[Cite as *State v. Lababidi*, 2008-Ohio-574.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 89460

STATE OF OHIO

PLAINTIFF-APPELLANT

vs.

MAJED LABABIDI

DEFENDANT-APPELLEE

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-490241

BEFORE: McMonagle, J., Gallagher, P.J., and Kilbane, J.

RELEASED: February 14, 2008

JOURNALIZED:

[Cite as *State v. Lababidi*, 2008-Ohio-574.]

ATTORNEY FOR APPELLANT

William D. Mason
Cuyahoga County Prosecutor

BY: T. Allan Regas
Thorin Freeman
Assistant Prosecuting Attorneys
The Justice Center, 8th Floor
1200 Ontario Street
Cleveland, OH 44113

ATTORNEY FOR APPELLEE

Dale R. Friedland
Rapoport, Spitz, Friedland & Courtney
55 Public Square, Suite 1750
Cleveland, OH 44113-1974

[Cite as *State v. Lababidi*, 2008-Ohio-574.]

CHRISTINE T. McMONAGLE, J.:

{¶ 1} Plaintiff-appellant, the State of Ohio, appeals from the trial court's judgment finding the State's re-indictment of defendant-appellee, Majed Lababidi, barred by res judicata. The State argues that the trial court's dismissal of the first indictment against Lababidi was a dismissal without prejudice and, therefore, it could properly re-indict him. We affirm the decision of the trial court.

{¶ 2} Lababidi was originally indicted in Case No. CR-478783 on four counts of trademark counterfeiting, in violation of R.C. 2913.34, and four counts of criminal simulation, in violation of R.C. 2913.32.

{¶ 3} The trial court subsequently held a hearing of some sort. Neither Lababidi nor the State provided this court with a copy of the transcript of this proceeding. The docket reflects that Lababidi "waived his right to trial by jury," and filed a "Motion to Dismiss," both on August 3, 2006,[1] but does not reflect that a bench trial was actually commenced. That same date the docket reflects "calling witnesses" and "Motion of Defendant to Dismiss is Granted." What knowledge this court has of that hearing is limited to the opinion written by the trial judge in the case sub judice.

{¶ 4} The State subsequently re-indicted Lababidi, in an identical indictment, in Case No. CR-490241. The trial court ruled that the State was barred by the doctrine of res judicata from prosecuting Lababidi on identical charges and

[1]There is no Motion to Dismiss contained within the file.

dismissed the case. The trial court filed an opinion in this matter, and it is from this opinion that the State now appeals.

{¶ 5} The State argues that the trial court erred in finding its re-indictment of Lababidi barred by the doctrine of res judicata. The State directs us to *State v. Brown*, Cuyahoga App. No. 84229, 2004-Ohio-5587, wherein this court stated, "this court has repeatedly held that, in the absence of a notation that the matter was dismissed with prejudice, a dismissal pursuant to Crim.R. 48(B) is not a final appealable order." Id. at ¶6. Thus, the State contends that the trial court's order dismissing Case No. CR-478783 (the first indictment) was not a final order, because the entry did not specify whether the dismissal was with or without prejudice, and, therefore, it could properly re-indict Lababidi on the same charges.

{¶ 6} The State ignores other language found in *Brown*, however. In considering a dismissal under Crim.R. 48(B), this court stated:

{¶ 7} "'Crim.R. 48(B) does not provide for a dismissal with prejudice; the court has the inherent power to dismiss with prejudice only where it is apparent that the defendant has been denied a constitutional or statutory right, the violation of which would, in itself, bar prosecution.'" Id. at ¶9, quoting *Fairview Park v. Fleming* (Dec. 7, 2000), Cuyahoga App. Nos. 77323, 77324.

{¶ 8} Here, it is clear from the court's opinion that the trial court dismissed Case No. CR-478783 (the first case) as a result of its finding constitutional violations;

hence, the dismissal was upon the merits. The State did not appeal that dismissal, as was its right under R.C. 2945.67(A).[2]

{¶ 9} The doctrine of res judicata provides that "'a final judgment, rendered upon the merits, without fraud or collusion, by a court of competent jurisdiction, is conclusive of rights, questions and facts in issue, as to the parties and their privies, in all other actions ***.' Thus, a judgment in a former action acts as a bar in a subsequent action where the cause of action prosecuted is the same." *State v. Hay*, 169 Ohio App.3d59, 2006-Ohio-5126, at ¶24, quoting *Norwood v. McDonald* (1943), 142 Ohio St. 299. If the same facts or evidence would sustain both, the two actions are considered the same within the rule and the judgment in the former is a bar to the subsequent action. Id. at ¶25.

{¶ 10} Here, there is no question that the State's re-indictment of Lababidi is based upon the same facts and evidence as the first indictment. Because the first indictment was dismissed on the merits as a result of the court finding constitutional violations, and the State did not appeal the dismissal, the State's re-indictment is barred by the doctrine of res judicata.

{¶ 11} The State's assignment of error is overruled.

Affirmed.

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

---

[2]"A prosecuting attorney *** may appeal as a matter of right *** any decision of a trial court in a criminal case *** which decision grants a motion to dismiss all or any part of an indictment."

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

MARY EILEEN KILBANE, J., CONCURS
SEAN C. GALLAGHER, P. J., DISSENTS WITH SEPARATE OPINION

SEAN C. GALLAGHER, P.J., DISSENTING:

{¶ 12} The prosecutor in his case must feel like the character Yossarian in Joseph Heller's novel *Catch-22*. He was in a no-win situation.

{¶ 13} I respectfully dissent from the majority opinion because it is based on an after-the-fact determination by the trial court that the initial case was dismissed with prejudice on constitutional grounds. The trial court's subsequent explanation is nothing more than revisionist history. While there was apparently a discussion on the record in the first case about constitutional issues, that transcript is not before us. Further, the judgment entry in the first case did not state the reason for the dismissal or that the dismissal was with prejudice. It simply stated that defendant's motion to dismiss was granted; therefore, it is treated as a dismissal without

prejudice. At the time of the re-indictment, the dismissal did not specify that it was with prejudice.

{¶ 14} Here, the August 9, 2006 judgment entry shows the case was "dismissed." Pursuant to our earlier ruling in *State v. Brown*, Cuyahoga App. No. 84229, 2004-Ohio-5587, this ruling was not a dismissal with prejudice and was not a final appealable order. This case was then re-indicted on December 21, 2006. The fact that the trial court issued what amounts to a "clarification" order to justify the earlier dismissal does not cure the underlying problem. The case was simply not properly dismissed with prejudice, thus the State's only remedy was to refile the action. As a result, I would reverse the trial court's ruling, and reinstate the case against the defendant.