

[Cite as *State v. Tate*, 2010-Ohio-3312.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
Nos. 93384, 93385, and 93386

STATE OF OHIO

PLAINTIFF-APPELLANT

VS.

TYRONE TATE, ET AL.

DEFENDANTS-APPELLEES

**JUDGMENT:
REVERSED, MODIFIED, AND REMANDED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-519485-A,C, & D

BEFORE: Rocco, P.J., Jones, J., and Cooney, J.

RELEASED: July 15, 2010

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief per App.R. 26(A), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

KENNETH A. ROCCO, P.J.:

{¶ 1} In these three appeals that have been consolidated for briefing, hearing and disposition, plaintiff-appellant the state of Ohio appeals from the trial court's order that dismissed with prejudice the single indictment issued by the Cuyahoga County Grand Jury against three co-defendants, appellees Tyrone Tate, Calvin Burks, and Phillip Sims.

{¶ 2} The state argues the trial court abused its discretion in issuing the order, and requests this court to modify the order to a dismissal "without prejudice." Upon a review of the record, this court agrees with the state's argument. Consequently, the trial court's order is reversed and modified to a dismissal without prejudice, and these appeals are remanded to the trial court for correction of the journal entry.

{¶ 3} The record reflects appellees were indicted together in Case No. CR-519485 on one count. Each appellee was charged with violating R.C. 2923.16(B), "Improperly Handling Firearms in a Motor Vehicle," with a forfeiture specification. The state filed the indictment on December 31, 2008.

{¶ 4} The body of Count 1 of the indictment stated in pertinent part that the grand jurors found that appellees "unlawfully did knowingly transport a loaded firearm in a motor vehicle in such a manner that the firearm [wa]s accessible to the operator or any passenger without leaving the vehicle *and the offender previously has been convicted of or pleaded guilty to a violation of division (B)* * *

*.” (Emphasis added.) The offense was alleged to have been committed “on or about November 18, 2008.”

{¶ 5} As it existed at the time of the alleged offense, R.C. 2923.16 provided in pertinent part as follows:

{¶ 6} “(B) No person shall knowingly transport or have a loaded firearm in a motor vehicle in such a manner that the firearm is accessible to the operator or any passenger without leaving the vehicle.

{¶ 7} “ * * *

{¶ 8} “(I) Whoever violates this section is guilty of improperly handling firearms in a motor vehicle. * * * A violation of division (B) of this section is whichever of the following is applicable:

{¶ 9} “(1) If, at the time of the transportation or possession in violation of division (B) of this section, the offender was carrying a valid license or temporary emergency license to carry a concealed handgun issued to the offender under section 2923.125 or 2923.1213 of the Revised Code or a license to carry a concealed handgun that was issued by another state with which the attorney general has entered into a reciprocity agreement under section 109.69 of the Revised Code and the offender was not knowingly in a place described in division (B) of section 2923.126 of the Revised Code, the violation is a misdemeanor of the first degree or, if the offender previously has been convicted of or pleaded guilty to a violation of division (B) of this section, a felony of the fourth degree.

{¶ 10} “(2) If division (l)(1) of this section does not apply, a felony of the fourth degree.”

{¶ 11} At their arraignment, each of the appellees entered a not guilty plea. Appellees thereafter filed motions for discovery from the state. The state’s bills of particulars mirrored the indictment’s language.

{¶ 12} The court issued journal entries indicating it conducted three pretrial hearings in January, February, and March 2009. A final pretrial hearing took place on April 1, and the court set the case for trial on May 4, 2009.

{¶ 13} At 8:41 a.m. on May 4, 2009, the prosecutor filed a motion to amend the indictment. The prosecutor sought to delete the language in Count 1 this court has italicized, stating that “the clause does not constitute an essential element of the charged offense,” did not enhance the penalty level, and was “likely, simply a typographical error.”

{¶ 14} The case was called for trial at 10:14 a.m. The prosecutor brought the trial court’s attention to his motion. Each of the defense attorneys objected to the state’s motion, indicating that they had just received it, that the matter had never previously been raised, and that their defense to the charge had been directed at the language the state now sought to delete.

{¶ 15} In particular, appellee Sims’s counsel stated, “I don’t want to go overboard here, Judge, but we’re in fact in a courtroom for trial and [the prosecutor] can’t even tell you what — exactly what the nature of the charges are.

Why is he amending the indictment if he can't tell you why or even if it changes the nature of the offense? It's our position it absolutely does. And it changes the presentation of the evidence, it changes the documentation the state must bring in, it changes the way we would defend the case. * * *

{¶ 16} The trial court asked the prosecutor when he discovered the problem; the prosecutor admitted he noticed it “several weeks ago in all honesty, and in light of the volume, it slipped [his] mind. * * *

{¶ 17} After some additional discussion, the trial court stated that the case would be dismissed with prejudice as to each appellee. The prosecutor requested the trial court to reconsider its decision.

{¶ 18} The court stated, “We are here now on the date of trial and I am disturbed by the fact that you came across this [problem] several weeks ago and didn't act on it. You know, that type of negligence is inexcusable. * * * [The defendants] have a right * * * to due process and at the point that you realized that a mistake occurred or existed, then you had some responsibility to correct it.

{¶ 19} * * You know the state has some responsibility to act with due diligence

{¶ 20} * *.”

{¶ 21} The court went on to remark that, had defense counsel “known, they would have had the opportunity to properly prepare a defense. They are all here prepped for trial today and to come here and say, okay, your case was originally

this degree and this is what we thought, and now we're going to go with something else. You could do it if it didn't change the elements of the offense. But you can't do it if it's going to change the elements of the offense. And the fact of the matter is for you to take this long to make a decision and to decide to do something about it is inexcusable.”

{¶ 22} The trial court dismissed the indictment against each appellee. Nevertheless, without having heard any evidence on the matter, the trial court's order additionally stated that the “parties [are] to forfeit gun.” The state filed separate appeals of the decision; the appeals have been consolidated.

{¶ 23} The state presents the following assignment of error:

{¶ 24} **“The trial court abused its discretion when it dismissed with prejudice the single charge of improperly handling a firearm in a motor vehicle in this case.”**

{¶ 25} A trial court's dismissal of an indictment is reviewed for an abuse of discretion. *State v. Busch*, 76 Ohio St.3d 613, 616, 1996-Ohio-8, 669 N.E.2d 1125; *State v. Walton*, Cuyahoga App. No. 87347, 2006-Ohio-4771, at ¶4, citing *State v. Tankersley* (Apr. 23, 1998), Cuyahoga App. Nos. 72398 and 72399. An abuse of discretion implies a decision that either is without a reasonable basis or is clearly wrong. *Id.*, citing *Angelkovski v. Buckeye Potato Chips Co.* (1983), 11 Ohio App.3d 159, 463 N.E.2d 1280.

{¶ 26} Crim.R. 48(B) provides the procedure for the dismissal of a criminal case by the court over the objections of the state, viz., that “if the court over the objection of the state dismisses an indictment, information, or complaint, it shall state on the record its findings of fact and reasons for the dismissal.”

{¶ 27} In *Busch*, the supreme court held Crim.R. 48(B) “does not limit the reasons for which a trial judge might dismiss a case, and we are convinced that a judge may dismiss a case pursuant to Crim.R. 48(B) if a dismissal serves the interest of justice.” *Id.* at 615, 669 N.E.2d 1125. See also, *State v. Craig*, Cuyahoga App. No. 88313, 2008-Ohio-3978, ¶10.

{¶ 28} The state argues the trial court’s decision must be reversed because the appellees failed to establish they were denied a constitutional or a statutory right by the proposed amendment of the indictment. This court previously has iterated such a standard, and other Ohio appellate districts have agreed with it. See, e.g., *State v. Caringi*, Cuyahoga App. No. 87005, 2006-Ohio-5937, ¶5; *State v. Walton*, ¶5; *State v. Jones*, Montgomery App. No. 22521, 2009-Ohio-1957, ¶13, citing, *inter alia*, *State v. Wright* (July 24, 1996), Hamilton App. No. C960019.

{¶ 29} It is apparent that the language the state sought to delete from the indictment in this case would not have violated Crim.R. 7(D). The statute as it existed at the time was not well-phrased, so the amendment requested by the

prosecutor did not change either the nature of the offense or the penalty involved.

In determining otherwise, therefore, the trial court was wrong.

{¶ 30} The trial court in this case also specifically indicated that it considered the state's negligence to have violated the appellees' constitutional right to due process of law. The court based this conclusion on the facts presented, i.e., the prosecutor admitted he became aware of the surplus language "several weeks" before the scheduled trial date, the defense attorneys informed the court that their defenses had been directed to that language as constituting an "element" of the offense, and, as of the trial date, all of the parties expressed confusion about the effect of the proposed amendment.

{¶ 31} However, if the trial court truly sought to serve the interests of justice, it had two other options which would have served the purpose: 1) conducting a full hearing, which the law favors, or 2) simply dismissing the indictments without prejudice. The parties would have been able to sort through the confusion under either of these scenarios.

{¶ 32} On the other hand, "[t]he court may not dismiss an indictment with prejudice unless it is apparent that the defendant has been denied either a constitutional or statutory right, *the violation of which, in itself, would bar prosecution.*" *Caringi*, ¶5. The situation in this case did not warrant such drastic action. Indeed, the trial court's decision in this case clearly was arbitrary

because, in spite of the fact that the court conducted no evidentiary hearing, it ordered forfeiture of the weapon allegedly involved.

{¶ 33} Therefore, the trial court abused its discretion when it dismissed the indictment against appellees with prejudice. *Id.*; cf., *Columbus v. Storey*, Franklin App. No. 03AP-743, 2004-Ohio-3377.

{¶ 34} The state's assignment of error is sustained.

{¶ 35} In each appeal, the trial court's order is reversed and modified to a dismissal without prejudice, and these cases are remanded to the trial court for correction of the journal entry accordingly.

It is ordered that appellant recover from appellees 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. Cases remanded to the trial court for further proceedings.

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

KENNETH A. ROCCO, PRESIDING JUDGE

LARRY A. JONES, J., and
COLLEEN CONWAY COONEY, J., CONCUR