

[Cite as *State v. Orr*, 2011-Ohio-1371.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
No. 95344

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STATE OF OHIO

PLAINTIFF-APPELLANT

vs.

WYLEE ORR

DEFENDANT-APPELLEE

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**JUDGMENT:**  
**AFFIRMED IN PART, REVERSED IN**  
**PART AND REMANDED**

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Civil Appeal from the  
Cuyahoga County Common Pleas Court  
Case No. CR-506072

**BEFORE:** E. Gallagher, J., Boyle, P.J., and Jones, J.

**RELEASED AND JOURNALIZED:** March 24, 2011

**ATTORNEYS FOR APPELLANT**

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EILEEN A. GALLAGHER, J.:

{¶ 1} The state of Ohio (“State”) appeals from the trial court decision granting Wylee Orr’s (“Orr”) pro se petition for postconviction relief and dismissing his original conviction as violating the protections of double jeopardy. The State argues the trial court erred in not conducting a hearing

on Orr's motion for postconviction relief and in finding that Orr's conviction violated the constitutional protections against double jeopardy. For the following reasons, we affirm the decision of the trial court.

{¶ 2} On January 16, 2008, Cleveland police officers were on routine patrol when they observed a white 1990 Chevy Astro minivan operating with a license plate belonging to another vehicle. The police officers activated their lights and sirens but the van failed to pull over, fleeing the scene. During the pursuit, the two passengers, Lavelle Jackson and Orr, jumped out of the moving van and fled on foot. The officers followed and arrested both Orr and Lavelle Jackson hiding in a garage located at 4090 East 80<sup>th</sup> Street in Cleveland, Ohio.

{¶ 3} Mr. Orr's actions on January 16, 2008 resulted in two separate convictions for the same underlying conduct. The first was from the Cleveland Municipal Court, Case No. 2009-TRD-002944. On January 29, 2008, Orr pleaded no contest to a violation of Cleveland City Codified Ordinance 403.02, compliance with the lawful order of a police officer, in addition to a plea of no contest on two other charges, driving under suspension, and display of fictitious plates. On March 6, 2008, the trial court sentenced Orr to 180 days of imprisonment, with 100 suspended and a suspended fine of \$1,300.

{¶ 4} On January 29, 2008, a Cuyahoga County grand jury returned an indictment charging Orr with breaking and entering in violation of R.C. 2911.13(A), and failure to comply with order or signal of a police officer in violation of R.C. 2921.331(B), Case No. CR-506072. In exchange for a guilty plea to the charge of failure to comply on April 2, 2008, the State nolleed the charge of breaking and entering. On April 29, 2008, the trial court imposed a two-year sentence of imprisonment followed by three years of postrelease control. Orr challenged this conviction and sentence through direct appeal and postconviction filings.

{¶ 5} This Court of Appeals granted Orr permission to file a delayed direct appeal of his Cuyahoga County conviction. In the direct appeal, Orr asserted for the first time that his conviction violated the prohibition against double jeopardy, in addition to four other claims for relief. This court affirmed Orr's conviction and sentence on direct appeal. *State v. Orr*, Cuyahoga App. No. 92005, 2009-Ohio-4038. This court did not address the double jeopardy claim on its merits; rather, the Court found the issue to be based on evidence outside the record and therefore, not proper on direct appeal. *Id.* The Ohio Supreme Court declined jurisdiction and dismissed the appeal. *State v. Orr*, 123 Ohio St.3d 1511, 2009-Ohio-6210, 917 N.E.2d 813.

{¶ 6} Under his direct appeal case number, Orr filed a pro se motion to reopen his appeal, raising a postrelease control issue, which this Court denied. *State v. Orr*, Cuyahoga App. No. 92005, 2010-Ohio-1657. Orr also sought relief in the direct appeal, in a motion filed pro se pursuant to Crim.R. 52(B), raising the issue of double jeopardy. This Court denied the motion on February 16, 2010 on procedural grounds without addressing the merits of the double jeopardy claim.

{¶ 7} With his direct appeal pending, Orr filed a pro se petition for postconviction relief in the trial court, claiming his conviction violated the Double Jeopardy Clause. The State filed a brief in opposition to the petition, asking the trial court to dismiss the petition. The trial court denied the petition, claiming it had no jurisdiction to entertain a postconviction petition while an appeal was pending. Orr successfully appealed the denial to this Court, which reversed and remanded the petition for postconviction relief to the trial court for review. *State v. Orr*, Cuyahoga App. No. 93796, 2010-Ohio-366.

{¶ 8} On remand, the State filed a supplemental response to the defendant's original petition. The trial court did not conduct an evidentiary hearing, but granted Orr's petition, dismissing his conviction for failure to comply with order or signal of a police officer as violating the protections of

double jeopardy and issued findings of fact and conclusions of law on June 23, 2010.<sup>1</sup> It is from this order that the State appeals, raising the two assignments of error contained in the appendix to this opinion.

{¶ 9} In its first assignment of error, the State argues the trial court abused its discretion when it ruled on Orr's petition for postconviction relief without first holding a hearing. We find this assigned error to have no merit.

{¶ 10} R.C. 2953.21 provides:

**(A)(1) Any person who has been convicted of a criminal offense or adjudicated a delinquent child and who claims that there was such a denial or infringement of the person's rights as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States \* \* \* may file a petition in the court that imposed sentence, stating the grounds for relief relied upon, and asking the court to vacate or set aside the judgment or sentence or to grant other appropriate relief. The petitioner may file a supporting affidavit and other documentary evidence in support of the claim for relief.**

**\* \* \***

**(C) Before granting a hearing on a petition filed under division (A) of this section, the court shall determine whether there are substantive grounds for relief. In making such a determination, the court shall consider, in addition to the petition, the supporting affidavits, and the documentary evidence, all the files and records pertaining to the proceedings against the petitioner, including but not limited to, the**

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<sup>1</sup> The trial court also vacated Orr's plea and entry of sentence.

**indictment, the court's journal entries, the journalized records of the clerk of the court, and the court reporter's transcript. \* \* \* If the court dismisses the petition, it shall make and file findings of fact and conclusions of law with respect to such dismissal.**

**\* \* \***

**(E) Unless the petition and the files and records of the case show the petitioner is not entitled to relief, the court shall proceed to a prompt hearing on the issues even if a direct appeal of the case is pending. \* \* \***

{¶ 11} A postconviction proceeding is not an appeal of a criminal conviction, but rather, a collateral civil attack on the judgment. *State v. Steffen*, 70 Ohio St.3d 399, 410, 1994-Ohio-111, 639 N.E.2d 67. In postconviction cases, a trial court acts as a gatekeeper, determining whether a defendant will even receive a hearing. *State v. Gondor*, 112 Ohio St.3d 377, 2006-Ohio-6679, 860 N.E.2d 77. In *State v. Calhoun*, 86 Ohio St.3d 279, 1999-Ohio-102, 714 N.E.2d 905, the Ohio Supreme Court held that the trial court's gatekeeping function in the postconviction relief process is entitled to deference, including the court's decision regarding the sufficiency of the facts set forth by the petitioner and the credibility of the affidavits submitted. Accordingly, we review appellant's postconviction claims brought pursuant to R.C. 2953.21 under an abuse of discretion standard. *Id.* An abuse of discretion is more than a mere error in judgment; it implies that a court's ruling is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore*

(1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140. See, also, *State v. Hines*, Cuyahoga App. No. 89848, 2008-Ohio-1927.

{¶ 12} In the instant case, Orr filed a petition for postconviction relief, claiming his conviction for failure to comply with order or signal of a police officer violated the Double Jeopardy Clause. In support of his pro se motion, Orr attached a copy of the citation, a copy of the final judgment in the Cleveland Municipal Court case, and copies of R.C. 2921.331 (Failure to comply with order or signal of police officer) and City of Cleveland Ordinance 403.02 (Compliance with lawful order of police officer, fleeing). Without addressing the merits of Orr's claims, a cursory review of City of Cleveland Codified Ordinance 403.02 and R.C. 2921.331 reveal the first two paragraphs of each enactment are substantively identical to the first two paragraphs of the other. Given that Orr was convicted of both charges, it is clear Orr presented substantive grounds for relief in his petition for postconviction relief.

{¶ 13} The instant case presents this court with the unique factual circumstance in which the trial court granted Orr's petition for postconviction relief without first conducting a hearing. Nonetheless, the trial court was able to review and consider Orr's petition, the brief in opposition to the petition, the indictment and attendant common pleas court records, and the



Cleveland Municipal Court court reporter’s transcript before issuing its findings of fact and conclusions of law. The trial court conducted a thorough review of the documentary evidence presented by both the defendant and the State, as evidenced by the findings of fact and conclusions of law issued by the court. Furthermore, as this petition rested solely on a constitutional issue, which could be verified through court records alone, conducting an evidentiary hearing would not be fruitful. Moreover, the basis for the court’s decision rested solely on the documentary evidence already before the court; testimonial evidence was not warranted.

{¶ 14} We therefore find that the trial court conducted an in camera hearing and rendered judgment accordingly. Based on the foregoing, the state’s first assignment of error is overruled.

{¶ 15} In its second assignment of error, the State argues that the trial court erred when it ruled Orr’s conviction violated the constitutional protections against double jeopardy. Specifically, the State claims that Orr’s protections against double jeopardy were not violated because Orr’s minor misdemeanor conviction in municipal court was not a lesser included offense of R.C. 2921.331(B). We find this argument to lack merit.

{¶ 16} The guarantees against double jeopardy secured by the Fifth Amendment to the United States Constitution and by Section 10, Article I, of

the Ohio Constitution protect criminal defendants from being placed in jeopardy twice for the same offense, but not necessarily the same conduct. *State v. White*, Cuyahoga App. No. 92972, 2010-Ohio-2342. But, it is important to understand that the Double Jeopardy Clause only states the right not to be placed in jeopardy twice for the same offense, not the same conduct. *Burks v. United States* (1978), 437 U.S. 1, 11, 98 S.Ct. 2141, 57 L.Ed.2d 1. The Double Jeopardy Clause has long been understood to allow multiple convictions from the same conduct, as long as that conduct does not constitute the “same offense.” *Blockburger v. United States* (1932), 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306. Different offenses stemming from the same conduct can stand if the one offense requires “proof of a fact which the other does not.” *Id.* Specifically, “[t]he 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.” *Id.*

{¶ 17} In accordance with *Blockburger*, the trial court in the present case correctly examined the statutes at issue to determine whether the two offenses require different elements of proof. The statutes, in their entirety, read as follows:

Cleveland City Codified Ordinance 403.02:

**(A) No person shall fail to comply with any lawful order or direction of any police officer invested with authority to direct, control, or regulate traffic.**

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

R.C. 2921.331:

**(A) No person shall fail to comply with any lawful order or direction of any police officer invested with authority to direct, control, or regulate traffic.**

**(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 his motor vehicle to a stop.**

{¶ 18} The trial court quoted each law and found that paragraphs A and B of each enactment were substantively identical to the first two paragraphs of the other. Additionally, the trial court determined it was impossible to violate Cleveland Codified Ordinance 403.02(B) and R.C. 2921.331(B) without also violating Cleveland Codified Ordinance 403.02(A) and R.C. 2921.331(A), and therefore, (A) was a lesser-included offense of paragraph (B).

{¶ 19} We agree with the trial court's conclusions. Moreover, the State offers no legal support or analysis in its brief in support of its argument that paragraph (A) is not a lesser-included offense to paragraph (B). Based on the

foregoing, the trial court correctly concluded that jeopardy attached at the moment the Cleveland Municipal Court accepted Orr's plea of no contest, and from that point on, the State was precluded from prosecuting Orr under R.C. 2921.331(B).

{¶ 20} The trial court did not abuse its discretion in granting Orr's petition for postconviction relief on the basis of double jeopardy protections. The judgment of the trial court is affirmed.

{¶ 21} Nonetheless, when the trial court vacated Orr's plea and entry of sentence, it vacated the State's dismissal of the first count of the indictment, breaking and entering. Accordingly, this case must be remanded for trial on the reinstated charge of breaking and entering.

It is ordered that appellant and appellee share the 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.

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EILEEN A. GALLAGHER, JUDGE

MARY J. BOYLE, P.J., and  
LARRY A. JONES, J., CONCUR

## Appendix

### Assignments of Error:

- I. A trial court errs in ruling on a motion for post conviction relief without first holding a hearing. (R.C. 2953.21(E)).
- II. The trial court erred when it held pursuant to its findings of fact and conclusions of law that the Double Jeopardy Clause of the United States Constitution precluded the prosecution of count two, failure to comply with order, signal of police officer.

