

[Cite as *State v. Nihiser*, 2004-Ohio-4067.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
HOCKING COUNTY

State of Ohio,	:	
	:	
Plaintiff-Appellant,	:	
	:	Case No. 03CA21
v.	:	
	:	<u>DECISION AND</u>
Michael D. Nihiser,	:	<u>JUDGMENT ENTRY</u>
	:	
Defendant-Appellee.	:	FILE STAMPED DATE: 8-02-04

APPEARANCES:

David A. Sams, Assistant Hocking County Prosecutor, Logan, Ohio, for appellant.

John P. Lavelle, Athens, Ohio, for appellee.

Kline, P.J.

{¶1} The State of Ohio appeals the judgment of the Hocking County Municipal Court dismissing the charges against Michael D. Nihiser. Because we find that the Ohio Rules of Criminal Procedure do not provide for summary judgment on an indictment prior to trial, and that the trial court abused its discretion by reviewing the sufficiency of the State's evidence prior to trial, we

sustain the State's sole assignment of error, reverse the judgment of the trial court, and remand this cause for further proceedings consistent with this decision.

I.

{¶2} The State alleges that on September 30, 2002, Nihiser entered city owned property known as Mingo Park, removed trees, and began construction of a road without the permission of the appropriate authorities. As a result, the State charged Nihiser with: (1) criminal damaging in violation of R.C. 2909.06(A)(1), a second degree misdemeanor; (2) criminal mischief in violation of 2909.07(A)(1), a third degree misdemeanor; and (3) criminal trespass in violation of 2911.21(A)(2), a fourth degree misdemeanor.

{¶3} The judge originally assigned to the case recused himself, and a visiting judge was assigned to hear the case. Nihiser entered a not guilty plea and filed a jury demand. Thereafter, Nihiser moved the court to dismiss the charges, alleging that he acted with the consent of the City Service Director. The State filed a memorandum contra, alleging that, because the City of Logan established a recreation board pursuant to R.C. 755.14(A), the Service Director for the City of Logan had no authority over city parks. Accordingly, the State claimed that the

City Service Director could not give Nihiser valid authority to enter Mingo Park and cut down trees.

{¶4} The trial court conducted a hearing upon Nihiser's motion to dismiss on March 18, 2003. On October 23, 2003, the trial court issued a decision, wherein the court found that the City Service Director authorized the modifications to the park on September 19, 2002. Additionally, the trial court found that the City Service Director did not give Nihiser notice to cease and desist when he met with Nihiser on September 27, 2002. The trial court further found that the City did not give Nihiser notice to cease and desist until October 1, 2002, after the trees were felled. The trial court also found that the State failed to produce any evidence tending to prove that the City had released the property in question to the authority of the Recreation Board. Accordingly, the trial court dismissed "both counts" in this matter.¹

{¶5} The State appeals raising the following assignment of error: "THE TRIAL COURT ERRED IN DISMISSING A CRIMINAL CHARGES (*sic*) PRIOR TO TRIAL (October 23rd, 2003 Decision of the Trial Court)."

II.

¹ The record reflects that the State originally charged Nihiser with three separate misdemeanors. Therefore, we presume that one of the charges remains pending.

{¶6} The State contends that the trial court erred in granting Nihiser's motion to dismiss. The State argues that it was inappropriate for the trial court to look beyond the face of the complaints to determine whether Nihiser's pre-trial motion to dismiss had merit.

{¶7} In support of its argument, the State relies upon the Ninth District Court of Appeals' decision in *State v. Tipton* (1999), 135 Ohio App.3d 227, discretionary appeal not allowed, (2000), 88 Ohio St.3d 1416. There, the Ninth District found that when a defendant in a criminal action files a motion to dismiss which goes beyond the face of the indictment or complaint, he, essentially, moves the court for summary judgment. *Id.* at 228. The *Tipton* court found that the Ohio Rules of Criminal Procedure do not provide for summary judgment on an indictment prior to trial. *Id.*, citing *State v. McNamee* (1984), 17 Ohio App.3d 175. Instead, where a claim goes beyond the face of the indictment or complaint, the *Tipton* court found that the rules contemplate the presentation of the State's evidence at trial, followed by a motion for acquittal. *Id.*; Crim.R. 29(A).

{¶8} Here, Nihiser filed a motion to dismiss, claiming, in essence, that the City of Logan consented to his actions. Therefore, Nihiser argues that his conduct in entering the park and cutting down trees was not criminal.

{¶9} “A motion to dismiss charges in an indictment [or complaint] tests the sufficiency of the indictment [or complaint], without regard to the quantity or quality of evidence that may be produced by either the state or the defendant.” *State v. Patterson* (1989), 63 Ohio App.3d 91, 95. In order to test the sufficiency of the indictment or complaint, the proper query is whether the allegations contained in the indictment or complaint make out offenses under Ohio criminal law. *Id.* If they do, it is premature for the trial court to determine, in advance of trial, whether the State could satisfy its burden of proof with respect to those charges. *Id.*

{¶10} Nihiser’s motion did not challenge the sufficiency of the complaints. Instead, it required the trial court to look beyond the face of the complaints to consider evidence and testimony regarding Nihiser’s communications with the City Service Director, and the authority of the Service Director and the City Recreation Board. The issue of whether Nihiser actually had the consent of the appropriate City official or board goes beyond the face of the complaints, and inappropriately attempts to test the weight or sufficiency of the State’s evidence prior to trial. See *State v. O’Neal* (1996), 114 Ohio App.3d 335, 336; *State v. Varner* (1991), 81 Ohio App.3d 85, 86; *McNamee*, *supra* at 176; *Tipton*, *supra* at 229; see, also, Crim.R. 12(C) (allowing only pretrial motions capable of determination *without* the trial of

the general issue). Therefore, the trial court could not properly dismiss the charges against Nihiser pursuant to Crim.R. 12(C).

{¶11} However, Nihiser argues that the trial court properly dismissed the charges against him pursuant to the Ohio Supreme Court's interpretation of Crim.R. 48(B) in *State v. Busch* (1996), 76 Ohio St.3d 613. There, the Supreme Court held that a trial court has the authority to dismiss criminal charges before trial, provided that it states its findings of fact and reasons for dismissal on the record, when the dismissal is in the interest of justice. Nihiser further argues that, because the State failed to file either a transcript of the proceedings below, or an App.R. 9(C) statement of evidence, the State has waived any argument that anything improper occurred at the hearing below.

{¶12} Crim.R. 48(B) provides for the dismissal of a criminal case by the court. It 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.” Here, although the State has not provided a transcript or App.R. 9(C) statement of the proceedings below, we note that the trial court has plainly stated the reasons supporting its decision in its journalized judgment entry.² It is a well settled rule of law that a court speaks only through its

² Although the trial court's judgment is captioned as a “DECISION” rather than a “JUDGMENT ENTRY,” we have determined that it discloses the present intention of the trial court to terminate the action and contains a sufficiently

journal entries. *Kaine v. Marion Prison Warden* (2000), 88 Ohio St.3d 454, 455.

Therefore, we may review the trial court's reasons for dismissal as stated in its journal entry.

{¶13} In *Busch*, the Supreme Court reviewed the trial court's dismissal of domestic violence charges where the victim, and sole prosecution witness, did not wish the case to proceed. The *Busch* Court noted that Crim.R. 48 "does not limit the reasons for which a trial judge might dismiss a case * * * ." *Busch* at 615.

Therefore, the Court concluded that a trial court could dismiss a case pursuant to Crim.R. 48(B) if the dismissal "serves the interests of justice." *Id.* The *Busch* court concluded that the trial court did not abuse its discretion in dismissing the domestic violence charges where: the charges were related to an isolated incident of domestic violence, the record contained no evidence against the defendant other than the victim's testimony, the court determined the defendant was not coercing the victim, and the court made sure the couple was in counseling.

{¶14} The *Busch* Court concluded that the trial court's dismissal served the interests of justice in that it preserved court resources that would only be wasted by impaneling a jury in a case where the sole witness did not want the case to go forward. Because the victim and the defendant wished to continue counseling in

definitive formal statement indicating such an intention. Accordingly, in our February 25, 2004 Entry, we found the trial court's "DECISION" to be a final appealable order. Furthermore, the record reflects that the trial court journalized its "DECISION" in Journal 47, pages 339-340.

an effort to salvage their personal relationship and family life, the Court found that “[i]n this case, the trial court used its judicial power to do its best with a matter which no longer seemed to fit in the court system.”

{¶15} In *Busch*, the Supreme Court broadly stated that a trial court may dismiss a case pursuant to Crim.R. 48(B) if a dismissal “serves the interests of justice.” However, in her dissent, Justice Cook noted that other courts have exercised inherent power to dismiss cases over the objection of the State for “(1) want of prosecution, (2) regulation of the practice before the court, such as dismissal for prosecutorial misconduct, and (3) preservation of the defendant’s statutory and constitutional rights, including speedy trial and double jeopardy issues. See, e.g., *State v. Hancock* (1990), 67 Ohio App.3d 328, 586 N.E. 2d 1192; [*State v.*] *Sutton* [(1979), 64 Ohio App.2d 105]; *State v. Long* (May 8, 1979), Jefferson App. No. 1290, unreported.”

{¶16} Here, after a hearing on Nihiser’s motion to dismiss, the trial court found that the State failed to satisfy its burden of proving that Nihiser’s actions were without the consent of the proper governmental officials. This issue goes to an element of the charged crime, which the court should determine at trial, not pursuant to a motion to dismiss. We find that many of the concerns addressed by the Supreme Court in *Busch* are unique to domestic violence proceedings. Without

the victim to testify in domestic violence proceedings, there may be little or no evidence available to support the prosecution's case. Additionally, in the context of a domestic violence proceeding, the interests of justice may encompass the social objective of maintaining a family unit in addition to the punishment and deterrence of crime. Further, we note that the cases cited by Justice Cook as proper uses of Civ.R. 48(B), unlike the situations involved here and in *Tipton*, did not require the trial court to analyze the sufficiency of the State's evidence before trial.

{¶17} Accordingly, we find that the trial court abused its discretion in dismissing the charges against Nihiser based solely upon the sufficiency of the State's evidence presented at the hearing on Nihiser's motion to dismiss. We, therefore, sustain the State's sole assignment of error and remand this cause for further proceedings consistent with this decision.

JUDGMENT REVERSED
AND CAUSE REMANDED.

Harsha, J., Concurs in Judgment and Opinion.
Abele, J., Dissents with Dissenting Opinion.

Abele, J., Dissents with Dissenting Opinion.

{¶18} In State v. Busch (Oct. 9, 1996), 76 Ohio St.3d 613, 669 N.E.2d 1125, the Ohio Supreme Court, in a departure from long-standing Ohio law, held that Crim.R. 48(B) provides Ohio judges with the broad authority to dismiss a criminal case if the dismissal serves the "interest of justice." I note that Justice Cook's dissenting opinion asserts that courts do not have a broad, general inherent power to reject the judicial process as a means of determining controversies, over the objection of a party to a case. Rather, Justice Cook asserts that courts should continue to dismiss criminal cases over the objection of party only for specific and well-defined reasons, including (1) want of prosecution; (2) regulation of the practice before the court; and (3) preservation of the defendant's statutory and constitutional rights, including speedy trial and double jeopardy issues. See State v. Hancock (1990), 67 Ohio App.3d 328, 596 N.E.2d 1192.

{¶19} Although I personally agree with Justice Cook's now minority view, I am obligated to follow Ohio Supreme Court decisions. Thus, I believe that in the instant case we must defer to the trial court's judgment. The trial court conducted a lengthy evidentiary hearing and issued a detailed judgment. Because the trial court is, pursuant to Busch, vested with this broad authority, I cannot say that the trial court's decision does not serve the "interest of justice." Again, Busch now provides courts with this broad authority.

{¶20} Further, I disagree with the view that this authority only applies in domestic violence cases in which the complaining witness refuses to testify.

Although I recognize the court's syllabus in Busch contained this language, the opinion's language is much broader and, I believe, now provides courts with this expanded authority. In other words, I see very little in the opinion to limit a court's exercise of its authority under Crim.R. 48(B).

{¶21} Accordingly, based upon the foregoing reasons I would affirm the trial court's judgment.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE REVERSED and the cause remanded to the trial court for further proceedings consistent with this opinion and that costs herein be taxed to the appellee.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Hocking County Municipal Court to carry this judgment into execution.

Any stay previously granted by this Court is hereby terminated as the date of this Entry.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

For the Court

BY: _____
Roger L. Kline, Presiding Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.