

[Cite as *State v. Knight*, 2010-Ohio-3873.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93649

STATE OF OHIO

PLAINTIFF-APPELLANT

vs.

TONY KNIGHT

DEFENDANT-APPELLEE

JUDGMENT:
REVERSED AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-522173

BEFORE: Celebrezze, J., Stewart, P.J., and Dyke, J.

RELEASED AND JOURNALIZED: August 19, 2010

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FRANK D. CELEBREZZE, JR., J.:

{¶ 1} The state of Ohio appeals the trial court's decision to dismiss the indictment against Tony Knight with prejudice. Based on our review of the record and pertinent case law, we reverse and remand for proceedings consistent with this opinion.

{¶ 2} On March 20, 2009, defendant-appellee, Tony Knight, was indicted on two counts of felonious assault, one in violation of R.C. 2903.11(A)(1) and one in violation of R.C. 2903.11(A)(2). Trial was set for

July 20, 2009. When the victim failed to appear, the trial court dismissed the case with prejudice. This appeal followed wherein the state argues that the trial court had no authority to dismiss the indictment with prejudice, and its decision to do so was an abuse of discretion.

{¶ 3} When a trial court dismisses an indictment over the state's objections, it must express its findings and reasons for doing so on the record.

Crim.R. 48(B). We review the trial court's dismissal of an indictment for an abuse of discretion. *State v. Steel*, Cuyahoga App. No. 85076, 2005-Ohio-2623, ¶5. To constitute an abuse of discretion, the ruling must be unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 450 N.E.2d 1140. "The term discretion itself involves the idea of choice, of an exercise of the will, of a determination made between competing considerations." *State v. Jenkins* (1984), 15 Ohio St.3d 164, 222, 473 N.E.2d 264, quoting *Spalding v. Spalding* (1959), 355 Mich. 382, 384-385, 94 N.W.2d 810. In order to have an abuse of that choice, the result must be "so palpably and grossly violative of fact and logic that it evidences not the exercise of will but the perversity of will, not the exercise of judgment but the defiance thereof, not the exercise of reason but rather of passion or bias." *Id.*

{¶ 4} Although Crim.R. 48 allows a trial court to dismiss an indictment, the dismissal may be with prejudice only where the court finds that "the defendant has been denied a constitutional right or statutory right,

the violation of which would, in itself, bar prosecution.” *State v. Peters*, Cuyahoga App. No. 92791, 2009-Ohio-5836, ¶12, citing *Fairview Park v. Fleming* (Dec. 7, 2000), Cuyahoga App. Nos. 77323 and 77324; *State v. Tate*, Cuyahoga App. Nos. 93384, 93385, 93386, 2010-Ohio-3312, ¶32; *State v. Dixon* (1984), 14 Ohio App.3d 396, 471 N.E.2d 864. See, also, *State v. Johnson*, Cuyahoga App. No. 87348, 2006-Ohio-4772, ¶4; *State v. Lababidi*, Cuyahoga App. No. 89460, 2008-Ohio-574, ¶7; *State v. Walton*, Cuyahoga App. No. 87347, 2006-Ohio-4771, ¶5.

{¶ 5} In this case, the trial court made no finding that appellant’s constitutional or statutory rights were violated. As such, the trial court was not authorized to dismiss the case with prejudice pursuant to Crim.R. 48, and its decision to do so was an abuse of discretion. Therefore, the decision must be reversed and the matter remanded to the trial court to vacate its previous entry and enter a dismissal without prejudice. Appellant’s sole assignment of error is well taken.

{¶ 6} This cause is reversed and remanded to the lower court for further proceedings consistent with this opinion.

It is ordered that appellant recover of said 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.

FRANK D. CELEBREZZE, JR., JUDGE

MELODY J. STEWART, P.J., and
ANN DYKE, J., CONCUR