

[Cite as *State ex rel. Dailey v. Dawson*, 2016-Ohio-2837.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 103237

**STATE OF OHIO, EX REL.
RANDOLPH DAILEY, ET AL.**

RELATORS

vs.

JUDGE WILLIAM L. DAWSON

RESPONDENT

**JUDGMENT:
WRIT GRANTED**

Writ of Prohibition
Motion No. 488840
Order No. 489889

RELEASE DATE: April 29, 2016

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FRANK D. CELEBREZZE, JR., J.:

{¶1} In this original action, the sole issue before the court is whether respondent Judge William L. Dawson lacks jurisdiction to preside over misdemeanor dereliction of duty complaints that were filed in East Cleveland Municipal Court against relators on July 2, 2015.¹ When relators commenced this action on July 8, 2015, they were facing identical misdemeanor charges in the Cuyahoga County Court of Common Pleas pursuant to indictments that had been issued in May 2014.² The issue in this action is not if the relators will face prosecution on the charges, but where.

{¶2} The common pleas court misdemeanor indictments had been pending against relators for over a year and the common pleas court had scheduled trial for July 27, 2015. However, after the same court found codefendant Michael Brelo not guilty in a separate bench trial, the Cuyahoga County Prosecutor's Office announced its intention to pursue prosecution of the charges against relators in the East Cleveland Municipal Court.

¹The East Cleveland cases at issue are: *E. Cleveland v. Dailey*, E. Cleveland M.C. No. 15CRB000623; *E. Cleveland v. Donegan*, E. Cleveland M.C. No. 15CRB000626; *E. Cleveland v. Coleman*, E. Cleveland M.C. No. 15CRB000625; *E. Cleveland v. Edens*, E. Cleveland M.C. No. 15CRB000624; and *E. Cleveland v. Wilson*, E. Cleveland M.C. No. 15CRB000627 ("The East Cleveland cases").

²The common pleas court cases related to this action are: *State v. Dailey*, Cuyahoga C.P. No. CR-13-580457-B; *State v. Donegan*, Cuyahoga C.P. No. CR-13-580457-C; *State v. Coleman*, Cuyahoga C.P. No. CR-13-580457-D; *State v. Edens*, Cuyahoga C.P. No. CR-13-580457-E; and *State v. Wilson*, Cuyahoga C.P. No. CR-13-580457-F. ("The common pleas court cases").

{¶3} On July 2, 2015, the county prosecutor's office entered an agreement to serve as lead counsel in the prosecution of the criminal complaints that were filed that same day in East Cleveland. On July 3, 2015, each relator was served a summons and complaint that would have required him or her to appear in East Cleveland on July 10, 2015, for arraignment on the exact same misdemeanor charges that were ready for trial in the county common pleas court. Under these circumstances, this court granted relator's alternative writ, stayed the East Cleveland proceedings, and set an expedited briefing schedule.

{¶4} Respondent Judge Dawson has answered both the complaint and amended complaint by indicating that he takes no position on his authority or jurisdiction to proceed in the East Cleveland cases. He states that should relators file any motions in the East Cleveland cases, he will rule on them accordingly.

{¶5} The county prosecutor and the East Cleveland law director were granted permission to intervene as respondents in this original action and have moved for the dismissal of the complaint and amended complaint. Relators have moved for summary judgment and oppose the dismissal of the amended complaint.

{¶6} In addition to the extensive motion practice in this matter, there have been procedural developments in the underlying common pleas court prosecution that include the county prosecutor's motion to dismiss the common pleas court indictments on July 10, 2015, which the trial court granted on July 27, 2015. The parties dispute the validity of

the trial court's dismissal. The parties advance numerous competing arguments in support of their respective positions.

{¶7} Having thoroughly considered all of the facts, arguments, and law presented for our consideration and that is contained in this record, the writ is granted as detailed below.

FACTS

I. The Alleged Offense Conduct

{¶8} There is no dispute that both the East Cleveland charges and the common pleas court criminal indictments stem from the police pursuit that culminated in the deaths of Malissa Williams and Timothy Russell on November 29, 2012. The parties have submitted evidence that the vehicles traveled through parts of Cleveland and ended in East Cleveland. Both municipalities are located in Cuyahoga County.

II. The Original Cuyahoga County Common Pleas Court Cases

{¶9} The state initially elected to pursue charges against the relators in the Cuyahoga County Court of Common Pleas where the grand jury returned indictments in May 2014 that joined the misdemeanor charges against relators with felony charges against Michael Brelo. Specifically, relators were each charged with two counts of dereliction of duty in violation of R.C. 2921.44(E); both counts constitute misdemeanor offenses.

{¶10} In September 2014, the relators moved the trial court to bifurcate their misdemeanor charges from Brelo's felony counts and requested separate trials. The court granted relators' motions for separate trials on September 29, 2014. The charges against Brelo proceeded to trial first. Brelo was found not guilty on May 23, 2015.

{¶11} There is no dispute that in June 2015, the county prosecutor indicated that the misdemeanor charges should be tried in the East Cleveland Municipal Court. The common pleas court dockets contain entries dated June 29, 2015, noting that the state expected criminal complaints against relators with the exact same charges to be filed in East Cleveland. However, the same order provides that the common pleas court indictments remained pending and that the trial remained scheduled for July 27, 2015.

III. The East Cleveland Cases

A. The East Cleveland Charges

{¶12} On July 2, 2015, complaints were filed in East Cleveland Municipal Court against each relator alleging that he or she violated East Cleveland Municipal Code section 525.12 and R.C. 2921.44(E), dereliction of duty. These charges are identical to charges that were scheduled for trial in Cuyahoga County Common Pleas Court on July 27, 2015.

B. The Prosecution Agreement

{¶13} The same day the East Cleveland complaints were filed, the county prosecutor's office entered into an agreement with the city of East Cleveland. The county prosecutor, the East Cleveland Mayor, and the East Cleveland Law Director

executed the agreement. The county prosecutor and the East Cleveland law director submitted a copy of this agreement in support of their motion to intervene in this action.

{¶14} The relators opposed intervention based on the alleged invalidity of the agreement. The agreement provides that the county prosecutor will serve as lead counsel in the East Cleveland criminal proceedings against the relators. Although this court granted the county prosecutor and the East Cleveland law director's motion to intervene in this action, this court expressly has not made, and does not make, any determination as to the validity of the agreement entered between these parties and the East Cleveland mayor on July 2, 2015. A declaration regarding the validity or invalidity of the agreement is not pertinent to the jurisdiction of the East Cleveland Municipal Court.

IV. The Complaint and Amended Complaint For Writ of Prohibition

{¶15} Facing simultaneous and duplicate charges in the city of East Cleveland and the Cuyahoga County Court of Common Pleas, relators filed a complaint for a writ of prohibition in this court on July 8, 2015. In the original writ, relators alleged that respondent Judge Dawson patently and unambiguously lacked jurisdiction to proceed based on the jurisdictional priority rule. They argued that because the common pleas court's jurisdiction was invoked first, it possessed the exclusive jurisdiction to proceed over the misdemeanor charges.³

³ The relevant filings from CR-13-580457 are contained in the trial court's record of which we take judicial notice pursuant to Evid.R. 201(B).

{¶16} Two days after relators petitioned this court for a writ of prohibition and one day after this court granted the alternative writ and stayed the East Cleveland proceedings, the county prosecutor filed a motion to dismiss the common pleas court indictments. The relators opposed the dismissal of the common pleas court indictments, and the trial court held a hearing. By order dated July 27, 2015, the trial court granted the motion to dismiss the indictments without prejudice. The trial court found that the pendency of the same charges in the East Cleveland Municipal Court provided good cause and that dismissal could only be denied if the state had acted in bad faith by seeking the dismissals. Because the court concluded that the state had not acted in bad faith, the indictments were dismissed without prejudice. The parties agree that the trial court's dismissal was not a final, appealable order and that relators could not have perfected an appeal because this court would lack jurisdiction to consider a direct appeal.

{¶17} Consequently, relators sought and were granted leave to file an amended complaint for writ of prohibition. Relators contend the subsequent dismissal of the common pleas court indictments could not retroactively cure an alleged lack of subject matter jurisdiction that existed at the time the East Cleveland complaints were filed. Alternatively, relators contend that the dismissals were invalid and void pursuant to R.C. 2941.33 and Crim.R. 48 such that the jurisdictional priority rule still vests the common pleas trial court with exclusive jurisdiction. In addition, relators added a claim for relief alleging that the state's action in dismissing the indictment in order to pursue the same criminal charges in East Cleveland infringed their constitutional rights to be tried by a fair

cross-section of the community and constituted a violation of *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). Relators believe the dismissal of the common pleas court indictments should be construed as a transfer in violation of Crim.R. 21.

{¶18} The intervenors-respondents contend the writ should be dismissed for the following reasons: (1) the jurisdictional priority rule is limited to civil actions; (2) the jurisdictional priority rule does not apply when only one action is pending; (3) East Cleveland Municipal Court has jurisdiction to preside over criminal misdemeanor actions where part of the offense conduct occurred in its jurisdiction; and (4) relators have adequate remedies at law to raise their legal, constitutional, and jurisdictional challenges because the East Cleveland Municipal Court does not patently and unambiguously lack jurisdiction.

ANALYSIS

I. Standard for Writ of Prohibition

{¶19} “A writ of prohibition is an extraordinary remedy that is granted in limited circumstances with great caution and restraint.” *State ex rel. Corn v. Russo*, 90 Ohio St.3d 551, 554, 2001-Ohio-15, 740 N.E.2d 265.

{¶20} To obtain a writ of prohibition, relators are required to establish: (1) that Judge Dawson is about to exercise judicial or quasi-judicial power, (2) that the exercise of that power is unauthorized by law, and (3) that denying the writ would result in injury for

which no other adequate remedy exists in the ordinary course of law. *State ex rel. Abraitis v. Gallagher*, 143 Ohio St.3d 439, 2015-Ohio-2312, 39 N.E.3d 491, ¶ 9.

{¶21} Relators need not demonstrate the lack of an adequate remedy if the court's lack of jurisdiction is "patent and unambiguous." *Id.* For example, the Ohio Supreme Court found a patent and unambiguous lack of jurisdiction when a common pleas court attempted to exercise jurisdiction over a public-utilities complaint, over which the Public Utilities Commission of Ohio and the Ohio Supreme Court have exclusive jurisdiction. *State ex rel. Cleveland Elec. Illum. Co. v. Cuyahoga Cty.*, 88 Ohio St.3d 447, 452, 727 N.E.2d 900 (2000).

{¶22} "Absent a patent and unambiguous lack of jurisdiction, a court having general subject-matter jurisdiction can determine its own jurisdiction, and a party challenging the court's jurisdiction has an adequate remedy by way of appeal." *State ex rel. Steffen v. Myers*, 143 Ohio St.3d 430, 2015-Ohio-2005, 39 N.E.3d 483, ¶ 17. This court has discretion in issuing a writ of prohibition. *State ex rel. Gilligan v. Hoddinott*, 36 Ohio St.2d 127, 304 N.E.2d 382 (1973).

{¶23} There is no dispute that Judge Dawson would exercise judicial power over the East Cleveland charges. The first requirement is satisfied. At issue is whether relators have satisfied the remaining two requirements or can establish that respondent Judge Dawson patently and unambiguously lacks jurisdiction to proceed.

{¶24} Relators contend they are entitled to summary judgment. They present two main arguments: (A) that based on the jurisdictional priority rule Judge Dawson

patently and unambiguously lacks jurisdiction to proceed; and (B) that they have no other adequate remedy in the ordinary course of law to remedy the trial court's alleged unlawful dismissal of the common pleas court indictments because it is not a final, appealable order. Relators present additional arguments that will be discussed in addressing intervenors-respondents' arguments regarding the availability of other adequate remedies at law.

A. The Jurisdictional Priority Rule

{¶25} Relators invoke the jurisdictional priority rule in arguing that the state's election to pursue the charges in common pleas court vested exclusive jurisdiction over the charges in that court.

{¶26} The jurisdictional priority rule provides:

as between [state] courts of concurrent jurisdiction, the tribunal whose power is first invoked by the institution of proper proceedings acquires jurisdiction, to the exclusion of all other tribunals, to adjudicate upon the whole issue and to settle the rights of the parties.

State ex rel. Dunlap v. Sarko, 135 Ohio St.3d 171, 2013-Ohio-67, 985 N.E.2d 450, ¶ 9.

{¶27} The East Cleveland Municipal Court and the Cuyahoga County Court of Common Pleas are courts of concurrent jurisdiction with authority to preside over misdemeanors. *State ex rel. Coss v. Hoddinott*, 16 Ohio St.2d 163, 243 N.E.2d 59 (1968). There is no dispute that the alleged offense conduct took place in the cities of Cleveland and East Cleveland, which are in Cuyahoga County.

{¶28} The state initially chose to pursue charges in the court of common pleas. A Cuyahoga County Grand Jury jointly indicted relators, along with Brelo, in November 2012. However, in September 2014, the trial judge granted relators' motions to try them separately from Brelo. Brelo's charges proceeded to trial first, and he was found not guilty after a bench trial in May 2015. Then, in June 2015, the county prosecutor's office announced its intention to abandon prosecution of the misdemeanor charges against relators in the common pleas court in order to pursue them in the East Cleveland Municipal Court.

{¶29} When this writ action was commenced, relators faced duplicate charges in multiple courts of concurrent jurisdiction. Intervenors-respondents contend that the jurisdictional priority rule only applies in civil cases and not in the criminal context. A review of case law does not support this contention. The Ohio Supreme Court has addressed the merits of its application in concurrent pending criminal cases in *State ex rel. Coss*. Without definitive authority to the contrary, we must follow the precedent of the Ohio Supreme Court.

{¶30} The dismissal of the common pleas court cases theoretically removed the impediment to Judge Dawson's authority to proceed because there are not two "pending" cases. It would seem that Judge Dawson has jurisdiction to determine his jurisdiction by resolving motions to dismiss that may be filed in East Cleveland Municipal Court.

{¶31} Relators, however, argue that the jurisdictional priority still applies and prevents the East Cleveland cases from proceeding because they argue the dismissal of

the common pleas court cases was invalid for lack of good cause. If the dismissal is void, the jurisdictional priority rule continues to bar the East Cleveland prosecution. This argument has merit.

B. No adequate remedy at law to challenge the dismissal

{¶32} We cannot address the validity of the common pleas court's dismissal unless there is no other adequate remedy at law for relators to raise and challenge it. Relators have established that they have no other adequate remedy in the ordinary course of law to obtain relief from what they believe is a void judgment — that is, the common pleas court's order that granted the state's motion to dismiss the common pleas court indictments in order to allow the newly filed, yet exact same charges, to proceed in the East Cleveland Municipal Court.

{¶33} The parties agree that relators could not directly appeal the common pleas court's dismissal because it is not a final, appealable order. We can find no authority where a court of concurrent jurisdiction reviewed the validity of a different concurrent court's dismissal order. Accordingly, the common pleas court's dismissal cannot be reviewed after Judge Dawson's adjudication of the matter.

{¶34} In cases where the validity of a dismissal have been reviewed on direct appeal, the charges against the defendants were dismissed and refiled in the same court. *See State v. Davis*, 9th Dist. Lorain No. 08CA009412 2008-Ohio-6741; *State v. Monroe*, 4th Dist. Pike No. 99CA632, 2000 Ohio App. LEXIS 2745 (June 14, 2000). In the

current case, the common pleas court's dismissal did not place the relators in the same position they had been in before the common pleas indictments were issued because, at the time of the dismissal, the East Cleveland charges had already been filed with a prosecution agreement in place that would allow the county prosecutor to act as lead counsel in the East Cleveland proceedings. This is a relevant distinction because "a court has inherent authority to vacate its own void judgments" but the East Cleveland Municipal Court does not have the authority to vacate a void judgment of the common pleas court. *Lingo v. State*, 138 Ohio St.3d 427, 2014-Ohio-1052, 7 N.E.3d 1188, ¶ 48 (a court does not have the authority to vacate the void judgment of another court).

{¶35} The authority to vacate void judgments is exclusively conferred by the Ohio Constitution on courts of direct review. *Id.* Had the state refiled the charges in the court of common pleas, the common pleas court could review the validity of the prior dismissal order and its impact, if any, on the state's ability to proceed with the charges in that forum as occurred in *Davis and Monroe*. *Id.*, citing *Patton v. Diemer*, 35 Ohio St.3d 68, 518 N.E.2d 941 (1988), paragraph four of the syllabus. The charges were not refiled in the common pleas court; they were filed in a different court of concurrent jurisdiction that has no authority to address the validity or invalidity of the common pleas court's dismissal order. Because Judge Dawson has no authority to address this matter, an eventual appeal would provide no relief. Intervenors-respondents have not suggested, or presented any authority that would indicate, that respondent Judge Dawson has any jurisdiction to declare the judgment of the common pleas court void. *E.g., Lingo*, citing

State v. Harroff, 8th Dist. Cuyahoga No. 35140, 1976 Ohio App. LEXIS 7277 (July 29, 1976) (“the Common Pleas Court is without jurisdiction to vacate any judgment of the * * * Municipal Court”).⁴

{¶36} It is necessary for this court to determine the validity of the common pleas court’s dismissal order. Since the law provides, and the parties agree, the dismissal order did not constitute a final, appealable order, this is the only avenue that seems to be available for relators to seek relief from the operation of what they alleged is a void judgment. See *State v. Tankersley*, 8th Dist. Cuyahoga Nos. 70068 and 70069, 1996 Ohio App. LEXIS 4791 (Oct. 31, 1996); *State v. McWilliams*, 8th Dist. Cuyahoga No. 68571, 1995 Ohio App. LEXIS 2774 (June 29, 1995).

C. Invalidity of the Dismissal

{¶37} Relators assert that the trial court unlawfully dismissed the common pleas court indictments rendering the dismissal void, pursuant to R.C. 2941.33, which provides:

The prosecuting attorney shall not enter a nolle prosequi in any cause without leave of the court, on good cause shown, in open court. A nolle prosequi entered contrary to this section is invalid.

A dismissal without “good cause” is void. *Lakewood v. Pfeifer*, 83 Ohio App.3d 47, 613 N.E.2d 1079 (8th Dist.1992).

⁴Intervenors-respondents do claim that once the common pleas court indictments were dismissed, they could not be reinstated and they rely upon *State ex rel. Flynt v. Dinkelacker*, 156 Ohio App.3d 595, 2004-Ohio-1695, 807 N.E.2d 967 (1st Dist.). This action presents us with a different scenario than was addressed by the court in *Dinkelacker*, which involved the state’s efforts to reinstate an indictment on the basis that the dismissal was conditional. There was no allegation in *Dinkelacker* that the dismissal was invalid and void.

{¶38} A void judgment is a nullity and open to collateral attack at any time. *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E.2d 332, ¶ 40; *Tari v. State*, 117 Ohio St. 481, 494, 159 N.E. 594 (1927).

To be subject to collateral attack, the judgment must be relevant to the relief sought or to the enforcement of some right in a controversy properly before the court. See *Kingsborough v. Tousley*, 56 Ohio St. 450, 458, 47 N.E. 541 (1897) (“a collateral attack is an attempt to defeat the *operation* of a judgment, in a proceeding where some *new right* derived from or through the judgment is involved”). And the fact that a judgment might be void certainly does not give every court the authority to directly reverse, vacate, or modify that judgment.

(Emphasis sic.) *Lingo*, 138 Ohio St.3d 427, 2014-Ohio-1052, 7 N.E.3d 1188, at ¶ 47.

{¶39} “Crim.R. 48(A) provides that the state, by leave of court and in open court, may file an entry of dismissal which will terminate the prosecution. R.C. 2941.33 provides that the prosecuting attorney may enter a nolle prosequi with leave of court on good cause shown and in open court. These provisions are essentially identical, except that R.C. 2941.33 provides that a nolle prosequi entered contrary to these provisions is void.” *Pfeifer*, at 50, quoting *State v. Sutton*, 64 Ohio App.2d 105, 107, 411 N.E.2d 818 (9th Dist.1979).

{¶40} Through this original action, relators are collaterally attacking the void judgment in order to defeat the operation of that judgment on the grounds that they have

no other adequate remedy at law. In other words, if the dismissal was invalid, it is a nullity and the jurisdictional priority rule operates to vest jurisdiction over the prosecution of relators solely in the common pleas court to the exclusion of all other courts with concurrent jurisdiction. If the East Cleveland cases proceed to judgment, relators will have no way of obtaining review of the trial court's alleged invalid dismissal.

i. Good Cause

{¶41} “Good cause is defined as a substantial reason and one that affords a legal excuse.” *Pfeifer*, 83 Ohio App.3d at 51, 613 N.E.2d 1079, quoting *State v. Brown*, 38 Ohio St.3d 305, 308, 528 N.E.2d 523 (1988).

{¶42} Relators contend that the pendency of the newly filed East Cleveland charges did not provide good cause for the dismissal because they contend the prosecutor's reasons for the dismissal were insufficient and without a legal excuse.

{¶43} The “conscious exercise of selectivity in law enforcement by a prosecutor will not be abridged absent a constitutional violation.” *Pfeifer* at 51. However, once a prosecution has been initiated “the prosecutor does not have the unbridled authority to terminate the proceedings.” *Id.* Once a case is initiated, the prosecutor must obtain leave of court for good cause shown in open court before the matter can be properly dismissed.

{¶44} Had the county prosecutor selected the East Cleveland Municipal Court either in 2012, or even sought a dismissal when the common pleas court severed the misdemeanors from Brelo's felony charges in September 2014, that could have satisfied

the good cause criteria necessary for a valid dismissal. These would have been the appropriate times to select the East Cleveland Municipal Court. However, the motion to dismiss was not filed in the common pleas court until July 2015 and was not even suggested until after the court had returned a not guilty verdict in the *Brelo* case. The misdemeanor cases had been pending against the relators for years in the common pleas court and were set to be tried in July 2015 by the same common pleas court judge. The reasons offered by the state for seeking the delayed dismissal were not based on any new fact or information, and the timing and circumstances surrounding the dismissal effort just do not meet the requisite standard for a valid dismissal.

{¶45} The federal courts adhere to similar principles regarding the government's decisions to pursue criminal prosecutions in federal rather than state court. *E.g., United States v. Diaz*, 274 F.Supp.2d 1225 (Utah 2003) (finding that the fair administration of criminal justice did not condone or countenance the practice of post-indictment forum shopping and/or jurisdiction shopping).

{¶46} There is no doubt that the prosecutor is entitled to wide latitude in selecting the venue for pursuing prosecution. However, this discretion, once exercised, is not unfettered. For example, the court in *Diaz* at 1233 determined that Fed.R.Crim.P. 48(a) precluded the dismissal because it would be against the manifest public interest where the government had obtained an indictment in federal court. *Id.* The court reasoned,

The government has the awesome and unfettered discretion to bring a charge and to determine and choose the jurisdiction and forum in which the

charge is brought at the outset of the case. Ordinarily, the court has nothing to say or any power to interfere with that initial exercise of discretion by the prosecutor * * *. However once the charge is filed, such as a charge asserted in an Indictment by a Grand Jury, limits are placed upon the prosecution as to the dismissal of said charges, and leave of court must be obtained to effect a dismissal, subject to unreasonable withholding of such leave amounting to an abuse of the court's discretion. Prosecutorial discretion does not allow the government to bounce back and forth between state and federal forums according to a strategy or perceived prosecutorial benefit without regard to the manifest public interest.

{¶47} While prosecutorial discretion may involve seeking the dismissal of an indictment for “societal interests,” it does not allow for forum shopping. The court concluded in *Diaz*, that a dismissal in favor of state prosecution premised upon the belief that state penalties would be more lenient was an inappropriate basis for seeking dismissal notwithstanding the government's good faith. The court stated,

The fair administration of criminal justice does not condone or countenance the practice of post-Indictment forum shopping and /or jurisdiction shopping. It appears to this court that the machinations of the prosecution in this case are tantamount to egregious abuse of the criminal justice system — . This court is convinced, and on balance determines, that the fair administration of the criminal justice system would be served by retaining federal jurisdiction over all three of the defendants who were jointly charged with the conspiracy in this case. * * * the vacillations of the prosecution between state and federal jurisdiction do not serve the best interests of the judicial system. Such vacillations amount to trivialization of the system, which is manifestly unjust.

{¶48} The procedural course of the dual prosecutions at issue in this action present a very similar fact pattern to what the court examined and found to be an impermissible basis for dismissing criminal charges in *Diaz*. In fact, the common pleas

court's rationale for granting the dismissals of the common pleas indictments was based on the very factors that the federal court in *Diaz* denounced.

{¶49} The trial court opined, "I agree with the defendants' assertion that the East Cleveland charges are motivated by the state's desire to litigate the charges in a venue the state believes offers a better chance of successful prosecution, i.e. guilty verdicts." The trial court then supported this conclusion by referencing "several pieces of evidence," including that the state could have pursued charges in East Cleveland from the outset, that the misdemeanor charges were severed from Brelo's felony charges on September 29, 2014, but the state did not attempt to dismiss them until after Brelo's not guilty verdict in common pleas court, and that the state had argued in other proceedings that "'justice for the community' would not be done if African-Americans were excluded from deciding the case." The trial court took judicial notice of the fact that the presiding jurist and the likelihood of a majority African-American jury is greater in East Cleveland than in the common pleas court. Finally, the trial court rejected the state's "declared goal of eliminating unnecessary expense in criminal prosecutions" based on the fact that the state had agreed to assume the lead role and costs in the East Cleveland prosecution.

{¶50} Applying these findings to the law, it is difficult to comprehend how the trial court concluded that the dismissal could be based on good cause. It is not necessary to find that the prosecutor acted with bad faith. Even when the prosecutor moves for dismissal in good faith, the motion should be denied if it is not supported by good cause. *E.g., Diaz*, 274 F. Supp.2d 1225. In ascertaining good cause, it is improper to simply

consider the fact of concurrently pending identical charges in a vacuum. The facts surrounding the dismissal should be considered as a whole.

{¶51} In addition to the trial court's findings, it should be noted that judicial economy has not been served by the process that has ensued from this procedural maneuvering. The misdemeanor charges had been pending in common pleas court for over a year and were ready to be tried in July 2015. The East Cleveland charges were not even filed until July 2015. The evidence reflects that the majority of the police chase at issue occurred in Cleveland and continued into East Cleveland for a short duration. A trial in the common pleas court would afford the chance to obtain jurors from both municipalities that were affected by the police chase, which are both located in Cuyahoga county, rather than isolating the jury pool to only one. Further, the validity of the prosecution agreement whereby the county prosecutor would have assumed the lead role in and costs of the municipal prosecution presented a further matter of dispute. That becomes a non-issue if the charges proceed to conclusion in the common pleas court where they began in May 2014. Accordingly, this court rules that there was not good cause to support the dismissal.

{¶52} Because the dismissal is void, it is a nullity and the jurisdictional priority rule precludes East Cleveland from proceeding over the same charges that were instituted in the common pleas court over an entire year earlier. This conclusion is based solely on an application of the law to this unprecedented factual scenario. Had the prosecution of the misdemeanor charges against relators been initiated in East Cleveland or been filed

there upon severance of the misdemeanor indictments in September 2014, we would find that to be the proper forum for their resolution.

D. Remaining Claims

{¶53} We do not address the remaining and alternative arguments set forth in relator's complaints except to note that adequate remedies in the ordinary course of law would preclude issuing a writ on those grounds. For example, relators remaining contentions regarding constitutional violations and alleged procedural defects, including improper change of venue (Crim.R. 21 violations), intervenors-respondents maintain that these issues can be addressed in East Cleveland through motions to dismiss, to challenge the venire panel, to change venue, etc. We agree that these remedies would have been available to relators if the common pleas court's dismissal was valid and Judge Dawson had jurisdiction to proceed.

CONCLUSION

{¶54} Respondent Judge Dawson patently and unambiguously lacks jurisdiction to proceed and relators had no other adequate remedy at law to challenge the validity of the common pleas court's dismissal of the common pleas court indictments. Because the dismissal of the common pleas indictments is void, the jurisdictional priority rule applies to these matters, and the writ of prohibition is granted. Intervenors-respondents' motion to dismiss is denied and relators' motion for summary judgment is granted. Any motions to quash that remain unresolved are denied as moot.

{¶55} Intervenors-respondents to pay costs. The clerk of courts is directed to serve upon the parties notice of this judgment and its date of entry upon the journal. Civ.R. 58(B).

{¶56} Writ granted.

FRANK D. CELEBREZZE, JR., JUDGE

MARY EILEEN KILBANE, P.J., CONCURS
(SEE ATTACHED CONCURRING OPINION);
PATRICIA ANN BLACKMON, J., DISSENTS
(SEE ATTACHED DISSENTING OPINION)

MARY EILEEN KILBANE, P.J., CONCURRING:

{¶57} I agree with the majority of the case, and I write separately to emphasize the reasons for which I would grant relators' writ of prohibition.

{¶58} The prosecutor of Cuyahoga County is elected to office by the people of the county as their chief law enforcement officer. The powers and duties of the prosecuting attorney include "prosecut[ing], on behalf of the state, all complaints, suits, and controversies in which the state is a party[.]" R.C. 309.08.

{¶59} It is well established that the prosecution has wide discretion to bring a charge and choose the venue in which to pursue the charge against a defendant. *Diaz*, 274 F.Supp.2d 1225, 1233. Once the prosecution has been initiated however, "the prosecutor does not have the same unbridled authority to terminate the proceedings."

Pfeifer, 83 Ohio App.3d at 51, 613 N.E.2d 1079, citing *Akron v. Ragsdale*, 61 Ohio App.2d 107, 109, 399 N.E.2d 119 (9th Dist. 1978).

{¶60} In the instant case, the prosecutor deliberated for a year and a half after the November 2012 incident before making the decision on May 30, 2014, to proceed with misdemeanor charges on behalf of the state of Ohio and against the relators, along with felony charges against a single officer, Brelo, in the common pleas court. On September 12, 2014, Brelo filed a motion to sever his case from the relators' cases and requested a separate trial from relators. On September 22, 2014, relators filed their motion to sever their cases and also requested separate trials from Brelo. The common pleas court granted Brelo's motion on September 29, 2014, and separated Brelo's trial from the relators'. On this date, the state was aware that the only charges against the relators were misdemeanor charges. This would have been the ideal time to transfer the cases against relators to the East Cleveland Municipal Court. Instead, the state proceeded to trial against Brelo. Brelo was found not guilty on May 23, 2015. From the date of arraignment in June 2014, to the date of Brelo's not guilty verdict in May 2015, the relators appeared in common pleas court at least 12 times for pretrials and other proceedings.

{¶61} Over a month after the *Brelo* not guilty verdict, the state represented to the common pleas court at a June 29, 2015 pretrial that it was going to file the same charges against relators in East Cleveland Municipal Court. The court issued a journal entry stating that "regardless of whether such charges are filed, this indictment remains pending

and trial here remains set as scheduled for July 27, 2015.” Three days later, on July 2, 2015, the Cuyahoga County Prosecutor and the city of East Cleveland entered into a unique “single case agreement” for the relators’ cases only, in which East Cleveland agreed to have the Cuyahoga County Prosecutor serve as lead counsel, at the county’s expense, and handle the trial of the identical misdemeanor charges that would be filed against the relators in East Cleveland Municipal Court. That same day, which was almost three years after the incident and almost a year after the trial bifurcation, the identical dereliction of duty charges were filed against the relators in East Cleveland Municipal Court.

{¶62} Then, on July 8, 2015, the state moved to dismiss the relators’ cases in the Cuyahoga County Common Pleas Court. The trial court held a hearing on the matter on July 23, 2015. The trial court granted the state’s motion on July 28, 2015, issuing an opinion that found that the prosecutor established good cause for the dismissal.

{¶63} In the instant case, relators argue that this dismissal is without good cause, thereby rendering the dismissal void. The relators further argue that since the dismissal is void and not a final appealable order, the jurisdictional priority rule continues to vest jurisdiction of the charges exclusively in the common pleas court. As a result, they maintain that Judge Dawson’s exercise of power over their cases is unauthorized by law, and they have no other adequate remedy at law.

{¶64} In *State v. Brown*, 38 Ohio St.3d 305, 528 N.E.2d 523 (1988), the Ohio Supreme Court applied the plain meaning of the phrase when defining “good cause.”

The court stated “Black’s Law Dictionary (5 Ed.1979) defines ‘good cause’ as ‘[s]ubstantial reason, one that affords legal excuse.’ *Id.* at 622. The determination of what constitutes good cause can be made only on a case-by-case basis.” *Id.* at 308.

{¶65} In examining the good cause required for a state’s motion to dismiss, this court has noted that

requiring more than a cursory recitation that good cause exists reflects the fact that while the conscious exercise of selectivity in law enforcement by a prosecutor will not be abridged absent a constitutional violation, once the prosecution has been initiated, the prosecutor does not have the same unbridled authority to terminate the proceedings. [*Ragsdale*,] 61 Ohio App.2d 107, 109, 399 N.E.2d 119, 120.

Pfeifer, 83 Ohio App.3d at 51, 613 N.E.2d 1079.

{¶66} In the matter before us, the trial court ultimately found good cause to dismiss the indictment. However, the trial court contemporaneously questioned several issues, which based on the unprecedented circumstances of this case, would lead to the conclusion that the state did not establish good cause. The trial court stated:

I agree with the [relators’] assertion that the East Cleveland charges are motivated by the state’s desire to litigate the charges in a venue the state believes offers a better change of a successful prosecution, i.e. guilty verdicts.

That proposition is supported by several pieces of evidence. First, the state argues that East Cleveland is the best place to try the dereliction of duty case because “the charges are misdemeanors and East Cleveland is the location” of the end of the chase. But that was true in 2014 when the state sought misdemeanor charges from a grand jury in a felony court. Second, the misdemeanor charges were severed from the felony charges on September 29, 2014, but it was not until after Brelo’s not guilty verdict in common pleas court [in May 2015] that the state decided East Cleveland was a more suitable venue. Third, in opposing Brelo’s jury waiver, the state argues that “justice for the community” would not be done if

African-Americans were excluded from deciding the case. I assume that justice from the plaintiff's perspective is a guilty verdict and I take judicial notice of the fact that, in the event of a bench trial, my capable judicial colleague on the East Cleveland Municipal Court is an African-American and the likelihood of a majority African-American jury is greater there than the common pleas court. Last, the assumption by the county of the cost of a municipal prosecution is inconsistent with the prosecutor's declared goal of eliminating unnecessary expense in criminal prosecutions, suggesting the state's perception that a successful prosecution is more likely in East Cleveland.⁵

{¶67} It is well established that a writ of “[p]rohibition is an extraordinary remedy which is customarily granted with caution and restraint, and is issued only in cases of necessity arising from the inadequacy of other remedies.” *State ex rel. Henry v. Britt*, 67 Ohio St.2d 71, 73, 424 N.E.2d 297 (1981). A writ of prohibition prevents an inferior court from exceeding its jurisdiction. *State ex rel. Corn v. Russo*, 90 Ohio St. 3d 551, 554, 2001-Ohio-15 740 N.E.2d 265, citing *State ex rel. Barton v. Butler Cty. Bd. of Elections*, 39 Ohio St.3d 291, 530 N.E.2d 871 (1988).

{¶68} As stated in the majority, the relators must demonstrate that: (1) Judge Dawson is about to exercise or has exercised judicial power; (2) the exercise of that power is unauthorized by law, and (3) denying the writ would result in injury for which no other adequate remedy exists in the ordinary course of law. *State ex rel. Abraitis*, 143 Ohio St.3d 439, 2015-Ohio-2312, 39 N.E.3d 491, ¶ 9, citing *State ex rel. Bell v. Pfeiffer*, 131 Ohio St.3d 114, 2012-Ohio-54, 961 N.E.2d 181, ¶ 18; *State ex rel. Miller v. Warren Cty. Bd. of Elections*, 130 Ohio St.3d 24, 2011-Ohio-4623, 955 N.E.2d 379, ¶ 12. The

⁵Footnotes from trial court's opinion omitted.

relators, however, “need not demonstrate the lack of an adequate remedy if the court’s lack of jurisdiction is ‘patent and unambiguous.’” *Id.*, citing *Chesapeake Exploration, L.L.C. v. Oil & Gas Comm.*, 135 Ohio St.3d 204, 2013-Ohio-224, 985 N.E.2d 480.

{¶69} There is no dispute that Judge Dawson would exercise judicial power over East Cleveland, and I agree that Judge Dawson has no authority to address this matter by virtue of the jurisdictional priority rule. As the Ohio Supreme Court has previously stated: when a court acquires jurisdiction over a cause of action, its authority continues until the matter is “completely and finally disposed of, and no court of co-ordinate jurisdiction is at liberty to interfere with its proceedings.” *John Weenink & Sons Co. v. Court of Common Pleas of Cuyahoga Cty.*, 150 Ohio St. 349, 82 N.E.2d 730 (1948), paragraph three of syllabus.

{¶70} In the instant case, the Cuyahoga County Prosecutor carefully deliberated for a year and a half after the November 2012 incident before making the decision to charge the relators with misdemeanors and making the decision to pursue these charges in the common pleas court, not in the East Cleveland Municipal Court. The trial court bifurcated the relators’ cases from Brelo’s case four months later, on September 29, 2014.

At this point in time, Brelo was the only individual charged with felonies and the relators all faced misdemeanor charges. The county prosecutor could have dismissed the relators’ cases from the common pleas court and filed charges against relators in East Cleveland Municipal Court at that time, but chose not to do so. This would have been an ideal time to charge the relators in East Cleveland Municipal Court. Instead, the state

chose to continue with the prosecution of the relators' cases in the common pleas court. The relators appeared in that court at least 12 times for pretrials and other proceedings by the time Brelo's not guilty verdict was rendered on May 23, 2015, which was approximately one year after the charges were filed.

{¶71} Almost instantaneously, the state represented to the common pleas court on June 29, 2015, that it was going to file the same charges against relators in East Cleveland Municipal Court. Three days later, on July 2, 2015, the Cuyahoga County Prosecutor and the city of East Cleveland entered into an unprecedented "single case agreement" in which East Cleveland agreed to have the county prosecutor serve as lead counsel at the County's expense and handle the trial of the identical charges that would be filed against the relators. That same day, while the misdemeanor charges were still pending in common pleas court, the identical dereliction of duty charges were filed against the relators in East Cleveland Municipal Court.

{¶72} In this case of first impression, the timing of the filing of the charges in the East Cleveland Municipal Court and the missed opportunities by the state to dismiss the relators' cases gives us great concern. The nature and the expeditious timing of the "single case agreement," along with the expeditious timing of the filing of charges in East Cleveland Municipal Court, all while charges were still pending in the common pleas court, lead to the conclusion that good cause does not exist to justify a change of venue to East Cleveland. Furthermore, the majority of the police chase at issue in this case occurred in the city of Cleveland. The chase continued briefly in the city of East

Cleveland. While the prosecutor's concerns about a jury pool are warranted, a trial in the common pleas court would afford the state potential jurors from East Cleveland and Cleveland, both of which are Cuyahoga County municipalities. As a result, a trial in common pleas court would allow the potential of jurors from both cities, rather than limiting the jury pool to one city.

{¶73} It is important to acknowledge that the outcome of this case would be different had the state: (1) initially filed the misdemeanor charges against the relators in East Cleveland; (2) dismissed the charges against the relators and refiled different charges in common pleas court; or (3) dismissed the common pleas charges against the relators and filed new charges in East Cleveland when the matter was bifurcated in September 2014 — almost two years after the November 2012 incident. From the record, it appears that the state had several opportunities to change venue prior to the *Brelo* not guilty verdict, but chose not to seek dismissal of the relators' cases until July 8, 2015, which was almost three years after the incident, over a year after the relators were indicted, and coincidentally, days after the not guilty verdict was rendered in the common pleas court.

{¶74} It is alarming to consider the future implications for matters, such as this unprecedented case, in which the state is allowed to wait a year and a half to discern whether to file charges against a defendant (misdemeanor charges in this case), wait another year, but only after the codefendant's not guilty verdict is rendered, to refile the same charges against the defendant in another court, by virtue of a "single case agreement," and then seek dismissal of the defendant's initial charges in the original

court. All the while, the state had several earlier opportunities, which it chose not to pursue, to dismiss the charges against the defendant and file them in the other court.

{¶75} Therefore, based on the unique circumstances of this case, the timing of the county prosecutor's motion for dismissal, and the missed opportunities to file the charges in the East Cleveland Municipal Court, I agree with the majority that the trial court's dismissal was without good cause, and Judge Dawson patently and unambiguously lacks jurisdiction over the relators' cases.

PATRICIA ANN BLACKMON, J., DISSENTING:

{¶76} I respectfully dissent from the majority opinion. I would hold as a matter of law that the relators have not established all of the elements necessary for the issuance of a writ of prohibition in this case. Specifically, I would find that the trial court acted within its discretion when it dismissed the indictments and that, because the jurisdictional priority rule no longer applies, Judge William L. Dawson has subject matter jurisdiction over the East Cleveland charges.

Valid Dismissal

{¶77} "A trial court's dismissal of an indictment is reviewed for an abuse of discretion. Substantial deference is given to the trial court unless it is determined that the court's ruling was * * * 'without a reasonable basis or one which is clearly wrong.'"

(Citation omitted.) *State v. Walton*, 8th Dist. Cuyahoga No. 87347, 2006-Ohio-4771, ¶

{¶78} The common pleas court conducted a hearing in open court on the state's motion to dismiss, which the relators opposed. After hearing both sides, the court issued a reasoned decision, which concluded that the pendency of the same charges in East Cleveland provided good cause for the dismissal. Further, the trial court found that the state's decision to pursue prosecution in East Cleveland was not done in bad faith, but was the equivalent of litigation strategy. The trial court ultimately concluded

there is no evidence that the prosecution was not instituted, and is not being pursued, with anything other than a good faith belief that the defendants did commit the crimes with which they are charged and that justice will be served by convictions. Given that, the prosecutor, as an advocate for a particular result, may use any means within the bounds of the law to assure a correct verdict. One of those means is choosing the venue where the case will be heard when more than one court has statutory jurisdiction. If the executive reconsiders the wisdom of his initial choice of that venue it is not the prerogative of the judiciary — absent a dishonest purpose, moral obliquity, conscious wrongdoing, breach of a known duty through some ulterior motive or ill will partaking of the nature of fraud — to prevent that reconsideration, and I find no bad faith here.

The trial court went on to conclude that the dismissal should not be denied in order to serve the interests of justice. The court reasoned that the relators would be subjected to trial and that although the additional expense, inconvenience, uncertainty, and anxiety

were burdens, they did “not rise to the level of deprivation of constitutional and procedural safeguards.”

{¶79} The trial court provided a reasonable basis to support its decision and one that is not clearly wrong. Therefore, I cannot find that the trial court abused its discretion by granting the motion to dismiss.

Adequate Remedies At Law

{¶80} Because the dismissals were not invalid and the jurisdictional priority rule is inapplicable, respondent Judge William L. Dawson does not patently and unambiguously lack jurisdiction in the East Cleveland cases, and he has jurisdiction to determine his authority to preside over the misdemeanor cases.

{¶81} Relators are not precluded from challenging the jurisdiction of the East Cleveland court to proceed by filing motions to dismiss in that court based on their arguments that the procedural posture of the case amounts to a violation of their constitutional rights and a violation of the various procedural safeguards. Additional alternate remedies exist to challenge the venue and the jury array and can be litigated in East Cleveland. *State ex rel. Bell v. Pfeiffer*, 131 Ohio St.3d 114, 2012-Ohio-54, 961 N.E.2d181, ¶ 19 (noting “without a patent and unambiguous lack of jurisdiction, a court possessed of general subject-matter jurisdiction can determine its own jurisdiction, and a party contesting that jurisdiction has an adequate remedy by appeal).

{¶82} Relators assert that if the motions are denied an eventual appeal will not provide an adequate remedy because it does not provide speedy, complete, or beneficial relief to them. This argument presumes that relators will not prevail at the trial level on any of the various motions, which is only speculation at this time. Nonetheless, the Ohio Supreme Court has found that an eventual appeal does provide an adequate remedy to challenge any errors in the court's determination of its jurisdiction. *McGinty v. Eighth Dist. Court of Appeals*, 142 Ohio St.3d 100, 2015-Ohio-937, 28 N.E.2d 88. In *McGinty*, the relator prosecutor maintained that an eventual appeal from an appellate court's alleged improper exercise of jurisdiction would be inadequate because it is neither beneficial nor speedy. The Ohio Supreme Court held, "[t]he delay and expense caused by an appeal do not render that appeal an inadequate remedy." *Id.* at ¶ 16.

{¶83} For these reasons, I respectfully dissent and would grant intervenors-respondents' motion to dismiss, deny relators' motions for summary judgment, and deny the writ.