STATE OF SOUTH CAROLINA	)	IN THE COURT OF GENERAL SESSIONS
COUNTY OF RICHLAND	)	FIFTH JUDICIAL CIRCUIT
STATE,	)	Case Numbers: 2015-GS-40-01723; [redacted]; 2013A4010601092; and I902097
v.	)	
BRIAN TALKINGTON,	)	
Defendant.	)	**ORDER DENYING MOTION TO DISMISS, TO QUASH, FOR INJUNCTIVE RELIEF, FOR WRIT OF PROHIBITION, OR FOR WRIT OF MANDAMUS**

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Hearing Date: September 9, 2015
Attorneys for the State: Hans Pauling and Joseph Shenkar
Attorneys for Defendant: Douglas Truslow and Neal Truslow

This matter is before me on Defendant Brian Talkington's Motion to Dismiss, to Quash, for Injunctive Relief, for a Writ of Prohibition, or for a Writ of Mandamus. The essence of Talkington's motion is that this Court should prohibit the State from trying Talkington for Criminal Domestic Violence (CDV) of a High an Aggravated Nature (HAN) because the magistrate court previously dismissed a CDV charge against Talkington based on the same facts. After carefully considering the written submissions of counsel, the case files in 2015-GS-40-01723 and 2014-CP-40-07362, and arguments from counsel, Talkington's motion is respectfully denied for the reasons that follow.

BACKGROUND

The State initially charged Talkington with CDV 2nd offense on July 11, 2011. This was an error because Talkington had no predicate CDV 1st offense. Upon realizing this mistake, the State remanded the case to the magistrate court, but it did so without petitioning the circuit court, as required by section 22-3-545(B) of the South Carolina

Code. According to Talkington, he repeatedly brought this error to the State's attention, but the State forged ahead.

A jury trial in the magistrate's court was set for February 26, 2013. On the day of trial, a jury venire was qualified by the magistrate, and the parties selected a jury. Thereafter, Talkington moved to dismiss based, at least in part, on the magistrate's lack of jurisdiction over a CDV 2nd indictment that had not been properly remanded. According to Talkington, he made this motion after the State and the magistrate judge agreed that the motion would be heard as if the jury had been sworn. The magistrate, Judge Edmond, granted Talkington's motion to dismiss.

After the magistrate dismissed the case, Assistant Solicitor Sheila Mims emailed Talkington's attorney and informed him that the she intended to appeal the magistrate's dismissal. However, the State did not appeal. Instead, approximately nine months after Judge Edmond's dismissal, the State *nolle prossed* the CDV 2nd indictment and charged Talkington with a CDV 1st offense, based on the same set of facts.

A different magistrate, Judge Stroman, held a pre-trial hearing on the CDV 1st charge. At the hearing, Talkington argued: (1) the new indictment should be dismissed based on double jeopardy and other constitutional grounds, (2) the procedural history should be presented to the magistrate judge who issued the warrant for CDV 1st, or (3) the matter should be referred to Judge Edmond. Judge Stroman referred the matter back to Judge Edmond; however, for reasons unknown, a second pre-trial hearing was set before a third magistrate, Judge Shealy.

Judge Shealy denied Talkington's motion to dismiss. Specifically, Judge Shealy found that because the magistrate court did not have jurisdiction over the initial charge for CDV 2nd, jeopardy did not attach.

Talkington appealed Judge Shealy's order to the circuit court, and Judge Kinard heard the appeal on March 6, 2015. At the hearing, Judge Kinard orally announced that the matter would be remanded to the magistrate court so that Judge Edmond could attempt to reconstruct the record of the motion to dismiss from February 26, 2013.

On April 8, 2015, before Judge Kinard had reduced his order to writing, Solicitor Hans Pauling indicted Talkington on a charge of CDVHAN, based on the same underlying facts. On May 8, 2015, Judge Edmond issued an order attempting to reconstruct the record.[1] In the order, Judge Edmond stated, among other things, that the CDV 2nd case was not properly remanded to the magistrate court because it lacked a signature from a circuit court judge, and as a result, the case remained one for CDV 2nd, a crime over which the magistrate did not have jurisdiction.

Talkington filed this motion to dismiss, to quash, for injunctive relief, for a writ of prohibition, or for a writ of mandamus on May 12, 2015.

LAW/ANALYSIS

I. Collateral Estoppel/Double Jeopardy

Talkington first argues the CDVHAN indictment should be dismissed based on the doctrine of collateral estoppel because the April 2015 indictment is the State's "third attempt to perfect a charge relating to the exact same conduct occurring on July 4, 2011 . . . [, and it is] the third different charge the State has referred against Talkington (CDV

[1] The parties did not receive this order until September 1, 2015.

2nd Offense, CDV 1st Offense, and now CDVAN) arising out of the exact same nucleus of operative facts." (emphasis in original)

Collateral estoppel prevents a party from relitigaating an issue that has already been decided in a previous action. *See State v. Hewins*, 409 S.C. 93, 106, 760 S.E.2d 814, 821 (2014). "[C]ollateral estoppel in the criminal context is derived from the Fifth Amendment Double Jeopardy Clause, which forbids any person from being 'twice put in jeopardy of life or limb.'" *Id.* at 107, 760 S.E.2d at 821 (quoting *Ashe v. Swenson*, 397 U.S. 436, 442 (1970)).

The Double Jeopardy Clause provides three safeguards: "(1) protection from prosecution for the same offense after acquittal; (2) protection against prosecution for the same offense after conviction; and (3) protection from multiple prosecution for the same offense after an improvidently granted mistrial." *State v. Kirby*, 269 S.C. 25, 27-28, 236 S.E.2d 33, 34 (1977). "[O]ne is in jeopardy when a legal jury is shown and impaneled to try [a defendant] upon a valid indictment in a competent court." *State v. Stephenson*, 54 S.C. 234, 32 S.E. 305 (1899).

Here, even though the parties dispute whether they had an agreement to proceed "as if the jury was sworn" prior to hearing Talkington's motion to dismiss, there is no dispute that Judge Edmond determined the magistrate's court was not "a competent court" in which to try the case because the charge for CDV 2nd had not been properly remanded. Thus, jeopardy did not attach, and the ultimate issue of Talkington's guilt was never litigated.

II. Destruction of Evidence

Talkington next argues this case should be dismissed with prejudice because the State's actions have caused the destruction of the transcript from his motion to dismiss and that evidence was central to Talkington's argument. However, even assuming the transcript would reveal that the State had agreed to allow Talkington's motion to be heard "as if the jury had been sworn," jeopardy still would not have attached because the magistrate lacked subject matter jurisdiction over the CDV 2nd offense indictment. *Cf. State v. Whetstone*, 333 S.C. 376, 377, 510 S.E.2d 225, 226 (Ct. App. 1998) ("Absent compliance with 1993 S.C. Acts 174 section 1(B) [now codified as section 22-3-545(B)], the magistrate's court would have lacked jurisdiction of the subject matter to dispose of charges for second offense ill-treatment of animals . . . ."). Accordingly, the lack of a transcript does not make a difference to Talkington's double jeopardy argument, and in the words of Chief Judge Alex Sanders, "whatever doesn't make any difference, doesn't matter." *McCall v. Finley*, 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct. App. 1987).

III. Prohibiting the State from Prosecuting Talkington for CDVHAN

Finally, Talkington asks this Court to enjoin the State from pursuing its indictment for CDVHAN, because the State was using it as a vehicle to circumvent the order of remand issued by Judge Kinard.[2] However, even though the State's indictment for CDVHAN *might* have circumvented the remand, in reality, it did not. Judge Edmond issued an order in response to the remand, setting forth his recollection of events. The order confirmed that Judge Edmond had dismissed the case because the magistrate court

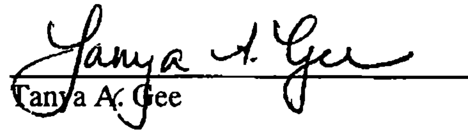
[2] In the alternative to an injunction, Talkington asks this Court to issue a Writ of Prohibition or a Writ of Mandamus to prevent the State from prosecuting the indictment for CDVHAN. These requests are also denied as they are based on the same reasons addressed in section III of this order.

lacked subject matter jurisdiction over the indictment. Thus, an injunction is not necessary because the circuit court's order was not circumvented. Moreover, the circuit court itself was without jurisdiction to hear the appeal from Judge Shealy's order denying Talkington's motion to dismiss because such an order is not subject to an immediate appeal. *See, e.g.*, *State v. Miller*, 289 S.C. 426, 427, 346 S.E.2d 705, 706 (1986) ("[A]n order denying a double jeopardy claim is not immediately appealable.").

CONCLUSION

Based on the foregoing reasons, Talkington's motion is denied. Case number 2014-CP-40-07362 (the appeal from Judge Shealy's order denying Talkington's motion to dismiss) is ended.

AND IT IS SO ORDERED.



Tanya A. Gee

October 12, 2015