

COURT OF APPEALS OF OHIO

**EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA**

CITY OF CLEVELAND, :
 :
 Plaintiff-Appellant, :
 : No. 107677
 v. :
 :
 SETH MERCER, :
 :
 Defendant-Appellee. :

JOURNAL ENTRY AND OPINION

JUDGMENT: DISMISSED
RELEASED AND JOURNALIZED: June 6, 2019

Criminal Appeal from the Cleveland Municipal Court
Case No. 2018 TRC 015281

Appearances:

Barbara Langhenry, City of Cleveland Law Director, and
Nicholas Kolar, Assistant Law Director, *for appellant.*

Samuel W. Basta, *for appellee.*

FRANK D. CELEBREZZE, JR., J.:

{¶ 1} The city of Cleveland (“the city”) brings the instant appeal challenging the trial court’s order dismissing a complaint against defendant-appellee, Seth Mercer (“appellee”). More specifically, the city argues that the trial court abused its discretion in granting appellee’s motion to suppress because appellee did not file a

motion to suppress. After a thorough review of the record and law, this court dismisses the city's appeal.

I. Factual and Procedural History

{¶ 2} On May 19, 2018, appellee was arrested for operating a vehicle under the influence ("OVI") by Trooper Spade of the Ohio State Highway Patrol ("OSHP"). Appellee was ultimately charged in a complaint in the Cleveland Municipal Court with two counts of OVI and one count of failure to control. On May 24, 2018, appellee entered a plea of not guilty. Thereafter, a first pretrial hearing was scheduled for June 11, 2018.

{¶ 3} Prior to the first pretrial hearing, on June 4, 2018, appellee's counsel filed a motion to preserve evidence and a demand for discovery. The first pretrial hearing was continued at appellee's request and rescheduled to July 11, 2018. It appears that a pretrial hearing was held on July 11, and on the trial court's order, the matter was continued to August 14, 2018, for a motion to suppress hearing. On August 14, 2018, the city requested a continuance on the motion to suppress hearing and the trial court granted this request. The trial court specifically noted in its journal entry on August 14, 2018, that a "final continuance [is] granted." In its journal entry granting the continuance, the trial court also included an order stating that "failure to produce [the] CD by [August 17] will result in sanctions. Additionally, [Trooper Spade's] failure to appear at [the] next hearing will result [in] a sanction." The matter was then rescheduled to September 5, 2018, for the motion to suppress hearing.

{¶ 4} On August 30, 2018, appellee filed a “motion for dismissal and/or in the alternative motion for sanctions pursuant to the court[’s] order as stated on the record.” The city did not file a response to appellee’s motion. At issue, at least with regard to the continuances, was that OSHP had lost the dashcam video that was associated with appellee’s May 19, 2018 arrest. The city indicated in its appellate brief that on “June 12, 2018, after an extensive search for the video, the [c]ity was informed that the video never existed because [OSHP] had a problem with the server on the date of the OVI arrest and the video was not available. On August 14, 2018, [appellee] was informed why the video did not exist.” City’s appellate brief at 4-5. The prosecutor assigned to the instant case sent appellee’s counsel an email on August 14, 2018, which indicated that the dashcam “video was lost in the system so there is no video available.”

{¶ 5} On September 5, 2018, the trial court reflecting on the continuances that it had previously granted noted that

the reason why this is continued at the [city’s] request, on September the fifth. It was scheduled originally August the 14th at 1:30 [p.m.] for [a] Motion to Suppress. There is — at that time [appellee] was given the occupational privileges but I don’t believe that I made the notation. I don’t know if they were subpoenaed any other time but the [c]ourt did make it clear, I know that he had failed to appear. It showed that he failed to appear the last time, correct? I’m sure that’s why I did the notation. It was not the CD nor was the officer present.

(Tr. 3.) Thereafter, appellee’s counsel made, in essence, an oral motion to renew his previously filed motion to dismiss. The city objected to the motion. The following

exchange then occurred between the trial court, the city prosecutor, and appellee's counsel:

THE COURT: Okay. So noted. Is the prosecution ready to go forward on the Motion to Suppress. We can make a record. Is the Prosecution ready to go forward on the Motion to Suppress.

[PROSECUTOR]: It is not, your Honor.

THE COURT: So, the Motion to Suppress would be the exclusion of the evidence. Since the prosecution is not able to go forward, can your office make a case — during trial, can your office produce sufficient evidence, if the evidence from the CD is excluded, can you — and the sanction of the Officer not being present, do you believe that your office could make — provide sufficient evidence for a finding of guilt, if the evidence is excluded?

Because there's no CD. The Court is going to exclude whatever evidence that was on the CD. The Court is going to exclude that.

Can your office make a finding without that; not only the officer's testimony but that evidence that would have been on the CD? Can the prosecution go forward without that?

[PROSECUTOR]: We can still use the officer's testimony —

THE COURT: That going to exclude whatever is on the CD as a sanction.

[PROSECUTOR]: We don't know what's on the CD, your Honor.

[APPELLEE'S COUNSEL]: That's right. We don't know what's on the stop.

[PROSECUTOR]: We don't know anything that has anything to do with the OVI.

If we're making a record, Counsel is going to agree with the Court, we have no idea what if anything is done because Criminal Rule 16 has not been complied with. A Motion to Preserve was filed in this matter June fourth at the inception of this case.

The Prosecutor, I know [the previous prosecutor assigned to the case] did what he needed to do because he informed the State Highway Patrol we need this CD. They never provided it.

THE COURT: You know what's on the CD, it's taking of the breathalyzer test. Is that on the CD? That would be on the CD. But normally the CD covers evidence from the time that the officer encounters the person until the booking room; is that right?

(Tr. 4-6.) The trial court thereafter dismissed the case, stating:

[S]o at this point, if you're not able to go forward, the Court made it very clear that the only other option is to have the case dismissed.

Now you can go and see if you can re-file or whatever, if you have time. I'm not necessarily dealing with prejudice. You count the days. You count the time. At this point it's going to be dismissed for want of prosecution. That makes it just cleaner for everyone involved.

(Tr. 7.) On September 5, 2018, the trial court issued a judgment entry dismissing the complaint for "want of prosecution." It is from that judgment entry that the city brings the instant appeal.

II. Law and Analysis

A. Motion to Suppress

{¶ 6} In its sole assignment of error, the city argues that the trial court abused its discretion when it granted appellee's motion to suppress. To this end, the city argues that appellee did not file a motion to suppress, therefore, the trial court's ruling granting appellee's motion to suppress was an abuse of discretion.

{¶ 7} In our review of the record, we note that appellee, in fact, did *not* file a motion to suppress. Moreover, there is no evidence within the record to suggest that appellee made an oral motion to suppress. Therefore, there was no suppression

motion properly before the trial court on which it could have ruled upon. Even assuming that there was a motion to suppress properly before the trial court, we note that the trial court did not explicitly rule on the motion to suppress. For these reasons, our review will not address the city's arguments relative to the motion to suppress because that issue is not currently before this court. Thus, the city's sole assignment of error — that the trial court abused its discretion granting the motion to suppress — will not be addressed by this court.

{¶ 8} Given the record before this court, the only issue for our review is whether the trial court properly dismissed the complaint.

B. Final, Appealable Order

{¶ 9} As an initial matter, we must clarify whether the trial court dismissed the complaint “with prejudice” or “without prejudice.” We note that the trial court did specify in its September 5, 2018 judgment entry that the “case is dismissed for want of prosecution.” Further, on September 5, 2018, the trial court stated on the record that it was dismissing the complaint for “want of prosecution” and that it was “not necessarily dealing with prejudice.” Thus, taking the trial court's statements on the record into consideration along with the judgment entry that stated the complaint was “dismissed for want of prosecution,” we find that the trial court dismissed the complaint for want of prosecution.

{¶ 10} For our review, we note that “[a] dismissal for want of prosecution is in the nature of a demurrer in a criminal case where the dismissal precedes the attachment of jeopardy in that the court implicitly finds the prosecution to be

defective prior to the introduction of evidence without the defendant going forward in any way.” *State v. Stephens*, 52 Ohio App.2d 361, 367, 370 N.E.2d 75 (8th Dist.1977). By dismissing the matter for “want of prosecution,” such a “dismissal is presumed to be without prejudice and, therefore, not a final, appealable order.” *State v. Morgan*, 8th Dist. Cuyahoga No. 87293, 2006-Ohio-3947, ¶ 1, citing *State v. Brown*, 8th Dist. Cuyahoga No. 84229, 2004-Ohio-5587, citing *State v. Fleming*, 8th Dist. Cuyahoga Nos. 77323 and 77324, 2000 Ohio App. LEXIS 5714 (Dec. 7, 2000).

When an indictment or citation is dismissed without any indication of whether the dismissal is with or without prejudice, we presume the dismissal to be without prejudice. *State v. Miller*, 7th Dist. Mahoning No. 07 MA 215, 2008-Ohio-3085, ¶ 43. And more broadly, Crim.R. 48(A) dismissals are considered to be without prejudice to refile charges unless there is a deprivation of a defendant’s constitutional or statutory rights, the violation of which would, in and of itself, bar further prosecution. *State v. Dixon*, 14 Ohio App.3d 396, 397, 471 N.E.2d 864 (8th Dist.1984); [*State v.*] *Jones*, 2d Dist. Montgomery No. 22521, 2009-Ohio-1957, ¶ 13.

Cleveland v. Primm, 8th Dist. Cuyahoga No. 104963, 2017-Ohio-7242, ¶ 8.

{¶ 11} Accordingly, because the trial court’s dismissal of the instant matter was without prejudice, such a dismissal deprives this court of a final, appealable order. *Primm* at ¶ 14; *State v. G.D.*, 8th Dist. Cuyahoga Nos. 104317 and 104328, 2016-Ohio-8148, ¶ 19; *Brown* at ¶ 6-12; *State v. Jackson*, 8th Dist. Cuyahoga No. 103035, 2016-Ohio-704, ¶ 6. The city’s appeal is therefore dismissed.

{¶ 12} Appeal dismissed.

It is ordered that appellee recover of appellant costs herein taxed.

**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

**EILEEN T. GALLAGHER, P.J., and
ANITA LASTER MAYS, J., CONCUR**