**[Cite as *State v. Edwards*, 2011-Ohio-95.]**

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION
**Nos. 94568 and 94929**

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## STATE OF OHIO

PLAINTIFF-APPELLANT

vs.

## SCOTT EDWARDS

and

## GARY SMITH, JR.

DEFENDANTS-APPELLEES

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**JUDGMENT:**
**AFFIRMED**

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Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-525645

**BEFORE:** Sweeney, J., Rocco, P.J., and Boyle, J.

**RELEASED AND JOURNALIZED:** January 13, 2011

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JAMES J. SWEENEY, J.:

**{¶ 1}** In this consolidated appeal, appellant, the state of Ohio, appeals the trial court's decisions that granted appellees', Gary Smith ("Smith") and Scott Edwards ("Edwards"), motions to dismiss based upon double jeopardy and collateral estoppel. For the reasons that follow, we affirm.

**{¶ 2}** These appeals stem from criminal charges contained in case number CR-525645. Smith and Edwards were named as co-defendants and

charged with the following counts: drug trafficking of methamphetamine with a schoolyard specification and a forfeiture specification pertaining to a 1999 Honda Accord, drug possession of methamphetamine with the same automobile forfeiture specification, and possession of criminal tools, also with an automobile forfeiture specification. The indictment was filed July 16, 2009. The date of offense in each count is listed as June 17, 2009.

**{¶ 3}** Both Edwards and Smith filed motions to dismiss, arguing that the charges against them were barred by double jeopardy and collateral estoppel. The State opposed the motions and the trial court conducted an evidentiary hearing before granting them and dismissing the indictment. The trial court issued a journal entry and opinion detailing its findings and conclusions of law. The State appealed in each case. The appeals were consolidated due to the identity of facts and law involved and because they present the identical assignment of error for our determination:

**{¶ 4}** "The trial court abused its discretion when it granted defendant's motion to dismiss on double jeopardy grounds where the State was unable to proceed with one of the charges at the time of the first plea because the necessary facts had not been discovered despite the exercise of due diligence."

**{¶ 5}** At the evidentiary hearing the following testimony was presented: The State called Lakewood police officer David Kappa. Kappa stated he is employed as a narcotics and vice detective. On April 7, 2009, Kappa

participated in an investigation that culminated in the arrest of Smith and Edwards.

**{¶ 6}** Through a confidential informant, the police arranged for the purchase of one and one half ounces of crystal methamphetamine that was to be transported from Columbus to Lakewood. Smith was the target of this controlled buy. Det. Kappa testified that "Smith agreed to sell our confidential source this ounce and-a-half of crystal methamphetamine for $4,000." The confidential source was in communication with Smith during the transport.

**{¶ 7}** Surveillance officers observed Smith's vehicle, a Honda Accord, exiting the Interstate. The confidential source identified Smith as the passenger in the Honda. Det. Kappa initiated a stop of the vehicle. Det. Kappa testified that the vehicle was speeding. The driver was identified as Edwards. Both Edwards and Smith were arrested and the police searched the Honda immediately after their arrest. Police found less than three grams of suspected crystal methamphetamine, some paraphernalia and some pills. The evidence was found underneath the kick panel and on the passenger side floor board. Police did not, at that time, locate the one and one-half ounces of methamphetamine the confidential source had requested to purchase.

**{¶ 8}** Det. Kappa confirmed, however, that on April 7, 2009, he was expecting 1.5 ounces of crystal methamphetamine to be delivered from

Columbus to Lakewood by Smith. Det. Kappa confirmed that he knew it was in the car and he obtained a search warrant on April 8, 2009 that permitted police to search the car in its entirety.

**{¶ 9}** The Honda was impounded in the Lakewood Police Department garage. The car was further searched by both officers and dogs in an effort to locate the drugs for purchase but no additional drugs were found at that time. The city mechanic also examined the vehicle, including the engine compartment. The next day, April 8, 2009, State Highway Patrol troopers, along with their K-9s conducted another search of the Honda pursuant to a search warrant issued that day. The car remained in a secured lot, without further incident, between April 8 and June 17, 2009.

**{¶ 10}** Smith and Edwards were charged with the evidence that had been seized upon their arrest and they both entered guilty pleas on June 17, 2009, which was assigned case number CR-523055.

**{¶ 11}** Det. Kappa stated that on June 17, 2009, he received a call from a detective of the Columbus Police Department narcotics vice unit. This detective instructed him that, according to a confidential informant, Smith and Edwards kept large quantities of drugs in a secondary fuse box of the Honda. Det. Kappa executed another search of the Honda and found packages of suspected crystal methamphetamine totaling 58.78 grams gross weight. Lab results determined the drugs weighed 48.7 grams, this is

roughly equivalent to the 1.5 ounces of drugs that Det. Kappa had been looking for in the vehicle since the date of arrest (April 7, 2009).

**{¶ 12}** Det. Kappa contacted the county prosecutor's office and reported the discovery of this evidence. Both Edwards and Smith had already entered guilty pleas before Kappa reported the recently discovered evidence. Neither Edwards nor Smith had been sentenced but the State instructed Det. Kappa to initiate a new case related to this quantity of drugs. A Cuyahoga County Assistant Prosecutor testified that he informed Edwards's attorney at sentencing in the initial case that police had discovered additional drugs in the Honda. The assistant prosecutor was unaware of whether this information was relayed to Edwards. The assistant prosecutor further testified that it is possible in some circumstances to either delay sentencing in a case, or amend the original case, to include new charges. While he opined that it was not possible to amend the indictment to a higher level drug offense in this instance, it would have been possible to delay sentencing in order to present evidence to a grand jury and obtain a new charge.

**{¶ 13}** Although two separate packages of drugs were found in the secondary fuse box, appellees were both subsequently indicted with single counts involving the combined amount of the drugs recovered on June 17, 2009. The indictment reflects the date of these offenses as occurring on June 17, 2009, however, Det. Kappa admitted that police had been in possession of

this evidence since April 7, 2009.

**{¶ 14}** The defense presented the indictment from CR-523055 as evidence, which mirrors the indictment in the instant case except with regard to the quantity of drugs at issue. The parties agree that Smith and Edwards pled guilty on June 17, 2009 and, as part of the plea agreement, the Honda was forfeited. Appellees were sentenced in that case on July 1, 2009, which was fourteen days after Det. Kappa had discovered the additional drugs in the fuse box.

**{¶ 15}** The subsequent indictment in this case, contains a forfeiture specification for the Honda that had already been forfeited in the previous case.

**{¶ 16}** At issue is whether the trial court properly dismissed the indictment that charged appellees with drug trafficking, drug possession, and possession of criminal tools with redundant specifications based on additional drugs that were found in the Honda after appellees had entered a plea and were sentenced on charges stemming from other drugs recovered out of the same incident. We find that the trial court properly dismissed the indictments for the reasons that follow.

**{¶ 17}** The Double Jeopardy Clause of the Fifth Amendment provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. Amend. V. This is enforceable to the

States through the Fourteenth Amendment. *Benton v. Maryland* (1969), 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707. The double jeopardy clause bars not only multiple punishments for the same offense but also affords protection against successive prosecutions for the same offense after acquittal or conviction. *Brown v. Ohio* (1977), 432 U.S. 161, 165, 97 S.Ct. 2221, 53 L.Ed.2d 187. The component of double jeopardy implicated by this case is the prohibition against successive prosecutions for the same offense after acquittal or conviction.

**{¶ 18}** Although both parties refer to the seminal case of *Blockburger v. United States* (1932), 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306, its application is not suited to the factual scenario before us. In *Blockburger*, the Court was addressing whether "a single act," i.e., a drug sale, could result in the commission of two offenses. There can be no real dispute that, had the officers found the 1.5 ounces of methamphetamine in the fuse box prior to the original indictment, the quantity of these drugs could have been added to the quantity charged in that action without implicating double jeopardy concerns.

**{¶ 19}** "Even if two offenses are sufficiently different to permit the imposition of consecutive sentences, successive prosecutions will be barred in some circumstances where the second prosecution requires the relitigation of factual issues already resolved by the first." *Brown v. Ohio* (1977), 432 U.S.

161, 166-167, n. 6, 97 S.Ct. 2221, 53 L.Ed.2d 187.

**{¶ 20}** The United States Supreme Court held that the rule of collateral estoppel is embodied by the Fifth Amendment guarantee against double jeopardy. *Ashe v. Swenson* (1970), 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed. 469. In reaching this conclusion, the Court observed, "[f]or whatever else that constitutional guarantee may embrace* * * it surely protects a man who has been acquitted from having to 'run the gantlet' a second time." *Ashe*, 397 U.S. at 446.

**{¶ 21}** In this case, there was a single act and course of conduct that led to the charges in both cases, that being the police orchestrated a drug buy that culminated in appellees' arrest and the impoundment of the Honda, on April 7, 2009. Accordingly, double jeopardy bars successive prosecutions. We note that the Sixth Circuit Court of Appeals has reached the same conclusion under factually analogous circumstances in *Rashad v. Burt* (1997), 108 F.2d 677. In *Rashad*, as here, the government attempted a successive prosecution of the accused for cocaine found in his automobile after he had been convicted for a drug offense related to cocaine that had been found in his house on the date of his arrest. The court observed that "successive prosecutions based on the same 'fact situation' are barred by double jeopardy if the separate charges could have been joined and no significant additional fact was required in the second prosecution." Id. at 680, citing *Jordan v. Commonwealth of Virginia*,

653 F.2d 870, 874. In *Rashad*, the "only additional fact required to convict on th[e] second prosecution was the cocaine's location in the car." Id. The court held this fact was not "significant" because "Rashad's possession of cocaine in his home and in his automobile constituted a single transaction. The seizure, and in part the discovery, of both quantities of the drug resulted from the same police confrontation with Rashad. Rashad's possession of both quantities occurred at the same time and place, and displayed a single intent and goal-distribution." Id. at 681. Where the possession and distribution of two caches of the same controlled substance are unified by a single intent and goal and arise out of a continuous time sequence, double jeopardy bars successive prosecutions. Id.

**{¶ 22}** The State urges that an exception applies in this case that would permit successive prosecution because it claims they were unable to proceed on the more serious drug charges. Specifically, the State maintains that they exercised due diligence but did not discover the larger quantity of drugs in the secondary fuse box until June 17, 2009. Yet, the Honda where all the drugs were found was in police custody since April 7, 2009. This is the same situation that was addressed in *Rashad* where "the cocaine at issue was stored in the rear quarter panel of Rashad's car at the time police initially searched and impounded the vehicle. A fully competent search of the car on the day of its seizure would have uncovered this second stash of cocaine at the same time

that drugs were found in the * * * residence." The court concluded that a thorough police investigation would have revealed the evidence necessary to charge possession of all the cocaine in a single count or at least in a single indictment. That logic applies equally here.

**{¶ 23}** Even though we do recognize that the police made several efforts to find the 1.5 ounces of methamphetamine that they believed to be located in the Honda, we still find that the successive prosecution is barred in this case. Det. Kappa acknowledged that from the date of appellees' arrests he expected to find 1.5 ounces of methamphetamine. This fact was known prior to appellees' guilty pleas and the drugs were ultimately found before either of them were sentenced. Nonetheless, the state did not reserve the right to file additional charges based on the discovery of the larger quantity of drugs. The Ohio Supreme Court has recently reiterated that a "negotiated guilty plea" bars successive prosecutions where the defendant would reasonably believe that his or her plea would bar further prosecutions for any greater offense related to the same factual scenario. *State v. Dye*, _____ Ohio St.3d _____, 2010-Ohio-5728, __ N.E.2d __; accord, *State v. Carpenter* (1993), 68 Ohio St.3d 59, 623 N.E.2d 66, syllabus. In *Dye*, the defendant pled guilty to aggravated vehicular assault, to which the State agreed despite an awareness of the "grave nature" of the victim's injuries and the parties entered the negotiated plea without reserving the right to bring any future charges.

When the victim died, the state attempted to prosecute Dye for murder. The Ohio Supreme Court held the negotiated plea without a reservation for future charges precluded the murder charge.

**{¶ 24}** Contrary to the State's argument, the Ohio Supreme Court has not limited the application of *Carpenter* or its progeny to cases involving vehicular homicide where the victim dies after the defendant has pled guilty to lesser offenses. Rather, the Court's focus is on the application and enforcement of contract law to the construction of the plea agreement. *Dye*, 2010-Ohio-5728, ¶20.

**{¶ 25}** In this case, we find that the appellees had a reasonable expectation that their pleas of guilty would end criminal prosecution based on the incident that lead to their arrest on April 7, 2009. The state knew about the 1.5 ounces of methamphetamine that the CI arranged to purchase from Smith and which the officers expected to find in the Honda. Nonetheless in the original action, the state never reserved the right to pursue further charges in the event that this quantity of drugs was discovered. "Requiring the state to make this reservation under these circumstances places no unreasonable burden on prosecutors and ensures that defendants are fully aware of the consequences of their guilty pleas." *Dye*, 2010-Ohio-5728, ¶26. The appellees entered negotiated pleas and because the state did not reserve the right to bring future charges despite knowledge of the potential for them to

arise, the negotiated pleas barred the prosecution for the charges in this case.

Judgment affirmed.

It is ordered that appellees recover from appellant 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.

JAMES J. SWEENEY, JUDGE

KENNETH A. ROCCO, P.J., CONCURS. (SEE ATTACHED CONCURRING OPINION)

MARY J. BOYLE, J., CONCURS WITH MAJORITY OPINION AND CONCURS WITH CONCURRING OPINION OF JUDGE ROCCO

KENNETH A. ROCCO, J., CONCURRING:

**{¶ 26}** I am constrained to concur with the majority opinion by the holding of *Rashad v. Burt* (1997), 108 F.3d 677. Nevertheless, I also agree with the trial court when it decided that the Lakewood police detectives exercised "due diligence" in attempting to locate the one and a half ounces of methamphetamine they were tracking and expecting to find on April 7, 2009.

**{¶ 27}** In spite of three thorough searches of the vehicle, they were foiled by a degree of ingenuity not normally associated with drug trafficking. Finally, armed with a tip from a Columbus detective, a fourth search of the vehicle uncovered the one and a half ounces of methamphetamine in question.

**{¶ 28}** I am constrained because I believe the due diligence of the police should not be trumped by criminal ingenuity. In my view, the sentence applicable for a conviction of the offense of trafficking in a certain quantity of contraband should not depend on the criminal's ingenuity or lack thereof.