

IN THE DISTRICT COURT OF CHERRY COUNTY, NEBRASKA

THE STATE OF NEBRASKA,

Plaintiff,

vs.

ALLEN DANIEL,

Defendant.

Case No. CR00-10

JUDGMENT OF DISMISSAL

DATE OF HEARING: October 27, 2000.

DATE OF RENDITION: October 30, 2000.

DATE OF ENTRY: Date of filing by court clerk per § 25-1301(3).

APPEARANCES:

For plaintiff:

Eric A. Scott, Cherry County Attorney.

For defendant:

Robert D. Coupland with defendant.

SUBJECT OF ORDER: Defendant's plea in bar.

PROCEEDINGS: See separate journal entry.

FINDINGS: The court finds and concludes that:

1. By a plea in bar, the defendant claims the current prosecution is barred by an order of the county court granting the plaintiff's motion to dismiss a previous felony complaint with prejudice.

2. The evidence shows that a complaint alleging the felony offense of assault in the first degree was filed against the defendant in Cherry County Court on September 24, 1999, in county court case number CR99-587. The complaint alleged that on June 12, 1999, the defendant "did intentionally, knowingly, or recklessly cause serious bodily injury to another person, to-wit: Vicki Johnston by hitting and kicking her in the face and the upper torso *and threatening to kill her . . .*" E7, at 2 (emphasis supplied).

3. A preliminary hearing was held on November 9, 1999, at which the county court found insufficient evidence to bind the defendant over, and directed the state to "file class I misdemeanor[.]" E7, at 3. This court presumes that the county court was directing the county attorney to file an amended

complaint, charging a third degree assault charge rather than the felony first degree assault originally charged. The transcript does not reflect that such amended complaint was ever filed.

4. Certain developments can only be inferred from the December 13, 1999, county court journal entry. E7, at 4. This court infers that: (a) a transcript of some type was filed in the district court on August 31, 1999, (b) the plaintiff apparently offered that transcript in evidence in the county court preliminary hearing on November 9, 1999, (c) that the transcript was apparently received by the county court as exhibit 1 in county court case number CR99-587 (although it is not clear from this record how the transcript came to be in the plaintiff's possession rather than on file with the clerk of the district court), (d) on December 8, 1999, the plaintiff brought before the county court the plaintiff's motion to release the transcript, (e) by order of December 8, 1999, the county court granted the motion, and, (f) thereafter the defendant filed a "motion to void order" attacking the December 8 order to release the transcript.

5. The December 13, 1999, county court journal entry shows that a hearing was held on that date regarding the defendant's "motion to void order" and the plaintiff's motion to release transcript. E7, at 4. That order, signed and filed on December 13, 1999, memorializes that "[The c]ase was dismissed by the State with prejudice on the record" *Id.* The order further memorializes that the county court clerk-magistrate was directed to hand-deliver the transcript in question to the clerk of the district court "instanter." *Id.* There is nothing in the record to show that the order was not carried out immediately.

6. This case charges the defendant with terroristic threats. It was filed directly with this court. A preliminary hearing was held on August 25, 2000. The transcript of that preliminary hearing was offered and received in evidence on the plea in bar as Exhibit 6.

7. This court first considers what was "dismissed by the State with prejudice." This court finds significance in the county court's statement that the case was dismissed *by the State* with prejudice. The able county judge undoubtedly recognized that he lacked jurisdiction to dismiss the original complaint for the felony charge of assault in the first degree with prejudice. The decision in *State v. Wilkinson*, 219 Neb. 685, 365 N.W.2d 478 (1985), teaches that a county judge sitting as an examining magistrate has no jurisdiction to dismiss a felony complaint with prejudice. There is no evidence to show that the misdemeanor complaint was ever filed by the county attorney. The only evidence of a complaint as of December 13, 1999, is the felony complaint as originally filed by the plaintiff.

8. This court also finds significance in the county court's memorandum that the "[c]ase" was dismissed with prejudice. That significance will be addressed later.

9. The county judge lacked jurisdiction to dismiss a felony complaint with prejudice. The action of the county attorney cannot constitute a "judgment," which is by definition the final consideration and determination *by a court* of the respective rights and obligations of the parties to an action. *State ex rel. Stenberg v. Moore*, 258 Neb. 199, 602 N.W.2d 465 (1999). This court concludes that the evidence fails to show any judgment of acquittal or conviction on the felony complaint. The plea in bar cannot raise a judgment where no judgment exists.

10. However, that does not end the analysis. It is apparent that the defendant seeks to enforce the plaintiff's dismissal of the "[c]ase . . . with prejudice" While the defendant might have correctly raised the issue by motion rather than by plea in bar, it would serve little purpose to deny the plea in bar only to have the defendant file a motion to correctly raise his claim regarding enforcement of the plaintiff's agreement. The court thus construes the plea in bar as a motion to enforce the plaintiff's action to dismiss "with prejudice."

11. The analysis in *State v. Howe*, 2 Neb. App. 766, 514 N.W.2d 356 (1994), partially relying on *State v. Copple*, 224 Neb. 672, 401 N.W.2d 141 (1987), provides helpful instruction. As noted in *Howe*, there is a difference between a plea bargain, a statutory immunity agreement, and other bargains that are neither plea bargains nor statutory immunity agreements. Like *Howe*, this case involves a bargain that was neither a plea bargain nor a statutory immunity agreement. Although the bargain here was not a "cooperation agreement" in the same sense as *Howe*, it raises the same equitable principles.

12. The plaintiff's agreement is enforceable on equitable grounds if (1) the agreement was made, (2) the defendant has performed whatever the defendant promised to perform, and (3) in performing, the defendant acted to his detriment or prejudice. *State v. Howe, supra*.

13. The county court records offered by the defendant without objection establish the agreement. The defendant abandoned his resistance to the release of the transcript that had been received in evidence by the county court, and in exchange, the plaintiff dismissed the "[c]ase" "with prejudice." Thus, the agreement at least inferentially, if not explicitly, constituted the state's agreement not to pursue certain charges against the defendant in the future.

14. The defendant clearly performed by not demanding a ruling on his “motion to void order” and in not resisting the December 13 order to release the transcript.

15. The defendant acted to his prejudice by allowing the state to make whatever use of the transcript it deemed appropriate or necessary.

16. This court concludes that the evidence meets all of the *Howe* requirements of an enforceable agreement.

17. As in *Howe*, the question in this case becomes: what was the meaning of the agreement. This agreement was contractual in nature and subject to contract law standards. *Id.* Those standards, as discussed in *Howe*, state:

a. The construction of a contract, if needed, is a question of law for the court. *Id.*

b. In construing a contract, the court will apply the general rule that when there is a question as to the meaning of the language of a contract, the contract will be construed against the party preparing it. *Id.* In the context of plea agreements, the government must bear the burden for any lack of clarity in the agreement and ambiguities should be resolved in favor of the defendant. *Id.*

c. Ambiguity exists in an instrument when a word, phrase, or provision in the instrument has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings. *Id.* Whether a document is ambiguous is a question of law initially determined by a trial court. *Id.* When a court has determined that ambiguity exists in a document, an interpretative meaning for the ambiguous word, phrase, or provision in the document is a question of fact for the fact finder. *Id.*

18. The agreement to dismiss the “case” with prejudice introduces an ambiguity. The agreement could be interpreted to preclude prosecution for the specific charge of first degree assault or any lesser included offense of that charge. Essentially, that interpretation would require this court to apply a double jeopardy analysis. See *State v. White*, 254 Neb. 566, 577 N.W.2d 741 (1998). That analysis would not preclude the present prosecution, as the charge of terroristic threats includes an element, i.e., intent to terrorize, that is not an element of first degree assault or third degree assault. However, the agreement could also be interpreted to preclude prosecution for the conduct addressed in the operative complaint, i.e., for “hitting and kicking [Vicki Johnston] in the face and upper torso and *threatening to*

kill her . . .” E7, at 2 (emphasis supplied). Under *Howe* and the authorities relied on in that case, this ambiguity must be resolved against the plaintiff and in favor of the defendant.

19. The question then becomes: what does the state seek to prosecute in this case. The information alleges the offense of terroristic threats in the general language of the statute. However, it is apparent from the preliminary hearing that the plaintiff seeks to prosecute the defendant in this case for threatening to “finish the job,” i.e. to kill Vicki Johnston (now Vicki Johnston Gann). E6, at 10:2-18. That conduct lies within the scope of the complaint defining the “case” that the plaintiff agreed to dismiss “with prejudice.”

20. Consequently, the court concludes that the prosecution is barred by the plaintiff’s agreement entered into before the county judge, and must be dismissed.

JUDGMENT: IT IS THEREFORE ORDERED AND ADJUDGED that:

1. The information is dismissed at the plaintiff’s cost.
2. The defendant’s bond, less any statutory fees, is released and discharged, and any surety thereon is exonerated.

Signed in chambers at Valentine, Nebraska, on October 30, 2000.
DEEMED ENTERED upon filing by court clerk.

If checked, the Court Clerk shall:

- Mail a copy of this order to all counsel of record and to any pro se parties.
Done on _____, 20____ by ____.
- 9 Enter judgment on the judgment record.
Done on _____, 20____ by ____.
- Mail postcard/notice required by § 25-1301.01 within 3 days **stating “Information dismissed at plaintiff’s cost”**.
Done on _____, 20____ by ____.
- Note the decision on the trial docket as: [date of filing] Signed “Judgment of Dismissal” entered.
Done on _____, 20____ by ____.

Mailed to:

BY THE COURT:

William B. Cassel
District Judge