

[Cite as *State v. Anderson*, 2018-Ohio-3051.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 106304

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

SHERMAN ANDERSON

DEFENDANT-APPELLANT

JUDGMENT:
REVERSED; INDICTMENT DISMISSED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-17-615343-A

BEFORE: Stewart, P.J., Celebrezze, J., and Keough, J.

RELEASED AND JOURNALIZED: August 2, 2018

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MELODY J. STEWART, P.J.:

{¶1} In 1996, defendant-appellant Sherman Anderson shot his girlfriend in the head and left her in a “persistent vegetative state.” He pleaded guilty to attempted murder. The victim died in 1998 as a result of her injuries. Nineteen years later, the state charged Anderson with murder. Citing *State v. Carpenter*, 68 Ohio St.3d 59, 60, 623 N.E.2d 66 (1993), Anderson filed a motion to dismiss the indictment because the state did not expressly reserve the right to file additional charges on the record at the time of his guilty plea. The court denied the motion to dismiss, finding that the state did not anticipate the 1996 plea would terminate the entire incident. Anderson appeals.

{¶2} We first address a motion to dismiss the appeal that has been referred for our consideration. The state argues that the court’s denial of Anderson’s motion to dismiss did not arise from a final order and that we lack jurisdiction to consider the appeal.

{¶3} The jurisdiction of a court of appeals is constitutionally limited to the review of “final” orders. See Section 3(B)(2), Article IV, Ohio Constitution (“Courts of appeals shall have such jurisdiction as may be provided by law to review and affirm, modify, or reverse judgments or final orders of the courts of record inferior to the court of appeals within the district * * *.”).

{¶4} The general rule is that an order denying a defendant’s motion to dismiss an indictment is an interlocutory order that is not immediately appealable. *State v. Mitchell*, 8th Dist. Cuyahoga No. 104314, 2017-Ohio-94, ¶ 10. This is because an order denying a defendant’s motion to dismiss an indictment does not determine the action as required by R.C. 2505.02(B)(1). *State v. Shaffer*, 8th Dist. Cuyahoga No. 87552, 2006-Ohio-5563, ¶ 21.

{¶5} Nevertheless, “[t]here are unusual instances when orders which standing alone are not considered final appealable orders become appealable by virtue of the exceptional circumstances under which they are rendered.” *State v. Eberhardt*, 56 Ohio App.2d 193, 198, 381 N.E.2d 1357 (8th Dist.1978). These types of orders tend to arise in the context of a provisional remedy, which is defined as “a proceeding ancillary to an action[.]” R.C. 2505.02(A)(3). If an order grants or denies a provisional remedy and both determines the action with respect to the provisional remedy and leaves the appealing party without a meaningful remedy by having to wait for the conclusion of all proceedings before being allowed to appeal, the order can be final and may be reviewed on appeal. *See* R.C. 2505.02(B)(4).

{¶6} In *State v. Anderson*, 138 Ohio St.3d 264, 2014-Ohio-542, 6 N.E.3d 23, ¶ 49, the Ohio Supreme Court held that an order denying a motion to dismiss on double-jeopardy grounds is a final order under R.C. 2505.02(B)(4) as a provisional remedy. It stated that it had “little trouble concluding that a motion to dismiss on double-jeopardy grounds is an ancillary proceeding,” *id.* at ¶ 48, because a motion to dismiss an indictment on grounds of double jeopardy is ““separate from and entirely collateral to the substantive issues at trial.”” *Id.* at ¶ 50, quoting John Paul Sellers III, *Between a Rock and a Hard Place: Does Ohio Revised Code Section 2505.02 Adequately Safeguard a Person’s Right Not to Be Tried?*, 28 Ohio N.U.L.Rev. 285, 299 (2002). The Supreme Court also found that “a decision on a motion to dismiss on double-jeopardy grounds determines the action because it permits or bars the subsequent prosecution.” *Anderson* at ¶ 52. Finally, noting that double jeopardy barred a second trial for the same offense, the Supreme Court held that absent an interlocutory appeal, a party seeking dismissal of an indictment on double-jeopardy grounds would not be afforded a meaningful review of the decision if forced to go to trial before being able to appeal. *Id.* at ¶ 59.

{¶7} Although this case does not involve double jeopardy, we think the *Anderson* decision applies by implication. The provisional remedy definition supplied in R.C. 2505.02(A)(3) is nonexhaustive, *State v. Muncie*, 91 Ohio St.3d 440, 448, 746 N.E.2d 1092 (2001), and, like a motion to dismiss on double jeopardy grounds, the motion that Anderson filed in this case grew out of the prosecution and was “attendant” upon the underlying prosecution. *Anderson* at ¶ 49. We likewise have no difficulty finding that a decision on the motion to dismiss the indictment determines the action because it permits or prohibits a second prosecution. *Id.* at ¶ 52.

{¶8} With respect to the final prong of the analysis, there is no doubt that Anderson would not be afforded a meaningful review absent an interlocutory appeal. In *Carpenter*, the Supreme Court held:

the state cannot indict a defendant for murder after the court has accepted a negotiated guilty plea to a lesser offense and the victim later dies of injuries sustained in the crime, unless the state expressly reserves the right to file additional charges on the record at the time of the defendant’s plea.

Carpenter, 68 Ohio St.3d at 62, 623 N.E.2d 66. This holding was premised on the notion that a plea agreement is a contract intended to terminate the prosecution. The Supreme Court reaffirmed this point in *State v. Dye*, 127 Ohio St.3d 357, 2010-Ohio-5728, 939 N.E.2d 1217, where it found that a guilty plea carried with it a “defendant’s reasonable expectation that pleading guilty would end the criminal proceedings arising out of the incident * * *.” *Id.* at ¶ 26. Just as *Anderson* involved the defendant’s right not to be tried twice, so too do *Carpenter* and *Dye* involve a defendant’s expectation that a guilty plea would bar additional charges unless the state specifically reserved the right to file additional charges. Denying Anderson the right to an immediate appeal from the denial of his motion to dismiss the indictment and forcing him to

stand trial for murder would deprive him of the reasonable expectation that his guilty plea terminated the proceedings against him in this case. We therefore deny the state's motion to dismiss the appeal.

{¶9} Our preceding discussion of *Carpenter* and *Dye* informs the substance of Anderson's claim that the court erred by denying his motion to dismiss the indictment. The record does not show that at the time Anderson pleaded guilty, the state reserved the right to bring additional charges against him. The state failed to reserve the right to bring additional charges even though it knew at the time of his guilty plea that the victim's condition — a persistent vegetative state — would not improve in the future.

{¶10} The state argues that the court correctly interpreted *Carpenter* to look at a defendant's subjective belief that a guilty plea would terminate the prosecution. It maintains that Anderson did not meet his burden of showing that he believed his guilty plea would prohibit the state from charging him with murder in the event the victim died as a result of the injuries inflicted by Anderson.

{¶11} The state misreads *Carpenter* — a defendant's subjective expectations regarding a guilty plea are formed by the state's conduct. The guilty plea itself creates the expectation that it will terminate criminal proceedings and that the defendant "[cannot] be called on to account further on any charges regarding this incident." *Carpenter*, 68 Ohio St.3d at 62, 623 N.E.2d 66.

The only thing that can change the defendant's expectation of finality in a guilty plea is the state's express reservation, made on the record at the time of the guilty plea, of its right to file additional charges. We very recently characterized this as an unambiguous legal proposition. *State v. Jackson*, 8th Dist. Cuyahoga No. 105997, 2018-Ohio-1306, ¶ 15. The court erred by denying Anderson's motion to dismiss the indictment.

{¶12} Judgment reversed and indictment dismissed.

It is ordered that appellant recover of appellee 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.

MELODY J. STEWART, PRESIDING JUDGE

KATHLEEN ANN KEOUGH, J., CONCURS;
FRANK D. CELEBREZZE, JR., J., CONCURS IN JUDGMENT ONLY