STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1259

State of Minnesota,
Appellant,

vs.

Austin Richard Blount,
Respondent.

Filed March 3, 2009
Reversed
Connolly, Judge
Dissenting, Ross, Judge

Washington County District Court
File No. 82CG-VB-08-2940

Greg T. Kryzer, Frederic W. Knaak, Knaak & Kantrud, P.A., 3500 Willow Lake Blvd., Suite 800, Vadnais Heights, MN 55110; and

Lori Swanson, Attorney General, 445 Minnesota Street, Suite 1800, St. Paul, MN 55101 (for appellant)

Benjamin Myers, Dejvongsa, Myers & Assoc., LLC, 2217 Nicollet Avenue South, Suite 100, Minneapolis, MN 55404 (for respondent)

Considered and decided by Bjorkman, Presiding Judge; Ross, Judge; and Connolly, Judge.

U N P U B L I S H E D O P I N I O N

CONNOLLY, Judge

Appellant argues that the district court erred by refusing to allow the state to dismiss the case under Minnesota Rule of Criminal Procedure 30.01 and then finding the defendant not guilty without hearing any evidence. We agree and reverse the case for dismissal in accordance with Rule 30.01.

FACTS

On January 18, 2008, Officer Allan Olson of the Newport Police Department cited respondent Austin Richard Blount for speeding. This matter was originally scheduled for a court trial on June 24, 2008. However, on the day before the trial, respondent requested a continuance. The state objected to the continuance but the district court granted the continuance and the court trial was rescheduled to July 24, 2008. The state notified Officer Olson about the new trial date and requested his appearance.

Officer Olson failed to appear on the rescheduled trial date. Because of Officer Olson's absence, the state requested a continuance. Respondent objected to the continuance, and the district court denied the state's request for a continuance.

The following is the complete exchange between counsel and the district court on the day in question:

> THE COURT: We have the case of State of Minnesota versus Austin Richard Blount. Mr. Kryzer appears. Also appearing—?
> DEFENSE ATTORNEY: Benjamin Myers, M-Y-E-R-S. Mr. Blount is present in the courtroom and we have two additional witnesses.
> PROSECUTOR: The state is going to be asking for a continuance. I have attempted to reach the officer in this case. I have not been able to reach him today. I did provide him with notice. This case kind of presents a little

bit of different fact situation. The state was ready to go on June 24, 2008, when on the day before we received a phone call from Mr. Myers requesting a continuance in this case. We objected to it at that time and in an ex parte letter, Mr. Myers did not inform the court—
DEFENSE ATTORNEY: I am going to object. May we approach?
THE COURT: I have the letter.
(Off-the-record discussion held.)
THE COURT: The court continued the prior setting at the request of Mr. Myers indicating that this matter was set for the last week that the Cottage Grove court was open. The calendars were set extremely heavy, and the court had taken a position to grant all continuances made in that last week in Cottage Grove. So the court granted the continuance earlier.

Mr. Kryzer, you are requesting a continuance as I understand, at this time because you are unable to reach your witness who knew about this because you informed him, but you haven't been able to track him down?
PROSECUTOR: I have not, Your Honor.
THE COURT: Your position, Mr. Myers?
DEFENSE ATTORNEY: At this point in time our position we move the court to dismiss this action. There is no reason the police can't be here. There had been an earlier notification of this court date. We have all these witnesses who have taken time off from work. Again, there are two witnesses, including the defendant, who is set to testify today. We move this matter be dismissed with prejudice.
PROSECUTOR: If the court is not willing to grant a continuance, the state will be dismissing and reserving the right to recharge.
DEFENSE ATTORNEY: I'm not sure that the state has that right. I have to research that issue.
THE COURT: I don't know the answer either.
DEFENSE ATTORNEY: Well, the other option would be to grant a continuance but allow costs for the witnesses who are present today. If they missed work or there are other expenses, the state would have to pay as a result of the continuance.
PROSECUTOR: Your Honor, I believe that is what the subpoena fees are for if the defendant subpoenaed them.
THE COURT: But if they are here and they have to come back and already missed work, that would be an expense that would be appropriate to pay. I don't know that you want to do that.
PROSECUTOR: I don't, Your Honor. In fact, if the court is willing to do that, we will dismiss without prejudice for lack of prosecution and reserve our right to recharge because the defendant has not been subjected to jeopardy at this point.
DEFENSE ATTORNEY: Your Honor, this is a petty misdemeanor offense. Typically jeopardy attaches on misdemeanor, gross misdemeanor or felony

matters. As to the point of impaneling a jury, this situation would not be jury impaneled; it would simply be Your Honor hearing the facts of the case. Your Honor is present. Counsel is present. Witnesses are present. I would argue that jeopardy has, in fact, attached. At this point I move to dismiss it, again, with prejudice.
THE COURT: I don't think this is a thing where you get to retry it. Today is the day for trial. If you can't call a witness, I find him not guilty.
PROSECUTOR: State would move to dismiss. We will recharge.
THE COURT: I don't know that you can do that, not under these fact situations.
PROSECUTOR: My understanding, Your Honor, is that jeopardy attaches as soon as the first witness is sworn in.
THE COURT: Well, he's not agreeing to the continuance so call your first witness. That is the situation we get in. That is how I don't think you can recharge on the day of trial. Now if this was a preliminary appearance, you could. So to avoid further—
PROSECUTOR: I'm dismissing the case before it's even being called.
THE COURT: Well, not exactly because I called it. You asked for a continuance. That is denied.
DEFENSE ATTORNEY: Just so we are clear, Your Honor. The court is not granting a continuance?
THE COURT: Correct.
DEFENSE ATTORNEY: My client has pled not guilty. My understanding the state has no witnesses to call. So based on that, Your Honor, I ask this matter be dismissed, or in the alternative the court find Mr. Blount not guilty. For my client this will keep it clean.
THE COURT: I agree. I think it is important we try to wrap this up so we don't have to continue to go through this.
DEFENSE ATTORNEY: I appreciate that, Your Honor.
THE COURT: My view of this situation is that the state has requested a continuance as a result of being unable to reach their witness. The defense has the defendant and two additional witnesses present. The state is unwilling to pay for expenses of those witnesses for a continuance to a new date. Under those circumstances I'm going to deny the request for a continuance.

So the court is ready for trial. As I understand it, Mr. Kryzer, there are no witnesses you have available to prove this case, so at this time I'm going to find Mr. Blount not guilty.
DEFENSE ATTORNEY: Thank you, Your Honor.
PROSECUTOR: Thank you, Your Honor.

This appeal follows.

D E C I S I O N

I. This court has jurisdiction to hear this appeal.

The state argues that we have jurisdiction because the district court's not-guilty verdict had a critical impact on its ability to prosecute respondent. "Critical impact is a threshold showing that must be made in order for an appellate court to have jurisdiction." *State v. Baxter*, 686 N.W.2d 846, 850 (Minn. App. 2004). "The state satisfies the critical-impact test when the district court's order is based on an interpretation of a rule that bars further prosecution of a defendant." *Id.*

This court questioned jurisdiction on its own accord. Generally, an acquittal bars appeal under the double-jeopardy clause. *State v. Abraham*, 335 N.W.2d 745, 748 (Minn. 1983). Therefore, the district court's not-guilty verdict would normally divest this court of jurisdiction to hear the appeal. But "what constitutes an 'acquittal' is not to be controlled by the form of the judge's action." *State v. Gurske*, 395 N.W.2d 353, 356 (Minn. 1986). Jeopardy attaches in a court trial when the first witness is sworn. *State v. Bouwman*, 354 N.W.2d 1, 7 (Minn. 1984). In this case, no witnesses were sworn. In a special term order, this court stated:

> In a court trial, jeopardy attaches when the first witness is sworn. *State v. Bouwman*, 354 N.W.2d 1, 7 (Minn. 1984). The parties agree that no witness was ever sworn. The lack of a witness swearing-in may have been due to the unavailability of the police officer who was apparently the state's only witness. But respondent presents no authority for departing from the bright-line rule that a witness must be sworn for jeopardy to attach in a bench trial. *Cf. People v. Grace*, 671 N.W.2d 554, 557 (Mich. App. 2003) (holding that when prosecutor's request for adjournment before trial was denied but prosecutor had other witnesses available to call

> and the jury had not been selected, jeopardy had not attached).
>
> The district court, after noting that the state had no witnesses available to call, found respondent "not guilty." But "what constitutes an 'acquittal' is not to be controlled by the form of the judge's action." *State v. Gurske*, 395 N.W.2d 353, 356 (Minn. 1986). Jeopardy had not attached, and the "not guilty" finding was prompted by the court's denial of a continuance or a dismissal without prejudice. Therefore, we cannot construe the district court's finding of "not guilty" as an acquittal that, under principles of double jeopardy, would bar this appeal.

State v. Blount, No. A08-1259 (Minn. App. Oct. 7, 2008) (order).

The district court, although not ruling on the motion to dismiss this case with prejudice as requested by the defense, also did not allow the state to dismiss its own case and by its not guilty verdict effectively barred the state from recharging. Therefore, the district court's order has critical impact. An acquittal generally bars further prosecution and appeals under the double jeopardy doctrine. But because jeopardy did not attach, this court has jurisdiction to hear this appeal.

II. The district court erred by not permitting the state to dismiss the case and finding the defendant not guilty without hearing any evidence.

The state argues that the district court erred by refusing to allow it to dismiss the complaint under Minnesota Rule of Criminal Procedure 30.01. "The interpretation of the rules of criminal procedure is a question of law subject to de novo review." *Ford v. State*, 690 N.W.2d 706, 712 (Minn. 2005).

Rule 30.01 states: "The prosecuting attorney may in writing or on the record, stating the reasons therefore, including the satisfactory completion of a pretrial diversion program, dismiss the complaint or tab charge without leave of court and an indictment

with leave of court." "A dismissal under rule 30.01 is without prejudice, and the state, provided it is not acting in bad faith, may later reindict based on the same or similar charges." *State v. Couture*, 587 N.W.2d 849, 853 (Minn. App. 1999) (upholding prosecutor's dismissal of original complaint for driving after cancellation and no proof of insurance under rule 30.01, and later recharging defendant with driving while impaired), *review denied* (Minn. Apr. 20, 1999) (quotation omitted).

The plain language of Rule 30.01 allows the state to dismiss a complaint without leave of court. "Generally, a prosecutor has broad discretion in the exercise of the charging function and ordinarily, under the separation-of-powers doctrine, a court should not interfere with the prosecutor's exercise of that discretion." *State v. Foss*, 556 N.W.2d 540, 540 (Minn. 1996). The issue of whether or not the state is able to recharge the case at a later date was irrelevant at the time of this petty-misdemeanor trial. Therefore, the district court erred by refusing to allow the state to dismiss this case.

This does not mean that the state has an unqualified right to recharge the case and proceed to trial. If and when the state proceeds further, respondent could request and the district court could assess the costs associated with the defendant being ready for trial on July 24, 2008 when the state was not. Also, if there had been any evidence of prosecutorial misconduct, respondent could challenge the refiling of any charges at the first appearance on the reissued complaint. *See generally State v. Kasper*, 411 N.W.2d 182, 184 (Minn. 1987) (discussing impact of dismissal and refiling on speedy trial calculation). At that point any bad-faith or undue-delay allegations against the state would be ripe for consideration. *See Couture*, 587 N.W.2d at 853 ("A dismissal under

rule 30.01 is without prejudice, and the state, *provided it is not acting in bad faith*, may later reindict based on the same or similar charges.") (emphasis added) (quotation omitted).

Alternatively, the district court could have dismissed the action pursuant to Rule 30.02 of the Minnesota Rules of Criminal Procedure. The rule states: "If there is unnecessary delay by the prosecution in bringing a defendant to trial, the court may dismiss the complaint, indictment or tab charge." Minn. R. Crim. P. 30.02. However, the court did not take this action. In fact, it did not even rule on respondent's motion to dismiss the case with prejudice. Instead, it found respondent not guilty without hearing any testimony or considering any evidence which would ordinarily bar any retrial of the respondent but for the record before us.[1] This is the one thing it could not do and that is why we must reverse.

Reversed.

[1] To suggest that the district court could find respondent not guilty because the state had no evidence to present ignores the fact that the state asked for a continuance and then tried to dismiss the case pursuant to Rule 30.01.

ROSS, Judge (dissenting)

I respectfully dissent from the majority decision. Rule 30.01 of the Rules of Criminal Procedure is not intended to give the prosecutor the right to effectuate a do-it-yourself continuance order. It is the inescapable conclusion here that the prosecutor attempted to use the rule solely in that manner.

The prosecutor, defendant, defense attorney, and defense witnesses were all present in the courtroom after the district court called the case for trial. Everyone appeared at the appointed time except for the state's key witness—the charging police officer to whom the state had given notice of the trial. After the prosecutor requested a continuance and the court stated its intention to deny the motion, the prosecutor announced his plan to use rule 30.01 to obtain on his own what the court would deny stating, "If the court is not willing to grant a continuance, the state will be dismissing [the complaint] and reserving the right to recharge." The prosecutor may just as well have said, "Judge, either you enter the order for continuance or the state will enter its own order for continuance by way of a rule-30 dismissal."

It seems clear to me that this attempted use of rule 30.01 is "a clear act of bad faith," as described by the United States Court of Appeals for the Ninth Circuit in a case cited approvingly by our supreme court. In *United States v. Hayden*, the Ninth Circuit interpreted a similar federal rule and noted, "Of course, had the district judge concluded and specifically found that the government utilized the Rule 48(a) motion as a pretext to bypass his denial of the continuance, a clear act of bad faith, he could have reversed his earlier Rule 48(a) ruling." 860 F.2d 1483, 1488–89 (9th Cir. 1988) (cited approvingly by

State v. Pettee, 538 N.W.2d 126, 131 n.5 (Minn. 1995), for the proposition that rule 30.01 "allows the state, provided it is not acting in bad faith, to voluntarily dismiss an indictment without prejudice and later to reindict based on the same or similar charges").

I would affirm the district court's decision in order to support the trial judge's effort to prevent the prosecutor from stiffing the court's discretion to determine the prosecutor's day-of-trial motion to continue. I do not think the rule should be read without regard to related caselaw and a statute bearing on the district court's authority to manage the prosecution of a case that is, like this one, set and called for trial.

On its face, the rule states only that the state may dismiss a complaint without leave of the court; it does not expressly prohibit the district court from intervening to avoid a perceived injustice or unfairness to the defendant. The rule also requires the prosecutor to state on the record his reasons for the dismissal (something that did not occur here). There would be no need to require the prosecutor to do so if the rule prohibited the district court from exercising its authority to reject bad-faith attempts to dismiss.

Settled caselaw and a parallel statutory pronouncement empower the district court with the discretion and authority to decide whether a case called for trial may be continued. It is well established that "[w]hether to grant a continuance is within the trial court's discretion, based on all facts and circumstances surrounding the request." *State v. Worthy*, 583 N.W.2d 270, 278 (Minn. 1998). This judicial discretion covers continuance motions brought by the prosecutor as well as by the defendant. *State v. Stroud*, 459 N.W.2d 332, 335 (Minn. App. 1990). The discretion has its roots in the district court's

inherent case-management authority, and its origins are grounded deeply in Minnesota jurisprudence predating the criminal rules. *See State v. Sanders*, 598 N.W.2d 650, 655 (Minn. 1999) ("A trial court's ability to control the timing of a trial is critical in ensuring sound judicial administration and a speedy trial for all criminal defendants."); *State v. Fay*, 88 Minn. 269, 270, 92 N.W. 978, 979 (1903) ("[C]ontinuances in criminal as well as in civil cases are commonly declared to be within the discretion of the trial court, and subject only to review for an abuse of this discretion."). The district court's settled discretion to deny motions to continue has been expressly codified in language that directly regards this case: "A continuance may be granted by the court when a case is called for trial . . . upon motion of either the prosecution or defense," and the motion requires the moving party to include proof of "sufficient cause" for the continuance. Minn. Stat. § 631.02 (2008). But the district court's discretion to deny a motion to continue is meaningless if the prosecutor can unilaterally undo the denial after the district court calls the case to trial.

Rule 30.01 exists in this caselaw and statutory context, not in a vacuum. True, by its broad language it allows the prosecuting attorney to dismiss a criminal complaint for reasons stated in writing or on the record "without leave of the court." Although it does not expressly impose any limits, I believe that the prosecutor's dismissal privilege ends when it directly subverts the district court's discretionary power. Otherwise, the rule may be applied to allow the state to paralyze the district court's inherent case-management authority.

The majority relies on language from this court's decision in *State v. Couture* to support its implicit holding that the district court may not interfere with the prosecutor's rule-30.01 dismissal even when the dismissal rests expressly on the prosecutor's intent to circumvent the district court's ruling. I think *Couture* is inapposite for two reasons.

First, the cited language from *Couture* was superfluous in that case for the same reason that it is irrelevant here. We stated, "A dismissal under rule 30.01 is without prejudice, and the state, provided it is not acting in bad faith, may 'later reindict based on the same or similar charges.'" 587 N.W.2d 849, 853 (Minn. App. 1999) (quoting *Pettee*, 538 N.W.2d at 131 n. 5). But *Couture* involved the refiling of a criminal complaint, not an "indictment," and this case similarly regards the dismissal of a criminal complaint, not an "indictment." And our quotation in *Couture* came from *Pettee*, a supreme court decision that specifically concerned an indictment, not a complaint. As the majority points out, rule 30.01 permits the prosecutor to dismiss only a *complaint* without leave of court, not an *indictment*. The rule treats the two charging mechanisms differently, and the language in the caselaw and in the rule regarding indictments does not concern this case.

Second, the real question in *Couture* was merely whether the state could file an amended complaint after it had dismissed the defendant's charge under rule 30.01. 587 N.W.2d at 852–53. That case did not address our issue, which is *whether or when* the district court may address the state's bad-faith motive to dismiss a complaint.

The majority elaborates that the district court, facing the prosecutor's open objective to curtail the district court's authority, had only three options after the state

declared its intent to dismiss: (1) to assess costs against the state to punish the state's self-made continuance when the continuance ended; or (2) to address the state's bad faith or undue delay at the time the state refiled its complaint; or (3) to dismiss the case under rule 30.02 based on the state's failure to prosecute. It therefore concludes that finding Blount not guilty after the state failed to present evidence on the day of trial "is the one thing it could not do." I disagree with the majority.

None of the three suggested alternatives appears workable to prevent the prosecutor from overruling the district court's continuance decision. The first, requiring the state to pay costs, does not address the chief concern of the district court here: the prosecutor's unilateral attempt to postpone the trial after the district court refused to do so. The second option overlooks the fact that the rule's language does no more to authorize the district court to assess the state's bad faith at the time of the state's refiling of the complaint than it does to authorize the court to assess bad faith at the moment of attempted dismissal. And the third is unhelpful because, once the state has dismissed the case without leave of the court, there would be no case left for the court to dismiss, with or without prejudice. The suggested remedies seem to lack a solid footing.

I would affirm. Affirming would support the district court's exercise of discretion to prevent the prosecutor from undoing the court's continuance decision. I believe that the district court has the inherent and statutory authority to apply its own discretion to decide a prosecutor's or defendant's trial-day motion to continue, and we ought to interpret rule 30.01 consistent with that authority. The prosecutor left no mystery

concerning his motive, and I would hold that the district court acted within its discretion to remedy what another court has fairly described as a "clear act of bad faith."