[Cite as *State v. Tingler*, 2016-Ohio-7119.]

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

State of Ohio — Court of Appeals No. E-16-026

Appellee — Trial Court No. 2015-CR-029

v.

Charles L. Tingler — **DECISION AND JUDGMENT**

Appellant — Decided: September 30, 2016

* * * * *

Kevin J. Baxter, Erie County Prosecuting Attorney, and
Mary Ann Barylski, Chief Assistant Prosecutor, for appellee.

Charles L. Tingler, pro se.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Appellant, Charles Tingler, pro se, appeals the April 13, 2016 judgment of the Erie County Court of Common Pleas which denied his motion to dismiss the case with prejudice. Upon review of the record and the relevant case law we find that the alleged error is not ripe for review; accordingly, we dismiss the appeal.

{¶ 2} The relevant facts are as follows. On January 14, 2015, appellant was indicted by the Erie County Grand Jury on three counts of inducing a panic, R.C.

2917.31(A)(1), one second and two fourth-degree felonies. On June 8, 2015, at the request of the prosecutor, the charges were dismissed without prejudice. The judgment entry indicated that appellant had been sentenced to a four-year prison sentence in Ottawa County.

{¶ 3} On March 17, 2016, appellant, pro se, filed a motion requesting that the court dismiss the case with prejudice. Appellant stated that the charges in the dismissed Erie County case arose from the same facts and circumstances as the Ottawa County case, in which appellant was initially indicted on nine counts. According to appellant, that case proceeded to trial on March 17, 2015, and after the jury was empaneled the state dismissed Counts 3 and 4, inducing panic and disrupting public services. Based on these facts, appellant argued in his motion that the Erie County charges should have been dismissed with prejudice to prevent a violation of the prohibition against double jeopardy.

{¶ 4} On April 15, 2016, the trial court denied the motion finding that the case had been dismissed and was closed. This appeal followed with appellant raising the following assignment of error:

> Assignment of Error No. 1: The trial court committed reversible error when it denied appellant's motion to dismiss indictment with prejudice in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Article 1, Section 10, of the Ohio Constitution.

{¶ 5} In his appeal, appellant contends that the trial court's denial of his motion to dismiss violated his right to be protected from double jeopardy because the state may not separately pursue charges for the same conduct in two counties. Conversely, the state argues that the order is not final and appealable and that an appeal, if any, was rendered moot by the dismissal.

{¶ 6} Appeals may only be taken from final orders. A final order is defined in R.C. 2505.02 as "[a]n order that affects a substantial right in an action that in effect determines the action and prevents a judgment." The denial of a motion to dismiss without prejudice is generally not a final and appealable order because the defendant is placed in the same position he was in prior to the state filing the charges. *State v. Morgan*, 2d Dist. Clark No. 2012-CA-06, 2012-Ohio-4750, ¶ 9, citing *City of Hudson v. Harger*, 9th Dist. Summit No. CA 26208, 2012-Ohio-2604. However, in certain instances a trial court's denial of a motion to dismiss with prejudice may affect a substantial right and, thus, be deemed a final order. *See State v. Eberhardt*, 56 Ohio App.2d 193, 381 N.E.2d 1357 (8th Dist.1978) (denial of a meritorious motion to dismiss based on speedy trial grounds followed by a nolle prosequi rendered the denial a final order.).

{¶ 7} Further, a controversy must be ripe for review in order to be justiciable. *State v. Booker*, 10th Dist. Franklin No. 15AP-42, 2015-Ohio-5118, ¶ 21. In *Booker*, the court found that a double jeopardy argument relating to a charge that was dismissed at the request of the state after a jury was empaneled was not ripe for review. *Id.* The court

first noted that "'[a] claim is not ripe for our consideration if it rests on contingent future events that may not occur as anticipated or may never occur at all.'" *Id.*, quoting *State v. Loving*, 180 Ohio App.3d 424, 2009-Ohio-15, 905 N.E.2d 1234, ¶ 4 (10th Dist.). The court then concluded that because the nolle prosequi was entered at the request of the state and the court's judgment entry supported the state's argument that it did not intend to retry appellant on the charge, the appellant's "argument [was] not ripe for review because it [was] contingent on the state attempting to retry him on that charge, which may never come to pass." *Id.*

{¶ 8} In the present matter, on June 8, 2015, the court dismissed the case, without prejudice, at the request of the state based upon the fact that appellant was sentenced to a four-year prison term in Ottawa County. Appellant's motion to dismiss the indictment, with prejudice, and request for a hearing was filed on March 17, 2016. The state's response simply indicated that the case had already been dismissed and that a hearing was not necessary.

{¶ 9} Upon review, we find that there is no justiciable controversy before this court. The state has not given any indication that they may attempt to re-indict appellant on the dismissed charges. Accordingly, appellant's assignment of error is moot, not well-taken and the appeal is dismissed. Pursuant to App.R. 24, appellant is ordered to pay the costs of this appeal.

Appeal dismissed.

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

Mark L. Pietrykowski, J. _____
JUDGE

Thomas J. Osowik, J. _____
JUDGE

James D. Jensen, P.J. _____
CONCUR.
JUDGE