JUDGE

Stephen A. Yarbrough, J. _____
JUDGE
CONCUR.