

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

STATE OF OKLAHOMA,)
)
 Appellant,)
)
 v.)
)
 LARRIE MOYERS, and)
 THERESA MOYERS,)
)
 Appellees.)

NOT FOR PUBLICATION
Case No. S-2006-117

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

AUG 29 2006

SUMMARY OPINION

MICHAEL S. RIGHE
CLERK

LEWIS, JUDGE:

Appellees and others not before the Court were originally indicted by the Multi-County Grand Jury in Oklahoma County District Court, Case No. CF-2003-2026, with seventy one (71) counts alleging a criminal scheme to defraud the State of Oklahoma of tax revenue related to interstate trucking operations. The Grand Jury charged the scheme was carried out through crimes including conspiracy, bribery of an Oklahoma Tax Commission employee, falsifying documents, perjury, income tax violations, and racketeering. In March, 2004, Appellee Larrie Moyers entered a guilty plea to Count 1 of the Grand Jury Indictment. Pursuant to a plea bargain, the District Court sentenced Larrie Moyers to a recommended sentence of ten (10) years imprisonment, and the State dismissed the remaining counts against him. The indictment against his wife, Appellee Theresa Moyers, and another co-defendant remains pending in the District Court of Oklahoma County and has not been resolved by either a negotiated plea or jury trial. Another co-defendant pled guilty in exchange for a

five (5) year deferred sentence and agreed to cooperate with the State's investigation.

In September, 2004, Larrie Moyers requested a modification of his sentence under the authority of 22 O.S.2001, § 982 (a). In January, 2005, after investigating the circumstances of Larrie Moyers imprisonment and weighing a variety of factors, including Larrie Moyers' need for substance abuse treatment and the possibility of early release without proper treatment, the District Court entered an order modifying Larrie Moyers' sentence to eighteen (18) months imprisonment with credit for time served, and eight and one-half (8 ½) years probation under terms and conditions, including house arrest, three (3) months of in-patient substance abuse treatment at Larrie Moyers' expense, restitution to the State of Oklahoma of \$350.00 per month throughout the term of probation, and ongoing random drug screening. The State, represented by the Attorney General, opposed Moyers' request for modification.

Several weeks later, on March 17, 2005, the State filed an Information in the District Court of Oklahoma County, Case No. CF-2005-1351, charging the Appellees with one (1) count of conspiracy against the State, 21 O.S.2001, § 424; six (6) counts of falsifying public records, 21 O.S.2001, § 463; fourteen (14) counts of bribery, 21 O.S.2001, §§ 381 and 382; two (2) counts of filing a false, fraudulent State income tax return, 68 O.S.2001, §§ 241 and 2376; two (2) counts of failure to file a State income tax return, 68 O.S.2001, §§ 240.1 and 2376; and one (1) count of racketeering, 22 O.S.2001, § 1403 (A). All of

these charges arose from conduct involving the same criminal scheme as the counts in the original Grand Jury Indictment.

On May 23, 2005, prior to preliminary examination, Appellees filed in District Court a *Motion to Dismiss Information with Prejudice to Re-Filing and Request for Evidentiary Hearing*. In the motion to dismiss, Appellees alleged the charges constituted a vindictive prosecution in violation of the due process guaranteed by the Fourteenth Amendment. See *Blackledge v. Perry*, 417 U.S. 21, 94 S.Ct. 2098, 40 L.Ed.2d 628 (1974). The State objected to the form and substance of this motion in a written response filed July 8, 2005, stating that the charges filed in Case No. CF-2005-1351 involved different criminal offenses never charged in the counts of the Grand Jury Indictment dismissed against Larrie Moyers as a consequence of his plea. The State argued that the prosecution in Case No. CF-2005-1351 was not vindictive in the constitutionally prohibited sense, but rather within the legitimate exercise of prosecutorial discretion.

On July 11, 2005, Appellees waived preliminary hearing on these twenty-six charges and were bound over for District Court arraignment. The District Court, Honorable Tammy Bass-Jones, who had presided over the State's prosecution in Case No. CF-2003-2026, heard evidence and argument from the parties on the Appellees' motion to dismiss on November 8, 2005, and took the matter under advisement.¹ On January 31, 2006, Judge Bass-Jones orally

¹ The appearance sheet and the transcript of January 31, 2006, indicate that an Assistant Attorney General appeared at this November 8, 2005, hearing and participated in argument of the issues to the District Court concerning the reasons for the State's filing of the information

sustained the motion to dismiss from the bench. Her written order filed February 1, 2006, memorializes that Judge Bass-Jones found the State filed the Information in CF-2005-1351 against the Appellees “in direct retaliation for the Sentence Modification which was properly sought by Larrie Moyers, and properly granted by this Court.” Judge Bass concluded that “the evidence before this Court shows unequivocally the appearance of vindictive or retaliatory punishment by the Attorney General’s Office as a result of Larrie Moyers exercising a statutory right, and also reflects actual vindictiveness by the prosecution’s own candid admissions throughout the record in this proceeding.” The State appeals the following allegations of error.²

1. The Court’s Finding Of “Prosecutorial Vindictiveness” In Favor Of The Defendants Larrie Moyers And Theresa Moyers And Resulting Dismissal Of All Charges Against Them In CF-2005-1351 Was Contrary To Law.
2. This Court May Exercise Appellate Jurisdiction Over The Trial Court’s Order In The Event It Construes It To Be An Order Sustaining A Motion To Quash Or Set Aside The Information.

The State initiated the instant appeal of the District Court’s ruling under 22 O.S.2001, § 1053 (1), and a parallel proceeding seeking a writ of prohibition in *State ex rel. Edmondson v. The Honorable Tammy Bass-Jones*, No. PR-2006-227, under Rule 10, Rules of the Court of Criminal Appeals. By an order entered April 11, 2006, this Court dismissed the application for prohibition and directed a response from Appellees to the State’s appeal. Appellees argue the

in CF-2005-1351 and the merits of Appellees’ motion to dismiss. The State’s designation of record requested only the transcript of the January 31, 2006 hearing be included as part of the record on appeal.

² Appellant’s application for oral argument is denied.

appeal should be dismissed, and that the District Court's findings of fact and conclusions of law are supported by the record.

We first address the issue of whether an appeal to this Court lies from the District Court's order. Section 1053 of Title 22 provides that appeals to the Court of Criminal Appeals may be taken by the state or a municipality in the following cases and no other:

1. Upon judgment for the defendant on quashing or setting aside an indictment or information;
2. Upon an order of the court arresting the judgment;
3. Upon a question reserved by the state or a municipality;
4. Upon judgment for the defendant on a motion to quash for insufficient evidence in a felony matter;
5. Upon a pretrial order, decision, or judgment suppressing or excluding evidence where appellate review of the issue would be in the best interests of justice.

Although neither party cites it in their brief, *State v. Lefebvre*, 1994 OK CR 38, 875 P.2d 431 provides precedent for the State's appeal. In *Lefebvre*, a unanimous Court took jurisdiction of a State appeal under section 1053 (1) where the District Court entered an order sanctioning the prosecutor's discovery violations by dismissing the criminal charges with prejudice. Though the District Court's order rested on the exercise of its power to sanction rather than a determination under the statutorily enumerated grounds for a motion to set aside, motion to quash, or a demurrer to the indictment or information, see 22 O.S.2001, § 493-504.1, the appeal proceeded.

We agree with Appellees that their motion to dismiss did not formally allege, and the District Court's ruling clearly did not rest upon, any of the

statutorily enumerated grounds for a motion to set aside, motion to quash, or a demurrer to the indictment or information. 22 O.S.2001, §§ 493-504.1. Nevertheless, we do not conclude that our previous cognizance over the State's appeal in *Lefebvre* under strikingly similar circumstances amounted to an improvident enlargement of terms of the statute. *State v. Hammond*, 1989 OK CR 25, ¶ 6, 775 P.2d 826, 830, overruled in part on other grounds, *State v. Young*, 1994 OK CR 25, 874 P.2d 57 (Lumpkin, V.P.J., dissenting)(appeal of motion to quash based on allegation of insufficient evidence, though not specifically authorized, was consistent with legislative intent). The order appealed is a dismissal with prejudice imposed as a remedy or sanction for the State's violation of due process in filing criminal charges. We conclude that the State's appeal properly invokes our appellate jurisdiction under *Lefebvre* and section 1053 (1).

We also address the State's argument that the District Court's order dismissing the charges with prejudice was unauthorized by the statutes on dismissal of criminal charges. See 22 O.S.2001, §§ 493-510, 815-817. The State's statutory analysis here overlooks the constitutional nature of a District Court's authority in response to a legal motion. Our District Courts are "constitutionally endowed with unlimited original jurisdiction of *all justiciable matters* except as otherwise provided in Article 7, Section 7, of the Oklahoma Constitution." *Cummings v. State*, 1998 OK CR 45, ¶ 26, 968 P.2d 821, 831 (emphasis added). The District Court's jurisdiction in a criminal prosecution "is triggered by the filing of an Information alleging the commission of a public

offense with appropriate venue,” Id., quoting *Parker v. State*, 1996 OK CR 19, ¶ 21, 917 P.2d 980, 985. Once triggered, the unlimited original jurisdiction of the District Court permits it to hear, determine, and properly remedy all “justiciable” matters in the prosecution.

Counsel for Appellees filed, and the District Court sustained, a motion alleging a violation of the United States Constitution in the State’s conduct of a criminal prosecution. The due process guarantees arising under the state and federal constitutions, and proper remedies for their violation, are clearly justiciable matters lying within the unlimited original jurisdiction of the District Court. Cf. *Reeds v. Walker*, 2006 OK 43, ¶ 11, ___ P.3d ___ (absent Congressional pre-emption, state courts possess inherent authority to adjudicate claims arising under the laws of the United States). That the motion to dismiss sustained by the District Court here does not fit neatly within a particular statutory designation for demurrer, motion to set aside, or motion to quash is irrelevant to whether the District Court can entertain its legal and factual premises and devise a proper remedy. *State v. Hammond*, 1989 OK CR 25, ¶ 3, 775 P.2d 826, 829, overruled in part on other grounds, 1994 OK CR 25, 874 P.2d 57 (Lumpkin, V.P.J., dissenting) (a motion is an application by a party to a suit for an order from the court and may encompass a wide variety of matters not specifically enumerated in the statutes), citing *Landrum v. State*, 1953 OK CR, 96 Okl.Cr. 356, 255 P.2d 525, *Barber v. State*, 1963 OK CR 103, 388 P.2d 320; and *Holt v. State*, 1973 OK CR 7, 505 P.2d 500.

This Court held without dissent in *Lefebvre* that the District Court had broad discretion to enforce the then-existing³ discovery obligations under *Allen v. District Court* by fashioning an appropriate remedy, including dismissal of the charges with prejudice. *Lefebvre*, at ¶ 7-8, 875 P.2d at 432-433. A District Court vested with the discretionary power to sanction a prosecutor's discovery violations by dismissal of criminal charges with prejudice clearly possesses no less authority to impose an effective remedy upon finding a violation of due process by the State's initiation of a vindictive prosecution. The remedy imposed here is not without precedent. *Application of Anderson*, 1990 OK CR 82, ¶ 6, 803 P.2d 1160, 1163 (dismissing murder charge with prejudice for due process violation); *T.F.M. v. State*, 1977 OK CR 323, ¶ 17, 572 P.2d 280, 284 (dismissing delinquency proceedings and criminal charges for due process violation); *Wilson v. District Court of Oklahoma County*, 1970 OK CR 58, ¶ 15, 471 P.2d 939, 943 (trial court may properly entertain motion to dismiss charges with prejudice for speedy trial violation).

Consistent with our approach to the State's appeal in *Lefebvre* and our case law under section 1053, this Court will not interfere with the District Court's exercise of the power to enter such an order unless an abuse of discretion is shown. *State v. Love*, 1998 OK CR 32, ¶ 2, 960 P.2d 368, 369. Abuse of discretion occurs only where the trial court engages in "unreasonable, unconscionable and arbitrary action taken without proper consideration of the

³ Supplanted by legislation in the Oklahoma Criminal Discovery Code, 22 O.S.2001, § 2001 et seq., which also confers broad enforcement powers under section 2002 (E)(2).

facts and law pertaining to the matter submitted.” *Harvey v. State*, 1969 OK CR 220, ¶9, 458 P.2d 336, 338.

On appeal, the State argues that the filing of the Information in Case No. CF-2005-1351 did not breach its plea bargain agreement with Larrie Moyers; that it has no plea agreement with Theresa Moyers (her pending charges in CF-2003-2026 will be resolved by jury trial or plea regardless of the District Court’s order in CF-2005-1351); that the charges in CF-2005-1351 are different offenses than the counts in the Grand Jury Indictment in CF-2003-2026; and that the charges are supported by probable cause. Finally, without disputing the facts found by the District Court, the State submits that the “vindictive prosecution” prohibited by the Fourteenth Amendment has not been shown.

The District Court’s order of dismissal finds as a fact that the charges against both Larrie and Theresa Moyers in Case No. CF-2003-1351 were prompted by the State’s dissatisfaction with the District Court’s lawful order modifying the sentence of Larrie Moyers. The District Court further found that the filing of the additional charges would not have occurred but for the order modifying Larrie Moyers’ sentence to terms unsatisfactory to the State. The District Court’s recitations in the transcript before this Court (the January 31, 2006 transcript) of statements made by the Assistant Attorney General in prior proceedings show this conclusion is supported by the evidence.

After considering the evidence, the parties’ arguments, and very capable briefing from the parties on the law of vindictive prosecution, the District Court

concluded that the State's Information in CF-2005-1351 was filed in "direct retaliation" for Larrie Moyers' successful quest for a sentence modification in CF-2003-2026, that such retaliation was unlawful, and dismissal of the charges with prejudice was the proper remedy. The record presented shows the District Court gave careful consideration to the issues presented. The State has not shown that under these circumstances the District Court abused its discretion. We affirm.

DECISION

The Judgment of the District Court of Oklahoma County is **AFFIRMED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2005), the **MANDATE** is **ORDERED** issued upon delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY
THE HONORABLE TAMMY BASS-JONES, DISTRICT JUDGE

APPEARANCES IN DISTRICT COURT

W.A. DREW EDMONDSON
ATTORNEY GENERAL
CHARLES S. ROGERS
MARY ANN ROBERTS
ASSISTANT ATTORNEY GENERALS
112 STATE CAPITOL BLDG.
OKLAHOMA CITY, OK 73105

ATTORNEYS FOR STATE

J. DAVID OGLE
JOSH T. WELCH
117 PARK AVENUE, THIRD FLOOR
OKLAHOMA CITY, OK 73102

R. SCOTT ADAMS
CITY PLACE BUILDING
240 N. ROBINSON
TWENTY-FIFTH FLOOR
OKLAHOMA CITY, OK 73102

ATTORNEYS FOR DEFENDANTS

OPINION BY: LEWIS, .J.
CHAPEL, P.J.: Concur
LUMPKIN, V.P.J. Concur In Results
A. JOHNSON, J.: Concur
C. JOHNSON, J.: Concur

APPEARANCES ON APPEAL

W.A. DREW EDMONDSON
ATTORNEY GENERAL
CHARLES S. ROGERS
ASSISTANT ATTORNEY GENERAL
112 STATE CAPITOL BLDG.
OKLAHOMA CITY, OK 73105

ATTORNEYS FOR APPELLANT

J. DAVID OGLE
JOSH T. WELCH
117 PARK AVENUE, THIRD FLOOR
OKLAHOMA CITY, OK 73102

ATTORNEYS FOR APPELLEES