[Cite as *State v. Martin*, 2007-Ohio-1833.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 87618

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

KYLE MARTIN

DEFENDANT-APPELLANT

JUDGMENT:
VACATED IN PART AND
REMANDED FOR RESENTENCING

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case Nos. CR-407193 and CR-463761

BEFORE: McMonagle, J., Celebrezze, A.J., and Kilbane, J.

RELEASED: April 19, 2007

JOURNALIZED:

[Cite as *State v. Martin*, 2007-Ohio-1833.]

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[Cite as *State v. Martin*, 2007-Ohio-1833.]

CHRISTINE T. McMONAGLE, J.:

{¶ 1} Defendant-appellant, Kyle Martin, appeals his conviction for conspiracy to commit aggravated murder and sentence for conspiracy to commit aggravated murder and kidnapping. For the reasons that follow, we vacate the finding of guilt as to the conspiracy charge (and, accordingly, its attendant sentence) and we vacate the sentence for kidnapping and remand for resentencing solely on that count.

{¶ 2} In May 2001, a Cuyahoga Grand Jury returned a ten count indictment against three defendants. Appellant was indicted as follows: count three, tampering with evidence; count four, attempted murder; count five, kidnapping; count six, tampering with records; and count eight, conspiracy to commit aggravated murder. (Case No. CR-407193.) Prior to trial, the State dismissed counts three and six.

{¶ 3} The case then proceeded to jury trial, with appellant representing himself. At the conclusion of the State's case, appellant moved to dismiss count eight, conspiracy to commit aggravated murder, on the ground that the indictment was defective as to that charge. The State requested, and was granted, an overnight recess "in order to respond in a more considered fashion." When court reconvened the following day, the State dismissed the count of conspiracy to commit aggravated murder. After appellant's Crim.R. 29 motion for acquittal was made and denied as to the remaining counts, he presented a defense. The trial court, sua sponte, included an instruction on attempted murder, a lesser included offense of attempted

aggravated murder. The jury found appellant not guilty of all counts except the kidnapping count. From that verdict appellant appealed.

{¶ 4} The conviction was reversed in *State v. Martin*, Cuyahoga App. No. 80198, 2003-Ohio-1499 ("*Martin I*"). In *Martin I*, this court reversed the trial court's judgment and remanded for a new trial because appellant was not adequately advised about representing himself and did not properly waive his right to counsel. The Supreme Court of Ohio affirmed this court's decision. *State v. Martin*, 103 Ohio St.3d 385, 2004-Ohio-5471.

{¶ 5} The State subsequently secured a second indictment against appellant in Case No. CR-463761 ("*Martin II*"). This indictment charged appellant with conspiracy to commit aggravated murder, insurance fraud and attempted theft. The insurance fraud and attempted theft were new charges, while the conspiracy to commit aggravated murder was the same charge that had previously been dismissed by the State. Those charges were consolidated and tried together with the kidnapping charge from *Martin I*.

{¶ 6} Prior to the trial, appellant moved the court to dismiss the conspiracy to commit aggravated murder charge on two grounds. First, appellant contended that the jury's acquittal in *Martin I* on the attempted aggravated murder and attempted murder charges barred a subsequent prosecution on the conspiracy to commit aggravated murder, based upon the doctrine of collateral estoppel. Second, appellant contended that retrial on the conspiracy to commit aggravated murder

violated double jeopardy protections. After a hearing, appellant's motion was denied. The case proceeded to trial and the jury found appellant guilty of conspiracy to commit aggravated murder, not guilty of insurance fraud, not guilty of attempted theft, and once again, guilty of kidnapping. At sentencing, appellant requested merger of the conspiracy and kidnapping counts. The court denied appellant's request and sentenced him to five years on the conspiracy count and the maximum ten years on the kidnapping count. The sentences were ordered to be served consecutively. This appeal followed.

{¶ 7} The testimony at the trial in *Martin II* was, with one exception, similar to the testimony at the trial in *Martin I*. In *Martin I*, this court set forth the case as follows:

{¶ 8} "The State contended [appellant] was a knowing co-conspirator and active participant in a scheme concocted by his cousin, Tonica Jenkins, and his aunt, Tonica Clement, to fake his cousin's death so she could escape a federal prosecution. The plan was to find a woman similar in appearance and age to Ms. Jenkins and, under the name 'Tonica Jenkins,' have her attend doctor's appointments in order to create a medical file. The State alleged that, once sufficient medical records existed, the three intended to kill the victim and burn her body so that the woman's medical records would be used to identify her remains as those of Ms. Jenkins. The objective, the State argued, was to feign Ms. Jenkins' death in order to evade a federal criminal indictment related to drug possession and/or trafficking.

{¶ 9} "At trial, Martin argued that, while his cousin asked him to locate a female participant for a scheme, when he and Ms. Jenkins enlisted the services of Melissa Latham, the victim, he understood that she would be using Ms. Latham to perpetrate some type of insurance fraud. He claimed to be unaware of any plot to kill the victim until Ms. Jenkins attempted to kill her with an overdose of insulin.

{¶ 10} "Ms. Latham testified that both Martin and Ms. Jenkins asked her, as part of an insurance scam, to attend some doctor's appointments using Ms. Jenkins' name in exchange for money and drugs. She stayed at Jenkins' home for a few days and used drugs with Martin during this time period. Martin then drove Ms. Latham and his cousin to a dentist in Strongsville, where Ms. Latham had her teeth cleaned and had dental x-rays taken, and where Ms. Jenkins filled out all the paperwork.

{¶ 11} "In the Jenkins' basement the following day, Ms. Latham claimed, Martin attacked her and either he or Ms. Jenkins hit her in the head several times with a brick. Then, she said, while Martin held her down, Ms. Jenkins repeatedly injected her with insulin. After she 'played dead,' she claimed they left and she was able to escape and find help." *Martin I* at ¶2-5.

{¶ 12} During the trial of *Martin II*, Charles Moore, a prison inmate with whom appellant had become acquainted during the period of time between the two trials, testified. According to Moore, appellant told him that he and Jenkins planned to find and kill a "Jenkins look-alike" so that Jenkins could escape prosecution on her federal drug case.

{¶ 13} In his first assignment of error, appellant challenges the denial of his motion to dismiss on two grounds, collateral estoppel and double jeopardy. We address here only the doctrine of double jeopardy, as it is dispositive of the issue raised.

{¶ 14} Double jeopardy is established by the Fifth Amendment to the Constitution of the United States, which states: "No person shall * * * be subject for the same offence to be twice put in jeopardy of life or limb * * * ." The Fifth Amendment has been made applicable to the states through the Fourteenth Amendment. *Benton v. Maryland* (1969), 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707.

{¶ 15} It is well established that the Double Jeopardy Clause protects against successive prosecutions for the same offense. *United States v. Dixon* (1993), 509 U.S. 688, 696, 113 S.Ct. 2849, 2855, 125 L.Ed.2d 556, 567; *Ashe v. Swenson* (1970), 397 U.S. 436, 445-446, 90 S.Ct. 1189, 1195, 25 L.Ed.2d 469, 476-477. As stated in *Green v. United States* (1957), 355 U.S. 184, 187-188, 78 S.Ct. 221, 223, 2 L.Ed.2d 199, 204:

{¶ 16} "The underlying idea [embodied in the Double Jeopardy Clause], one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing

state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty."

{¶ 17} In addition to its primary function of safeguarding against governmental overreaching, the double jeopardy guarantee protects a defendant's "'valued right to have his trial completed by a particular tribunal.'" *Crist v. Bretz* (1978), 437 U.S. 28, 36, 98 S.Ct. 2156, 2161, 57 L.Ed.2d 24, 31, quoting *Wade v. Hunter* (1949), 336 U.S. 684, 689, 69 S.Ct. 834, 837, 93 L.Ed. 974, 978. Once a tribunal has decided an issue of ultimate fact in the defendant's favor, the double jeopardy doctrine also precludes a second jury from ever considering that same or identical issue in a later trial. *Dowling v. United States* (1990), 493 U.S. 342, 348, 110 S.Ct. 668, 672, 107 L.Ed. 2d 708, 717.

{¶ 18} We agree with appellant's contention that the State's dismissal of the conspiracy count in *Martin I* barred the prosecution of it in *Martin II.* In a jury trial, jeopardy attaches when the jury is empaneled and sworn. *Dowling*, supra. In a bench trial, jeopardy attaches when the court first hears evidence (often referred to as "when the first witness is sworn"). *United States v. Martin Linen Supply Co.* (1977), 430 U.S. 564, 51 L.Ed.2d 642 , 97 S.Ct. 1349.

{¶ 19} There are circumstances, however, when it may be said that jeopardy does not attach despite the swearing-in of the jury or the first witness. In *United States v. Scott* (1978), 437 U.S. 82, 98 S.Ct. 2187, 57 L.Ed.2d 65, the United States Supreme Court held that jeopardy does not attach if the court "terminates the

proceedings favorably to the defendant on a basis not related to factual guilt or innocence." Id. at 92. In particular, the court explained:

{¶ 20} "We now turn to the relationship between the Double Jeopardy Clause and reprosecution of a defendant who has successfully obtained not a mistrial but a termination of the trial in his favor before any determination of factual guilt or innocence. Unlike the typical mistrial, the granting of a motion such as this obviously contemplates that the proceedings will terminate then and there in favor of the defendant. The prosecution, if it wishes to reinstate the proceedings in the face of such a ruling, ordinarily must seek reversal of the decision of the trial court." Id. at 94.

{¶ 21} The Supreme Court summarized its position in *Scott* as follows:

{¶ 22} "We think that in a case such as this the defendant, by deliberately choosing to seek termination of the proceedings against him on a basis unrelated to factual guilt or innocence of the offense of which he is accused, suffers no injury cognizable under the Double Jeopardy Clause * * *. Rather, we conclude that the Double Jeopardy Clause, which guards against Government oppression, does not relieve a defendant from the consequences of his voluntary choice." (Footnote omitted.) Id. at 98-99.

{¶ 23} The Supreme Court of Ohio, relying on *Scott*, held in *State v. Broughton* (1991), 62 Ohio St.3d 253, 581 N.E.2d 541, as follows:

{¶ 24} "Therefore, we hold that where jeopardy has attached during the course of a criminal proceeding, a dismissal of the case may be treated in the same manner as a declaration of a mistrial and will not bar a subsequent trial when: (1) *the dismissal is based on a defense motion*, and (2) the court's decision in granting such motion is unrelated to a finding of factual guilt or innocence." (Footnote omitted.) (Emphasis added.) Id. at 266.

{¶ 25} In this case, the conspiracy count in *Martin I* was dismissed by the State at the conclusion of its own case. It was not dismissed upon a defense motion. It was not dismissed sua sponte by the court, as against the wishes of the State. See *State v. Calhoun* (1968),18 Ohio St.3d 373. This case does not implicate the type of situation discussed in *Scott*, *Broughton* and *Calhoun*; hence, re-indictment of the conspiracy count was barred by double jeopardy. Admittedly, there was a defense motion extant that "requested dismissal unrelated to a finding of factual guilt or innocence." But that motion was not ruled on and was, therefore, denied. See *Solon v. Solon Baptist Temple, Inc.* (1982), 8 Ohio App.3d 347, 457 N.E.2d 858. The State contends that it dismissed for the same reason raised by appellant in his motion. However, the State cannot attack its own indictment by moving for its dismissal at the conclusion of its own case, and thereby avoid jeopardy.

{¶ 26} Appellant's first assignment of error is sustained and his conviction on the conspiracy to commit aggravated murder charge is vacated.

{¶ 27} In his second assignment of error, appellant contends that the trial court erred by not merging the kidnapping and conspiracy counts for sentencing. Because we are vacating the conspiracy conviction pursuant to appellant's first assignment of error, this second assignment of error is moot and we decline to address it pursuant to App.R. 12(A)(1)(c).

{¶ 28} In his third assignment of error, appellant contends that the trial court violated his state and federal constitutional rights by sentencing him to maximum and consecutive sentences based upon factual findings not found by the jury.

{¶ 29} In *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, the Supreme Court of Ohio held that judicial findings are unconstitutional and that several provisions of Senate Bill 2 are unconstitutional. The court concluded that a trial court is no longer required to make findings or give its reasons for imposing maximum, consecutive, or more than the minimum sentences. The *Foster* holding applies to all cases on direct review, which includes the present case. Because the trial court sentenced appellant under unconstitutional statutory provisions, he must be resentenced. See *State v. Childs*, Cuyahoga App. No. 87408, 2006-Ohio-5016; *State v. Malcolm*, Cuyahoga App. No. 87622, 2006-Ohio-6024.

{¶ 30} Appellant also argues that the severance remedy established in *Foster* violates the ex post facto and due process clauses of the United States Constitution. This issue is not ripe for our review because appellant has yet to be sentenced under

Foster. See *State v. Anderson*, Cuyahoga App. No. 87309, 2006-Ohio-5431; *State v. McKercher*, Allen App. No. 1-05-83, 2006-Ohio-1772; *Malcolm*, supra.

{¶ 31} Accordingly, appellant's third assignment of error is granted in part and overruled in part. Appellant's sentence for kidnapping is vacated and the case is remanded for resentencing.

{¶ 32} In his fourth and final assignment of error, appellant argues that the trial court improperly considered alleged conduct that he was acquitted of in *Martin I*. Although we are vacating appellant's sentence, we address this assignment since appellant will have to be resentenced.

{¶ 33} In sentencing appellant to the maximum term on the kidnapping, the court stated, "I cannot imagine a more serious form of kidnapping than to hold someone for the purpose of extinguishing her life." The court also stated that the victim "was held for purpose of causing her harm and eventually *** for the purpose [of] causing her demise." Appellant contends that the trial court's comments were in reference to attempted aggravated murder/attempted murder, which he was acquitted of in *Martin I*. Appellant was convicted in *Martin II* of conspiracy to commit aggravated murder, however, and those comments certainly could have been directed toward that conviction.

{¶ 34} Moreover, the Supreme Court of Ohio has expressly recognized that a sentencing court may consider the existence of other charges prior to sentencing even if the defendant has been acquitted on those charges. *State v. Wiles* (1991), 59

Ohio St.3d 71,78, 571 N.E.2d 97. See, also, *United States v. Donelson* (C.A.D.C. 1982), 224 U.S. App. D.C. 389, 695 F.2d 583, 590 ("It is well established that a sentencing judge may take into account facts introduced at trial relating to other charges, even ones of which the defendant has been acquitted."); *United States v. Watts* (1997), 519 U.S. 148, 136 L.Ed.2d 554, 117 S.Ct. 633 (It is proper to consider the underlying facts of a charge of which the defendant was acquitted in determining the sentence for the convicted offense).

{¶ 35} Accordingly, appellant's fourth assignment of error is overruled.

{¶ 36} Within ten days of the announcement of this court's decision, and before journalization of same, both appellant and appellee filed motions for reconsideration. Appellant made an argument that it did not make in its original brief or at oral argument, and appellee cited a case and made an argument, neither of which was contained in its brief or mentioned at oral argument. Neither appellant nor appellee responded to the argument of the other. Nonetheless, we consider these new arguments and revise our decision to reflect this consideration.

{¶ 37} Appellant argues in his motion that because this court dismissed the conspiracy to commit aggravated murder on double jeopardy grounds, such ruling necessitates that his kidnapping conviction be likewise dismissed. Appellant maintains that the kidnapping charge prohibited the "removal or restraint of another person by force, threat, or deception for the purpose of facilitating the commission of any felony or flight thereafter." Appellant hence argues that once the conspiracy

charge is dismissed, there is no predicate felony upon which the kidnapping charge could be based.

{¶ 38} Appellant's argument ignores that fact that the indictment charged that he "by force, threat, or deception removed Melissa Latham from the place where she was found or restrained her of her liberty for the purpose of facilitating the commission of a felony or the flight thereafter *and/or terrorizing or inflicting serious physical harm on Melissa Latham*." (Emphasis added.) Further, the jury was likewise instructed as to both prongs of the kidnapping statute (TR. 1503-1504).

{¶ 39} There was substantial evidence at trial that demonstrated appellant, by force, threat or deception, restrained the victim of her liberty for the purpose of terrorizing or inflicting serious physical harm on her. Accordingly, we find that the kidnapping conviction is valid regardless of the resolution of the conspiracy to commit aggravated murder charge.

{¶ 40} In regard to the State's request for reconsideration, it claims that it dismissed the indictment in the instant case *at the conclusion of its case* because there was a "typographical error" in the indictment (the indictment did not specify the overt act that formed the basis of the conspiracy. We do not decide whether such omission is "typographical.") It further claims that because this "error" was procedural in nature and did not go to the merits, its dismissal was "without prejudice to further prosecution." In support of this proposition, the State cites *Illinois v. Somerville* (1973), 410 U.S. 458, 93 S.Ct. 1066, 35 L.Ed.2d 425. In *Somerville*, after

the jury was sworn, but before the presentation of any evidence, the prosecutor realized that the indictment was fatally defective *under Illinois law*, and moved for a mistrial. Under Illinois law, the defect in the indictment was not curable by amendment, as it is under Ohio law.[1]

{¶ 41} Further, under Illinois law, such defect is not waived by a defendant's failure to object. In sum, a defendant could raise such error for the first time at the appellate level, and prevail. Under Ohio law the defect is waived by a defendant if not presented by pre-trial motion under Crim.R. 12(C)(2).[2] In short, the State's reliance upon *Somerville*, supra, is misplaced as *Somerville* is specific to Illinois law

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[1]Crim.R. (7)D provides that an indictment which does not contain all the essential elements of an offense may be amended "at any time before, during or after trial" to include the omitted element if the name or identity of the crime is not changed. See, also, *State v. Habash* (Jan. 31, 1996), Summit App. No. 17072, where the court permitted amendment to the indictment to specify the overt act that formed the basis of the conspiracy, exactly the defect alleged here.

[2]Crim R. 12(C) provides as follows: "Prior to trial, any party may raise by motion any defense, objection, evidentiary issue, or request that is capable of determination without the trial of the general issue. The following must be raised before trial:

"***

"(2) Defenses and objections based on defects in the indictment, information or complaint ***."

Crim R. 12 (F), which governs ruling on a Crim.R. 12(C) motion provides that "[t]he court may adjudicate a motion based upon briefs, affidavits, the proffer of testimony and exhibits, a hearing or other appropriate means. A motion made pursuant to divisions (C)(1) to (C)(5) of this rule shall be determined before trial." See, also, *State v. Haberek* (1988).47 Ohio App.3d 35, 546 N.E.2d 1361 and *State v. Warren*, 168 Ohio App.3d 288, 2006-Ohio-4104, 859 N.E.2d 998.

which prohibited any cure of the State's mistakes. "In the instant case, the trial judge terminated the proceeding because a defect was found to exist in the indictment that was, *as a matter of Illinois law*, not curable by amendment." *Sommerville* at 468 (emphasis added.)

{¶ 42} Here, the State had many options to avoid the attachment of jeopardy upon discovering the defect in the indictment. It could have amended the indictment to correct the defect, as such amendment would not have changed the name or identity of the crime. Although we have pointed out that the defense's motion was clearly untimely, had the State indicated no opposition to the defense's motion, the matter *might* have been dismissed by the court "other than on the merits"—and a *defense* motion resulting in dismissal of the charges "other than on the merits" would not have resulted in jeopardy attaching. Finally, the State could have taken the position that the defense's motion was untimely, and that the defense therefore had waived the objection by not bringing it to the court's attention in a pre-trial motion, as required by Crim R. 12. Any one of these actions would have avoided the jeopardy issue before us today. In fact, the State's dismissal of the charges at the conclusion of its own case was really the only way that jeopardy was caused to attach. While this court cannot fathom what tactic might have been involved in the decision to dismiss, nonetheless, this is what the State did. For us to establish a rule that would permit the State to dismiss a charge at the conclusion of its own case, and then later reindict upon that charge, when simple correction of the defect was then available by

amendment, or when the defense had obviously waived objection thereto, would be to destroy *any* concept of double jeopardy.

{¶ 43} In sum, the State in this case could have indicted correctly in the first instance; it could have amended the indictment; it could have lodged no objection to the *defense's* motion to dismiss, and given the fact that the defense did not timely (that is, pre-trial) bring the defect in the indictment to the court's attention, could simply have proceeded with knowledge that the defense had waived the defect altogether. It requested of the court an overnight recess to consider its options; it returned to court the next day, and chose to dismiss. As a result of that choice, jeopardy attached and appellant may not now be retried on the conspiracy count.

{¶ 44} Finding of guilt affirmed as to kidnapping and vacated as to conspiracy to commit aggravated murder. Sentence vacated; case remanded for resentencing.

It is ordered that appellant recover from appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

CHRISTINE T. McMONAGLE, JUDGE

FRANK D. CELEBREZZE, JR., A.J., and

MARY EILEEN KILBANE, J., CONCUR