

[Cite as *State v. Hornbuckle*, 2015-Ohio-3962.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,)	CASE NO. 14 MA 105
)	
PLAINTIFF-APPELLEE,)	
)	
VS.)	OPINION
)	
MICHAEL HORNBUCKLE,)	
)	
DEFENDANT-APPELLANT.)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from the Court of
Common Pleas of Mahoning County,
Ohio
Case No. 12CR1154

JUDGMENT: Reversed.

APPEARANCES:

For Plaintiff-Appellee: Atty. Paul J. Gains
Mahoning County Prosecutor
Atty. Ralph M. Rivera
Assistant Prosecuting Attorney
21 West Boardman St., 6th Floor
Youngstown, Ohio 44503

For Defendant-Appellant: Atty. Rhys Cartwright-Jones
42 N. Phelps St.
Youngstown, Ohio 44503

JUDGES:

Hon. Carol Ann Robb
Hon. Gene Donofrio
Hon. Cheryl L. Waite

Dated: September 23, 2015

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ROBB, J.

{¶1} Defendant-Appellant Michael Hornbuckle appeals the decision of Mahoning County Common Pleas Court denying his motion to dismiss the indictment on the basis of double jeopardy. The issue in this case is whether the trial court erred in reaching that decision. For the reasons expressed below, we hold that Appellant's felony conviction for failure to comply with an order or signal by a police officer violates the Double Jeopardy Clause. Accordingly, the trial court's decision is reversed, the felony conviction vacated and the charge dismissed.

Statement of the Facts and Case

{¶2} On October 17, 2012, an officer from the Youngstown Police Department attempted to stop a 1983 Oldsmobile Cutlass in Mahoning County, Ohio, because the windshield of the vehicle was shattered. Instead of stopping, the driver of the vehicle accelerated and a chase ensued. The driver eventually lost control of the vehicle and hit a curb. This crash immobilized the vehicle. The occupants of the vehicle, including the driver, fled on foot. A foot chase followed and the driver was apprehended. In attempting to handcuff the driver, the driver fought and refused to comply with the officer's demands.

{¶3} The Youngstown Police Officer identified Appellant as the driver of the vehicle. As a result, Appellant was charged with failing to comply with a signal, resisting arrest, driving under suspension, and unsafe vehicle.

{¶4} One failure to comply, charged as a felony, was bound over to the Mahoning County Common Pleas Grand Jury. The remaining charges, which included a misdemeanor failure to comply, remained in Municipal Court. On November 15, 2012, Appellant was indicted by the Mahoning County Grand Jury for failing to comply with an order or signal of a police officer in violation of R.C. 2921.331(B)(C)(5)(a)(ii), a third-degree felony.

{¶5} While the felony charge was pending, Appellant entered a no contest plea in Youngstown Municipal Court to the misdemeanor failure to comply, a violation of R.C. 2921.331(B)(C)(1), a first-degree misdemeanor, and driving under suspension, a violation of R.C. 4510.16, a first-degree misdemeanor. 1/8/13 Plea. He was found guilty. The unsafe vehicle charge was dismissed by the state. 1/8/13

Plea Agreement. He was ordered to serve 5 days in jail with credit for time served. He was also ordered to serve 90 days of electronically monitored house arrest, pay \$200 in fines, complete the Day Reporting Program at CCA, and was placed on reporting probation for 2 years. 3/18/13 Sentence J.E. Furthermore, his license was suspended for 1 year, he was ordered to undergo a mental health assessment, and to perform 100 hours of community service. 3/18/13 Sentencing J.E.

{¶16} Two months after sentencing in the misdemeanor case, Appellant filed in the Mahoning County Common Pleas Court a motion to dismiss the felony indictment based on double jeopardy. 5/29/13 Motion. Appellant contended that he was convicted of the misdemeanor failure to comply, and thus he could not be found guilty of the felony failure to comply without double jeopardy being violated.

{¶17} The state responded to the motion and argued that Appellant (and his counsel who was counsel for both the felony and misdemeanor) tried to manipulate the system by pleading no contest to the misdemeanor offense and then moving to have the felony offense dismissed on double jeopardy grounds. 6/5/13 State's Brief in Opposition. It cited a Ninth Appellate District decision for the proposition that the Double Jeopardy Clause is not violated when the defendant pleads guilty to the misdemeanor to intentionally avoid felony prosecution. *State v. Gonzalez*, 112 Ohio App.3d 19, 677 N.E.2d 1207 (9th Dist.1996).

{¶18} Appellant responded by arguing that his case is distinguishable from *Gonzalez* because he did not attempt to manipulate the system. He asserted both the municipal and common pleas court prosecutors knew he wanted to enter the military. He attempted to have the municipal prosecutor dismiss the misdemeanor charge because he was facing potential prison time for the felony. Likewise, he attempted to have the county prosecutor reduce the felony to a misdemeanor so that he could enter the military. Thus, he contended he was not trying to manipulate the system. 7/8/13 Defendant Sur-Reply.

{¶19} The state replied and asserted that his reasons support the conclusion he was attempting to manipulate the system. 9/3/13 State Brief in Response. Appellant then filed another response to the state's reply. 9/5/13 Defendant Reply.

{¶10} On October 14, 2013, the trial court denied the motion to dismiss reasoning:

Attorney DiMartino was well aware of all pending proceedings in the Mahoning County Common Pleas Court and failed to bring the matter of the indictment to the Youngstown Municipal Court Judge involved at his (Defendant's) plea hearing. Likewise, Dennis A. DiMartino failed to inform the Assistant Mahoning County Prosecutor of the plea of no contest to a misdemeanor of the first degree in Youngtown Municipal Court.

Instead, Attorney DiMartino filed numerous motions and attended pretrial hearings intending to commence trial and then disclose his double jeopardy argument.

There simply has been none of the governmental overreaching that double jeopardy is suppose to prevent. *Arizona v. Washington*, 434 U.S. 497, 434 U.S. 509 (1978).

. . . respondent should not be entitled to use the Double Jeopardy Clause as a sword to prevent the State from completing its prosecution on the remaining charges. *Ohio v. Johnson*, 467 U.S. 493 (1984).

The lower court, when told of the bindover and subsequent indictment should have recognized the possibility of a double jeopardy argument on behalf of Defendant, Michael D. Hornbuckle. The Common Pleas Court was never informed of the plea to a lesser included offense in the lower court.

The court system today must recognize the consequence(s) of legal manipulations of all litigations and attendant counsel whether in defense or prosecutorial mode.

As stated above in *Arizona v. Washington*, 434 U.S. 497, 434 U.S. 509 (1978) and as applied to this case Defendant, Michael D. Hornbuckle should not be entitled to use the double jeopardy clause as

a sword to prevent the State from completing its prosecution on the remaining charge.

10/16/13 J.E.

{¶11} Thereafter, Appellant and the state reached a plea agreement whereby Appellant pled no contest to the felony failure to comply charge. The plea agreement specifically indicated that Appellant preserves his right to appeal the denial of his motion to dismiss on double jeopardy grounds. 5/19/14 J.E. The state agreed to recommend community control and a 3 year license suspension.

{¶12} The trial court accepted the plea, found Appellant guilty and sentenced him to 1 year of community control and suspended his license for 3 years. 7/18/14 J.E.

{¶13} Appellant timely appealed that decision.

Assignment of Error

“The trial court erred in denying Michael Hornbuckle’s motion to dismiss on grounds of a Fifth Amendment double jeopardy violation.”

{¶14} Appellant argues that when a court accepts a defendant’s no contest plea, the state cannot proceed with additional charges against that defendant if the new charges satisfy the test for double jeopardy as espoused in *Blockberger v. United States*, 284 U.S. 299 (1932). He asserts that the misdemeanor conviction for failing to comply and the felony conviction for failing to comply satisfy the *Blockberger* test.

{¶15} The state does not dispute Appellant’s general proposition about the Double Jeopardy Clause and *Blockberger*. Instead the state argues that there is an exception. It directs this court to the Ninth Appellate District decision in *Gonzalez* for explanation of the exception. The state also argues, as an alternative, that there is nothing in the record to establish that the misdemeanor and felony offenses were not separate and distinct. It contends that Appellant did not present the trial court with sufficient facts to determine whether they were separate and distinct.

{¶16} The Fifth Amendment to the United States Constitution states that no person shall “be subject for the same offence to be twice put in jeopardy of life or limb.” *State v. Ruff*, 143 Ohio St.3d 114, 2015-Ohio-995, 34 N.E.3d 892, ¶ 10. This

protection applies to Ohio citizens through the Fourteenth Amendment to the United States Constitution and is guaranteed by the Ohio Constitution, Article I, Section 10. *Id.*

{¶17} The Ohio Supreme Court has applied the “same elements” test articulated by the United States Supreme Court in *Blockburger* to determine whether two offenses are the same or whether each is a separate offense for double jeopardy purposes. *State v. Andrews*, 4th Dist. No. 13CA22, 2014-Ohio-2954, ¶ 26, citing *State v. Zima*, 102 Ohio St.3d 61, 2004–Ohio–1807, 806 N.E.2d 542, ¶ 18. “The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.” *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180 (1932). Or in other words, the “same elements” test “inquires whether each offense contains an element not contained in the other; if not, they are the ‘same offense’ and double jeopardy bars additional punishment and successive prosecution.” *United States v. Dixon*, 509 U.S. 688, 696, 113 S.Ct. 2849 (1993).

{¶18} The record before this court indicates that in the Youngstown Municipal Court Appellant pled no contest to failure to comply, a violation of R.C. 2921.331(B)(C)(1).¹ In the Common Pleas Court Appellant was indicted and pled no contest to failure to comply, a violation of R.C. 2921.331(B)(C)(5)(a)(ii). R.C. 2921.331 reads, in pertinent part:

(B) No person shall operate a motor vehicle so as willfully to elude or flee a police officer after receiving a visible or audible signal from a police officer to bring the person's motor vehicle to a stop.

(C)(1) Whoever violates this section is guilty of failure to comply with an order or signal of a police officer.

* * *

¹Reference is made in the briefs to R.C. 2921.331(A), which is a first degree misdemeanor. That subsection states that it is unlawful for any person to fail to comply with a lawful order of a police officer who is invested with authority to direct, control, or regulate traffic. However, nothing in the record before us indicates Appellant was charged or pled to division (A) of the statute. Rather, the judgment entry from Youngstown Municipal Court clearly indicates Appellant pled no contest to division (B) of R.C. 2921.331. 1/8/13 Municipal Court J.E.; 1/8/13 Municipal Court Tr. 4.

(3) Except as provided in divisions (C)(4) and (5) of this section, a violation of division (B) of this section is a misdemeanor of the first degree.

* * *

(5)(a) A violation of division (B) of this section is a felony of the third degree if the jury or judge as trier of fact finds any of the following by proof beyond a reasonable doubt:

* * *

(ii) The operation of the motor vehicle by the offender caused a substantial risk of serious physical harm to persons or property.

R.C. 2921.331(B) and (C).

{¶19} Considering the language of this statute, it is a violation of the Double Jeopardy Clause to convict and punish an individual for violation R.C. 2921.331(B)(C)(3) and R.C. 2921.331(B)(C)(5), if the incident arose from the same transaction or occurrence. The only difference between the two charges is that subsection (5) under division (C) enhances the penalty if the operation of the motor vehicle by the offender caused a substantial risk of serious physical harm to persons or property. Or in other words, the misdemeanor offense is a lesser included offense of the felony.

{¶20} The state futilely argues there were not sufficient facts before the trial court for it to determine whether the misdemeanor and felony offenses were separate and distinct. The record in this case reveals that both charges arose from a high speed vehicle chase that occurred on October 17, 2012 and lasted only a couple of minutes. 5/15/14 Plea Tr. 16. Everything in the record before this court supports the position that the charges arose from the same transaction or occurrence. Consequently, the Double Jeopardy Clause is applicable.

{¶21} The state urges this court to apply the recognized exception to the Double Jeopardy Clause – that it cannot be used as a sword. It cites the Ninth Appellate District’s decision in *Gonzalez* and argues that the case is similar to the matter before us. 112 Ohio App.3d 19.

{¶22} In *Gonzalez* there were two separate indictments handed down by the Lorain County Grand Jury based on appellant's alleged conduct on a particular day. *Id.* The first indictment was for first-degree misdemeanor child endangering and was rendered on July 15, 1992. *Id.* This indictment was transferred to the Lorain Municipal Court. *Id.* The second indictment, the August 3, 1993 indictment, was for felony child endangering. *Id.* Appellant pled no contest to the misdemeanor charge and then attempted to have the felony charge dismissed on double jeopardy grounds. *Id.* Our sister district concluded that the Double Jeopardy Clause was not violated because Gonzalez attempted "to manipulate the proceedings against her and to use the double jeopardy clauses as a sword." *Id.* at 25. It explained that although the state was not blameless because it allowed the first indictment to continue after the second indictment was returned, appellant had not convinced the court that the state was guilty of overreaching. *Id.* "Any blame to be assessed against the state is outweighed by the defendant's failure to move to have the charges against her consolidated." *Id.* In reaching this decision it cited the two seminal United States Supreme Court cases on the exception to the Double Jeopardy Clause - *Jeffers v. United States* and *Ohio v. Johnson*.

{¶23} In *Jeffers*, the High Court was asked to consider whether a defendant was protected by the Double Jeopardy Clause from prosecution on a charge of conducting a continuing criminal enterprise to violate drug laws after he had been convicted of conspiring to distribute heroin and cocaine based upon the same facts. *Jeffers v. United States*, 432 U.S. 137, 97 S.Ct. 2207 (1977). The United States Supreme Court determined that criminal enterprise was a lesser included offense of the conspiracy charge, and thus, for double jeopardy purposes, both crimes constituted the same offense. However, it found the Double Jeopardy Clause was not violated in this instance:

[A]lthough a defendant is normally entitled to have charges on a greater and a lesser offense resolved in one proceeding, there is no violation of the Double Jeopardy Clause when he elects to have the two offenses tried separately and persuades the trial court to honor his election.

Id. at 152.

{¶24} Although the charges against Jeffers came from separate indictments, the government sought to have the crimes tried together. *Id.* at 142-143, 153-154. Jeffers and his co-defendants objected. *Id.* The trial court ordered the charges to be tried separately with the conspiracy charge being tried first. *Id.* According, Jeffers was solely responsible for the successive prosecutions for the conspiracy offense and the continuing-criminal-enterprise. *Id.* at 154. His own actions “deprived him of any right that he might have had against consecutive trials.” *Id.* Thus, he could not avail himself of the Double Jeopardy Clause’s protection.

{¶25} In reaching this conclusion, the *Jeffers* Court recognized that had the government also contributed to the gamesmanship, a different result might occur:

The considerations relating to the propriety of a second trial obviously would be much different if any action by the Government contributed to the separate prosecutions on the lesser and greater charges. No hint of that is present in the case before us, since the Government affirmatively sought trial on the two indictments together.

Id. at ft. 20.

{¶26} The second seminal case is *Ohio v. Johnson*, 467 U.S. 493, 104 S.Ct. 2536 (1984). The Court was asked to consider whether a defendant could defeat a criminal prosecution on murder and aggravated robbery charges by pleading guilty to the lesser included offenses of involuntary manslaughter and grand theft. It concluded the Double Jeopardy Clause did not bar prosecution:

We think this is an even clearer case than *Jeffers* * * *, where we rejected a defendant's claim of double jeopardy based upon a guilty verdict in the first of two successive prosecutions, when the defendant had been responsible for insisting that there be separate rather than consolidated trials. Here respondent's efforts were directed to separate disposition of counts in the same indictment where no more than one trial of the offenses charged was ever contemplated. Notwithstanding the trial court's acceptance of respondent's guilty pleas, respondent should not be entitled to use the Double Jeopardy Clause as a sword to

prevent the State from completing its prosecution on the remaining charges.

Id. at 502.

{¶27} A review of the above cases leads this court to the conclusion that the case at hand is distinguishable from *Jeffers*, *Johnson* and *Gonzalez*.

{¶28} In *Jeffers*, the government wanted to try the crimes together, but defendants objected and the trial court agreed to try the crimes separately. Thus, Jeffers and his co-defendants were actively involved in the decision to have the charges tried separately.

{¶29} In *Johnson*, the state objected to defendant pleading guilty to lesser offenses, but the trial court accepted those pleas. Johnson's actions constituted an active involvement in having charges arising from one indictment being disposed of in two separate proceedings.

{¶30} In *Gonzalez*, the parties "stipulated that defendant had pleaded no contest to the misdemeanor charge in the municipal court in order to avoid prosecution on the felony charge." *Gonzalez*, 112 Ohio App.3d at 21. This was an explicit act to avoid prosecution.

{¶31} In the case sub judice, there was no stipulation that the no contest plea to the misdemeanor failure to comply was being used to avoid prosecution.

{¶32} Furthermore, the record before us does not indicate Appellant was attempting to have the charges decided in two different proceedings. The felony and misdemeanor failure to comply charges originated in Youngstown Municipal Court. The city prosecutor sought to have the felony charge bound over to the Common Pleas Court, but retained jurisdiction of the misdemeanor charge. According to counsel, Appellant tried to have the misdemeanor charges dismissed but the city refused.

{¶33} Admittedly, it was within the City's right to prosecute the misdemeanor charge in Municipal Court.² However, when the City decided to pursue that right, the

²This case originated prior to the July 1, 2014 amendment to Crim.R. 5(B)(1). The amendment to that rule states, in pertinent part, "Except upon good cause shown, any misdemeanor, other than a minor misdemeanor, arising from the same act or transaction involving a felony shall be bound over or transferred with the felony case." Crim.R. 5(B)(1).

decision should have been communicated to the County Common Pleas Court. Although Appellant's counsel, who represented him for both the felony and misdemeanor failure to comply charges, could have informed the common pleas court and/or the county prosecutor of the misdemeanor failure to comply charge, the City prosecutor prior to entering a plea agreement with Appellant, could also have informed the County it was pursuing the misdemeanor failure to comply charge, and was accepting a no contest plea on that charge. In fact, trial counsel asserted that he reminded the assistant city prosecutor of the felony failure to comply indictment and pushed for dismissal of the misdemeanor. That argument "fell on deaf ears." 9/5/13 Defendant Trial Brief Reply. Trial counsel also attempted, unsuccessfully, to have the county prosecutor reduce the felony to a misdemeanor so Appellant could enter the military. Thus, the charges proceeded in two different courts systems and apparently no communication occurred between the city and county prosecuting officers, even though both agencies should have been aware that there was a probable double jeopardy issue.

{¶34} Considering the actions taken by the government, we cannot find that it was blameless in the creation of the situation. As such, the Double Jeopardy Clause barred prosecution of the felony failure to comply. The sole assignment of error has merit.

Conclusion

{¶35} The sole assignment of error is sustained. Prosecution of the felony failure to comply charge was barred by the Double Jeopardy Clause. The trial court's decision to the contrary is hereby reversed, the conviction for felony failure to comply is vacated and the felony failure to comply is dismissed.

Donofrio, P.J., concurs.

Waite, J., concurs.