Circuit Court for Baltimore City
Case No. 118156015 & 118226006

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 225 & 226

September Term, 2019

STATE OF MARYLAND

v.

DARRELL DAVON ASHE

Graeff,
Friedman,
Eyler, James R.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Graeff, J.

Filed: November 4, 2020

Darrell D. Ashe, appellee, was indicted on August 14, 2018, for various drug and firearm charges. His trial in the Circuit Court for Baltimore City was postponed several times, with trial ultimately set for March 6, 2019. On that date, the State, appellant, requested that the trial begin at 11:00 a.m. because the assigned prosecutor was presenting a case to the grand jury. The court denied that request, and it dismissed the case with prejudice for "lack of prosecution."

On appeal, the State presents the following question for this Court's review:

> Did the circuit court abuse its discretion in dismissing the indictments for "lack of prosecution"?

For the reasons set forth below, we answer that question in the affirmative, and therefore, we shall reverse the judgment of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

Because the issue presented on appeal is a procedural one, we need not discuss the facts underlying the charges against appellee. It is sufficient to note that, on June 5, 2018, appellee was indicted on charges of possession with intent to distribute narcotics, possession of narcotics, and various traffic violations for an incident occurring on March 3, 2018. On August 14, 2018, the State filed a second indictment against appellee for a separate incident occurring on July 16, 2018, charging him with possession of a firearm

with a nexus to drug trafficking, possession of a firearm by a prohibited person, drug distribution, possession with intent to distribute, and related charges.[1]

After several postponements, appellee's trial date was scheduled for March 6, 2019.[2] The court asked counsel to return to the courtroom to "work around [their] schedule . . . and then we can work around getting it in a court that makes sense. But I don't want to put you in a part and then you can't do it."

The transcript reflects that the cases were scheduled to begin at 9:30 a.m. on March 6, 2019. At 10:09 a.m., the State called the cases and asked that they be "sent to trial . . . with a start time of 11:00." The assigned prosecutor was not present, but another prosecutor was there and informed the court that the assigned prosecutor was presenting before a grand jury and requested the short delay. The court responded as follows:

> No. She's to go to trial now. She was to go to trial 40 minutes ago.
>
> This case was postponed, she knew she was in trial, she asked me to find a court for two days, I did, I held that Court, they've been ready. No, 9:30. If they go to -- send to [the trial judge] if they're not there then the State is prepared to have it not prosecuted. Now.

Shortly thereafter, appellee and his attorney appeared before the judge assigned for trial. The court stated that "we're here on two different cases *State versus Darrell Ashe*,

[1] The two sets of charges (Case Nos. 118156015 and 118226006) were not consolidated at trial, but trial was scheduled for the same date, both cases were dismissed in the same proceeding, and the cases have been consolidated on appeal (No. 225 and No. 226, Sept. Term 2019).

[2] The Criminal Postponement Forms show that all postponements were requested by "All" and approved for good cause.

Case No. 118226006, and *State versus Ashe*, Case No. 118156015," and the prosecutor had "not made herself available." The following then occurred:

> THE COURT: So the case has been called. Is there a motion?
>
> [Counsel]: Yes, Your Honor. I move to dismiss both indictments for lack of prosecution.
>
> THE COURT: **Both indictments are dismissed with prejudice for lack of prosecution.**
>
> [Counsel]: Thank you, Judge.

(Emphasis added.) The court noted for the record that it was 10:50 a.m.

Ten minutes later, the assigned prosecutor appeared before the trial judge, and the following occurred:

> [Counsel]: Your Honor, it is my understanding that in my absence these cases were dismissed with prejudice.
>
> THE COURT: That's correct.
>
> [Counsel]: I wanted to attempt to offer an explanation to the Court.
>
> I was before Judge Phinn in Part 46 when these cases were sent to trial out of Part 45. It was my understanding – and Your Honor, I apologize I haven't been able to speak with my colleague who stood in for me in Part 45 -- but it's my understanding that it was explained to [the motions judge] that I was in part 46 handling matters and I asked to be able to begin here at 11 a.m. so that I could conclude those matters. It's my understanding that that request was denied and that I was sent to trial.
>
> I handed -- I had to hand off my matters to other prosecutors in Part 46, and because of my disability had to find somebody to help me get from Courthouse East to Mitchell Courthouse because there's a significant hill that I can't manage on my own, and so in the time it took me to do that and find somebody who could help me that was my delay in getting here.

And so I wanted to obviously apologize to the Court for my tardiness and also ask if the Court would be willing to reconsider its ruling.

THE COURT: All right. And I'll hear from [defense counsel] in just a moment, but I just want to say what information I had coming out, which was the case was sent to me at 10 o'clock, [the motions judge] had said that her understanding was that you actually had -- were in front of a grand jury and that she had denied the motion because the case had been set for this day well in advance and thought that while people get double booked it shouldn't have happened in this particular case. So that was the information that she gave me. Not that you were in front of Judge Phinn, but that you were in front of a -- that you had grand jury issues today.

[Counsel]: Yes, Your Honor, and I was also scheduled to be before the grand jury. I -- when finding out that this case was sent out of Part 45 got someone to stand in for me in the grand jury so that I could report directly here.

THE COURT: Well what about Part 46?

[Counsel]: I was in Part 46 at that time, Your Honor.

THE COURT: Okay. So you had this case that was already scheduled for today --

[Counsel]: Yes.

THE COURT: -- back in February, plus you had stuff in Part 46, plus you had grand jury?

[Counsel]: Yes, Your Honor.

* * *

THE COURT: Well I mean I'm sympathetic, but I don't think I even have the power to reconsider --

[Counsel]: Yes, Your Honor.

THE COURT: -- frankly, and you know, we waited 'til 10:50 --

[Counsel]: Yes, Your Honor.

> THE COURT: -- before [we] dismissed it, and it's just -- you can't be in three places at once, and the Reception Court's position, it was not specific to [the motions judge], Judge Phinn would have told me [the] same thing.
>
> [Counsel]: I understand.
>
> THE COURT: We schedule you in advance for a trial on a certain date, don't book two other things on the same day.
>
> [Counsel]: Yes, Your Honor.

This appeal followed.

DISCUSSION

The State contends that the circuit court abused its discretion in dismissing the indictments for lack of prosecution. It asserts that the court was angry with the prosecutor for the way she handled her schedule, and the "only conceivable reason for dismissal" was to teach the prosecutor a lesson to deter her "from being late to court in the future." The State argues that this was improper pursuant to *Gonzales v. State*, 322 Md. 62 (1991), and *Wynn v. State*, 388 Md. 423 (2005).

Appellee contends that the circuit court did not improperly grant a motion to dismiss. Instead, he characterizes the court's action as "a permissible acquittal resulting from the State's failure to present any evidence when the case was called on the scheduled trial date."

It is clear, and appellee does not dispute, that it is improper for the circuit court to dismiss a criminal trial for "lack of prosecution" in order to punish a tardy prosecutor.[3] In *Gonzales*, 322 Md. at 64, the circuit court dismissed an indictment for lack of prosecution because the State failed to issue a writ for the defendant to be brought to court. The Court of Appeals declined to address "whether a trial judge has the inherent power to dismiss an indictment or other charging document for a lack of prosecution," holding that, assuming that the trial court had such power, it abused its discretion in exercising this power because the underlying motivation appeared to have been to "teach the prosecution a lesson so as to deter a prosecutor from coming to trial in the future so unprepared." *Id*. at 71, 73. The Court explained: "The State, as the representative of the public may not be deprived of trying a person duly charged with the commission of a crime merely to teach the prosecutor a lesson for his lack of diligence in pursuing a prosecution, there being no constitutional or statutory rights of an accused to be timely tried involved." *Id.* at 74

In *State v. McKay*, 103 Md. App. 298 (1995), this Court addressed a factual scenario similar to this case. When the case was called for trial, the prosecutor was in another courtroom, and defense counsel stated that the prosecutor intended to seek a continuance.

[3] Although federal courts and other state courts have rules permitting the dismissal of criminal charges for unnecessary delay, Maryland has no such rule at the circuit court stage. Dismissal for lack of prosecution in a criminal case is authorized by the Maryland Rules only in District Court when the State fails to take certain pretrial actions not pertinent to the facts of this case. Md. Rule 4–221(f)–(g). Additionally, there is a rule permitting dismissal for lack of prosecution in civil cases. Md. Rule 2–507(c) ("An action is subject to dismissal for lack of prosecution at the expiration of one year from the last docket entry[.]"). Neither rule is applicable to this case.

Id. at 299. The court then dismissed the case "for failure of the State to appear and go forward." *Id.* at 300. This Court, in a brief discussion, stated: "It is beyond cavil in Maryland that a trial judge may not punish a prosecutor for 'lack of prosecution' by summarily dismissing a valid indictment." *Id.*

In *Wynn*, 388 Md. at 444, the Court of Appeals held that a trial court does not have the authority to dismiss a charging document based on a violation of a scheduling order after the first trial ended in a mistrial. The Court stated that, although trial courts have an inherent power to control their dockets, this "authority should be applied only when necessary to the performance of the judicial function," and it should be employed rarely, and only when there are no "other means to rectify the threat to the judicial branch." *Id.* at 429, 435–36. With respect to criminal cases, courts must be "mindful of the separation of powers and avoid unnecessary intrusion upon the powers of the executive branch." *Id.* at 439. The Court noted that a circuit court's decision to exercise its inherent authority to control its docket in a criminal case, as opposed to a civil case, "would limit the power of the executive branch to prosecute criminal cases on behalf of the public." *Id.*

The Court stated that "[t]he violation by the State of a scheduling order can be an affront to the court, but the court must utilize other means to rectify that affront." *Id.* at 443. It noted that the trial court has an option other than dismissal, i.e., "forc[ing] the State to proceed to trial or to enter a *nolle prosequi* when the case is called for trial on a regularly assigned trial date," with the consequence of an acquittal if the State failed to produce evidence at trial. *Id.* at 443 (quoting *Daff v. State*, 317 Md. 678, 687 (1989)). Accordingly,

the Court concluded that the trial court does not have the authority to dismiss the charges as a sanction on the State for violating a scheduling order. *Id.* at 443–44.

Recognizing the impropriety of dismissing a criminal case for lack of prosecution, appellee contends on appeal that the court did not grant a motion to dismiss, but instead, the ruling was "in purpose and effect" an acquittal after the State failed to present sufficient evidence to sustain a conviction. He argues that the court's acquittal was proper after "the State's failure to present any evidence when the case was called on the scheduled trial date."

In support, appellee relies on *Daff*, 317 Md. at 687, where the Court of Appeals held that, if the State does not present any evidence at trial, the circuit court may properly acquit the defendant. In that case, the State failed to issue the necessary subpoenas for witnesses, and as a result, the State had no evidence to present at the time of trial. *Id.* at 681–82. The trial court denied the State's request for a postponement, and the State indicated that it would not "nolle pros" the case. *Id.* at 682. The court then entered a finding of not guilty. *Id.* The State subsequently filed new charges against Daff, and the circuit court dismissed the charges based on double jeopardy. *Id*.[4]

[4] Double jeopardy principles provide that a defendant who is "acquitted at trial may not be retried on the same offense." *Daff v. State*, 317 Md. 678, 683 (1989). As the Court of Appeals subsequently explained, however, this principle applies only when the court has the authority to grant an acquittal. *See State v. Johnson*, 452 Md. 702, 726, 735 (2017) (An acquittal implicates double jeopardy only when the court has the authority to act, and because the court acted without authority in granting an acquittal weeks after declaring a mistrial and discharging the jury, double jeopardy principles did not prevent Johnson's retrial.).

The Court of Appeals upheld the ruling. *Id.* at 682. It held that a trial court "may force the State to proceed to trial or to enter a *nolle prosequi* when the case is called for trial on a regularly assigned trial date. Failure of the State to produce any evidence at the trial will necessarily result, as it did here, in an acquittal." *Id.* at 687. Jeopardy had attached to this acquittal because the State "was given the opportunity to present evidence at trial," but it failed to do so. *Id.* at 689.

Daff is not directly on point with this case for several reasons. Most notably, in that case, the court found the defendant not guilty. Thus, there was no question that the ruling was an acquittal. Here, however, the court granted a motion to dismiss the cases.

Appellee contends that, despite the language used, the court's order, in substance, constituted an acquittal based on insufficient evidence. The State contends that the court's ruling was a dismissal of the indictments, noting that this was the relief requested by defense counsel: "I move to dismiss both indictments for lack of prosecution," and the language used by the court: "[b]oth indictments are dismissed with prejudice for lack of prosecution."

In addressing the import of the court's ruling here, several cases are relevant to our analysis. In *State v. Taylor*, 371 Md. 617, 621–28 (2002), the circuit court granted pretrial motions to dismiss in two consolidated cases after finding that, based on the facts as stipulated by the parties, there was insufficient evidence to sustain a conviction. In both cases, the circuit court explicitly used and considered the facts in making the decision to grant the motion. *Id.* at 623, 628. The Court of Appeals stated that a pretrial motion to

dismiss "may not be predicated on insufficiency of the State's evidence[,]" and therefore, the court erred by granting the motions to dismiss. *Id.* at 645. The Court noted, however, that the "substance" of the rulings, not their "form," was the critical issue. *Id.* at 649. It ultimately determined that the substance of the circuit court's ruling was to grant judgments of acquittal because the trial court "weigh[ed] the State's evidence in an attempt to determine whether it [was] sufficient to support a conviction." *Id.* at 651.

In re Kevin E., 402 Md. 624, 628–29 (2008), addressed whether the dismissal of a delinquency petition was, in substance, an acquittal. In that case, the prosecution requested a postponement due to the failure of a necessary police officer to appear for the proceeding. After the juvenile court magistrate denied the request for a continuance, the prosecution presented no evidence and stated: "The State rests, Your Honor." *Id.* Defense counsel moved to dismiss the delinquency petition, and the magistrate granted the motion and issued a recommendation of dismissal. *Id.* The juvenile court judge subsequently signed an order, adopting the recommendation. *Id.*

In holding that the import of the ruling was an acquittal, the Court of Appeals noted that, when the magistrate denied the request for a continuance, the State had "other options available short of presenting no evidence and resting its case." *Id.* at 638. The State decided, however, to "rest its case" without presenting any evidence, which resulted in an acquittal based on insufficient evidence. *Id.* at 641.

In *State v. Smith*, 244 Md. App. 354 (2020), this Court again addressed whether the substance of a court's action was a dismissal or a grant of a judgment of acquittal. In that

case, the parties appeared before the court for approval of a plea agreement. *Id.* at 365. The court asked if the State had an operability report for the firearm. *Id.* The State did not respond, and defense counsel "ma[d]e a motion." *Id.* at 365–66. The court granted the motion, stating "[c]ase is dismissed." *Id.* at 366. The ruling was docketed as the grant of a motion for judgment of acquittal. *Id.*

On appeal, this Court held that the circuit court had no authority to dismiss the charges or acquit Smith given the posture of the case, but we had to determine the substance of the order to determine whether we could correct the ruling. *Id.* As Chief Judge Fader explained, if the ruling was an acquittal, double jeopardy principles would prevent the State from re-prosecuting Smith, and it would not have the ability to appeal the ruling. *Id. See* CJP § 12-302(c)(2) (providing the State a statutory right to appeal a dismissal of charges, but not an acquittal).

This Court held that, "[i]n determining whether a judgment was a dismissal or acquittal, we must ask 'whether the ruling of the judge, whatever its label, actually represent[ed] a resolution, correct or not, of some or all of the factual elements of the offense[s] charged.'" *Id.* at 396–97 (quoting *Johnson*, 452 Md. at 725). If the parties present evidence, and "the court rules on a motion that is properly before it based on an assessment of that evidence, then the ruling must be treated as an acquittal." *Id*. at 397. On the other hand, if no evidence is presented, the court is unable to weigh the sufficiency of that evidence and its actions constitute a dismissal. *Id.* at 398–99. In *Smith*, we held

that, "because the circuit court had no evidence before it to consider, the substance of the court's action was a dismissal, not the grant of judgments of acquittal." *Id.* at 396.

With this case law in mind, we look to whether the court's ruling here was based on an assessment of the State's evidence. In *Daff*, 317 Md. at 685, where a continuance was denied, the court gave the State the option to nol pros the cases, but the prosecutor declined to do so. It was under those circumstances, where the State declined to enter a nol pros of the charges and declined the opportunity to present evidence, that the court's acquittal based on insufficient evidence was upheld. *Id.* at 689.

With different facts, however, there is a different result. In *State v. Haynes*, 463 So.2d 1248, 1250 (Fla. Dist. Ct. App.), *cert. denied*, 475 So.2d 694 (Fla. 1985), the court addressed the effect of a court's dismissal of charges in a somewhat similar situation. In that case, the prosecutor, after a request for continuance was denied, advised that the State was unable to go forward with the case because a witness was unavailable. *Id.* The court then dismissed the charges. *Id.* at 1249.

On appeal, the *Haynes* court assessed whether the trial court's decision was a dismissal, which the State could appeal, or an acquittal, which the State could not appeal. *Id.* at 1251. The court noted that, when the State's motion for a continuance was denied, it had two options: (1) a voluntary dismissal, or (2) begin trial with the swearing of a jury, which would result in an adverse judgment based on insufficient evidence. *Id.* The trial court, however, did not give the State the choice of these two options, but instead, it dismissed the case. *Id.* at 1252. Under these circumstances, the Florida appellate court

held that, because the dismissal "preceded the impaneling of a jury or the swearing of a witness," it could not be viewed as a judgment of acquittal, but rather, it was a dismissal for lack of prosecution. *Id.*

Similarly, here, the court did not give the State the option to enter a nol pros. Indeed, at the time of the dismissal, there was no prosecutor even present in the courtroom to make a decision how to proceed.[5] Thus, unlike in *Daff* and *In re Kevin E.*, there was no decision by the State to proceed with trial. Accordingly, as in *Smith*, 244 Md. at 398–99, there were no facts before the court to resolve the case, and the court was not in a position to make any assessment regarding the sufficiency of the evidence. *See United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977) (A defendant is acquitted only when "the ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged.").

We hold that, given the posture of this case, the circuit court's ruling in this case was, in substance, what it stated it was, a dismissal of the indictments based on a lack of prosecution, not an acquittal based on insufficient evidence. The parties agree, as do we, that the dismissal of a criminal prosecution for "lack of prosecution" to punish a tardy

[5] We note that the case was dismissed 10 minutes before the time the State requested to begin and the time the prosecutor arrived in the courtroom.

prosecutor is not permitted.[6] Therefore, the circuit court's ruling dismissing the indictments is reversed.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY REVERSED. COSTS TO BE PAID BY THE MAYOR AND CITY COUNCIL OF BALTIMORE.

[6] If a prosecutor, for unacceptable reasons, fails to appear in court at the scheduled time, the court has remedies available other than dismissal, "such as contempt of court or attorney disciplinary proceedings." *See State v. Deleon*, 143 Md. App. 645, 662 n.4 (2002).