

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

UNIVERSITY OF CINCINNATI, : APPEAL NO. C-080357
Plaintiff-Appellee, : TRIAL NO. A-0704646
vs. : *DECISION.*
VIRGIL TUTTLE, :
Defendant-Appellant, :

Criminal Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: September 2, 2009

Richard Cordray, Ohio Attorney General, and *Christopher Wagner*, for Plaintiff-Appellee,

Michaela Stagnaro, for Defendant-Appellant.

Please note: This case has been removed from the accelerated calendar.

J. HOWARD SUNDERMANN, Judge.

{¶1} Appellant Virgil Tuttle appeals his convictions for indirect criminal contempt under R.C. 2705.02(A). We conclude that Tuttle's convictions were based on sufficient evidence, were not against the manifest weight of the evidence, and did not violate double jeopardy even though the state had already prosecuted Tuttle for two counts of criminal trespassing that were based upon the same evidence as the contempt charges. Accordingly, we affirm his convictions.

I. Tuttle's Violation of the Court's Permanent Injunction

{¶2} On October 9, 2007, and December 19, 2007, Tuttle was found on the University of Cincinnati (UC) campus. Prior to that date, UC had obtained a permanent injunction against Tuttle that permanently precluded him from being on UC's property unless he was a registered student. As a result of his October 9 and December 19 conduct, Tuttle was convicted in the Hamilton County Municipal Court of two counts of criminal trespassing under R.C. 2911.21(A)(1) and sentenced to 30 days in jail for each offense.

{¶3} On January 9, 2008, UC filed a motion for contempt against Tuttle in the common pleas court. The motion was based on the same October 9 and December 19, 2007, trespassing incidents. In March 2008, the trial court held a bench trial. UC presented testimony from two campus police officers that Tuttle had been found on UC's property on October 9, 2007, and December 19, 2007, as well as the following exhibits: a map with the locations where Tuttle had been found, and certified copies of the records of the Hamilton County Municipal Court finding Tuttle guilty of criminal trespass. At the conclusion of the hearing, the trial court found Tuttle guilty of contempt.

{¶4} The trial court sentenced Tuttle to 30 days in the Hamilton County Justice Center and imposed a \$250 fine for the October 9, 2007, trespassing incident. The trial court sentenced Tuttle to a consecutive 60 days in the Hamilton County Justice

Center and imposed a \$500 fine for the December 19, 2007, trespassing incident. It also made the contempt sentences consecutive to the sentences for criminal trespass. It further assessed attorney fees and costs against Tuttle. This appeal followed.

II. Weight and Sufficiency of the Evidence

{¶5} Tuttle raises two assignments of error for our review. In his first assignment of error, Tuttle argues that his convictions for contempt were based upon insufficient evidence and were against the manifest weight of the evidence.

{¶6} Tuttle was punished for a violation of R.C. 2705.02(A), which provides that persons may be punished for contempt if they are found guilty of “disobedience of, or resistance to, a lawful writ, process, order, rule, judgment, or command of a court or officer[.]” The parties agree that Tuttle’s contempt was criminal because the purpose of the contempt finding was not to coerce Tuttle’s compliance with the trial court’s order barring him from UC’s property, but to punish him for disobeying the order. They also agree that Tuttle was punished for indirect contempt because his behavior occurred outside the presence of the court.

{¶7} Tuttle argues that the state failed to prove beyond a reasonable doubt that he had intended to violate the court’s order. He contends that the state was required to show that he had purposely violated the court’s order. He argues that because he had told the officers that he was on a public sidewalk during both incidents and because he was visibly intoxicated during the December 19 incident, the state failed to show that he had purposely violated the trial court’s order.

{¶8} While we agree with Tuttle that the Ohio Supreme Court has held in *Midland Steel Prods. Co. v. U.A.W. Local 486* that “in cases of criminal, indirect contempt, it must be shown that the contemnor intended to defy the court,”¹ we must

¹ (1991), 61 Ohio St.3d 121, 127, 573 N.E.2d 98.

disagree with his assertion that a purposeful act is necessarily required for a finding of indirect criminal contempt.² As the Second Appellate District has pointed out, Ohio courts both before and after *Midland* have held that reckless or indifferent conduct also provides a sufficiently culpable mental state for indirect criminal contempt.³

{¶9} In this case, the trial court stated on the record that it had personally provided Tuttle with a copy of its permanent injunction on June 22, 2007, and that the injunction outlined the consequences of violating its terms. The state then presented testimony from two university officers who testified about Tuttle's familiarity with the UC campus, about his awareness of the court's permanent injunction, and about his presence on UC's campus on the two dates in question. This evidence was sufficient to show that he had acted recklessly or indifferently.

{¶10} Moreover, the fact that Tuttle was voluntarily intoxicated during the December 19, 2007, incident did not, as he argues, negate the mental state required for his contempt conviction.⁴ Finally, we cannot conclude, given our review of the record, that the trial court lost its way and created a manifest miscarriage in determining that Tuttle was guilty of the two counts of contempt. We, therefore overrule his first assignment of error.

III. Double Jeopardy

{¶11} In his second assignment of error, Tuttle argues that his convictions for contempt were based solely upon the trespassing violations, offenses for which he had already been convicted, and that the contempt convictions thus violated the Double Jeopardy Clause of the United States Constitution.

² *State v. Mobley*, 2nd Dist. No. 19176, 2002-Ohio-5535, at ¶19.

³ *Id.* at ¶15.

⁴ R.C. 2901.21(C); *State v. Saylor*, 10th Dist. No. 08AP-625, 2009-Ohio-1974, at ¶42-45; *State v. Monticue*, 2nd Dist. No. 06-CA-33, 2007-Ohio-4615, at ¶16-17.

{¶12} The Double Jeopardy Clause protects an accused against being twice placed in jeopardy for the same offense.⁵ This proviso bars a second prosecution for the same offense after a conviction has been obtained.⁶ It also protects against multiple punishments for the same offense.⁷ Because this case concerns only the issue of successive prosecution, it is not controlled by R.C. 2941.25 or *State v. Cabrales*.⁸ Rather, we must employ the test outlined in *Blockburger v. United States*⁹ and its progeny.¹⁰ Under *Blockburger*, the Double Jeopardy Clause “prohibits successive prosecutions for the same criminal act or transaction under two criminal statutes unless each statute ‘requires proof of a fact which the other does not.’ ”¹¹

{¶13} Tuttle argues that his contempt convictions violated the Double Jeopardy Clause because they were premised upon the same conduct underlying his convictions for criminal trespassing. But his argument lacks force in the aftermath of the United States Supreme Court’s decision in *United States v. Dixon*.¹² As this court noted in *State v. Gonzales*, *Dixon* provides that the same action can constitute an offense under two distinct statutes and can be prosecuted separately under each statute as long as the statutes do not define a single offense within the meaning of *Blockburger*’s “same elements” test.¹³ Similarly, in *State v. Zima*, the Ohio Supreme Court stated that “*Blockburger* requires a comparison of the elements [of the offenses], not the evidence.”¹⁴ Thus, the fact that the state proved that Tuttle was in contempt of court by relying upon the same evidence it had used to prove the elements of criminal trespassing did not offend the Double Jeopardy Clause.

⁵ *United States v. Dixon* (1993), 509 U.S. 688, 696, 113 S.Ct. 2849.

⁶ *Id.*; see, also, *North Carolina v. Pearce* (1969), 395 U.S. 711, 717, 898 S.Ct. 2072.

⁷ *Id.*

⁸ 118 Ohio St.3d 54, 2008-Ohio-1625, 886 N.E.2d 181.

⁹ (1932), 284 U.S. 299, 304, 52 S.Ct. 180.

¹⁰ *State v. Zima*, 102 Ohio St.3d 61, 2004-Ohio-1807, 806 N.E.3d 542, at fn. 3.

¹¹ *State v. Tolbert* (1991), 60 Ohio St.3d 89, 573 N.E.2d 617, paragraph one of the syllabus.

¹² *Dixon*, *supra*, at 694-697 and 703-712.

¹³ See 151 Ohio App.3d 160, 2002-Ohio-4937, 788 N.E.2d 903, at ¶¶25 and 30.

¹⁴ *Zima*, *supra*, at ¶35.

{¶14} Application of the *Blockburger* test in this case compels the conclusion that Tuttle could have been prosecuted for contempt despite his earlier convictions for criminal trespassing. To secure a conviction under R.C. 2705.02(A), the state had to prove that Tuttle (1) was aware of a lawful court order and (2) that he had disobeyed or resisted that order.¹⁵ In comparison, his criminal-trespassing convictions under R.C. 2911.21(A)(1) required proof that Tuttle had (1) knowingly entered or remained (2) upon the land or premises of another (3) without privilege to do so. Each statute clearly required proof of elements that the other did not. Under the contempt statute, for example, the state had to prove that Tuttle was subject to a lawful court order, and that he had disobeyed that order. Proof of these elements, however, was not required to support the convictions for criminal trespassing.

{¶15} Moreover, the contempt and criminal-trespassing statutes, involve injuries to two distinct interests. Contempt concerns the court's interest in protecting its dignity and preserving its authority,¹⁶ while the criminal-trespassing statute serves to protect the public's interest in protecting property rights and punishing criminal conduct. Because the offenses are separate and distinct, Tuttle's prosecution for both criminal trespassing and contempt did not violate the Double Jeopardy Clause.¹⁷ We, therefore, overrule his second assignment of error and affirm the judgment of the trial court.

Judgment affirmed.

HILDEBRANDT, P.J., concurs separately.

PAINTER, J., dissents.

¹⁵ See, also, *State v. Komadina*, 11th Dist. No. 03CA008325, 2004-Ohio-4962, at ¶11.

¹⁶ See, e.g., *Cramer v. Petrie* (1994), 70 Ohio St.3d 131, 133, 637 N.E.2d 882; *Bank One Trust Co. N.A. v. Scherer*, 10th Dist. No. 08AP-288, 2008-Ohio-6910, at ¶19.

¹⁷ See, also, *Bentleyville v. Pisani* (Aug. 22, 1996), 8th Dist. Nos. 69063, 69064, 69065, and 69066 (holding that a defendant's conviction for telephone harassment did not violate double jeopardy even though the defendant had already been found in contempt for violating a restraining order by contacting the victim by telephone); *State v. Gurnick*, 9th Dist. No. 04CA008617, 2005-Ohio-3630 (holding that a defendant's convictions for indirect criminal contempt and criminal nonsupport did not violate the Double Jeopardy Clause even though they were based upon the same conduct).

HILDEBRANDT, P.J., concurring.

{¶16} The dissent suggests that we follow a Texas court’s decision because it could not figure out what the United States Supreme Court was saying in *Dixon*. But Ohio courts have had no such difficulty.¹⁸ In my opinion, to adopt the dissent would make this a case of (United States Supreme Court) precedent be damned, and I don’t like the outcome. The lead opinion is correct as written and I concur.

PAINTER, J., dissenting.

{¶17} Another adventure in Wonderland. Alas, it is my last trip down this rabbit hole, as I leave this court today.

{¶18} What a great new tool for allowing punishments greater than called for in the criminal law—just bring a guy into court and have a judge admonish him not to do something. Then when he does, punish him for contempt by giving him more time than he could get for the act itself. Then also punish him *again* for the act itself. Simply stating the obvious makes the answer obvious.

{¶19} “When the issue of double jeopardy arises in the context of a judgment of criminal contempt followed by a prosecution for a violation of the criminal law, the application of the *Blockburger* ‘same elements’ test has obvious difficulties.”¹⁹ Quite so.

{¶20} *State v. Rhodes*, from Texas, is the precedent this court should follow. “The [Texas] Court of Criminal Appeals pointed out in *Rhodes* that the members of the Supreme Court could not agree on how the *Blockburger* test applied under the facts of the two consolidated cases involved in *Dixon*. The *Rhodes* Court considered the true holding of *Dixon* so difficult to ascertain that it applied the legal reasoning of each separate

¹⁸ See, *Bentleyville v. Pisani* (Aug. 22, 1996), 8th Dist. Nos. 69063, 69064, 69065, and 69066; *State v. Gurnick*, 9th Dist. No. 04CA008617, 2005-Ohio-3630; *State v. Miller*, 9th Dist. No. 05CA0043, 2006-Ohio-524; *State v. Mobley*, 2nd Dist. No. 19176, 2002-Ohio-5535.

¹⁹ *Penn v. State* (2001), 73 Ark.App. 424, 428; 44 S.W.3d 746.

opinion in *Dixon* to the facts before it to determine whether a majority of members from that decision would find that Rhodes' subsequent prosecution is jeopardy barred; the Court then tallied the 'votes' to determine the outcome of the case. In that fashion, the Court hoped to replicate what is the essential 'holding' of *Dixon*."²⁰ (Citations omitted.)

{¶21} When a Supreme Court case is impossible to figure out, perhaps we should resort to common sense. Ohio courts, as the concurrence opines, have not had this exact trouble, because they have not had this exact case. This is not a case where the defendant committed contempt in a separate case and part of the conduct that was contemptuous also violated the law. For instance, disrupting court proceedings during a trial by assaulting a deputy and attempting to escape. Surely that is assault and attempted escape—but it is also contempt, and could be separately punished.

{¶22} Thus many times a punishment for contempt might be allowable if not for the very act of the crime. Here, the original case was a setup; and the contempt was exactly the same act as the crime. The act of criminal trespass was a lesser-included offense of "contempt of court for criminal trespass." This was only one offense. That is what courts in Texas and Arkansas have held.²¹

{¶23} Here, Tuttle was told by a judge not to criminally trespass at UC. He criminally trespassed at UC. He was sent to jail for the maximum 30 days on the criminal charge. He was then sent to jail for *longer* on the contempt charge. That is double jeopardy under any test. I find it difficult to believe that, even as presently constituted, the U. S. Supreme Court would uphold this abomination.

{¶24} The case is not "correctly decided"; it is simply legal mumbo jumbo used to justify imposing multiple punishment for the same conduct, in clear violation of the Double Jeopardy Clause.

²⁰ *Ex parte Arenivas* (Tex.App. 1999), 6 S.W.3d 631, 635.

²¹ *Penn, supra; Ex parte Rhodes* (Tex.App.1998), 974 S.W.2d 735

{¶25} It is true, as the concurrence says, that I do not “like” the outcome. I don’t like any outcome that is illegal. I don’t like any outcome that allows the government to trample individual liberty under the guise of law. I don’t like any outcome that bends the law to the whim of government. Mr. Tuttle’s case is just the latest.

{¶26} It acts, quacks, and screams double jeopardy. But some remain deaf.

