

**THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
LAKE COUNTY, OHIO**

STATE OF OHIO,	:	OPINION
Plaintiff-Appellee,	:	CASE NO. 2008-L-106
- vs -	:	
JAMES LESLIE DYE,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 07 CR 000443.

Judgment: Reversed; sentence vacated.

Charles E. Coulson, Lake County Prosecutor, and *Teri R. Daniel*, Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

Michael B. Bowler and *Matthew L. Rizzi, Jr.*, Blakemore, Meeker & Bowler Co., L.P.A., 19 North High Street, Akron, OH 44308 (For Defendant-Appellant).

COLLEEN MARY O'TOOLE, J.

{¶1} James Leslie Dye appeals from the judgment entries of the Lake County Court of Common Pleas, denying his motions to dismiss, and to apply the aggravated vehicular homicide statute existing in August 1999 to his case. Mr. Dye was eventually sentenced to a nine year term of imprisonment, less eighteen months previously served for aggravated vehicular assault. We reverse, and vacate Mr. Dye's sentence.

{¶2} August 10, 1999, Mr. Dye, operating his Dodge pickup while under suspension, struck thirteen year old Robbie Arnold as the latter retrieved his family's

mail at their home in Concord Township, Lake County, Ohio. Robbie was thrown some seventy-five feet, and suffered injuries leaving him a quadriplegic, perpetually dependent on a breathing machine. Peace officers responding to the scene found Mr. Dye extremely agitated, insisting Robbie had run in front of his truck. Mr. Dye smelled of alcoholic beverages, slurred his speech, and admitted to consuming seven beers. He was placed under arrest, but refused any breathalyzer test.

{¶3} September 28, 1999, Mr. Dye was indicted by the Lake County Grand Jury on two counts: Count One, aggravated vehicular assault, in violation of R.C. 2903.08, a fourth degree felony; and, Count Two, driving while under the influence of alcohol or drugs, in violation of R.C. 4511.19, a first degree misdemeanor. Count One carried three specifications: (1) that Mr. Dye was under the influence of alcohol or drugs during the commission of the offense; (2) that he was driving under suspension when he committed the offense; and, (3) that he had been convicted previously for driving under the influence. Mr. Dye pleaded not guilty.

{¶4} November 5, 1999, Mr. Dye, represented by counsel, appeared before the trial court to change his pleas. He entered a plea of guilty to Count One, aggravated vehicular assault, along with the first specification. At the state's behest, the trial court nolledd the remaining specifications to Count One. Mr. Dye further pleaded guilty to Count Two, driving under the influence. On the state's recommendation, Mr. Dye's bond was continued pending sentencing. Sentencing hearing was held December 9, 1999. The state asked for the maximum sentence, which Mr. Dye received: eighteen months for aggravated vehicular assault, and six months for driving under the influence, to be served concurrently.

{¶5} Mr. Dye was released from prison June 6, 2001.

{¶6} December 26, 2006, Robbie Arnold died from complications attendant upon his quadriplegia. December 27, 2006, an autopsy was performed on Robbie's remains by the Cuyahoga County Coroner, who ruled his death a homicide.

{¶7} July 6, 2007, the Lake County Grand Jury indicted Mr. Dye in three counts: Count 1, aggravated vehicular homicide, in violation of R.C. 2903.06(A)(1)(a), a first degree felony; Count 2, aggravated vehicular homicide, in violation of R.C. 2903.06(A)(2)(a), a second degree felony; and, Count 3, aggravated vehicular homicide, in violation of R.C. 2903.06(A), a third degree felony. The first two counts follow the law as it existed at Robbie's demise; the third, the law as it existed in 1999, when this tragedy commenced. August 10, 2007, Mr. Dye filed a written waiver of his right to appear at arraignment, and the trial court entered pleas of not guilty on his behalf.

{¶8} October 26, 2007, Mr. Dye moved the trial court to dismiss the indictment against him, on the authority of *State v. Carpenter* (1993), 68 Ohio St.3d 59, at the syllabus, which provides: "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." Mr. Dye maintained that his 1999 plea to aggravated vehicular homicide was a "negotiated" plea, and pointed out that the state failed to reserve the right to bring further charges against him.

{¶9} November 5, 2007, Mr. Dye filed a second motion, requesting that the trial court apply the aggravated vehicular homicide statute as it existed in 1999 to his case. As he pointed out, that statute has been extensively amended in the interim. Under the former statute, the maximum penalty was as a third degree felony; under the statute as it existed at Robbie's death, the crime may be punished as a first degree felony. Mr. Dye maintained that application of the later version of the statute to him would violate the constitutional bans on ex post facto laws and retroactive laws.

{¶10} The state responded to Mr. Dye's motions; and, hearing was held before the trial court. March 25, 2008, the trial court filed two judgment entries. By one, it held that *Carpenter* did not apply to Mr. Dye's situation, since he neither pleaded to a lesser offense, nor was there sufficient evidence that his 1999 plea was "negotiated." By the second, the trial court rejected Mr. Dye's request that the former version of the aggravated vehicular homicide statute be applied to his case, holding that the act of homicide did not occur until Robbie's death in 2006.

{¶11} May 5, 2008, Mr. Dye withdrew his plea of not guilty, and pleaded no contest to Count 1 of the indictment. The trial court found him guilty. Sentencing hearing was had June 9, 2008. In addition to nine years imprisonment, less time served for his prior aggravated vehicular assault conviction, Mr. Dye was ordered to pay restitution to Robbie's family.

{¶12} July 2, 2008, Mr. Dye timely noticed this appeal, assigning two errors:

{¶13} "[1.] The trial court committed reversible error in denying Mr. Dye's Motion to Dismiss the Indictment. ***

{¶14} “[2.] The trial court committed reversible error in applying the later enacted version of R.C. § 2903.06 to Mr. Dye, in violation of the Ex Post Facto Clauses and Retroactivity Clauses of the State and Federal Constitution (sic). ***”

{¶15} By his first assignment of error, Mr. Dye challenges the trial court’s denial of his motion to dismiss based on *Carpenter*, supra. In that case, Jeffrey Carpenter was indicted for felonious assault, due to a stabbing occurring September 6, 1984. *Id.* at 60. January 17, 1985, following negotiations between the parties, the state and Mr. Carpenter entered a plea deal, whereby he agreed to plead guilty to the lesser included offense of attempted felonious assault, while the state agreed to recommend a minimum sentence, and maximum fine. *Id.* The state was aware at the time that Mr. Carpenter’s victim was in a coma, and likely to die, but it made no reservation on the record for additional prosecution for homicide if that occurred. *Id.*

{¶16} The victim died March 28, 1986. *Carpenter* at 60. Mr. Carpenter was released from prison in September 1987. *Id.* In January 1988, Mr. Carpenter was indicted for murder. *Id.* He was granted motions to dismiss by the trial court three times; each time, the Tenth Appellate District reversed. *Id.* The Supreme Court of Ohio reversed the third holding of the Tenth District, ordering the indictment to be dismissed and Mr. Carpenter discharged. *Id.* at 62. After citing to *Santobello v. New York* (1971), 404 U.S. 257, 261, for the proposition that plea deals are a necessary part of the criminal justice system, the court quoted with approval the holding of the New Jersey Supreme Court in *State v. Thomas* (1972), 61 N.J. 314. In that case, the defendant was charged with robbery, assault with intent to rob, and atrocious assault and battery, after he knocked his victim down, and took her purse. *Carpenter* at 61. The defendant

pleaded guilty to atrocious assault and battery, while the remaining charges were dismissed. *Id.* The victim died, and the defendant was indicted for murder. *Id.* The New Jersey Supreme Court directed that the indictment be dismissed, holding, in relevant part:

{¶17} “From an examination of the record (***) we are convinced that the defendant anticipated that by pleading guilty to atrocious assault and battery, and then serving whatever sentence might be imposed, he was terminating the incident and could not thereafter be called upon to account further. We think, under all of the circumstances, that this expectation was entirely reasonable and justified.” *Carpenter* at 61, quoting *Thomas* at 323.

{¶18} The Supreme Court of Ohio went on to hold:

{¶19} “In the present case, the state had actual knowledge of the alleged victim’s condition at the time of the plea agreement and knew death was possible. Nevertheless, the state accepted a plea in which it agreed to reduce the charge of felonious assault to attempted felonious assault and recommend the imposition of a minimum sentence of two to ten years. By accepting a plea to a lesser included charge, the state obtained a definite prison term for the defendant and avoided the uncertainties of trial. In exchange, the appellant anticipated that by pleading guilty to attempted felonious assault, and giving up rights which may have resulted in his acquittal, he was terminating the incident and could not be called on to account further on any charges regarding this incident. We think this expectation was entirely reasonable and justified and that the prosecutor was aware of this expectation. Therefore, if the state wanted to

reserve its right to bring further charges later, should the victim die, the state should have made such a reservation a part of the record.” *Carpenter* at 61-62.

{¶20} Mr. Dye contends his case is on all fours with that presented in *Carpenter*. He notes that, pursuant to the syllabus of *Carpenter*, he pleaded guilty in 1999 to a lesser offense than homicide – aggravated vehicular assault, and was sentenced accordingly.¹ He cites to a report dated June 5, 2008, from Dr. Frank P. Miller III, M.D., the Cuyahoga County Coroner, which is part of the Joint Stipulated Factual Statement in this case. In the report, Dr. Miller states that it was foreseeable that Robbie Arnold would die of complications attendant upon his quadriplegia. Mr. Dye further notes that the state failed to reserve its right to prosecute him for homicide on the record at the time of his first plea.

{¶21} Finally, Mr. Dye contends that his 1999 plea was clearly a “negotiated” plea within the meaning of *Carpenter*. In so urging, he notes that the state was relieved from the uncertainties of trying him; that the state successfully moved the trial court to nolle prosequi the second and third specifications attendant upon the count of aggravated vehicular assault; and, that the state supported the continuance of his bond pending sentencing. In this regards, he cites to the opinion of this court in *State v. Wendt* (Dec. 3, 1993), 11th Dist. No. 93-P-0042, 1993 Ohio App. LEXIS 5767, for the proposition that agreement by the state to urge continuance of bond indicates the

1. We note that both the state and the trial court appear to have assumed that the “lesser offense” referenced in *Carpenter* must be a lesser included offense of the crime charged. Mr. Carpenter pleaded to attempted felonious assault, which is a lesser included offense of felonious assault. *Id.* at 60. However, the syllabus in *Carpenter* provides that the state may not indict for murder, on the death of a victim, if the defendant has previously pleaded guilty to “a lesser offense.” Thus, the fact that, in this case, the trial court only nolle two lesser specifications on Mr. Dye’s aggravated vehicular assault charge, and that he pleaded guilty to the most serious form of aggravated vehicular assault, does not seem pertinent. Certainly aggravated vehicular assault, in any form, is a lesser offense than homicide.

existence of a negotiated plea.

{¶22} We review a trial court's decision regarding whether to grant or deny a motion to dismiss de novo. *State v. Palivoda*, 11th Dist. No. 2006-A-0019, 2006-Ohio-6494, at ¶4. That is, we review the record and applicable law without deference to the judgment of the trial court. Having conducted that review, we find that this case falls within the parameter of *Carpenter*, and that the motion to dismiss should have been granted.

{¶23} The Supreme Court of Ohio has given some additional insight to its analysis in *Carpenter* in the case of *State v. Zima*, 102 Ohio St.3d 61, 2004-Ohio-1807. In *Zima*, the Supreme Court of Ohio pointed out that *Carpenter* represented “a synthesis of contract and criminal law” as applied to a particular set of facts. *Zima* at ¶11. The *Zima* Court noted the foundation of the *Carpenter* decision was “that plea agreements are a necessary and desirable part of the administration of criminal justice and, therefore, “must be attended by safeguards to insure the defendant what is reasonably due in the circumstances.”” *Id.*, citing *Carpenter*, quoting *Santobello* at 262. While the trial court noted this passage from *Zima*, there is additional analysis that should guide us in the instant case.

{¶24} The *Zima* case found that if the defendant reasonably anticipated that in giving up his right to a trial which may have resulted in his acquittal, the case should be concluded and he should not be called on to further account for any charges from that incident. *Id.* at ¶14. The *Zima* Court noted that the *Carpenter* Court recognized essentially an “implied promise” not to prosecute the defendant for further offenses that

might arise as a result of the defendant's conduct. *Id.* at ¶11. In line with this analysis, the *Zima* Court, citing *Carpenter* and *Thomas*, *supra*, points out the following:

{¶25} “Critically, in both *Carpenter* and *Thomas*, the defendant's expectation that his guilty plea would terminate the incident was inherently justified because the prosecutor and the court had jurisdiction over all the charges, both actual and potential, and because the negotiated guilty plea included the dismissal of all pending charges. In the absence of these or equivalent circumstances, however, it would be exceedingly difficult to sustain a defendant's belief that no further charges will be brought or prosecuted.” *Zima* at ¶12.

{¶26} Therefore, under the facts of this case, the issues are (1) whether Mr. Dye reasonably believed his plea would end the matter, (2) whether he gave up substantial rights, and 3) whether the state received or gave up something in the plea negotiation process.

{¶27} It was the responsibility of the state, if they had this knowledge and intention to prosecute subsequent to the plea, to preserve potential future prosecution on the record at the 1999 plea hearing. As the Supreme Court of Ohio stated, “[t]he essence of [the *Carpenter*] holding is to require the state ‘to reserve its right to file additional charges based upon the contingency of the death of the alleged victim.’” *Zima* at ¶9, quoting *Carpenter* at 61. This requirement ensures both parties to the plea agreement, as well as the trial court, have the same understanding when the plea is entered. Alternatively, there may be cases in which the state, in an attempt to secure a conviction, could intentionally forfeit its right to pursue additional charges.

{¶28} In this case, unlike in *Zima*, the prosecutor and the common pleas court were the same at all stages. The state professes there was no plea “agreement,” since Mr. Dye, at the time of his 1999 plea, really did not receive anything. He pled to both counts in the indictment, and the lesser two of the three specifications were dismissed. The state also argues there was no agreement to give any favorable recommendation concerning sentencing and, therefore, the state gave up nothing at the time of the 1999 plea. By accepting the plea to aggravated vehicular assault without reserving its right to file additional charges upon the contingent death of the victim, the state gave up that right. In addition, as the court in *Zima* pointed out, the most critical thing the defendant did was give up his right to a trial at which he could have been acquitted. In addition, when the defendant waives his rights and the state does not have the risk of going to trial, there is always a benefit to the state.

{¶29} To understand the benefit given up by Dye, one need look no further than the plea hearing itself. The law demands an extensive colloquy between the court and the defendant prior to taking a plea, to ensure the defendant understands what he is giving up by entering the plea. Crim.R. 11(C). Indeed, this colloquy occurred at Dye’s plea hearing before visiting Judge Robert Ford in 1999. The list is long, but includes the right to have the state prove each and every element of the offense beyond a reasonable doubt and to have the issues resolved by a jury, the right to confront and cross examine witnesses, the right to testify or not to testify, the right to counsel if you cannot afford one, and the right to compel the appearance of witnesses. Crim.R. 11(C). To suggest that there was no consideration for Dye’s plea when he waived these rights is to ignore the dictate of *Zima* and *Carpenter*. Consideration is a benefit or detriment to

one party or the other. We cannot ignore the critical rights given up by the defendant and the significant benefit to the state.

{¶30} This combination of benefit to the state and detriment to Dye is sufficient consideration to bind any agreement. The devastating tragedy in this case is difficult to comprehend. However, under the facts, this result comports with the precedent established by both the Ohio and United States Supreme Courts.

{¶31} The first assignment of error has merit.

{¶32} We decline to reach the second assignment of error, finding it moot.

{¶33} The court respectfully acknowledges the superior quality of the briefs submitted by both parties on this appeal. They are models of lucid argumentation.

{¶34} The judgment of the Lake County Court of Common Pleas is reversed, and Dye's sentence is vacated.

{¶35} It is the further order of this court that appellee is assessed costs herein taxed.

{¶36} The court finds there were reasonable grounds for this appeal.

DIANE V. GRENDALL, J.,

TIMOTHY P. CANNON, J.,

concur.