

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellant,	:	
	:	No. 11AP-914
v.	:	(C.P.C. No. 10CR-1067)
	:	
N.E.,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellee.	:	

N U N C P R O T U N C ¹

D E C I S I O N

Rendered on October 29, 2013

Ron O'Brien, Prosecuting Attorney, and *Steven L. Taylor*, for appellant.

Samuel B. Weiner Co., L.P.A., and *Sam B. Weiner*, for appellee.

APPEAL from the Franklin County Court of Common Pleas.

DORRIAN, J.

{¶ 1} Plaintiff-appellant, State of Ohio ("the state"), appeals from a judgment of the Franklin County Court of Common Pleas dismissing the state's case against defendant-appellee, N.E. ("appellee"), and granting appellee a full judgment of acquittal. Because we conclude that the trial court did not abuse its discretion by dismissing the case, but erred by using the phrase "full judgment of acquittal" and abused its discretion by dismissing the case with prejudice, we affirm in part and reverse in part.

¹ This decision replaces, nunc pro tunc, the original decision released September 20, 2012, and is effective as of that date. This decision redacts all references to the defendant's name in light of a July 1, 2013 order of the Franklin County Court of Common Pleas sealing all records related to the charge discussed herein.

{¶ 2} Appellee was indicted on one charge of felonious assault, a second-degree felony in violation of R.C. 2903.11. The state alleged that, in the early morning hours of January 11, 2010, appellee punched J.A. in the head while J.A. was standing outside a bar. The state claimed that the blow caused J.A. to fall and strike his face on the pavement, resulting in serious physical injuries. The case was tried before a jury over a three-day period in June 2011. J.A. testified at the trial regarding the events leading up to the punch and the extent of his injuries. The state presented testimony from J.A.'s former girlfriend, who was at the bar when the incident occurred, and from two employees of the bar, who were working there when the incident occurred. The state also presented testimony from a former business associate of appellee, who testified that he received a telephone call from appellee shortly after the incident and that appellee admitted to striking a man at a bar. The state introduced various items of evidence supporting its case, including copies of text messages sent by appellee. At the close of the state's presentation, appellee moved for a judgment of acquittal under Crim.R. 29(A). The trial court denied the motion, stating that it believed there was sufficient evidence to sustain a conviction. Appellee then presented his defense, claiming that J.A. attempted to punch appellee and that he only acted in self-defense.

{¶ 3} After deliberating, the jury could not reach a unanimous verdict. The jury was evenly split, with six jurors voting to convict appellee and six jurors voting to acquit him. The trial court dismissed the jury and declared a mistrial on June 10, 2011. On August 24, 2011, appellee filed a memorandum with the trial court discussing the court's authority to dismiss a case pursuant to Crim.R. 48(B). The trial court conducted a hearing on September 15, 2011 to address the case status. The state indicated a general intention to retry the case and requested that, if the court decided to dismiss the case, that it do so without prejudice. The trial court subsequently entered a judgment order dismissing the case with prejudice and granting appellee a "full judgment of acquittal."

{¶ 4} The state appeals from the trial court's judgment, assigning three errors for this court's review:

FIRST ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED IN DISMISSING THE CASE WITH A "FULL JUDGMENT OF ACQUITTAL," AS THE COURT LACKED JURISDICTION AND AUTHORITY TO DISMISS THE CASE WITH AN "ACQUITTAL."

SECOND ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN DISMISSING A SECOND-DEGREE FELONY INVOLVING SERIOUS PHYSICAL HARM ON THE BASIS OF "INHERENT AUTHORITY" AND CRIM.R. 48(B).

THIRD ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN DISMISSING THE FELONIOUS ASSAULT CHARGE WITH PREJUDICE.

{¶ 5} In its first assignment of error, the state asserts that the trial court erred by dismissing the case with a "full judgment of acquittal." The state argues that a trial court may only acquit a defendant when the defendant waives a jury trial and the court issues a verdict at the end of a bench trial, or under Crim.R. 29 when the court determines that the evidence was insufficient. In this case, the trial was conducted before a jury, and the jury was discharged after failing to reach a verdict. The trial court had previously denied appellee's motion for judgment of acquittal at the close of the state's case, and appellee did not renew the motion for acquittal after the jury was discharged. Therefore, the state argues that the trial court exceeded its authority by issuing a judgment of acquittal.

{¶ 6} Appellee moved to dismiss the appeal, arguing that the state has no right to appeal a judgment of acquittal and that this court lacks jurisdiction to review a judgment of acquittal. We reserved ruling on appellee's motion to dismiss until we considered the merits of the appeal. Because our analysis of appellee's motion to dismiss is interrelated with our analysis of the state's first assignment of error, we will address them together.

{¶ 7} R.C. 2945.67(A) provides, in relevant part, that a prosecuting attorney "may appeal as a matter of right any decision of a trial court in a criminal case * * * which decision grants a motion to dismiss all or any part of an indictment, complaint, or information * * * and may appeal by leave of the court to which the appeal is taken any

other decision, except the final verdict, of the trial court in a criminal case." The Supreme Court of Ohio has held that a judgment of acquittal pursuant to Crim.R. 29(C) constitutes a final verdict for purposes of R.C. 2945.67(A) and is not appealable by the state as a matter of right or by leave of court. *State ex rel. Yates v. Court of Appeals for Montgomery Cty.*, 32 Ohio St.3d 30 (1987), syllabus. Therefore, if the trial court in this case issued a judgment of acquittal under Crim.R. 29(C), the state's appeal must be dismissed.

{¶ 8} Appellee argues that, because the trial court's order stated that it was issuing a "full judgment of acquittal," this court lacks jurisdiction to consider the appeal. The Supreme Court of Ohio has held that appellate courts may review rulings on questions of substantive law made in a criminal case where a trial court has issued a judgment of acquittal but may not disturb the trial court's verdict. *State v. Bistricky*, 51 Ohio St.3d 157, 160 (1990). *See also State v. Ross*, 128 Ohio St.3d 283, 2010-Ohio-6282, ¶ 51 ("We have answered the substantive legal question presented in the state's position of law. However, pursuant to *Bistricky* and *Yates*, we do not disturb the trial judge's acquittal order because that order—as distinct from the substantive legal rulings underlying it—is not appealable under R.C. 2945.67(A) [internal citations omitted]."). Based on these precedents, appellee argues that the appeal should be dismissed. In response, the state asserts that we have jurisdiction to consider this appeal, arguing that, despite the trial court's use of the phrase "full judgment of acquittal," the trial court did not properly enter a judgment of acquittal under Crim.R. 29. Rather, the state asserts that the trial court dismissed the case pursuant to Crim.R. 48 and its inherent authority to control its docket.

{¶ 9} In cases involving appeals under R.C. 2945.67, the Supreme Court of Ohio at times has taken a "look beyond the label" approach in determining whether an order is subject to appeal. In *State v. Davidson*, 17 Ohio St.3d 132 (1985), the appellee argued that a trial court order granting a motion "in limine" was not appealable under R.C. 2945.67 because the statute provided that a prosecutor could appeal from a decision granting a "motion to suppress evidence." *Id.* at 134-35. The court rejected this argument, holding that any motion seeking to obtain a judgment suppressing evidence constituted a "motion to suppress" for purposes of R.C. 2945.67, when the motion, if granted, would destroy the

state's ability to prosecute. *Id.* at 135. The court focused on the relief obtained under the motion:

The determination of whether a motion is a "motion to suppress" or a "motion *in limine*" does not depend on what it is labeled. It depends on the type of relief it seeks to obtain. Any other result would improperly elevate form over substance[.]

Id. Similarly, the Supreme Court has also held that a juvenile court order denying a motion for mandatory bindover constitutes the "functional equivalent" of a dismissal of an indictment because it terminates the state's ability to secure an indictment for the crimes charged. *In re A.J.S.*, 120 Ohio St.3d 185, 2008-Ohio-5307, syllabus. Consistent with the reasoning of these decisions, we will consider the content of the trial court's order to determine whether it is subject to appeal.

{¶ 10} Crim.R. 29 governs motions for acquittal in criminal cases. Crim.R. 29(A) provides that "[t]he court on motion of a defendant or on its own motion, after the evidence on either side is closed, shall order the entry of a judgment of acquittal of one or more offenses charged in the indictment, information, or complaint, if the evidence is insufficient to sustain a conviction of such offense or offenses." Crim.R. 29(C) further provides that, if a jury returns a verdict of guilty or is discharged without having rendered a verdict, a motion for judgment of acquittal may be made or renewed within 14 days after the jury is discharged or within such further time as the court may specify. If no verdict was returned, as in the present case, the court may enter a judgment of acquittal. Crim.R. 29(C). A judgment of acquittal under Crim.R. 29(C), therefore, is based on the trial court's conclusion that the evidence was insufficient to convict the defendant. *See Yates* at 32-33.

{¶ 11} In the present case, the trial court stated in the dismissal order that it was issuing a "full judgment of acquittal." However, the order contains no finding that the evidence was insufficient to sustain a conviction. The only ruling regarding the sufficiency of the evidence occurred when appellee moved for acquittal under Crim.R. 29(A) at the close of the state's case. At that time, the trial court denied the motion for acquittal, stating that the evidence was sufficient to sustain a conviction. (Tr. 216.) Moreover, in the dismissal order, the trial court did not purport to act under Crim.R. 29. The only

mention of Crim.R. 29 in the order occurred when the court noted that appellee failed to file a timely motion for acquittal under Crim.R. 29(C) after the court discharged the jury. The trial court cited Crim.R. 48(B) and its inherent authority as the basis for dismissing the case. For these reasons, we find this case to be distinguishable from cases in which the Supreme Court and courts of appeals have held that a judgment of acquittal was not appealable. In *Yates* and *Ross*, the trial courts had explicitly granted acquittals under Crim.R. 29(C) based on their findings that the evidence was insufficient. *Yates* at 31 ("[T]he trial court granted the motion [for judgment of acquittal pursuant to Crim.R. 29(C)] on the grounds of (1) insufficient evidence of guilt and (2) refusal to grant Yates' request to waive a jury."); *Ross* at ¶ 9 ("Ross filed a second supplemental memorandum in support of his renewed motion for acquittal pursuant to Crim.R. 29. The trial court issued a written opinion purporting to reconsider its previous denial of Ross's motion for acquittal and acquitting Ross of the rape charge and the related death-penalty specification."). See also *State v. Hampton*, 10th Dist. No. 10AP-1109, 2011-Ohio-3486, ¶ 12; *State v. Roddy*, 8th Dist. No. 88759, 2007-Ohio-4015, ¶ 3-4.

{¶ 12} Based on the trial court's express reliance on Crim.R. 48(B) and the lack of any finding that the evidence was insufficient to sustain a conviction or any reliance on Crim.R. 29 as authority for its decision, we conclude that, despite the use of the phrase "full judgment of acquittal," the trial court did not properly enter a judgment of acquittal pursuant to Crim.R. 29(C). In effect, the trial court's order was a dismissal with prejudice subject pursuant to Crim.R. 48(B). A dismissal order under Crim.R. 48(B) is an appealable order. See *State v. Watkins*, 10th Dist. No. 02AP-659, 2003-Ohio-668 (reversing dismissal under Crim.R. 48(B) and ordering trial court to reinstate case to active docket). Additionally, because the trial court did not find the evidence to be insufficient to sustain a conviction, the trial court erred by stating that it was entering a "full judgment of acquittal."

{¶ 13} Accordingly, appellee's motion to dismiss the appeal is denied. The state's first assignment of error is sustained.

{¶ 14} In its second assignment of error, the state asserts the trial court erred by dismissing the case on the basis of Crim.R. 48(B) and the court's inherent authority. The state argues that the trial court lacked the authority to dismiss a criminal case based on a

weighing of factors and a conclusion that a dismissal was in the interests of justice. Further, the state argues that, even if the trial court possessed such authority, it abused its discretion in dismissing this case.

{¶ 15} Generally, "[a] court has the 'inherent power to regulate the practice before it and protect the integrity of its proceedings.' " *State v. Busch*, 76 Ohio St.3d 613, 615 (1996), quoting *Royal Indem. Co. v. J.C. Penney Co.*, 27 Ohio St.3d 31, 33-34 (1986). Crim.R. 48(B) provides that "[i]f the court over objection of the state dismisses an indictment, information, or complaint, it shall state on the record its findings of fact and reasons for the dismissal." The Supreme Court explained the effect of Crim.R. 48(B) in the *Busch* decision:

Crim.R. 48(B) recognizes by implication that trial judges may *sua sponte* dismiss a criminal action over the objection of the prosecution, since the rule sets forth the trial court's procedure for doing so. The rule does not limit the reasons for which a trial judge might dismiss a case, and we are convinced that a judge may dismiss a case pursuant to Crim.R. 48(B) if a dismissal serves the interests of justice.

Busch at 615.

{¶ 16} *Busch* involved a prosecution for misdemeanor domestic violence and assault charges in the Franklin County Municipal Court. *Id.* at 613. Shortly after filing the complaints, the victim submitted an affidavit indicating that she wanted the charges dropped. Through several hearings and court appearances, the victim repeatedly indicated a desire to have the charges dropped. *Id.* at 613-14. Ultimately, the trial court dismissed the charges over the objection of the prosecution. *Id.* at 614. The court of appeals reversed the dismissal, but the Supreme Court reversed the appellate court's ruling and held that the trial court did not abuse its discretion in dismissing the case. *Id.* at 616. In 1997, the General Assembly enacted R.C. 1901.20(A)(2), which provides that a municipal court judge may not dismiss a criminal complaint or indictment solely at the request of the complaining witness and over the objection of the prosecutor. Am.Sub.S.B. No. 98, 147 Ohio Laws, Part IV, 7357, 7358. As a result of this amendment, we have previously stated that *Busch* has "essentially been legislatively superseded" as to the specific facts of the case. *Watkins* at ¶ 26. However, we have continued to cite the

reasoning of *Busch* and the factors discussed in that case when presented with trial court dismissals of criminal cases. See *State v. Cosgrove*, 10th Dist. No. 06AP-1129, 2007-Ohio-3323, ¶ 13-14; *Columbus v. Storey*, 10th Dist. No. 03AP-743, 2004-Ohio-3377, ¶ 8-11; *State v. Ferguson*, 10th Dist. No. 02AP-660, 2003-Ohio-665, ¶ 23-25; *Watkins* at ¶ 24-26. Accordingly, we reject the state's contention that the trial court lacked authority to enter a dismissal order in this case.

{¶ 17} Next, we consider whether the trial court properly exercised its authority in dismissing the case. A trial court's dismissal of criminal charges under Crim.R. 48(B) is subject to review for abuse of discretion. *Storey* at ¶ 10. An abuse of discretion occurs where a trial court's decision is "unreasonable, arbitrary, or unconscionable." *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983). "An unreasonable decision is one that is unsupported by a sound reasoning process; an arbitrary attitude is an attitude that is without adequate determining principle not governed by any fixed rules or standard; and unconscionable may be defined as affronting the sense of justice, decency, or reasonableness." *State v. Hill*, 10th Dist. No. 10AP-177, 2010-Ohio-6121, ¶ 34, citing *State v. Waugh*, 10th Dist. No. 07AP-619, 2008-Ohio-2289, ¶ 13. However, "[a]n appellate court is not permitted to find an abuse of discretion merely because it would have arrived at a different result if it had reviewed the matter de novo." *Newsome v. Mt. Carmel Health Sys.*, 10th Dist. No. 05AP-169, 2005-Ohio-6853, ¶ 3.

{¶ 18} In the dismissal order, the trial court stated that it analyzed and weighed seven factors in deciding whether to dismiss the case: (1) the state had indicated that it would not raise new arguments or present new evidence if the case was retried; (2) the lack of a jury instruction on a lesser-included offense and the fact that the jurors indicated that they would have voted to convict appellee on a lesser charge; (3) the lack of allegations of misconduct by jurors or counsel; (4) the evenly divided jury, with six jurors voting to convict and six jurors voting to acquit; (5) the seriousness of the offense; (6) policy issues, including judicial efficiency and economy; and (7) the fairness and burden that retrial would impose on appellee. Based on its analysis of these factors, the trial court concluded that dismissal of the case was in the interest of the court's "obligation to ensure justice is achieved." The state argues that the trial court erred in its analysis by failing to consider certain factors set forth in *Busch* and by improperly weighing other factors.

{¶ 19} In *Busch*, the Supreme Court stated that Crim.R. 48(B) does not limit the reasons for which a trial judge may dismiss a case. *Busch* at 615. The court indicated several factors that are relevant in determining whether a dismissal serves the interests of justice: "[T]he seriousness of the injuries, the presence of independent witnesses, the status of counseling efforts, whether the complainant's refusal to testify is coerced, and whether the defendant is a first-time offender." *Id.* at 616. The state asserts that the trial court erred by improperly weighing or failing to consider several of these factors. However, in the *Busch* decision, the Supreme Court stated that these were factors that a trial court *should* consider and that a reviewing court *may* consider in determining whether the trial court abused its discretion. *Id.* The Supreme Court did not state that these were mandatory factors a trial court must always consider before dismissing a case under Crim.R. 48(B). Moreover, it is clear that all of the factors listed in the *Busch* decision will not apply in every case. For example, the status of counseling efforts is a factor that is specifically applicable to a narrow range of cases, such as the domestic violence scenario presented in *Busch*. Similarly, the issue of whether a complainant's refusal to testify is coerced would only be relevant in a case where the complaining witness refused to testify. Neither of those factors were relevant to this case, and the trial court did not abuse its discretion by failing to consider them.

{¶ 20} The state asserts that the trial court erred by failing to consider the existence of independent witnesses. The state argues that at least one of the employees of the bar where the incident occurred provided independent, neutral testimony supporting the state's case. The trial court did not specifically address the presence of independent witnesses in the dismissal order. However, the trial court noted that, if the case was retried, the state would present the same arguments and evidence. Presumably, the trial court was aware that this would include the testimony from the bar employees. In a criminal case, the testimony of one witness, if believed by the jury, is sufficient to sustain a conviction. *State v. Strong*, 10th Dist. No. 09AP-874, 2011-Ohio-1024, ¶ 42. The presence of independent witnesses is a factor that would weigh more heavily against dismissal in a case where a victim refused to testify and the prosecution was forced to rely solely on the testimony of an independent witness. In this case, the victim testified and was likely to testify at any retrial. The state also argues that the trial court erred by failing

to consider the fact that appellee was not a first-time offender because he had a prior conviction for misdemeanor telecommunications harassment. However, in response to appellee's pretrial motion in limine to exclude evidence of that conviction, the state conceded that it never intended to introduce evidence of the conviction to the jury.

{¶ 21} The state further argues that the trial court incorrectly weighed two factors discussed in the dismissal order. The state argues that the court incorrectly stated the facts when discussing the lack of a jury instruction on a lesser-included offense. The state claims that the trial court erred by indicating that the state was responsible for the lack of such an instruction, arguing that both parties agreed to the jury instructions and that appellee opposed an instruction on a lesser-included offense. The state is correct that appellee opposed such an instruction, but the transcript also indicates that the state did not argue in favor of including a lesser-included offense in the jury instructions.

{¶ 22} Finally, the state argues that the trial court incorrectly weighed the seriousness factor. In considering the seriousness of the offense, the trial court stated that the incident arose from a single punch from appellee after both J.A. and appellee had been drinking at a bar. The trial court concluded that the case did not involve "the most egregious offense which would necessitate a retrial." (Order at 3.) The state argues that the trial court erred because it did not address J.A.'s injuries in assessing the seriousness of the offense. The *Busch* decision indicates that, in weighing the seriousness factor, the trial court should have examined the extent of J.A.'s injuries rather than focusing solely on appellee's act of throwing a single punch.

{¶ 23} As noted above, we review this case under the abuse-of-discretion standard. An abuse of discretion exists where a trial court has acted in an arbitrary, unreasonable or unconscionable manner, not where the reviewing court might have reached a different result if reviewing the matter de novo. *Newsome* at ¶ 3. Further, in *Busch*, the Supreme Court stated that Crim.R. 48(B) does not limit the reasons for which a trial court may dismiss a case and that a trial court may dismiss a case if it serves the interests of justice. *Busch* at 615. The rule only requires that the trial court state on the record its findings of fact and reasons for dismissing the case. Crim.R. 48(B). In this case, the trial court weighed multiple factors and clearly set forth the reasons that it concluded that dismissal would be in the interests of justice. Under the circumstances presented in this appeal, we

conclude that the trial court did not abuse its discretion in dismissing the case pursuant to its inherent authority and Crim.R. 48(B).

{¶ 24} Accordingly, the state's second assignment of error is without merit and is overruled.

{¶ 25} In the third assignment of error, the state asserts that the trial court abused its discretion by dismissing the case with prejudice. The state argues that, even if the trial court did not err by dismissing the case, it should have dismissed the case without prejudice.

{¶ 26} In *State v. Sutton*, 64 Ohio App.2d 105 (9th Dist.1979), the Ninth District Court of Appeals observed that Crim.R. 48(B) did not specifically provide for dismissals with prejudice. *Id.* at 108. The court concluded that a trial court, acting pursuant to its inherent powers, could only dismiss a criminal case with prejudice "where it is apparent that the defendant has been denied either a constitutional or a statutory right, the violation of which would, in itself, bar prosecution." *Id.* This court relied, in part, on *Sutton*, in reversing a trial court's dismissal order in *State v. Clipner*, 10th Dist. No. 98AP-1477 (Sept. 14, 1999). Other appellate courts have similarly cited *Sutton* in analyzing the limits on a trial court's inherent power. *See State v. Today's Bookstore, Inc.*, 86 Ohio App.3d 810, 824 (2d Dist.1993) ("[A] court has inherent power to dismiss with prejudice only where it is apparent that the defendant has been denied either a constitutional or statutory right, the violation of which would, in itself, bar prosecution."); *State v. Dixon*, 14 Ohio App.3d 396, 397 (8th Dist.1984) ("[W]e conclude that a dismissal or *nolle* with prejudice pursuant to Crim.R. 48(A), as in Crim.R. 48(B), may only be entered where there is a deprivation of a defendant's constitutional or statutory rights, the violation of which would, in and of itself, bar further prosecution.").

{¶ 27} In *Sutton*, the court found that, at the time of dismissal, the defendant had not been placed twice in jeopardy nor been denied his constitutional and statutory rights to a speedy trial. *Sutton* at 108. Here, the trial court did not find that appellee had been denied any statutory or constitutional right. Likewise, appellee does not allege any violation or denial of his constitutional or statutory rights. Absent such circumstances, we conclude that the trial court abused its discretion by dismissing the charges against appellee with prejudice.

{¶ 28} Accordingly, the state's third assignment of error is sustained.

{¶ 29} For the foregoing reasons, appellee's motion to dismiss is denied, the state's first and third assignments of error are sustained, and the state's second assignment of error is overruled. We affirm the portion of the judgment of the Franklin County Court of Common Pleas dismissing the case, but reverse the portions of the judgment stating that the dismissal was with prejudice and granting a "full judgment of acquittal." We remand this cause to that court with instructions to enter a judgment order dismissing the case without prejudice.

*Appellee's motion to dismiss denied;
judgment affirmed in part and reversed in part;
cause remanded with instructions.*

BROWN, P.J., and BRYANT, J., concur.
