STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

SEAN LAWRENCE PETERSON,

Defendant-Appellee.

UNPUBLISHED
February 14, 1997

No. 190644

Jackson Circuit Court
LC No. 95 071573 FH

Before: Doctoroff, C.J., and Corrigan and Danhof,* JJ.

PER CURIAM.

By leave granted on its delayed application, the prosecution appeals the order quashing a charge of operating a motor vehicle under the influence of intoxicating liquor causing death (OUIL), MCL 257.625(4); MSA 9.2325(4), or in the alternative, unlawful blood alcohol level (UBAL), MCL 257.625(1)(b); MSA 9.2325(1)(b) (Count I), and a charge of involuntary manslaughter with a motor vehicle, MCL 750.321; MSA 28.553 (Count II). Defendant ultimately pleaded guilty to negligent homicide, MCL 750.324; MSA 28.556. The court sentenced defendant to 225 days in jail, a five year term of probation, a fine and costs. We affirm.

After drinking alcoholic beverages at three bars, defendant and two friends went home in defendant's car. Defendant failed to negotiate a curve. His car struck a tree, killing one passenger and severely injuring defendant. At the hospital, the attending emergency room physician ordered a test of defendant's blood alcohol content. Someone drew a sample of defendant's blood at 2:30 a.m. and sent it to the laboratory for testing. The test showed that defendant had a blood alcohol level of 165.1 milligrams of alcohol per deciliter of blood. The testing document, however, showed that the procedure had concluded at 2:15 a.m., fifteen minutes before defendant's blood was drawn.

At the preliminary examination, the emergency staff nurse on duty that night testified that the doctor had ordered the test at 2:30 a.m. Witnesses could not recall, however, who actually drew the

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

blood and laboratory personnel could not explain why the test report reflected that the test ended at 2:15 a.m. Nonetheless, the district court admitted the test report. The district court bound over defendant on one count of operating a motor vehicle under the influence of intoxicating liquor causing death, or alternately, having an unlawful blood alcohol level (Count I), and on one count of involuntary manslaughter with a motor vehicle (Count II).

In May 1995, defendant moved to suppress the blood test results, alleging that the prosecution had not established a proper foundation for the test's admission. It its order of June 9, 1995, the circuit court suppressed the test results and quashed both counts against defendant, but ruled that the prosecution could proceed on the lesser included charge of negligent homicide. The prosecutor did not seek leave to appeal the order at that time.

On June 13, 1995, defendant praeciped a motion to enter a plea of nolo contendere to negligent homicide. On July 11, 1995, the date for the plea entry, the prosecution still had not filed an amended information on the negligent homicide charge. When defendant offered his plea, the appellate prosecutor, who was filling in for the assigned prosecutor and had no prior contact with the file, asked for a recess to speak with her superior. After conferring with the chief assistant prosecutor, the appellate prosecutor filed an amended information on negligent homicide. The appellate prosecutor did not object specifically to the lesser charge; she objected only on the ground that the nolo contendere plea could not be used as a basis of liability in any subsequent civil action. The circuit court accepted defendant's plea.

Two days later, the prosecution moved to set aside defendant's plea and/or for a clarification on the quashing of Count I. Although the court determined that the motion was untimely, it ruled that its order quashing Count I was clear. Again, the prosecution did not seek leave to appeal at that time.

In September 1995, the circuit court sentenced defendant to 225 weekend days in jail, a five year term of probation, a $1,000 fine and costs.[1] The prosecutor did not object to the plea or the sentence. Finally, in a delayed application in November 1995, the prosecution sought leave to appeal, which this Court granted on February 13, 1996.

The prosecution raises two substantive issues on appeal. We cannot examine these issues in a procedural vacuum, however. The prosecution's actions are similar to those described in *Santobello v New York*, 404 US 257; 92 S Ct 495; 30 L Ed 2d 427 (1971): "This record represents another example of an unfortunate lapse in orderly prosecutorial procedures, in part, no doubt, because of the enormous increase in the workload of the often understaffed prosecutor's offices. The heavy workload may well explain these episodes, but it does not excuse them." *Santobello*, 92 S Ct at 498.

In this case, the prosecution did not specifically object to the reduced plea until its delayed application for leave to appeal.[2] The prosecution did not appeal immediately the court's order to quash.[3] The prosecution tacitly agreed to defendant's plea by filing an amended information charging the lesser count.

Additionally, the prosecution did not preserve an objection at sentencing. "As a matter of policy, the prosecution cannot raise post-sentencing objections to matters that could have been raised at the time of sentencing." *People v Krim*, ___ Mich App ___ (Docket No. 169682, issued November 26, 1996). The prosecution has waived the issue. *Id.*

The prosecution explains on appeal that an administrative snafu caused its delay in objecting and appealing. The chief trial prosecutor and the elected prosecutor originally had handled the case, but they left town, and gave the case to the then-chief appellate prosecutor without sufficient instructions for the plea hearing. When defendant expressed his desire to plead, the appellate prosecutor contacted the then-chief assistant prosecutor, who instructed her to agree to the plea. The chief assistant prosecutor apparently disregarded the elected prosecutor's instruction not to participate in a plea proceeding. In October 1995, the prosecution's current appellate counsel assumed the duties of chief appellate attorney and finally sought delayed leave to appeal the following month.

This is not a case where the prosecutor's office was unaware of a defendant's plea. The court stated on the record that the prosecution had informed it before the hearing that defendant would plead. The chief assistant advised his subordinate to agree to the plea. Thus, this is not an occasion where a lower-level prosecutor, who was not informed fully about the nuances in a case, agreed to a plea. The chief assistant prosecutor, a high-ranking member of the prosecutor's office who could be presumed to know the elected prosecutor's policies, and to apply those policies, approved the reduced plea.

At oral argument, the prosecution conceded that the history of the case was "a mess." *Santobello*, however, parries the point: "The staff lawyers in a prosecutor's office have the burden of 'letting the left hand know what the right hand is doing' or has done. That the breach of agreement was inadvertent does not lessen its impact." *Santobello, supra* at 499. When the elected prosecutor learned of the reduced plea, he reportedly disciplined the involved prosecutors. Nonetheless, the prosecution still did not object at defendant's sentencing. The *Santobello* Court also said that "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *Id.* In this case, the prosecution's agreement to the reduced plea must be fulfilled.

At oral argument, the prosecution asked this Court to rely on *Huff v State*, 599 A2d 428 (Md, 1991). In *Huff*, the prosecutor charged the defendant with "homicide by motor vehicle while intoxicated" and negligently driving a motor vehicle. The defendant paid a preset fine, to which the prosecutor did not object, for the negligent driving charge. The defendant relied on Maryland case law, which held that his payment of the fine acted as a conviction, and contended that he could not be convicted of the greater offense. *Id.* at 429-430, 438. The court reasoned that although the payment acted as a conviction, the defendant had committed multiple offenses. Accordingly, the multiple charges did not violate double jeopardy principles. *Id*. at 438. Unlike the *Huff* defendant, in this case defendant's one offense was prosecuted under the single negligent homicide charge. Also, *Huff* did not occur in a plea setting. Here, the prosecutor's failure to object and her acquiescence in filing the amended information acted as an agreement to the procedure.

The prosecution also asserted at oral argument that the court's order quashing the counts precluded it from objecting to the plea. A comment from our Court repudiates this assertion:

> Since the prosecutor affirmatively added the new count, *would be bound by the accepted plea in the absence of an objection to the proffered plea,* and could not thereafter prosecute on the greater offenses arising out of the same transaction, we do not feel that affirmative acknowledgment under the rule requires that the prosecutor mouth some pointless phrase to the effect that he acknowledges that what he has said is what he intended to say. [*People v Aleman*, 55 Mich App 445, 449; 222 NW2d 771 (1974) (emphasis added).]

Likewise, the prosecution here is bound by its failure to object to the proffered plea.

In the alternative, the prosecution argued that its motion regarding the order to quash acted as an implicit objection to the negligent homicide plea. That motion, however, involved a clarification of the order and was not an objection regarding the reduction of charges. This distinction is crucial and not merely a matter of form. "[I]t was incumbent on the prosecutor to object if he thought no such promise [regarding the defendant's maximum sentence] had been made." *People v Tolbert*, 119 Mich App 422, 424; 326 NW2d 530 (1982). Contrast *People v Sammons*, 191 Mich App 351, 369-370; 478 NW2d 901 (1991), wherein the prosecution actually, not implicitly, objected to the defendant's plea of nolo contendere. See also, *People v Bray*, 77 Mich App 339, 340; 258 NW2d 220 (1977), wherein this Court refused to review the defendant's claim because he failed to object to his plea bargain. The prosecutor here did not object to the reduced charge – indeed, the prosecutor filed an amended information before the court accepted defendant's plea. Those actions are inconsistent with the prosecution's contention on appeal that it did not agree to defendant's negligent homicide plea. Defendant should be able to rely on the prosecution's acquiescence.

The prosecution, however, contends that it did not acquiesce to defendant's plea. We disagree. In *People v Connor*, 209 Mich App 419; 531 NW2d 734 (1995), the trial court quashed an habitual offender information, the defendant pleaded to the remaining charge, and the prosecutor objected to the defendant's nolo contendere plea. *Id*. at 421. Under those circumstances, this Court ruled that the prosecutor had not acquiesced. *Id.* at 430. Unlike *Connor*, the prosecutor in this case agreed to the amended information and did not object to the lesser plea. These actions reflect acquiescence from the prosecution; therefore, this case is not akin to *Connor*.

Although the prosecution's errors are regrettable, particularly in light of the distressing nature of this case, those errors should not affect defendant's right to rely on the prosecutor's original agreement to his reduced plea. Recent case law from our Supreme Court reiterates this policy:

> Public confidence in a system increasingly driven by negotiation can only be preserved by protecting the defendant's constitutional rights, upholding the prosecutor's executive authority, and preserving the trial court's independence. The optimum bargained disposition is that result which best harmonizes these core interests. Where

> the negotiations do not produce harmony, care must be taken to ensure the least damage possible to each of these concerns. When the bargain goes awry, the variation of agreements and remedies admit of no hard and fast rule for resolution. In these cases the appropriate remedy is to remand to allow the defendants to affirm their pleas and bargain for further proceedings if necessary. [*People v Siebert*, 450 Mich 500, 518-519; 537 NW2d 891 (1995).]

The prosecution in this case gave no formal indication that the "bargain" was awry until it sought leave after the court had sentenced defendant. We need not remand to permit defendant to bargain for further proceedings because we uphold the plea made by defendant and assented to by the prosecution.

Finally, the prosecution argues that double jeopardy principles do not preclude the reinstatement of charges against defendant, citing *People v Howard*, 212 Mich App 366; 538 NW2d 44 (1995). This case is distinguishable because the *Howard* prosecutor timely objected to the order reducing the charges before the district court entered it. Further, the prosecution timely appealed to the circuit court, which denied leave. *Id*. at 368. The prosecution here relies on the following passage from *Howard*: "When a plea and sentencing occur on a reduced charge, and the basis for the reduction is later overturned on appeal, jeopardy does not attach." *Id.* at 370. We decline to overturn the basis for defendant's reduced plea. The procedural posture of this case invokes not the double jeopardy principle, but due process issues. The prosecution seeks to do on appeal what it should have done at the trial level. The prosecution may not bargain with a defendant at the trial level, then seek redress in this Court when it later decides that it does not like the deal to which it acquiesced.

Given our disposition of the above issue, the remaining issues are moot.

Affirmed.

/s/ Martin M. Doctoroff
/s/ Maura D. Corrigan
/s/ Robert J. Danhof

[1] We note that this sentence was quite light given the tragic circumstances of this case and defendant's lengthy record of driving offenses.

[2] At the plea hearing, the prosecutor merely objected because the plea would not be admissible in a subsequent civil action.

[3] The prosecution's motion for clarification on the quashing of Count I was not a significant action to retract the plea.