2015 IL App (4th) 150252-U

NO. 4-15-0252

FILED
November 6, 2015
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Adams County
PATRICIA CRIST-SCHMITT,	)	No. 14CF479
Defendant-Appellant.	)	
	)	Honorable
	)	William O. Mays,
	)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Justices Turner and Holder White concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court dismissed the appeal, concluding it was without jurisdiction to address the merits of defendant's arguments.

¶ 2 In August 2014, the State charged defendant by information with unlawful possession of cannabis sativa plant (720 ILCS 550/8(d) (West 2014)), a Class 2 felony. In December 2014, the trial court granted the State's motion for leave to file an amended information. The State's amended information included additional charges of unlawful delivery of cannabis (720 ILCS 550/5(f) (West 2014)), a Class 1 felony, and conspiracy (unlawful delivery of cannabis) (720 ILCS 5/8-2(a) (West 2014); 720 ILCS 550/5(f) (West 2014)), a Class 2 felony. In March 2015, the court held a hearing on the State's motion for a *nolle prosequi* and

defendant's motion to object. The court granted the State's motion over defendant's objections. Defendant appeals, asserting the granting of a *nolle prosequi* was improper because (1) the State's actions were capricious and vexatiously repetitious and (2) defendant was substantially prejudiced. We dismiss the appeal for lack of jurisdiction.

¶ 3 I. BACKGROUND

¶ 4 In August 2014, the State charged defendant by information with unlawful possession of cannabis sativa plant (720 ILCS 550/8(d) (West 2014)), a Class 2 felony. On October 28, 2015, the trial court found probable cause after hearing evidence and arguments, and defendant pleaded not guilty. The parties agreed to a jury trial date of December 8, 2014.

¶ 5 On November 26, 2014, the State filed a motion to file an amended information and a motion for a continuance. On December 1, 2014, the State argued its motion for an amended information was necessary due to an ongoing investigation and newly discovered evidence. The court granted the State's motion for leave to file an amended information. The State's amended information added the charges of unlawful delivery of cannabis (720 ILCS 550/5(f) (West 2014)), a Class 1 felony, and conspiracy (unlawful delivery of cannabis) (720 ILCS 5/8-2(a) (West 2014)); (720 ILCS 550/5(f) (West 2014)), a Class 2 felony. The State requested a motion for a continuance, claiming it was not ready to proceed with the trial due to the ongoing investigation and a pending subpoena. The State's motion for a continuance was granted over defendant's objections. The parties agreed to December 16, 2014, for the preliminary hearing and January 12, 2015, for the jury trial.

¶ 6 On December 3, 2014, defendant filed a motion to dismiss, claiming the State engaged in discovery violations by allegedly failing to turn over discovery.

¶ 7 On December 15, 2014, the trial court held a motion hearing on defendant's motion for a continuance, which was supported by a scheduling conflict. Defendant's motion was granted and the preliminary hearing date was changed from December 16, 2014, to December 23, 2014.

¶ 8 On December 22, 2014, the State filed a response to defendant's motion to dismiss regarding the alleged discovery violations. The State's response to defendant's motion to dismiss claimed the investigation against defendant was ongoing and new discovery would be provided to defendant once it was received.

¶ 9 On December 23, 2014, the trial court heard evidence and arguments on the amended information, the court found probable cause, and defendant pleaded not guilty. The court set pending motions for hearing on February 5, 2015. The jury trial date was set for March 9, 2015.

¶ 10 On February 5, 2015, the trial court heard arguments on defendant's motion to dismiss regarding the alleged discovery violations, which was denied. The court concluded defendant was not prejudiced by any alleged delay in discovery turn over.

¶ 11 On February 20, 2015, the State filed a motion for evidence deposition pursuant to Illinois Supreme Court Rule 414 (eff. Oct. 1, 1971), and filed a notice of hearing date of February 24, 2015. In its motion, the State claimed the Illinois State Police chemist, Hope Erwin, tested the evidence in this case and since incurred an injury that "prevents her from working and traveling at the present time." The State argued the evidence deposition of Hope Erwin was necessary for the preservation of relevant testimony, as she would be unavailable to testify at the time of the trial.

¶ 12 On February 24, 2015, the trial court denied the State's motion for evidence deposition regarding Hope Erwin.

¶ 13 On February 25, 2015, defendant filed a motion for a speedy trial.

¶ 14 On February 27, 2015, both parties contended during the pretrial conference that they were ready for trial on March 9, 2014.

¶ 15 On March 6, 2015, defendant filed a motion for objection of *nolle prosequi* after learning the State intended on moving to nol-pros the case.

¶ 16 On March 9, 2015, the State filed a motion to nol-pros the case.

¶ 17 On March 10, 2015, the trial court heard arguments on the State's motion for a *nolle prosequi* and defendant's motion to object. The State argued it was not prepared to move forward with the trial due to the unavailability of its essential witness, Hope Erwin, and the State previously attempted to present her evidence in an evidence deposition, which the court had denied. Defendant argued (1) the State's actions were capricious and vexatiously repetitious and (2) defendant was substantially prejudiced. The court granted the State's motion and denied defendant's motion to object.

¶ 18 This appeal followed.

¶ 19 II. ANALYSIS

¶ 20 On appeal, defendant argues the trial court erred when it granted the State's motion to enter a *nolle prosequi* because (1) the State's actions were capricious and vexatiously repetitious and (2) defendant was substantially prejudiced. The State argues this court lacks jurisdiction because the granting of a *nolle prosequi* is not a final order. We conclude we are without jurisdiction to address the merits of defendant's argument.

¶ 21 As a reviewing court, it is our duty to consider jurisdiction and to dismiss the appeal if we determine jurisdiction is lacking. See *Ferguson v. Riverside Medical Center*, 111 Ill. 2d 436, 440, N.E.2d 1252, 1253 (1985). In a case cited by the State, our supreme court has established an order granting the State's motion for a *nolle prosequi* cannot be appealed by a defendant because it is interlocutory and not final. *People v. Woolsey*, 139 Ill. 2d 157, 163, 564 N.E.2d 764, 766 (1990). Defendant has failed to either acknowledge or distinguish her position from this controlling case.

¶ 22 The entry of a *nolle prosequi* reverts the case to the condition it existed in prior to the commencement of prosecution. *People v. Tannenbaum*, 218 Ill. App. 3d 500, 502, 578 N.E.2d 611, 612 (1991). The charging instrument is dismissed and the defendant is allowed to be free without any obligation to appear when called or enter into a recognizance. *Id.* The State's Attorney has the discretion to enter a *nolle prosequi*, based on his or her own judgment, subject to the discretion and approval of the trial court. *Woolsey*, 139 Ill. 2d at 164, 564 N.E.2d at 766. A court must allow the prosecutor to nol-pros a case unless it is persuaded (1) the prosecutor's request is capricious or vexatiously repetitious or (2) the entry of a *nolle prosequi* will prejudice the defendant. *Id.* A court may not allow the State to nol-pros in order to obstruct a defendant's right to a speedy trial. *Id.* No such claim is made in the case at bar.

¶ 23 Defendant first cites *Ferguson v. City of Chicago*, 213 Ill. 2d 94, 820 N.E.2d 455 (2004), to argue this court has jurisdiction over a criminal case dismissed by entry of a *nolle prosequi*. In *Ferguson*, the supreme court was confronted with the issue as to when a case for malicious prosecution accrues. *Id.* The court decided "[a] cause of action for malicious prosecution does not accrue until the criminal proceeding on which it is based has been

terminated in the plaintiff's favor." *Id.* at 99, 820 N.E.2d at 459. The court further stated the entry of a *nolle prosequi* has the effect of terminating a case for purposes of bringing a cause of action for malicious prosecution. See *id.* The court distinguished the review of a *nolle prosequi* in malicious prosecution cases from criminal cases on appeal. The court recognized the entry of a *nolle prosequi* in criminal cases "does not terminate the proceedings against the accused," and therefore, is not a final order for purposes of appeal in a criminal case. See *id.* at 100, 820 N.E.2d at 459. As the present case involves a criminal proceeding, we continue to follow our supreme court's ruling stating a criminal case dismissed through a *nolle prosequi* is not a final disposition for purposes of appeal. See *id.*

¶ 24 Defendant also cites *Swick v. Liautaud,* 169 Ill. 2d 504, 662 N.E.2d 1238 (1996), to argue this court has jurisdiction over a case dismissed by entry of a *nolle prosequi*. In *Swick,* the supreme court again distinguished the effect of a *nolle prosequi* in a criminal context from a civil malicious prosecution context. *Id.* at 512, 662 N.E.2d at 1242. In a criminal context, a *nolle prosequi* is not a final disposition but reverts the case to the condition it was in prior to the commencement of prosecution. *Id.* at 512-13, 662 N.E.2d at 1242. In civil cases involving allegations of malicious prosecution, "a criminal proceeding has been terminated in favor of the accused when a prosecutor formally abandons the proceeding via a *nolle prosequi*, unless the abandonment is for reasons not indicative of the innocence of the accused." *Id.* at 513, 662 N.E.2d at 1242-43. We again decline to use defendant's suggestion to follow the court's malicious prosecution interpretation of a *nolle prosequi* in the present criminal case. In the context of a criminal case, we continue to follow the effect of a *nolle prosequi* as a nonfinal disposition. *Id.* at 512-13, 662 N.E.2d at 1242.

¶ 25 Defendant last relies on the trial court judge's statement for this court's jurisdiction. On March 10, 2015, after the court granted the State's request for a *nolle prosequi*, the following discussion took place:

> "MR. SCHNACK [(defense attorney)]: Your Honor, I'm assuming this is a final and appealable order?
>
> THE COURT: Yes."

¶ 26 In the absence of a statute or rule specifically authorizing review, no appeal lies from an interlocutory order. *Woolsey*, 139 Ill. 2d at 163, 564 N.E.2d at 766. Pursuant to Illinois Supreme Court Rule 604 (eff. Dec. 11, 2014), certain interlocutory judgments are appealable, however, this rule does not authorize the defendant to appeal from the grant of a *nolle prosequi*. *Id.* Absent such authority, we conclude the trial court erred when it stated defendant had a final and appealable order. See *id.*

¶ 27 III. CONCLUSION

¶ 28 We dismiss this appeal, concluding the dismissal of defendant's criminal charges through a *nolle prosequi* is not a final order or judgment for purposes of appeal. *Id.*

¶ 29 Appeal dismissed.