

2014 IL App (2d) 121425-U
Nos. 2-12-1425 & 2-12-1426 cons.
Order filed May 28, 2014

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court of Kendall County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 12-CF-31
)	
ALBERT H. HOFFMAN, JR.,)	Honorable
)	Timothy J. McCann,
Defendant-Appellant.)	Judge, Presiding.

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court of Kendall County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 12-CM-77
)	
ALBERT H. HOFFMAN, JR.,)	Honorable
)	Timothy J. McCann,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE McLAREN delivered the judgment of the court.
Justices Zenoff and Spence concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court properly denied defendant’s motion to dismiss a charge on double-jeopardy grounds, as he did not establish that the act that supported his prior guilty plea was the same act that supported the present charge.

¶ 2 Defendant, Albert H. Hoffman, Jr., appeals from an order of the circuit court of Kendall County regarding his motion to dismiss a charge of domestic battery in case No. 12-CM-77 and a charge of aggravated domestic battery in case No. 12-CF-31. Because there was no appealable order as to the motion to dismiss in case No. 12-CM-77, we dismiss that appeal. Because defendant failed to establish that the domestic battery charges, which he sought to have dismissed on double jeopardy grounds, were based on the same physical act that provided the factual basis for his guilty plea to domestic battery in Kane County, we affirm the denial of his motion to dismiss in case No. 12-CF-31.

¶ 3 I. BACKGROUND

¶ 4 Defendant was charged by complaint in the circuit court of Kane County with one count of domestic battery based on bodily harm (720 ILCS 5/12-3.2(a)(1) (West 2012)) and one count of domestic battery based on contact of an insulting or provoking nature (720 ILCS 5/12-3.2(a)(2) (West 2012)). Pertinent to this appeal, the complaint alleged that defendant caused bodily harm to his spouse, Elaine Hoffman, in that he struck her in the “arm, head, and eye.”

¶ 5 Defendant was charged by complaint in Kendall County (case No. 12-CM-77) with one count of domestic battery based on bodily harm (720 ILCS 5/12-3.2(a)(1) (West 2012)). The complaint alleged that he struck Elaine “once with a closed fist to the right side of her face.” He was also indicted in Kendall County (case No. 12-CF-31) on one count of aggravated domestic battery based on great bodily harm (720 ILCS 5/12-3.3(a) (West 2012)). The indictment alleged that defendant struck Elaine “in the face with his fist and in doing so, caused orbital bone fractures.”

¶ 6 Defendant pled guilty to the Kane County charge of domestic battery based on bodily harm, and the other domestic battery charge was nol-prossed. After pleading guilty in Kane County, defendant moved to dismiss, on double jeopardy grounds, the two domestic battery charges in Kendall County.

¶ 7 In doing so, defendant filed his motion in both case No. 12-CF-31 and case No. 12-CM-77. In the motion to dismiss, defendant contended that, pursuant to section 3-4(a)(1) of the Criminal Code of 2012 (Code) (720 ILCS 5/3-4(a)(1) (West 2012)), the prosecutions were barred because he previously had been convicted in Kane County based on the same conduct upon which the Kendall County charges were predicated.

¶ 8 Defendant attached to his motion to dismiss the factual synopsis prepared by Deputy Michael Novak of the Kendall County sheriff's office. According to the synopsis, on January 21, 2012, Deputy Novak was dispatched to defendant's and Elaine's residence in Kendall County to arrest defendant for a domestic battery that occurred in Kane County. Deputy Novak had been advised that Elaine had reported that she had suffered "a severe injury to her eye *** within Kendall County."

¶ 9 Deputy Novak arrested defendant and transported him to a nearby hospital where Elaine was being treated. At the hospital, Deputy Novak transferred custody of defendant to the Aurora police and interviewed Elaine.

¶ 10 Elaine told him that earlier that day she and defendant had been at her daughter's home in North Aurora. They left in a car with Elaine driving. As they drove through Aurora, they argued, and their argument "became physical." During the drive on Route 25, defendant twice tried to grab the steering wheel. The second time, which occurred as they neared their home, Elaine hit defendant, causing his nose to bleed. He then "punched her in the right side of the

face.” Elaine “suffered a severe injury to her right eye which was preliminarily diagnosed as fractured facial bones.”

¶ 11 Defendant also attached to his motion to dismiss the factual synopsis of Officer Erin Lapp of the Aurora police department. According to the synopsis, while defendant and Elaine were driving, defendant struck Elaine “in the right shoulder, back, and head numerous times with a closed fist.” The synopsis stated that Elaine had been “struck in the right eye by a closed fist” and that that blow had “occurred in Kendall County’s jurisdiction.”

¶ 12 Defendant included with his motion to dismiss a copy of the order from Kane County related to his guilty plea. The order indicated that defendant pled guilty to the “original” charge in the complaint. Defendant also submitted the sentencing order, which indicated that he had been convicted of the “original” charge.

¶ 13 The State filed a response, to which it attached a transcript of the grand jury testimony of Deputy Novak. Deputy Novak testified that he was dispatched to defendant’s and Elaine’s home to arrest defendant. He had been informed that defendant had committed a domestic battery in Kane County and “possibly another incident that occurred within our jurisdiction.” When he spoke to Elaine at the hospital he observed that her right eye was “swollen pretty bad.” Elaine told him that her right eye was injured when defendant “punched her in the face with a closed fist while they were seated in their car” near their home in Kendall County.

¶ 14 The trial court conducted a hearing on defendant’s motion to dismiss. At the outset of the hearing, the court asked if the parties agreed that the exhibits attached to the motion to dismiss “would be admissible and *** considered as evidence.” The State agreed, and defense counsel stated that she would “stand on [her] filing.”

¶ 15 Defendant contended that, because there was one continuous fight in the car, he had engaged in a “continuing course of conduct” for purposes of domestic battery. Thus, defendant argued that it violated double jeopardy to prosecute him for domestic battery in both counties based on that single course of conduct.

¶ 16 The State responded that there were separate physical acts that occurred in each county. Alternatively, the State, relying on section 3-4(d) of the Code (720 ILCS 5/3-4(d) (West 2012)), argued that Kane County did not have jurisdiction over defendant and that the Kane County prosecutor procured his guilty plea in Kane County without the knowledge of the Kendall County prosecutor.

¶ 17 In ruling on the motion to dismiss, the trial court noted that there was “no indication of what [the] exact factual basis” was for defendant’s guilty plea. The State then asked the court to consider the “sworn synopsis” of Officer Lapp. The court responded that it did not know what such a synopsis “would mean as specifically as a pleading.” The court added that it did not “know what [defendant] pled guilty to or whether or not the factual basis included the punch to the eye or whatever” and that there was “no evidence in [the] record of what” the factual basis was. The court pointed out that there was no “evidence that [it could] use to come to a determination here.” After referring to Deputy Novak’s grand jury testimony as to the injury to Elaine’s eye having occurred in Kendall County, the court stated that “judging by the evidence that I have here, I don’t know what [defendant] pled guilty to in Kane County.” The court noted that, although defendant pled guilty to the charge as set forth in the complaint, there was “no evidence presented [as to] what he exactly pled guilty—whether it [was] the exact physical act that [the] State [had] charged” in Kendall County. The court ruled that there was “insufficient evidence presented” for it to “sustain [the] motion to dismiss” and denied it.

¶ 18 After denying the motion to dismiss, the trial court stated that it “imagine[d]” that the motion was “filed in the CF file.” The assistant State’s Attorney responded that he believed so. The court stated that it would not bar defendant from filing a motion to dismiss the charge in case No. 12-CM-77, but “as far as [case No. 12-CF-31] goes,” it was denying the motion to dismiss. Defense counsel sat silent during this discussion.

¶ 19 The trial court entered a written order that stated, in pertinent part, that defendant’s motion to dismiss “the felony case” was denied for the reasons stated on the record. The order was placed in both case files and contained both case numbers in its caption. Defendant filed a notice of appeal in each case, and we consolidated the cases on appeal.

¶ 20 **II. ANALYSIS**

¶ 21 On appeal, defendant contends that the trial court erred in denying his motion to dismiss, because he established that the prosecution in Kendall County was based on the same physical act as the one to which he pled guilty in Kane County. Additionally, he argues that his double jeopardy claim was not barred by section 3-4(d).¹

¶ 22 The State initially contends that appeal No. 2-12-1426 (case No. 12-CM-77) should be dismissed, because the trial court never ruled on the motion to dismiss as to that case. Defendant responds that the appeal should not be dismissed, because the court’s denial of the motion should be interpreted to apply to case No. 12-CM-77 and because the court mistakenly believed that the motion was not filed in that case.

¹ A defendant may appeal from the denial of a motion that was based on double jeopardy. Ill. S. Ct. R. 604(f) (eff. July 1, 2006); *People v. Griffith*, 404 Ill. App. 3d 1072, 1087 (2010) (Rule 604(f) allows for interlocutory review of the denial of a double jeopardy claim).

¶ 23 Here, there is no question that the trial court never ruled on defendant's motion to dismiss filed in case No. 12-CM-77. The report of proceedings clearly shows that the court considered the motion as having been filed only in case No. 12-CF-31. Moreover, the written order stated that the ruling applied in "the felony case." The fact that the order, which had both case numbers in its caption, was entered in both cases does not show that the court ruled on the motion in case No. 12-CM-77. To the extent that the written order could be read to conflict with the oral ruling, the oral pronouncement controls. See *People v. Roberson*, 401 Ill. App. 3d 758, 774 (2010). Thus, because the court never ruled on the motion in case No. 12-CM-77, there was no appealable order in that case.

¶ 24 Nor does the trial court's apparent mistake as to whether defendant had filed a motion to dismiss in case No. 12-CM-77 alter our conclusion. Any mistake by the court in that regard does not provide a basis for this court to correct the error. Defendant could have sought a correction of any mistake prior to filing his notice of appeal but failed to do so. There being no appealable order as to the motion to dismiss in case No. 12-CM-77, we dismiss appeal No. 2-12-1426.

¶ 25 We turn to defendant's contention that he established that the physical act underlying the charge to which he pled guilty in Kane County was the same act that provided the basis for the aggravated domestic battery charge in Kendall County. In that regard, he argues that the complaint, the written guilty plea order, and the sentencing order show that the physical act to which he pled guilty in Kane County included the blow to Elaine's right eye and, that, therefore, the charge in Kendall County, which was predicated on that same physical act, violated double jeopardy.

¶ 26 When reviewing the denial of a motion to dismiss based on double jeopardy, if the trial court made factual findings pertinent to the motion, we will not reverse them unless they are

against the manifest weight of the evidence. *People v. Campos*, 349 Ill. App. 3d 172, 175 (2009).² We will not reverse the trial court's decision on the merits of the motion absent an abuse of discretion. *Campos*, 349 Ill. App. 3d at 175.

¶ 27 The prohibition against double jeopardy is both constitutional and statutory. *People v. Dunnavan*, 381 Ill. App. 3d 514, 517 (2008) (citing U.S. Const. amends. V, XIV; Ill. Const. 1970, art. I, § 10; 720 ILCS 5/3-4(c)(1) (West 2004)). For purposes of constitutional double jeopardy, if the prosecutions are predicated on different acts, then the prohibition against double jeopardy is not violated. *People v. Sienkiewicz*, 208 Ill. 2d 1, 6 (2003). Similarly, for a statutory double jeopardy challenge to succeed, both prosecutions must be based on the same conduct. *People v. Porter*, 156 Ill. 2d 218, 222 (1993).

¶ 28 In deciding whether two prosecutions are premised on different physical acts, the Illinois Supreme Court has applied a six-factor test. *People v. Dinelli*, 217 Ill. 2d 387, 404 (2005). The six factors are: (1) whether the defendant's acts were separated by an intervening event; (2) the time between the defendant's acts; (3) the identity of the victim; (4) the similarity of the acts; (5) whether the acts occurred in the same location; and (6) the prosecutorial intent, as shown by the charging instrument. *Dinelli*, 217 Ill. 2d at 404.

¶ 29 In this case, defendant contends that the charging instrument, the order regarding his guilty plea, and the sentencing order show that he pled guilty to a charge that was based, in part, on the same act of striking Elaine in the right eye as charged in Kendall County. We disagree.

² We recognize that we have applied *de novo* review to an issue of whether a defendant's acts constituted one continuous course of conduct for double jeopardy purposes. See *People v. Brener*, 357 Ill. App. 3d 868, 870 (2005). Unlike in *Brener*, here the dispositive issue involved a factual question as to what physical act provided the basis for defendant's guilty plea.

Although the complaint in Kane County alleged that defendant struck Elaine in the arm, head, and eye, it alone did not show that defendant actually pled guilty to an act involving a blow to Elaine's eye. Defendant might have pled guilty to having struck her in the arm or head only. Even were we to assume that defendant pled guilty to striking Elaine in one of her eyes, there was no showing as to which eye or as to whether, if it was the right eye, the blow was the same as that charged in Kendall County. Without some proof of the precise factual basis for defendant's guilty plea, it was not possible to know whether defendant pled guilty to the same physical act for which he was charged in Kendall County.³

¶ 30 Defendant's reliance on the guilty plea order and the sentencing order is also of no avail. Neither of those orders was sufficient to show the exact physical act to which he pled guilty in Kane County. Although the guilty plea order stated that defendant pled guilty to the "original" charge, that did not mean that he pled guilty to the precise factual basis alleged in the original charge. As we have already pointed out, he might have pled guilty to an act that did not involve striking Elaine in either eye, let alone her right eye. For the same reason, the sentencing order does not help defendant.

¶ 31 Because defendant did not establish what the factual basis was for his guilty plea in Kane County, it was not possible for the trial court to decide whether the act to which he pled guilty was the same as the act for which he was charged in Kendall County.⁴ That being the case,

³ We note that, based on the materials submitted with defendant's motion to dismiss, it does not appear that defendant struck Elaine in the eye other than in the incident that occurred in Kendall County. If defendant's guilty plea in Kane County was based, even in part, on his having struck Elaine in the right eye while in Kendall County, it lacked a proper factual basis.

⁴ Absent any showing of the precise physical act to which defendant pled guilty in Kane

defendant did not establish that he was entitled to relief based on double jeopardy, and the court did not err in denying his motion to dismiss.⁵

¶ 32

III. CONCLUSION

¶ 33 For the reasons stated, we dismiss appeal No. 2-12-1426 and affirm the judgment of the circuit court of Kendall County in No. 2-12-1425.

¶ 34 No. 2-12-1426, Appeal dismissed.

¶ 35 No. 2-12-1425, Affirmed.

County, the trial court was unable to engage in any comparative analysis under the factors set forth in *Dinelli*.

⁵ Because we decide the case on this basis, we need not address the State's argument under section 3-4(d).