

NO. 06-1568

IN THE SUPREME COURT OF OHIO

APPEAL FROM
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO
NO. 88313

STATE OF OHIO,

Plaintiff-Appellant

-vs-

NORMAN A. CRAIG,

Defendant-Appellee

MERIT BRIEF OF APPELLANT

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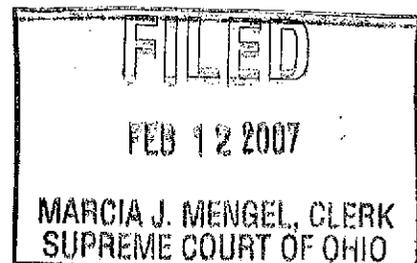


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Statement Of The Case And Relevant Facts

Defendant-Appellee, Norman A. Craig (hereinafter, "defendant") was indicted by a Cuyahoga County grand jury for one count of Rape, through force or the threat of force, of a nine-year-old child. (See indictment, CR 470055, dated August 26, 2005) The case was assigned to the docket of Judge Eileen A. Gallagher.

Shortly after indictment, the defendant subpoenaed records from the Cuyahoga County Department of Children and Family Services ("CCDCFS" or "the Agency"), which immediately moved for a protective order. (CCDCFS Motion For Protective Order and In Camera Inspection filed October 7, 2005) Judge Gallagher conducted an in-camera inspection of the subpoenaed records, denied the Agency a protective order, and turned over to the defense all the CCDCFS records, including the referent information. (Order filed November 3, 2005) Upon handing over the records, Judge Gallagher expressed her opinion of the credibility of the victim to the prosecutor and defense counsel, stating, "*This victim has credibility problems.*" Defense counsel filed a notice of intent to use the CCDCFS records at trial. In this pleading, he memorialized Judge Gallagher's opinion of the victim's credibility, stating: "*this Court acknowledged that the alleged victim...has credibility problems then provided all the records at issue to the defense.*" (See, Defendant's Response to CCDCFS's Motion For Protective Order and Notice of Intent to Use Records at Trial filed February 13, 2006) The State then filed a Motion in Limine under the rape shield statute to prevent the use of the CCDCFS documents at trial. (Motion in Limine filed February 15, 2006).

Numerous trial dates were set. On the sixth of these, defense counsel began trial in another courtroom and Judge Gallagher put the defendant's trial on hold until defense counsel was available. The child-victim, her family, school personnel, medical professionals, and law

enforcement officers were prepared for trial and waited each day until defense counsel became available two days later, but Judge Gallagher reset the trial for three days after that.

Finally, on the day of trial, Judge Gallagher conducted an in-camera rape shield hearing pursuant to the State's Motion in Limine. After personally confronting the victim as to any prior sexual activity, Judge Gallagher ruled that the material she provided to defense counsel, i.e., the child-victim's CCDCFS records that defense counsel wished to introduce at trial, were, in fact, protected by Ohio's Rape Shield Law and thus could not be presented to the jury. Judge commented that "*[t]he entire case rests upon (the victim's) word.*" (Transcript dated June 12, 2006, pages 13-14.)¹ Minutes after defense counsel heard the trial court's decision that a jury would not be able to receive any evidence from the CCDCFS reports and that the "entire case rest[ed] upon [the victim's] word", defense counsel waived a jury trial and elected to have the case tried to the one person who had read the CCDCFS reports and had evaluated the victim's credibility, Judge Eileen A. Gallagher. (Tr. 15)

The State then immediately moved for Judge Eileen A. Gallagher to recuse herself as the finder of fact. (Tr. 15-18) She denied the State's motion. (Tr. 21-22) After accepting defendant's jury waiver, the trial judge at noon then set the bench trial to commence in one hour at 1:00pm. (Tr. 22) Counsel for the State then prepared a Writ of Prohibition to be filed in the Eighth District, but seconds before filing, Judge Gallagher dismissed the case for want of prosecution at 1:30 p.m. on June 12, 2006. The State filed a timely notice of appeal with the Eighth District Court of Appeals. In an opinion journalized on July 3, 2006, the Eighth District

¹ The State is filing a separate motion to supplement the record with the twenty-two page transcript from the June 12, 2006 hearing in common pleas court. This transcript was not part of the record in the Eighth District because the appellate court dismissed the appeal approximately three weeks after the State filed its notice of appeal. Thus, the State did not have the opportunity to complete the appellate record prior to the appellate court's dismissal of the appeal.

dismissed the State's appeal because the trial court's dismissal was not "with prejudice." This Court accepted jurisdiction of the following proposition of law in the State's appeal. *Id.*, (Nov. 29, 2006), 111 Ohio St. 3d 1491, 2006-Ohio-6171.

Law And Argument

Proposition Of Law I: The State May Appeal as a Matter Of Right Any Decision by a Trial Court that Dismisses a Criminal Indictment Regardless of Whether the Dismissal is With or Without Prejudice.

A. *Introduction*

In *State v. Craig, supra*, the Eighth District Court of Appeals dismissed the State's appeal of the trial court's dismissal of an indictment for rape of a minor child after the prosecutor was a half-hour late for trial. The prosecutor had been preparing a writ of prohibition to prevent Judge Gallagher from presiding over the trial in the case after the Judge had read the minor victim's CCDCFS records and from them, pre-judged the victim's credibility. The Appellate Court concluded that the order appealed from was not a final, appealable order because the order was not "with prejudice" and thus the state had the ability "to re-indict." *See, Craig, supra at ¶10.* This conclusion by the Eighth District is in error and should be reversed for the following reasons:

- It ignores the clear language of both R.C. §2945.67 and R.C. §2505.02;
- It oversimplifies the State's ability to "re-indict" a criminal case;
- It denies the State due process by preventing arbitrary dismissals from appellate scrutiny; and,
- The Eighth District is the only jurisdiction to erect this hurdle to the State appeal of a dismissed criminal case.

The grand jury charged the defendant with a serious crime, the crime of rape. In dismissing these charges, the State believes the trial court acted unreasonably, arbitrarily and

capriciously. The State believes it had a right and a duty to appeal such a dismissal, both to correct a wrong as well as to prevent further such unreasonable decisions. In the case at bar, however, the trial court was able to *insulate* itself from appellate scrutiny simply by not dismissing the case “with prejudice.” This result cannot comport with our adversarial system’s concepts of due process and fundamental fairness. Simply put: the entity that allegedly takes action that is contrary to law (herein the trial court) should not be able to be in control of and thus prohibit appellate review of that decision. The Eighth District’s dismissal of the State’s appeal allows this perversity to occur.

B. The decision of the Eighth District ignores the clear language of R.C. 2945.67 and R.C. 2505.02.

The dismissal of the indictment by the trial court in *State v. Craig* is, in fact, a final appealable order. R.C. §2945.67(A) provides the circumstances under which the State may appeal and R.C. §2505.02(B) defines which orders are final and appealable. Both Revised Code sections are unambiguous and both must be considered when deciding the State’s right to appeal the dismissal of an indictment without prejudice. Not only did the *Craig* Court read R.C. §2505.02 incorrectly, it failed to consider R.C. §2945.67(A) at all.

R.C. §2505.02 in pertinent part, states:

- (B) An order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is one of the following:
 - (1) An order that affects a substantial right in an action that in effect determines the action and prevents a judgment;***

The *Craig* Court incorrectly concluded that because the trial court’s dismissal was without prejudice and the State was able to re-present the matter to a grand jury for re-indictment, there was no final, appealable order. See *Id.*, citing *State v. Brown*, Cuyahoga App. No. 84229, 2004-Ohio-5587 at ¶10: “A dismissal without prejudice does not affect a

'substantial right' within the meaning of R.C. §2505.02 because the state can bring the action again." This conclusion by the Eighth District ignores the unique qualities of a specific criminal case. A criminal case is the prosecution of charges brought by a grand jury and assigned a specific criminal case number. The Eighth District ignored the fact that a dismissal without prejudice does affect the substantial right of the State to prosecute *that criminal case*. It declares *that criminal case* "over" and prevents a judgment from being rendered *in that criminal case*. This is the very definition of a final, appealable order under R.C. §2505.02(B)(1). The fact that the State "can re-indict" under a different case number does not mean that *in that original case* substantial rights were not affected, the action was not determined, and a judgment was not prevented. In other words, the definition in R.C. §2505.02 unmistakably reads as *case-specific*, not *relief-specific*, as the above logic from the Eighth District favoring dismissal would suggest.

Moreover, the specific language of R.C. §2945.67 provides a distinct right of appeal to the State when a criminal case is dismissed without *any* limitation as to whether the dismissal is with or without prejudice. R.C. §2945.67 provides in pertinent part:

(A) A prosecuting attorney *** may appeal as a matter of right any decision of a trial court in a criminal case *** which decision grants a motion to dismiss all or any part of an indictment ***.

This statute cannot be any clearer. It allows the State to appeal any situation where an indictment is dismissed. By adding the requirement that a dismissal be "with prejudice" before the State is allowed to appeal, the Eighth District is reading words into the statute. "Courts do not have authority to ignore the plain and unambiguous language of a statute under the guise of statutory interpretation, but must give effect to the words used. *Wray v. Wymer* (1991), 77 Ohio App. 3d 122, 132. In other words, courts may not delete words used or insert words not used.

Cline v. Ohio Bur. Of Motor Vehicles (1991), 61 Ohio St. 3d 93, 97.” *In re Collier* (1993), 85 Ohio App.3d 232, 237.

Recently, this Honorable Court analyzed both statutes and held that the dismissal of all or part of a juvenile complaint is a final appealable order in a situation where the State had no ability to re-charge the juvenile. See, *In re S.J.*, 106 Ohio St.3d 11, 2005-Ohio-3215.² The *In re S.J.*, this Court held that when a juvenile court dismisses a felony-murder charge and amends it to a lesser-included offense on its own motion, the dismissal is the equivalent of a “decision grant[ing] a motion to dismiss” under R.C. §2945.67(A). *Id.*, 2005-Ohio-3215 at ¶13 (Importantly, the dismissal of the felony-murder charge did not indicate it was with prejudice). Citing R.C. §2505.02(B), this Court determined that such “***an order is final, as it affects a substantial right and prevented a judgment on the murder charges.”

Indeed, it appears that the Eighth District is alone in its construction of an artificial “with prejudice” requirement prior to the State’s appeal of a dismissal of an indictment. The other jurisdictions of this State have decided appeals by the State without regard to the nature of the dismissal.³

² See also, *State v. Hayes* (1986), 25 Ohio St. 3d 173, where this Court held that the State has the right of appeal under R.C. §2945.67(A) after the trial court’s dismissal of part of an indictment as unconstitutional, even though there remained pending criminal charges against the defendant. In *Hayes*, there is no discussion of whether or not the order of the trial court was a final, appealable order in a situation where, ostensibly, there was no ability to re-indict.

³ In the following cases, the courts decided the appropriateness of the trial court’s dismissal of indictments without indicating that the dismissals were with or without prejudice: *Columbus v. Storey*, Franklin App. No. 03AP-743, 2004-Ohio-3377; *State v. Daugherty*, Ashland App. No. 03COA, 2004-Ohio-2005; *State v. Songer*, Ashland App. No. 03COA051, 2004-Ohio-1281; *State v. Ferguson*, Franklin App. No. 02AP-660, 2003-Ohio-665; *State v. Watkins*, Franklin App. No. 02AP-659, 2003-Ohio-668; *State v. Schoolcraft*, Meigs App. No. 02CA1, 2002-Ohio-5947; *State v. Mobley* (Sept. 3, 1999), Hamilton App. No. C-980868, 2999 WL 682625; *State v. Moran* (Nov. 25, 1998), Lorain App. No. 97CA006885, 1998 WL 831570; *State v. Lewis* (1998), 125

C. *The ability of the State to attempt to re-indict a criminal case should not preclude the State's appeal of dismissed indictment.*

The Eighth District's analysis is additionally flawed in that it wrongly assumes that the State can merely "bring the action again". Unlike a Civ.R. 41(A) dismissal by a party "without prejudice," the State cannot unilaterally just "re-file" a criminal case. Unless and until a grand jury returns a true bill verdict, a criminal case is not re-instated. To obtain a new criminal case, the State must go back to the grand jury, re-subpoena the victim(s) and other witnesses to grand jury, and present the case again. Then, and only *if* the grand jury indicts again, will the State be able to prosecute the case. After that, the State will have to schedule another arraignment, conduct discovery anew, conduct again one or more pretrial hearings --- and then be faced with the possibility that the trial court could dismiss the case for the same arbitrary reason.

In *Craig*, the Eighth District's solution is for the State to endure a potentially endless round of re-indictments. While the State may have obtained another indictment, it can have no confidence that the trial court that dismissed its previous case for failure of a the victim to appear for trial will again dismiss its case when the victim again fails to appear, even if the State wishes to proceed to trial without that witness. If the trial court then dismissed the case without prejudice, the State again would not be able to appeal and would again be forced to attempt to re-indict, setting off a potential endless chain with no resolution.

The Eighth District's analysis further presumes there are no other factual or legal prohibitions preventing the State from representing the case to the grand jury, including speedy trial prohibitions, statutes of limitation, witness availability, etc. For example, the State is required to comply with R.C. §2945.71 -- to bring a criminal defendant to trial within a

Ohio App.3d 352 (Lorain); *State v. Hays* (Dec. 30, 1997), Mahoning App. No. 96 C.A. 108, 1997 WL 816537; *State v. Palmer*, Montgomery App. No. 19921, 2004-Ohio-779.

statutorily mandated period of time. This requirement is negatively impacted by a re-indictment process. While it is true that the State *can* re-present the matter to another grand jury and that grand jury *may* vote to indict for the same crimes, the time the State has to bring the same defendant to trial under R.C. §2945.71 is reduced by the time expended in the first case. *State v. Adams* (1989), 43 Ohio St. 3d 67, 68. It is the potential for (and the probability of) the re-indictment continuum in these cases that can eventually place the State in the precarious position of having to prosecute a criminal case literally within days of an indictment.⁴ In fact, a trial court could conceivably continue to dismiss re-indictments since the cases are placed back on the originating courts' dockets, until the State literally had no time left to prosecute.

The State in *Craig* sought to argue before the reviewing court that the potential for re-indictment is not only irrelevant to the appealability of an order dismissing an indictment under relevant statutes, the possibility of re-indictment is also not a reason that an order lacks status as a final, appealable order. The Eighth District's rationale erroneously ignores the unique circumstances of a criminal case.

D. The State must have the ability to appeal subjective and arbitrary dismissals.

In *Craig*, the State was prevented from making the argument that the trial court's decision to dismiss an indictment because a prosecutor was late for trial was unreasonable, capricious and arbitrary and, thus, an inappropriate basis for dismissal. The State further sought a ruling that dismissals for this and other subjective and capricious reasons are likewise prohibited. The result of the Eighth District's position on this issue is that a trial court could

⁴ See oral argument before the Ohio Supreme Court on February 8, 2006 in *State v. Hull*, 106 Ohio St. 3d 1482, 2005-Ohio-387, available for download at <http://www.supremecourtofohio.gov/videostream/> (last viewed Feb. 8, 2006), which includes a discussion of the precariousness of the State's position when little time remains for prosecution after a case is remanded by a reviewing court for trial.

dismiss a case for the most arbitrary of reasons and yet insulate itself from appellate scrutiny simply by not dismissing the case “with prejudice.”

Among the arbitrary dismissals appealed by the State in the Eighth District are: the failure of the victim to appear for trial⁵, the repeated failure of the State’s complaining witness to appear for trial, despite the fact that the State informed the trial court that it was ready and able to proceed without the witness,⁶ and the dismissal of an indictment because the State failed to produce an out-of-state witness for a pre-trial.⁷ The State unsuccessfully sought direct review in these cases in order to protect victims, the public, and itself, against future dismissals of a similar nature that are likewise contrary to law. Each victim, every potential victim, as well as the State of Ohio, must be confident that when a criminal case is brought before a trial court, that court will not seek to punish a tardy prosecutor or simply end the prosecution on an impulse because a witness did not appear. There are options for dealing with an attorney who does not comply with a court’s orders other than dismissing a minor rape victim’s case. As shown above, too many criminal prosecutions have abruptly ended for these subjective and inappropriate reasons. By appealing *Craig* and its predecessors, the State, since 2004, has sought to both clarify the appealability of dismissed indictments and achieve a rule of law that prohibits similar arbitrary dismissal of indictments. This Court must recognize that dismissals by trial courts without prejudice are final, appealable orders to prevent more unreasonable dismissals. See R.C. §2945.67(A); R.C. §2505.05(B); *In re S.J.*, *supra*.

⁵ *Brown, supra*, FN 3, *supra*.

⁶ *State v. Beauregard*, Cuyahoga App. Nos. 85402, 85403, 85404, 85405, 2005-Ohio-3722, appeal not allowed by, 107 Ohio St.3d 1699, 2005-Ohio-6763.

⁷ *State v. Morgan*, Cuy.App.No. 87293, 2006-Ohio-3947, (Aug. 28, 2006), state’s motion to certify conflict denied.

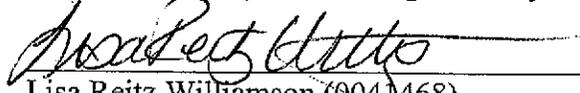
Conclusion

The impact of the *Craig* decision, while narrow in focus, has far-reaching ramifications for all persons within the criminal justice system as well as all persons who are now or will be affected by crime. This faulty conclusion by the Eighth District leaves the State with nothing more than the costly alternative of re-presenting the matter to another grand jury for re-indictment, which requires victims and other witnesses to come to court yet again; reproducing another arraignment and numerous pre-trial hearings; and again responding to discovery and other pre-trial motions in order to resolve the case – all the while hoping the trial court will not once more dismiss the second indictment for the same or a similar arbitrary reason. Victims, witnesses, law enforcement, and the public which the State is charged with protecting, are all left to wait while the process begins anew – it is the quintessential example of the aphorism: “justice delayed is justice denied”.

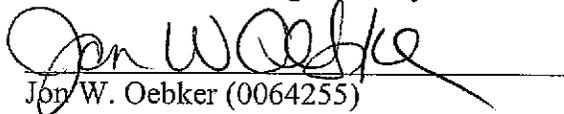
Accordingly, the State of Ohio respectfully asks this Court to reverse the Eighth district’s decision.

Respectfully submitted,

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Service

A copy of the foregoing Merit Brief of Appellant has been mailed this 12th day of February, 2007 to Rufus Sims, 75 Public Square #313, Cleveland, Ohio 44113.


Assistant Prosecuting Attorney

NO.

06-1568

IN THE SUPREME COURT OF OHIO

APPEAL FROM
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO
NO. 88313

STATE OF OHIO,
Plaintiff-Appellant

-vs-

NORMAN CRAIG,
Defendant-Appellee

NOTICE OF APPEAL TO THE SUPREME COURT OF OHIO

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FILED
AUG 17 2006
MARCIA J MENGEL, CLERK
SUPREME COURT OF OHIO

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NO.

IN THE SUPREME COURT OF OHIO

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THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO
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STATE OF OHIO,
Plaintiff-Appellant

-vs-

NORMAN A. CRAIG,
Defendant-Appellee

NOTICE OF APPEAL TO THE SUPREME COURT OF OHIO

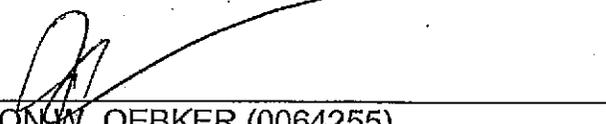
Now comes the State of Ohio and hereby gives Notice of Appeal to the Supreme Court of Ohio from a judgment and final order of the Court of Appeals for Cuyahoga County, Ohio, Eighth Judicial District, journalized July 3, 2006, which dismissed the appeal.

Said cause did not originate in the Court of Appeals and involves a felony.

Respectfully submitted

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CUYAHOGA COUNTY PROSECUTOR

BY:



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SERVICE

A copy of the foregoing Notice of Appeal has been mailed this 16th day of August 2006, to Rufus Sims, 75 Public Square #333, Cleveland, Ohio 44113.



Assistant Prosecuting Attorney

Westlaw

857 N.E.2d 1229 (Table)

Page 1

111 Ohio St.3d 1491, 857 N.E.2d 1229 (Table), 12 POR 9, 2006 -Ohio- 6171
(Cite as: 111 Ohio St.3d 1491, 857 N.E.2d 1229 (Table))

State v. Craig Ohio 2006.(The decision of the Court is referenced in the North Eastern Reporter in a table captioned "Supreme Court of Ohio Motion Tables".)

Supreme Court of Ohio
State
v.
Craig
NO. 2006-1568

November 29, 2006

APPEALS ACCEPTED FOR REVIEW

Cuyahoga App. No. 88313.
Pfeifer, J., dissents.
Ohio 2006.
State v. Craig
111 Ohio St.3d 1491, 857 N.E.2d 1229 (Table), 12
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Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Gerald E. Fuerst, Clerk of Courts

CA06088313
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STATE OF OHIO

Appellant

COA NO.
88313

LOWER COURT NO.
CP CR-470055

COMMON PLEAS COURT

-vs-

NORMAN A. CRAIG

Appellee

MOTION NO. 385415

Date 06/21/2006

Journal Entry

SUA SPONTE, THE APPEAL IS DISMISSED FOR LACK OF A FINAL APPEALABLE ORDER PER R.C. 2505.02. THE CASE WAS "DISMISSED FOR WANT OF PROSECUTION." WHEN A TRIAL COURT DOES NOT SPECIFY WHETHER A DISMISSAL IS WITH OR WITHOUT PREJUDICE, WE PRESUME IT WAS INTENDED TO BE WITHOUT PREJUDICE. A DISMISSAL WITHOUT PREJUDICE IS NOT A

FILED AND JOURNALIZED THE ORDER. STATE V. BROWN, CUYAHOGA APP.NO. 84229, 2004-OHIO-5587.
PER APP. R. 22(E)

JUL 3 - 2006

ANNOUNCEMENT OF DECISION
PER APP. R. 22(B), 22(D) AND 26(A)
RECEIVED

JUN 21 2006

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY: *[Signature]* DEP.

Judge FRANK D. CELEBREZZE, JR., Concur

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY: *[Signature]* DEP.

[Signature: Ann Dyke]
Administrative Judge ANN DYKE

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also S.Ct.Prac.R. II, Section 2(A)(1).

NOTICE MAILED TO COUNSEL
FOR ALL PARTIES-COSTS TAXED

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[Cite as *Columbus v. Storey*, 2004-Ohio-3377.]

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

City of Columbus, :
 :
 Plaintiff-Appellant, :
 :
 v. : No. 03AP-743
 : (M.C. No. 2002TRD-205145)
 Quincy L. Storey, : (ACCELERATED CALENDAR)
 :
 Defendant-Appellee. :

O P I N I O N

Rendered on June 29, 2004

Richard C. Pfeiffer, Jr., City Attorney; *Stephen L. McIntosh*,
City Prosecutor, and *Matthew A. Kanai*, for appellant.

Tracy A. Younkin, for appellee.

APPEAL from the Franklin County Municipal Court.

KLATT, J.

{¶1} Plaintiff-appellant, City of Columbus, appeals from the Franklin County Municipal Court's pretrial dismissal of misdemeanor traffic charges against defendant-appellee, Quincy L. Storey. Because the trial court did not abuse its discretion in dismissing the charges, we affirm that judgment.

{¶2} Appellee was arraigned on a series of misdemeanor traffic charges on October 21, 2002. After a number of continuances,¹ the case finally came on for trial on June 30, 2003, at 11:00 a.m. The identification of appellee as the driver of the vehicle in question was to be the key factual issue at trial. However, due to miscommunication within the prosecutor's office, the police officers who allegedly could identify appellee as the driver of the vehicle were not subpoenaed to appear in court at the scheduled 11:00 a.m. trial time. Rather, the officers were on a "call-in sheet" (meaning they would only have to appear if called). Because the officers were not present when the trial was scheduled to commence, and the assistant prosecutor did not want to request another continuance, the assistant prosecutor offered appellee a plea bargain to reduced charges. Apparently, appellee and his counsel initially accepted that plea bargain. However, appellee changed his mind and rejected the plea shortly before it was to be presented to the trial court at approximately 12:30 p.m.²

{¶3} Because the city's identification witnesses were not present, the city could not proceed with its case. Therefore, the trial court dismissed the case. Although the dismissal entry indicates that appellee's motion to dismiss was granted, the record reflects that the case was dismissed sua sponte by the trial court. The record also suggests that the trial court may have initially dismissed the case when the assistant prosecutor was out of the courtroom. Upon the assistant prosecutor's return, the trial court appeared to reconsider its decision as it heard arguments from counsel. During that argument, the assistant prosecutor neither requested a continuance nor expressed a

¹ On November 13, 2002, appellee requested and was granted a continuance of 60 days for a second pretrial hearing. On January 12, 2003, the court granted a continuance of the pretrial hearing to March 5, 2003. Additionally, the trial date, initially set for April 30, 2003, was continued to June 30, 2003.

² Appellee's counsel indicated that if appellee pled to the reduced charges, he would be subject to a one-year driver's rights suspension for lack of proof of insurance.

desire or ability to immediately proceed with trial. The assistant prosecutor did begin to explore the possibility of delaying the commencement of the trial so he could contact his witnesses, but the trial court quickly rejected that suggestion and indicated that the case was dismissed.

{¶4} On appeal, appellant assigns the following error:

THE TRIAL COURT ABUSED ITS DISCRETION BY SUA SPONTE DISMISSING THE INSTANT CASE OVER THE OBJECTION OF THE STATE WHERE SUCH DISMISSAL OPERATED AS A SUMMARY JUDGMENT; WAS NOT THE RESULT OF A CONSTITUTION [SIC] VIOLATION, STATUTORY VIOLATION, OR MANIFEST INJUSTICE; AND WHERE THE BALANCE OF INTERESTS MANDATED THAT THE TRIAL COURT SHOULD HAVE ALLOWED THE STATE EITHER TO PROCEED IMMEDIATELY TO TRIAL OR A BRIEF POSTPONEMENT OF THE CASE.

{¶5} Appellant first argues that the trial court's dismissal of the case was improper because the trial court assumed the role of the trier of fact and, without hearing any evidence, determined that the factual element of identification could not be made. In essence, appellant contends that the trial court made a pretrial determination that the city could not carry its burden. However, appellant's argument mischaracterizes the basis for the trial court's dismissal.

{¶6} The trial court made no substantive findings or rulings in connection with the dismissal. The trial court did not determine that the city's substantive evidence was deficient. Rather, the trial court dismissed the case on procedural grounds based upon the city's inability to timely proceed with its case. Therefore, this case is distinguishable from *State v. Shaw*, Franklin App. No. 02AP-1036, 2003-Ohio-2139, a case upon which appellant relies.

{¶7} In *Shaw*, the trial court went beyond the face of the complaint in granting the defendant's motion to dismiss after a pretrial evidentiary hearing. Because the trial

court did not confine itself to the face of the indictment in ruling on a substantive legal issue, this court reversed. In doing so, we noted that the Ohio Rules of Criminal Procedure do not allow for summary judgment on an indictment prior to trial. *Id.*, citing *State v. Tipton* (1999), 135 Ohio App.3d 227, 228. If a motion to dismiss requires examination of evidence beyond the face of the complaint, it must be presented as a motion for acquittal under Crim.R. 29 at the close of the state's case. *Shaw*, *supra*, citing *State v. Brown* (Apr. 26, 1999), Athens App. No. 98CA14. As previously noted, in the case at bar, the trial court's dismissal did not reflect a substantive ruling. The case was dismissed on procedural grounds for want of prosecution. Therefore, *Shaw* is not controlling.

{¶8} Crim.R. 48(B) recognizes by implication that trial judges may sua sponte dismiss a criminal action over the objection of the prosecutor, since the rule sets forth the procedure for doing so. *State v. Busch* (1996), 76 Ohio St.3d 613, 615.³ The rule does not limit the reasons for which a trial judge might dismiss a case, and the Supreme Court of Ohio has held that a judge may dismiss a case pursuant to Crim.R. 48(B) if a dismissal serves the interest of justice. *Id.* However, the trial court must state on the record its findings of fact and reasons for the dismissal. Crim.R. 48(B).

{¶9} Appellant argues that the trial court failed to make findings or state the reasons for the dismissal on the record. We disagree. The trial court's findings and reasons for the dismissal are reflected in the transcript of the exchange between counsel

³ Crim.R. 48(B) provides:

If the court over objection of the state dismisses an indictment, information, or complaint, it shall state on the record its findings of fact and reasons for the dismissal.

and the trial court. The trial court found that the trial was set to begin at 11:00 a.m. At 12:30 p.m., the trial court wanted the city to proceed with its case. However, the city was unprepared to proffer its identification witnesses as they had not been subpoenaed. Thus, the dismissal entry indicated "No I.D." Additionally, the trial court noted that this case previously had been scheduled for trial. Therefore, in essence, the trial court dismissed the case for want of prosecution. These findings and reasons for the dismissal are minimally sufficient to comply with Crim.R. 48(B).

{¶10} Appellant, however, also argues that the trial court's dismissal of the case was not in the interest of justice. The standard of review in assessing the propriety of the trial court's dismissal of criminal charges over the objection of a prosecutor is abuse of discretion. *Id.* at 616; *State v. Taylor* (Aug. 23, 2001), Franklin App. No. 01AP-158. Abuse of discretion connotes more than an error of law or judgment. *State v. Hancock* (1990), 67 Ohio App.3d 328, citing *Klever v. Reid Bros. Exp., Inc.* (1951), 154 Ohio St. 491. An abuse of discretion implies that the trial court's attitude, as evidenced by its decision was unreasonable, arbitrary, or unconscionable. *Busch*, *supra*, at 616, citing *State v. Jenkins* (1984), 15 Ohio St.3d 164, 222; see, also, *City of Cleveland v. Bacho*, Cuyahoga App. No. 81600, 2002-Ohio-6832 (trial court has the discretion to dismiss cases for a variety of reasons, which include the failure of the citing officer to appear for trial of the traffic matter).

{¶11} Here, we fail to see how the trial court's dismissal of the case constituted an abuse of discretion under these circumstances. It was apparent that the city was not prepared to proceed with trial in the absence of its identification witnesses. The assistant prosecutor did not express a desire or ability to proceed immediately with the case against appellee. The assistant prosecutor did not request a continuance of the trial date.

Although it appears the assistant prosecutor began to explore the possibility of a short postponement, he did not directly request a postponement. Nor was it clear how much time would have been needed to get the identification witnesses to the courtroom. It should also be noted that this case had been scheduled for trial once before. Accordingly, given that the trial court has the "inherent power to regulate the practice before it and protect the integrity of its proceedings," *Busch, supra*, at 615, citing *Royal Indemn. Co. v. J.C. Penney Co., Inc.* (1986), 27 Ohio St.3d 31, 33-34, we conclude that the trial court's dismissal of the case does not constitute an abuse of discretion when the city was unable to proceed with its case.

{¶12} Therefore, appellant's sole assignment of error is overruled, and the judgment of the Franklin County Municipal Court is affirmed.

Judgment affirmed.

PETREE, J., concurs.

LAZARUS, P.J. concurs in judgment only.

[Cite as *State v. Beauregard*, 2005-Ohio-3722.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NOS. 85402, 85403, 85404 & 85405

STATE OF OHIO :
 :
 Plaintiff-Appellant : JOURNAL ENTRY
 : and
 vs. : OPINION
 :
 MICHAEL BEAUREGARD (NO. 85402) :
 KIMAUDURA PULLIE (NO. 85403) :
 MARIE DEARMOND (NO. 85404) :
 SAMUEL TEASLEY (NO. 85405) :
 :
 Defendants-Appellees :

 DATE OF ANNOUNCEMENT :
 OF DECISION : JULY 21, 2005

 CHARACTER OF PROCEEDING: : Criminal appeal from
 : Common Pleas Court
 : Case No. CR-452110

 JUDGMENT : DISMISSED.

 DATE OF JOURNALIZATION :

 APPEARANCES:

 For plaintiff-appellant William D. Mason, Esq.
 Cuyahoga County Prosecutor
 BY: Martina Kulick, Esq.
 Assistant County Prosecutor
 The Justice Center - 9th Floor
 1200 Ontario Street
 Cleveland, Ohio 44113

 For defendant-appellee, Robert L. Tobik, Esq.
 Michael Beauregard: Cuyahoga County Public Defender
 BY: Paul Kuzmins, Esq.
 Assistant Public Defender
 1200 West Third Street
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For defendant-appellee,
Kimaudura Pullie:

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Marie Dearmond, Pro Se
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For defendant-appellee,
Samuel Teasley:

Ralph T. DeFranco, Esq.
75 Public Square
Suite No. 1320
Cleveland, Ohio 44113

MICHAEL J. CORRIGAN, J.:

{¶ 1} The state appeals from a dismissal of four separate criminal indictments on grounds that it failed to produce at a pretrial an out-of-state witness. We dismiss the appeal for want of a final, appealable order because the order itself is considered to be without prejudice. See *City of Fairview Park v. Fleming* (Dec. 7, 2000), Cuyahoga App. Nos. 77323 and 77324 (dismissal of a criminal complaint cannot be considered a proceeding ancillary to the action; therefore, the dismissal of a criminal complaint, without prejudice, is not a final order, and the court lacks jurisdiction to consider it); *State v. Steel*, Cuyahoga App. No. 85076, 2005-Ohio-2623 at ¶6.

{¶ 2} This appeal is dismissed.

It is, therefore, ordered that appellees recover of appellant their costs herein taxed.

It is ordered that a special mandate issue out of this court directing the Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MICHAEL J. CORRIGAN
JUDGE

ANTHONY O. CALABRESE, JR., P.J.,

MARY EILEEN KILBANE, J., CONCUR.

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R.22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).

COLLEEN CONWAY COONEY, J.:

{¶ 1} The State appeals the trial court's dismissal of the felony charges against defendant-appellee, Delrone Brown ("Brown"). For the reasons discussed below, we dismiss this appeal for lack of jurisdiction.

{¶ 2} On October 22, 2003, Brown was charged with aggravated burglary, robbery, domestic violence, and disrupting a public service. A pretrial was held on November 20, which was continued at Brown's request until December 5. Brown subpoenaed the victim to appear at the December 5 pretrial. When the victim failed to appear at the pretrial, Brown requested another continuance until December 18. The victim, although subpoenaed, again failed to appear at the pretrial. Brown requested another continuance of the pretrial until January 13, 2004, and subpoenaed the victim. The victim failed to appear again, and the trial court, sua sponte, dismissed the case over the State's objection. Following a hearing, the State's motion to vacate and to reinstate the case was denied.

{¶ 3} The State appeals the trial court's dismissal, raising three assignments of error. We need not address the merits of the appeal because the record contains no final appealable order.

{¶ 4} R.C. 2505.02(B) defines a final order, in pertinent part, as follows:

{¶ 5} **"(B) An order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is one of the following:**

- (1) An order that affects a substantial right in an action that in effect determines the action and prevents a judgment;**
- (2) An order that affects a substantial right made in a special proceeding or upon a summary application in an action after judgment;**
- (3) An order that vacates or sets aside a judgment or grants a new trial;**

(4) An order that grants or denies a provisional remedy and to which both of the following apply:

(a) The order in effect determines the action with respect to the provisional remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy.

(b) The appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action.

(5) An order that determines that an action may or may not be maintained as a class action; * * *

{¶ 6} A conflict exists among appellate districts as to whether a dismissal under Crim.R. 48(B) constitutes a final, appealable order. The Tenth Appellate District has contended that dismissals involving Crim.R. 48(B) constitute final appealable orders. See *State v. Watkins* (Feb. 13, 2003), Franklin App. No. 02AP-659; *State v. Ferguson*, Franklin App. No. 02AP-660, 2003-Ohio-665; *State v. Noland* (June 26, 2001), Franklin App. No. 01AP-159; *State v. Clipner* (Sept. 14, 1999), Franklin App. No. 98AP-1477. However, this Court has repeatedly held that, in the absence of a notation that the matter was dismissed with prejudice, a dismissal pursuant to Crim.R. 48(B) is not a final appealable order. See *Fairview Park v. Fleming* (Dec. 7, 2000), Cuyahoga App. Nos. 77323, 77324; *Cleveland v. Stifel* (Sept. 2, 1999), Cuyahoga App. No. 75761, citing *State v. Dixon* (1984), 14 Ohio App.3d 396, 471 N.E.2d 864.

{¶ 7} Crim.R. 48 provides the procedure for the dismissal of a criminal case by either the State or the court. Subsection (B) provides that “if the court over the objection of the state dismisses an indictment, information, or complaint, it shall state on the record its findings of fact and reasons for the dismissal.” This rule does not provide for a dismissal with prejudice. See *Stifel*, supra, citing *Dixon*, supra.

{¶ 8} In the instant case, the judgment entry of dismissal does not indicate that this matter was dismissed with or without prejudice. This court has held that, when a trial court does not specify whether the dismissal was with or without prejudice, we are to presume it was intended to be without prejudice. See, *Fleming*, supra, citing *Stifel*, supra. In *Fleming*, this court stated:

{¶ 9} “Crim.R. 48(B) does not provide for a dismissal with prejudice; the court has the inherent power to dismiss with prejudice only where it is apparent that the defendant has been denied a constitutional or statutory right, the violation of which would, in itself, bar prosecution. *State v. Dixon* (1984), 14 Ohio App.3d 396, 471 N.E.2d 864; *State v. Sutton* (1979), 64 Ohio App.2d 105, 411 N.E.2d 818.

• * *

{¶ 10} A dismissal without prejudice does not affect a ‘substantial right’ within the meaning of R.C. 2505.02 because the state can bring the action again. The entry does not deny the state a judgment in its favor. *State v. Eberhardt* (1978), 56 Ohio App. 2d 193, 198, 381 N.E.2d 1357; *State v. Tankersley*, 1996 Ohio App. LEXIS 4791, *7-8 (Oct. 31, 1996), Cuyahoga App. Nos. 70068 and 70069, unreported. A dismissal is not a final determination of the parties’ rights if the complaint can be refiled. *Stifel*, at 7-8. Therefore, a dismissal without prejudice is not a final order under R.C. 2505.02(B)(1) and (2).

{¶ 11} The orders of dismissal are not final orders under R.C. 2505.02(B)(3) and (5) because a dismissal does not vacate a judgment, grant a new trial, or determine whether an action may be maintained as a class action. These also are not orders that grant or deny a ‘provisional remedy’ under R.C. 2505.02(B)(4); the dismissal of a criminal complaint cannot be considered a ‘proceeding ancillary to [the] action.’ See R.C. 2505.02(A)(3) (defining a provisional remedy).” *Fleming*, supra.

{¶ 12} The trial court in the instant case made no finding that Brown was denied a constitutional or statutory right when it dismissed the charges against him. The trial court dismissed the action prior to trial and, therefore, jeopardy had not attached. Because this action may be refiled without infringing upon Brown’s constitutional or statutory rights, the dismissal was not a final determination of the parties’ rights and, thus, does not affect a substantial right. *Fleming*, supra; citing *Stifel*, supra. Therefore, a dismissal of a criminal complaint, without prejudice, is not a final order, and this court lacks jurisdiction to consider the State’s appeal.

Appeal dismissed.

It is, therefore, considered that said appellant shall pay the costs herein.

It is ordered that a special mandate be sent to the Cuyahoga County Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

ANN DYKE, P.J. and

TIMOTHY E. McMONAGLE, J. CONCUR

JUDGE
COLLEEN CONWAY COONEY

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).

[Cite as *State v. Daugherty*, 2004-Ohio-2005.]

COURT OF APPEALS
ASHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellant

-vs-

ROBERT T. DAUGHERTY

Defendant-Appellee

JUDGES:

Hon. William B. Hoffman, P.J.

Hon. Sheila G. Farmer, J.

Hon. Julie A. Edwards, J.

Case No. 03COA050

OPINION

CHARACTER OF PROCEEDING:	Appeal from the Ashland County Court of Common Pleas, Juvenile Division, Case No. 00CRI07960
JUDGMENT:	Reversed and charges reinstated.
DATE OF JUDGMENT ENTRY:	April 19, 2004
APPEARANCES:	
For Plaintiff-Appellant	For Defendant-Appellee
CHRISTOPHER R. TUNNELL Assistant County Prosecutor	SAMUEL B. WEINER 743 South Front Street

Hoffman, P.J.

{¶1} Plaintiff-appellant State of Ohio appeals the August 28, 2003 Judgment Entry entered by the Ashland County Court of Common Pleas, which dismissed two pending charges against defendant-appellee Robert T. Daugherty, following his completion of treatment in lieu of conviction on a related charge.

STATEMENT OF THE FACTS AND CASE

{¶2} On August 23, 2000, the Ashland County Grand Jury indicted appellee on two counts of illegal processing of drug documents, in violation of R.C. 2925.23(B)(1), and one count of possession of criminal tools, in violation of R.C. 2923.24(A). In a September 5, 2000 Judgment Entry, the trial court ordered appellee to undergo a drug evaluation to determine his eligibility for treatment in lieu of conviction. The trial court conducted a hearing on the matter on May 7, 2001. After hearing evidence, the trial court granted appellee's motion to amend count two of the indictment by striking the dates of the offense alleged to have occurred after March 23, 2000. This amendment permitted the trial court to order treatment in lieu of conviction on count two. Via Judgment Entry filed May 23, 2001, the trial court granted appellee's motion for treatment in lieu of conviction, and "held in abeyance" counts one and three of the indictment. The trial court placed appellee on community control for a period of two years, and ordered appellee to pay a fine and perform community service.

{¶3} In an April 28, 2003 correspondence, the trial court advised the assistant prosecuting attorney appellee had successfully completed his two year treatment program,

and requested the State dismiss the remaining two counts against appellee, which were not eligible for treatment in lieu of conviction. The State informed the trial court of its desire to and reasons for proceeding on the remaining counts.

{¶4} Via Judgment Entry filed August 28, 2003, the trial court found, "No useful purpose can be served by prosecuting [appellee] on the remaining charges," and dismissed counts one and three of the indictment.

{¶5} It is from this judgment entry the State appeals, raising as its sole assignment of error:

{¶6} "I. THE TRIAL COURT ABUSED ITS DISCRETION BY DISMISSING THE INDICTMENT OVER THE PROSECUTOR'S OBJECTION."

{¶7} Herein, the State maintains the trial court abused its discretion in dismissing the remaining counts of the indictment against appellee. We agree.

{¶8} As acknowledged by the trial court, only one of the three charges against appellee was eligible for treatment in lieu of conviction. Counts one and three of the indictment remained pending even after appellee successfully completed treatment on count two. Crim. R. 48(B) requires a trial court which dismisses an indictment over the objection of the State to state on the record its findings of fact and reasons for the dismissal. The Ohio Supreme Court has construed Crim. R. 48(B) as giving a court authority to dismiss an indictment if the dismissal "serves the interests of justice." *State v. Busch* (1996), 76 Ohio St.3d 613. Specifically, the *Busch* Court noted:

{¶9} "Crim. R. 48(B) recognizes by implication that trial judges may sua sponte dismiss a criminal action over the objection of the prosecution, since the rule sets forth the

Defendant-Appellee

:

Case No. 03COA050

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Ashland County Court of Common Pleas is reversed and counts one and three ordered reinstated. Costs assessed to appellee.

JUDGES

[Cite as *State v. Ferguson*, 2003-Ohio-665.]

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio, :
 :
 Plaintiff-Appellant, :
 :
 v. : No. 02AP-660
 :
 Geoffrey K. Ferguson, : (REGULAR CALENDAR)
 :
 Defendant-Appellee. :

D E C I S I O N

Rendered on February 13, 2003

Richard C. Pfeiffer, Jr., City Attorney, and *Lara N. Baker*, for
appellant.

David H. Thomas, for appellee.

APPEAL from the Franklin County Municipal Court.

LAZARUS, J.

{¶1} Plaintiff-appellant, State of Ohio ("prosecution"), appeals from the May 24, 2002 bond entry of the Franklin County Municipal Court sua sponte dismissing the criminal case over the objection of the prosecution. For the following reasons, we reverse and remand.

{¶2} On May 23, 2002, defendant-appellee, Geoffrey K. Ferguson ("Ferguson"), was arrested and charged with domestic violence and assault for punching Clarinda V.

Watkins ("Watkins"), mother of his children, in her face and pulling her hair.¹ Columbus Police Officer Michael Secrest swore the complaint.

{¶3} On May 24, 2002, Ferguson was arraigned.² Ferguson appeared in court, represented by counsel. The trial court, after inquiring as to the wishes of both Ferguson and Watkins, dismissed the criminal case. The prosecution objected to the dismissal of the complaint on the grounds that the trial court's decision was in violation of *State v. Busch* (1996), 76 Ohio St.3d 613, Crim.R. 48, and the local rules of the court.

{¶4} It is from this judgment that the prosecution timely appeals, assigning the following assignment of error:³

{¶5} "The trial court abused its discretion by dismissing the charges against the appellee, over the objection of the prosecutor, in violation of Criminal Rule 48(B), when the court failed to find either that a deprivation of defendant's constitutional and/or statutory rights existed or that the dismissal served the interests of justice."

{¶6} First, the prosecution contends that the trial court dismissed the charges against Ferguson without making the required findings of fact and reasons required by Crim.R. 48(B), which provides:

{¶7} "If the court over objection of the state dismisses an indictment, information, or complaint, it shall state on the record its findings of fact and reasons for the dismissal."

{¶8} Under Crim.R. 48, the trial court may dismiss a case over the prosecution's objection if the defendant's constitutional or statutory rights have been violated or if the dismissal serves the interests of justice. *State v. Clipner* (Sept. 14, 1999), Franklin App. No. 98AP-1477. If the trial court dismisses a case pursuant to Crim.R. 48(B), the trial court is required to make the requisite findings of fact on the record. *Id.* See, also, *State v. Noland* (June 26, 2001), Franklin App. No. 01AP-159 (when entering a dismissal, the trial court must make findings consistent with Crim.R. 48[B]).

¹ Watkins was also arrested and charged with domestic violence and assault for knowingly causing physical harm to Ferguson, by scratching him on the left side of his face and the left side of his torso with her fingernails.

² Watkins also appeared in court, with counsel, and was arraigned at the same time.

³ The prosecution also appealed the trial court's bond entry dismissing the criminal complaint against Watkins (02AP-659). On June 26, 2002, this court denied the prosecution's motion for consolidation of the two appeals, but coordinated the appeals for purposes of oral argument.

{¶9} In this case, the trial court failed to abide by the mandates of Crim.R. 48(B). The trial court stated no findings or reasons for dismissal. The transcript of the arraignment proceedings reads, in pertinent part:

{¶10} "THE COURT: Mr. Ferguson, do you wish to proceed against Ms. Watkins?"

{¶11} "DEFENDANT FERGUSON: (Shakes head.)"

{¶12} "THE COURT: Dismissed."

{¶13} "MR. PETERSON [prosecutor]: Judge, we are going to object. Judge, one second - -"

{¶14} "THE COURT: No."

{¶15} "(Discussion held off the record.)"

{¶16} "MR. PETERSON: Judge, we would object under *State v. Bush* [sic] as well as Criminal Rule 48 as well as local rules. Judge, the prosecuting witnesses in this case are not - - are not the complainants. This is a police filing."

{¶17} "THE COURT: I understand all that. You're right, but I'm dismissing it anyway." (Tr. 4.)

{¶18} The trial court failed to make the required findings of fact and reasons for the dismissal, specifically whether Ferguson's rights had been violated or whether the dismissal served the interests of justice. As such, we conclude that the trial court erred in dismissing the domestic violence and assault charges filed against Ferguson. See *State v. Lowe* (June 19, 2001), Franklin App. No. 00AP-1130.

{¶19} Additionally, the prosecution argues that continuing to prosecute the case against the wishes of Ferguson did not present constitutional or statutory violations. The prosecution contends that dismissing the case upon the wishes of the victim and over the objections of the prosecution was not the intent of the legislature in drafting R.C. 1901.20(A)(2) which prohibits dismissal of charges solely at the request of the complaining witness and over the objection of the prosecution.

{¶20} R.C. 1901.20(A)(2) provides:

{¶21} "A judge of a municipal court does not have the authority to dismiss a criminal complaint, charge, information, or indictment solely at the request of the complaining witness and over the objection of the prosecuting attorney, village solicitor,

city director of law, or other chief legal officer who is responsible for the prosecution of the case.”

{¶22} Strictly speaking, R.C. 1901.20(A)(2) is not applicable to this case because the complaining witness, Officer Secrest, did not request that the criminal complaint be dismissed. Thus, R.C. 1901.20(A)(2) does not address the situation here in which an alleged victim, who is not the complaining witness, does not wish to proceed. Here, both the complaining witness and the prosecution were ready and willing to proceed. Nevertheless, the clear intent of the general assembly in enacting R.C. 1901.20(A)(2) is to provide the prosecution with the discretion to proceed on a domestic violence complaint without the active participation, or perhaps even in the face of opposition, from the victim. *Clipner, supra*.

{¶23} In addition, the prosecution contends that the facts of the case do not support a finding that the dismissal should be affirmed on the basis that it served the interests of justice. Specifically, the prosecution contends that the trial court failed to consider the five factors enumerated in *Busch* before dismissing the charges of domestic violence. These factors are:

{¶24} “The seriousness of the injuries, the presence of independent witnesses, the status of counseling efforts, whether the complainant’s refusal to testify is coerced, and whether the defendant is a first-time offender * * *.”

{¶25} While *Busch* has essentially been legislatively superseded, this court has previously held that “the factors provided in *Busch* still provide valuable guidelines which a court should consider before dismissing a charge in a domestic case.” *Clipner, supra*. In this case, the trial court did not articulate on the record any of the *Busch* factors. The trial court simply inquired if Ferguson wanted to proceed against Watkins, and if Watkins wanted to proceed against Ferguson, and thereafter dismissed the case. At arraignment, the prosecution stated that Ferguson had no prior acts of violence, but had six prior order-ins for failing to appear for court on other matters. (Tr. 3.) The prosecution also stated that Ferguson had not been spoken to regarding his wishes as a victim of the offenses. We find that the trial court erred in dismissing the case without considering the five factors

in *Busch* on the record. Accordingly, the prosecution's sole assignment of error is well-taken.

{¶26} For the foregoing reasons, the prosecution's sole assignment of error is sustained. This case is reversed and remanded to the Franklin County Municipal Court with instructions to reinstate the case on its active docket.

*Judgment reversed and
remanded with instructions.*

BRYANT and KLATT, JJ., concur.

State v. Hays Ohio App. 7 Dist., 1997. Only the West-law citation is currently available.

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Seventh District, Mahoning County..

STATE of Ohio, Plaintiff-Appellant,

v.

Levon HAYS, Defendant-Appellee.

No. 96 C.A. 108.

Dec. 30, 1997.

Criminal Appeal from Youngstown Municipal Court, No. 96 CR 849 B. Affirmed.

Dionne M. Almasy, City Prosecutor, Youngstown, Ohio, for plaintiff-appellant.

Warren Pritchard, Youngstown, Ohio, for defendant-appellee.

OPINION

COX, J.

*1 This matter presents a timely appeal from a decision rendered by the Youngstown Municipal Court, Mahoning County, Ohio, whereupon the trial court dismissed a domestic violence case when the victim/spouse stated that she did not wish to pursue criminal charges against her husband, defendant-appellee, Levon Hays.

At the outset, we note that appellee has failed to file a brief in this matter. Therefore, pursuant to App.R. 18(C), this court is authorized to accept plaintiff-appellant, State of Ohio's statement of the facts and issues as correct and reverse the trial court's judgment if appellant's brief reasonably appears to sustain such action.

On or about May 17, 1996, appellee was arrested on a charge of domestic violence in violation of R.C. 2919.25(A). Appellee, during an argument, allegedly struck his wife (the victim) in her mouth causing her to have a swollen upper lip. The victim signed a domestic violence complaint and appellee was sub-

sequently arrested.

On May 20, 1996, appellee appeared before the trial court for his arraignment. The trial court set the hearing for June 3, 1996, however said hearing was rescheduled to June 10, 1996. Prior to the onset of the hearing on June 10, 1996; the trial court entertained a statement from the victim wherein she clearly indicated that she did not wish to pursue criminal charges against her husband. (Tr. 2). The victim stated that the only reason she signed the complaint was because she was told by Detective Sergeant Delphine Casey, the head of the crisis intervention unit, that the only way the charge would be able to go before the trial court was by signing said complaint. (Tr. 2). The victim stated before the trial court that she was not told that she was actually bringing criminal charges against her husband. (Tr. 2).

Upon hearing the victim's testimony, the trial court accepted such statement and found that she and appellee had "obviously made their peace" and that the victim did not wish to proceed any further. (Tr. 3). Appellant clearly explained to the trial court that it wished to proceed with the criminal charges, even without the victim's cooperation and despite the fact that she wanted to withdraw her complaint. (Tr. 3-4). The trial court asked the victim what her desire was and she clearly stated that she did not wish to go forward. (Tr. 5) The trial court thereupon dismissed the complaint against appellee. It is from this decision that the within appeal emanates.

Appellant presents three assignments of error on appeal.

Appellant's first assignment of error alleges:

"The trial court abused its discretion by granting the victim's request for dismissal of the charge without considering the appropriate factors set forth by the Ohio Supreme Court."

Appellant argues that the trial court abused its discretion by not allowing it to proceed with the domestic violence charges against appellee absent the fact that the victim refused to proceed with the criminal

charges against appellee.

*2 Appellant cites State v. Wise (1994), 99 Ohio App.3d 239, 650 N.E.2d 191 wherein the court held that a trial judge does not have the authority to grant a *sua sponte* motion to dismiss over the objection of the State.

The Ohio Supreme Court has addressed the issue before us. In State v. Busch (1996), 76 Ohio St.3d 613, 615, 669 N.E.2d 1125 the Ohio Supreme Court held that the trial court had authority to *sua sponte* dismiss a case over the State's objection. In *Busch*, the trial court ordered the couple to counseling and after becoming satisfied that no coercion had occurred between the parties, ordered that a complaint against the husband be dismissed.

Although appellant argues that *Busch* is distinguishable from the instant case we find it applicable to the facts herein. In *Busch, supra*, the State charged the accused with two counts of domestic violence and approximately two months later, several events took place such as the victim had the opportunity to retain her own counsel and sign an affidavit stating that she did not wish to proceed with her complaint. (*Busch, supra* at 613-614, 669 N.E.2d 1125). *Busch* further illustrated several factors that a trial court should consider prior to dismissing a case. Such factors include:

1. the seriousness of the injuries;
2. the presence of independent witnesses;
3. the status of counseling efforts;
4. whether the victim's refusal to testify is coerced;
5. whether the defendant is a first time offender.

(*Busch, supra* at 616, 669 N.E.2d 1125.)

A trial court has the discretion to *sua sponte* dismiss a criminal case over the objection of the State where the complaining witness does not wish to proceed. *Busch, supra* at 613, 669 N.E.2d 1125. *Busch* is controlling in the case at bar as the trial court was obviously convinced that there was no coercion between the victim and the appellee and that the parties had made their peace with each other. Therefore, the trial court did not abuse its discretion.

In the present case, the trial court repeatedly asked the victim if she wished to pursue the criminal

charges against her husband. The victim clearly stated that she had no intentions of filing criminal charges against her husband, nor was she aware that by signing the initial complaint, she was, in fact, filing same. The trial court did acknowledge appellant's desire to pursue the charges against appellee, however the trial court used its discretion in dismissing the complaint based upon the fact that the victim did not want to pursue criminal charges against her husband.

In *Hart v. Munobe (1993), 67 Ohio St.3d 3, 615 N.E.2d 617*, the Ohio Supreme Court held that an appellate court's reviewing of a lower court's judgment indulges in a presumption of regularity of the proceedings below. Based upon a thorough review of the record, it is apparent that the trial court considered all relevant factors presented to it, prior to making its decision to dismiss this case.

In *State v. Adams (1980), 62 Ohio St.2d 151, 404 N.E.2d 144*, the Ohio Supreme Court held that an abuse of discretion connotes more than an error of law or judgment, it implies that the trial court's attitude is unreasonable, arbitrary or unconscionable. Absent an abuse of discretion, this court will not reverse the trial court's decision.

*3 Appellant's first assignment of error is found to be without merit.

Appellant's second assignment of error alleges: "The trial court committed plain error by denying the State its substantial right to have a criminal trial conducted according to proper procedure."

Given our discussion and decision under appellant's first assignment of error, the issues presented under this assignment of error are found to be without merit.

Appellant's third assignment of error alleges: "The trial court erred by failing to state its findings of fact and reasons for dismissal on the record when the trial court dismissed the complaint over the objection of the State."

Crim.R. 48(B) reads that "if the court over objection of the state dismisses an indictment, information, or

complaint, it shall state on the record its findings of facts and reasons for the dismissal."

It is clear from the record that the trial court dismissed the case upon concluding after extensive dialogue that the victim and appellee were together, had made their peace and the victim would offer no testimony to support the criminal charge. The victim repeatedly told the trial court that she did not desire to pursue any criminal charges against her husband. Further, the victim clearly stated that she was unaware that by signing the initial complaint, it also meant that she would have to pursue a criminal charge against her spouse. At a hearing, the victim specifically stated:

"MRS. HAYS: I really don't have another statement. As far as what I have already said, Your Honor, I-

"THE COURT: MY UNDERSTANDING IS THAT YOU DON'T WANT TO GO FORWARD ON THIS CASE.

"MRS. HAYS: No, I don't.

"THE COURT: DO YOU WANT TO GIVE YOUR REASON FOR THE RECORD, PLEASE?

"MRS. HAYS: Yes, sir. It was no intention of mine to file criminal charges againsy (sic) my husband.

"THE COURT: IS THIS YOUR SIGNATURE?

"MRS. HAYS: Yes, sir.

"THE COURT: DO YOU READ?

"MRS. HAYS: Yes, sir.

"THE COURT: DID YOU READ THAT WHEN YOU SIGNED IT?

"MRS. HAYS: I was told what that-

"THE COURT: DID YOU READ IT WHEN YOU SIGNED IT?

"MRS. HAYS: Yes, sir, I did.

"THE COURT: GO AHEAD.

"MRS. HAYS: I was told by Delphine Casey the only way this would go before you or the court would be that I sign that form. it was not - I was not explained that I was bringing criminal charges against my husband.

"I had already taken care of what I needed to do in the county. I was called on my job and in my home by Ms. Casey.

"THE COURT: WELL, SINCE YOU CAN READ AND YOU SIGNED THIS, THERE ISN'T ANY QUESTION IN YOUR MIND THAT YOU SIGNED

A CRIMINAL COMPLAINT. IT SAYS 'STATE COMPLAINT' AT THE TOP.

"IF I CHOSE TO, I GUESS I COULD FIND YOU IN CONTEMPT IF YOU FAIL TO TESTIFY, BUT LET'S HOPE THAT THE TWO OF YOU MADE YOUR PEACE, WHICH SEEMS TO BE THE CASE AT THIS POINT. I WILL ACCEPT YOUR STATEMENT THAT YOU DO NOT WISH TO PROCEED.

*4 "OBVIOUSLY, WITHOUT HER TESTIMONY THE CASE COULD NOT BE PRESENTED.

"MS. DIONNE ALMASY: Your Honor, if the State could be heard. It is the State's intention that the State does in fact want to proceed with these charges.

"As the Court has inquired, it appears that Mrs. Hays was fully aware of what she was doing when she came down and signed this warrant.

" * * *

"THE COURT: WHAT IS YOUR DESIRE, MRS. HAYS?

"MRS. HAYS: I don't wish to go forward, Your Honor.

"THE COURT: COMPLAINANT'S REQUEST IS SUSTAINED. THIS CASE IS DISMISSED.

"MR. WARREN PRITCHARD: Thank you, Your Honor.

"MRS. HAYS: Thank you, Your Honor.

"THE COURT: AT COMPLAINANT'S REQUEST AND OVERRULING PROSECUTOR'S OBJECTION, COURT GRANTS COMPLAINANT'S REQUEST. CASE DISMISSED." (Tr. 2, 4, 5).

Based upon the foregoing, we find that the trial court clearly stated its reasons for dismissing the within case against appellee.

Appellee's third assignment of error is found to be without merit.

The judgment of the trial court is affirmed.

DONOFRIO, P.J. and VUKOVICH, J., concur.

Ohio App. 7 Dist., 1997.

State v. Hays

Not Reported in N.E.2d, 1997 WL 816537 (Ohio App. 7 Dist.)

END OF DOCUMENT

State v. Mobley Ohio App. 1 Dist., 1999. Only the Westlaw citation is currently available.

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, First District, Hamilton County.

STATE of Ohio, Plaintiff-Appellant,

v.

Ernest MOBLEY, Defendant-Appellee.

No. C-980868.

Sept. 3, 1999.

Appeal from Hamilton County Court of Common Pleas, NO. C-980868.

Michael K. Allen, Hamilton County Prosecuting Attorney, and James Michael Keeling, Assistant Prosecuting Attorney, for Plaintiff-Appellant, Douglas M. Mansfield, for Defendant-Appellee.

DOAN, P.J., GORMAN and PAINTER, JJ.

DECISION.

PER CURIAM.

*1 Following a jury trial, defendant-appellee, Ernest Mobley, was convicted of possession of heroin pursuant to R.C. 2925.11(A). The trial court sentenced him to serve twelve months' incarceration and suspended his driver's license for four years. Mobley appealed to this court and we reversed his conviction, holding that the trial court had improperly instructed the jury on the definition of "reasonable doubt." On remand, the trial court dismissed the case over the objection of the prosecutor because Mobley had already "served his maximum sentence." The state has filed a timely appeal from that judgment. We have *sua sponte* removed the case from the court's accelerated calendar and place it on the regular calendar.

In its sole assignment of error, the state contends that the trial court erred in dismissing the case over the prosecutor's objection. It argues that the entry dismissing the case did not sufficiently set forth the

court's findings of fact and the reasons for the dismissal. It further argues that the defendant's service of his entire sentence did not render further prosecution moot, and therefore that the trial court erred in dismissing the case on that basis. We find this assignment of error to be well taken.

Crim.R. 48(B) provides that when a court dismisses a complaint over the objection of the prosecution, it must state on the record its findings of fact and the reasons for the dismissal. State v. Wright (July 24, 1996), Hamilton App. No. C-960019, unreported. In this case, the trial court stated in its entry that it was dismissing the case because Mobley had served his entire sentence and nothing more. The record does not contain the transcript of any hearing in which the trial court elaborated on its rationale for the dismissal. This cursory treatment was not sufficient to meet the requirements of Crim.R. 48(B). See State v. Bound (1975), 43 Ohio App.2d 44, 48-49, 332 N.E.2d 366, 369; State v. Hays (Dec. 30, 1997), Mahoning App. No. 96 CA 108, unreported.

Moreover, the court's stated reason for the dismissal was incorrect. The trial court dismissed the case against Mobley presumably because it was moot since Mobley had already served his sentence. However, reliance on the mootness doctrine assumes the existence of a conviction. In this case, we had reversed Mobley's conviction and remanded the case for a new trial. A reversal of a conviction in a criminal case places the state and the defendant in the same position that they were in before trial, as though there had been no previous trial. State v. Liberatore (1982), 69 Ohio St.2d 583, 433 N.E.2d 561, paragraph two of the syllabus; State ex rel. Wilson v. Nash (1974), 41 Ohio App.2d 201, 207-208, 324 N.E.2d 774, 778. Consequently, there was no conviction of record at the time the trial court dismissed the charges, and the trial court's reliance on the mootness issue was premature in light of the procedural posture of the case.

*2 Further, even if Mobley were to be reconvicted of the same charge, dismissal on the basis of the mootness doctrine would still be improper. Mobley was charged with possession of heroin in an amount less

than or equal to one gram, which is a felony of the fifth degree. R.C. 2925.11(C)(6)(a). The Ohio Supreme Court has held that the mootness doctrine does not apply to felony convictions even if the accused has served his or her entire sentence. See State v. Golston (1994), 71 Ohio St.3d 224, 643 N.E.2d 109, syllabus; State v. Welsh (Apr. 17, 1998), Hamilton App. No. C-970032, unreported. Consequently, the trial court erred in finding that the case was moot.

The Ohio Supreme Court has stated that a trial court may dismiss a case over the state's objection pursuant to Crim.R. 48(B), "if a dismissal serves the interest of justice." State v. Busch (1996), 76 Ohio St.3d 613, 615, 669 N.E.2d 1125, 1127-1128. But, see, State v. Louis (1998), 125 Ohio App.3d 352, 353-356, 708 N.E.2d 745, 746-748; Cleveland v. Hogan (M.C.1998), 92 Ohio Misc.2d 34, 43, 699 N.E.2d 1020, 1026; State v. Shy (June 30, 1997), Pike App. No. 96 CA 581, unreported; Wright, *supra*. Because the trial court erred in finding that the case was moot, the dismissal did not serve the interests of justice. Accordingly, we sustain the state's assignment of error, reverse the decision of the trial court, and remand the case for further proceedings.

Judgment reversed and cause remanded.

Ohio App. 1 Dist., 1999.
State v. Mobley
Not Reported in N.E.2d, 1999 WL 682625 (Ohio App. 1 Dist.)

END OF DOCUMENT

State v. Moran Ohio App. 9 Dist., 1998. Only the Westlaw citation is currently available.

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Ninth District, Lorain County.

STATE of Ohio, Appellant,

v.

Edward B. MORAN, Appellee.

C.A. NO. 97CA006885.

Nov. 25, 1998.

Appeal From Judgment Entered In The Common Pleas Court, County Of Lorain, Ohio.

Gregory A. White, Prosecuting Attorney, and Lisa Milasky, Assistant Prosecuting Attorney, 226 Middle Ave., Lorain, OH 44035, for Appellant.

Joseph P. Keshock, Attorney at Law, 20325 Center Ridge Road, # 512, Rocky River, OH 44116, for Appellee.

DECISION AND JOURNAL ENTRY

DICKINSON.

*1 The State of Ohio has appealed from the dismissal of a count of domestic violence against defendant Edward Moran in the Lorain County Common Pleas Court. The State has argued: (1) that the trial court abused its discretion by dismissing the domestic violence charge against defendant; (2) that defendant's motion to dismiss was not a proper pretrial motion; and (3) that the trial court's dismissal of the domestic violence charge violated the doctrine of separation of powers. This Court reverses the judgment of the trial court because the trial court abused its discretion by dismissing the domestic violence charge.

I.

On January 13, 1997, Patrolman Tim Schleicher of the Avon Lake Police Department was dispatched to a residence on Forest Boulevard in the city of Avon Lake in response to a 911 call. When Patrolman Schleicher arrived, he observed defendant attempting

to force open the front door of the residence. After a second officer arrived, Patrolman Schleicher and the other officer approached defendant and told him to move away from the door. They observed defendant put his hands in his pockets. Because they believed that defendant was possibly armed with a knife, the officers ordered him to remove his hands from his pockets. Defendant refused to comply with the officers' orders. A third officer approached defendant from behind and pulled his hands out of his pockets. Defendant struggled with the officers, but was eventually handcuffed.

After defendant had been arrested, Patrolman Schleicher entered the home and found defendant's wife, Sarah Moran. Mrs. Moran appeared to be shaken and stressed when speaking with Patrolman Schleicher. She told him that defendant had returned home that night highly intoxicated; that he had screamed at her, pulled her out of bed by her hair, broke her glasses, and punched her in the back; that defendant had punched a hole in a wall and thrown a television set and a telephone; that she had run outside to get away from defendant, but that defendant had grabbed her again; and that she had then run back inside the house, locked the door, and called 911. Mrs. Moran also told Patrolman Schleicher that defendant had previously been convicted of domestic violence committed against her. Patrolman Schleicher asked Mrs. Moran if she would like to sign charges against defendant, or if she preferred that he (Patrolman Schleicher) sign the charges. Mrs. Moran replied that she preferred that Patrolman Schleicher sign the charges, because defendant had told her that if she ever filed charges against him again, "he would get out and kill her." Mrs. Moran did make and sign a statement, reciting the same allegations that she had made to Patrolman Schleicher.

Defendant was charged with domestic violence in the Avon Lake Municipal Court. After defendant was bound over, the Lorain County Grand Jury indicted him on one count of domestic violence.^{FNI} Defendant pleaded not guilty and moved to dismiss the domestic violence count. Defendant argued that the count should be dismissed because Mrs. Moran did

not wish for defendant to be prosecuted and wanted all charges dropped. The trial court held a hearing on August 11, 1997. Mrs. Moran and Patrolman Schleicher were the only witnesses. On August 18, 1997, the trial court granted defendant's motion and dismissed the domestic violence count. The State timely appealed to this Court.

FNL. Defendant was also indicted on two other counts, but those counts are not at issue in this appeal.

II.

A.

*2 The State's first assignment of error is that the trial court abused its discretion by dismissing the domestic violence charge against defendant. Pursuant to State v. Busch (1996), 76 Ohio St.3d 613, 669 N.E.2d 1125, syllabus, "[a] trial court has the discretion to sua sponte dismiss a criminal case over the objection of the prosecution where the complaining witness does not wish for the case to proceed." When making a determination under Busch, a trial court is to consider five factors: "1) the seriousness of the injuries, 2) the presence of independent witnesses, 3) the status of counseling efforts, 4) whether the complainant's refusal to testify is coerced, and 5) whether the defendant is a first-time offender." State v. Lewis (Jan. 14, 1998), Lorain App. Nos. 97CA006687 and 97CA006688, unreported, at 4. To constitute an abuse of discretion, a trial court's action must be arbitrary, unreasonable, or unconscionable. State ex rel. The v. Cos. v. Marshall (1998), 81 Ohio St.3d 467, 469, 692 N.E.2d 198.

Busch is distinguishable from this case in two important respects. First, the Supreme Court of Ohio held that a trial court may dismiss a criminal case when "the complaining witness does not wish the case to proceed." Busch, supra. Mrs. Moran is the victim in this case, but she is not the complaining witness. The complaint that was filed in the Avon Lake Municipal Court was signed by Patrolman Schleicher. There is no evidence in the record that Patrolman Schleicher wishes to drop the charges against defendant.

Second, this case is distinguishable from Busch on

the basis of the second and fifth of the factors listed in Lewis, supra. The second factor is whether there are independent witnesses. In Busch, the prosecution's sole witness was the victim/complainant. In this case, an independent witness and independent evidence exist. Mrs. Moran told Patrolman Schleicher about defendant's attack on her. Defendant conceded at oral argument that her statements to Patrolman Schleicher would be admissible as excited utterances; Patrolman Schleicher, therefore, can testify regarding what Mrs. Moran said defendant had done to her. In addition, the audiotape of Mrs. Moran's 911 call would be available as evidence. The tape contains statements made by Mrs. Moran concerning defendant's attack on her. Defendant likewise conceded that the tape would be admissible as an excited utterance. Thus, the State's "ability to proceed in light of the victim's reluctance," Lewis, supra, at 4, is not impaired.

The fifth factor is whether the defendant is a first-time offender. In Busch, the defendant was a first-time offender. By contrast, in this case, defendant had previously been convicted of domestic violence committed against Mrs. Moran. Defendant's previous conviction further distinguishes this case from Busch.

*3 In sum, the trial court abused its discretion when it dismissed the domestic violence charge against defendant. The State's first assignment of error is sustained.

B.

The State's second assignment of error is that defendant's motion to dismiss was not a proper pretrial motion. The State's third assignment of error is that the trial court's dismissal of the domestic violence charge violated the doctrine of the separation of powers. These assignments of error are moot based upon this Court's resolution of the State's first assignment of error and are overruled on that basis. See Rule 12(A)(1)(c) of the Ohio Rules of Appellate Procedure.

III.

The State's first assignment of error is sustained. The judgment of the trial court is reversed, and the cause

Not Reported in N.E.2d
Not Reported in N.E.2d, 1998 WL 831570 (Ohio App. 9 Dist.)
(Cite as: Not Reported in N.E.2d)

is remanded for further proceedings consistent with this opinion.

Judgment reversed, and cause remanded.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this court, directing the County of Lorain Common Pleas Court to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E).

Costs taxed to Appellee.

Exceptions.

REECE, P.J., CARR, J., concur.
Ohio App. 9 Dist., 1998.
State v. Moran
Not Reported in N.E.2d, 1998 WL 831570 (Ohio App. 9 Dist.)

END OF DOCUMENT

[Cite as *State v. Morgan*, 2006-Ohio-3947.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 87293

STATE OF OHIO	:	
	:	
Plaintiff-Appellant	:	JOURNAL ENTRY
	:	
-vs-	:	AND
	:	
LANCE MORGAN	:	OPINION
	:	
Defendant-Appellee	:	

Date of Announcement
of Decision: AUGUST 3, 2006

Character of Proceeding: Criminal appeal from
Court of Common Pleas
Case No. CR-468742

Judgment: Appeal dismissed.

Date of Journalization:

Appearances:

For Plaintiff-Appellant: WILLIAM D. MASON
Cuyahoga County Prosecutor
JON W. OEBKER, Assistant
Prosecuting Attorney
1200 Ontario Street
Cleveland, Ohio 44113

For Defendant-Appellee: ROBERT L. TOBIK
Cuyahoga County Public Defender
DAVID KING, Assistant Public
Defender
WALTER CAMINO, Assistant Public
Defender
100 Lakeside Place

1200 West Third Street
Cleveland, Ohio 44113

[Cite as *State v. Morgan*, 2006-Ohio-3947.]

JAMES J. SWEENEY, P.J.:

{¶ 1} Plaintiff-appellant, State of Ohio, appeals from the trial court's order that dismissed the felonious assault and domestic violence charges against defendant-appellee, Lance Morgan, for want of prosecution due to the victim's repeated failure to appear for trial. In the absence of language to the contrary, such dismissal is presumed to be without prejudice and, therefore, not a final, appealable order. *State v. Brown*, Cuyahoga App. No. 84229, 2004-Ohio-5587, citing *State v. Fleming* (Dec. 7, 2000), Cuyahoga App. Nos. 77323, 77324; *Cleveland v. Stifel* (Sept. 2, 1999), Cuyahoga App. No. 75761, citing *State v. Dixon* (1984), 14 Ohio App.3d 396.

Appeal dismissed.

It is ordered that appellee recover of appellant his costs herein taxed.

It is ordered that a special mandate issue out of this Court directing the Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

KENNETH A. ROCCO, J., CONCURS. (See attached separate concurring opinion.)
CHRISTINE T. McMONAGLE, J., DISSENTS.
(See attached separate dissenting opinion.)

JAMES J. SWEENEY
PRESIDING JUDGE

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. 112, Section 2(A)(1).

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 87293

STATE OF OHIO,	:	
	:	
Plaintiff-Appellant	:	D I S S E N T I N G
	:	
v.	:	O P I N I O N
	:	
LANCE MORGAN	:	
	:	
Defendant-Appellee	:	

DATE: AUGUST 3, 2006

CHRISTINE T. McMONAGLE, J., DISSENTING:

{¶ 2} Respectfully, I dissent from the decision of the majority dismissing this appeal before argument, and in perfunctory fashion.

Plaintiff-appellant, the State of Ohio, has done a thorough and complete job of outlining reasons this court should abandon precedent of declaring dismissals without prejudice in criminal cases not to be final appealable orders. Defendant-appellee, Lance Morgan, has likewise done a complete and thorough job of distinguishing the state's cases and arguing against overruling Eighth District precedent. The issue is ripe for review, and frankly well-presented by both appellant and appellee.

{¶ 3} I would not dismiss this case before argument, and I would specifically address the errors alleged.

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 87293

STATE OF OHIO	:	
	:	
Plaintiff-appellant	:	CONCURRING
	:	
vs.	:	OPINION
	:	
LANCE MORGAN	:	
	:	
Defendant-appellee	:	

DATE: AUGUST 3, 2006

KENNETH A. ROCCO, J., CONCURRING:

{¶ 4} Until the Ohio Supreme Court chooses to decide the question, our Eighth District precedent should stand on the issue whether a dismissal without prejudice is a final appealable order. Repetitive re-argument of decided issues is contrary to the judicial principle of stare decisis.

{¶ 5} Rather than asking us to revisit the precedent which precludes a direct appeal, the state should re-indict the defendant and contemporaneously file a writ of mandamus to compel the judge to proceed to trial. This procedure would allow the state to raise the very important legal question it attempts to argue here: whether a trial for domestic violence can proceed without the

victim-witness. Alternatively, of course, the state could also petition the judge to recuse herself.

[Cite as *State v. Palmer*, 2004-Ohio-779.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
	:	
Plaintiff-Appellant	:	C.A. CASE NO. 19921
v.	:	T.C. NO. 02 CR 4571
TIMOTHY PALMER	:	(Criminal Appeal from Common Pleas Court)
	:	Defendant-Appellee

OPINION

Rendered on the 20th day of February, 2004.

CARLEY J. INGRAM, Atty. Reg. No.0020084, Assistant Prosecuting Attorney, 301 W. Third Street, 5th Floor, Dayton, Ohio 45422
Attorney for Plaintiff-Appellant

MICHAEL S. KOUGHAN, Atty. Reg. No. 0067428, 500 E. Fifth Street, Suite 100, Dayton, Ohio 45402
Attorney for Defendant-Appellee

WOLFF, J.

{¶1} The state appeals from the dismissal of its indictment of Timothy J. Palmer for nonsupport of dependents, in violation of R.C. 2919.21(B), a felony of the fifth degree, on double jeopardy grounds.

{¶2} On June 22, 2001, Timothy Palmer was held in contempt for failure to pay child support in *State of Ohio, ex rel. Teri Longstreth v. Timothy J. Palmer*, Case No. JC 00-252, in the Juvenile Division of the Montgomery County Court of Common Pleas. He was sentenced to ten days of incarceration, with the sentence suspended on the condition that he make his court-ordered child support payments as well as payments toward his arrearage. On February 28, 2002, the case again came before the magistrate on Palmer's failure to make child support payments. Palmer was ordered to serve one day of the previously suspended ten days of incarceration in the county jail. In addition, he was again held in contempt for failure to pay child support, and he was sentenced to thirty days of imprisonment, which was suspended with the same conditions. Palmer served the one day sentence, as required.

{¶3} On January 9, 2003, Palmer was indicted for felony nonsupport of dependents, in violation of R.C. 2919.21(B), based on his failure to pay child support between August 30, 2000, and July 31, 2002. Palmer moved to dismiss the indictment on the ground that he had previously been held in contempt by the juvenile division of the common pleas court for failure to pay child support. Palmer argued that the February 28, 2002, order made no provision for purging the one day sentence and, thus, the contempt penalty was criminal, not civil, in nature. Palmer further argued that the criminal contempt was a lesser included offense of nonsupport of dependents. He contended that the felony indictment violated the constitutional prohibition against double jeopardy, because the "contempt of court proceeding dealt with the same dependant [sic] and covered a period of time which included the period of time for which the State [sought] to prosecute him." The court agreed and dismissed the indictment.

The state appeals from that dismissal, raising one assignment of error:

{¶4} "THE TRIAL COURT ERRED IN DISMISSING THE INDICTMENT ON THE GROUNDS OF DOUBLE JEOPARDY."

{¶5} Under the federal and state prohibitions against double jeopardy, a defendant may not be subjected to successive prosecutions for the same offense. *United States v. Dixon* (1993), 509 U.S. 688, 113 S.Ct. 2849, 125 L.Ed.2d 556; *State v. Lovejoy*, 79 Ohio St.3d 440, 443, 1997-Ohio-371, 683 N.E.2d 1112. "Double jeopardy may be applied in cases involving contempt charges, but only if the contempt penalty is criminal in nature, rather than civil." *State v. Mobley*, Montgomery App. No. 19176, 2002-Ohio-5535, ¶ 6; *Dayton Women's Health Ctr. v. Enix* (1991), 68 Ohio App.3d 579, 591, 589 N.E.2d 121. In the present case, the state does not challenge the trial court's conclusion that a prior criminal contempt for failure to pay child support would bar a subsequent prosecution for felony nonsupport of dependents, in violation of R.C. 2919.21(B). *Mobley*, supra. In other words, the state apparently agrees that if the February 28, 2002, sentence of one day of incarceration constitutes a criminal penalty, the prosecution for felony nonsupport is barred by double jeopardy. Thus, the sole issue before us is whether Palmer's one day of incarceration was a criminal, rather than a civil, contempt penalty.

{¶6} "To determine whether [a] proceeding involved criminal or civil contempt, we look at the character and purpose of the penalties imposed. Punishment for civil contempt is 'remedial or coercive and for the benefit of the complainant.' *Brown v. Executive 200, Inc.* (1980), 64 Ohio St.2d 250, 253. On the other hand, imprisonment for criminal contempt operates as 'punishment for the completed act of disobedience,

and to vindicate the authority of the law and the court.’ *Id.* at 254. Civil contempt punishments are conditional in that the contemnor can avoid the punishment by doing what was ordered. Thus, the contemnor is coerced into complying with the court’s order. However, criminal contempt sanctions are typically definite and unconditional, and the contemnor is punished for the punitive purposes of the court rather than for the benefit of the complainant. *Id.*” *Carter v. Carter* (Nov. 23, 1994), Montgomery App. Nos. Nos. 14409, 14530, 14574; see *Shapiro v. Shapiro* (Nov. 18, 1994), Miami App. No. 94-CA-2.

{¶7} The state indicates that the February 28, 2002, order required Palmer to serve one day of his previously suspended ten day sentence of incarceration. (In his motion to dismiss, Palmer likewise had indicated that he “was ordered to serve 1 day of the suspended sentence.”) The state argues that the June 22, 2001, sentence for contempt was civil in nature, because it was designed to coerce Palmer to comply with the court’s order of support. The state contends that Palmer had the ability to purge himself of the contempt and to avoid the sentence of incarceration by complying with the terms of the order. Thus, the state contends that the one day sentence was likewise a civil penalty.

{¶8} In support of its assertions, the state cites to *State v. Birch*, Summit Co. App. No. 20910, 2002-Ohio-3734, and *State v. Martin* (Mar. 27, 2001), Holmes App. No. 00CA003. In *Martin*, the defendant was held in contempt for failure to pay child support as previously ordered by the court, and he was sentenced to thirty days of incarceration. The incarceration was suspended on the condition that he comply with all support orders and pay for the costs of the action within sixty days. When the defendant failed

to comply with the conditions, the court reinstated his sentence and ordered him to serve thirty days in the county jail. Four days later, the court released the defendant from jail on the condition that he again comply with all court and administrative orders and pay the costs of the action. The defendant continued to fail to pay child support as required. Eventually, he was indicted with and convicted of felony nonsupport of dependents. On appeal, he argued that his conviction violated the principles of double jeopardy, on the ground that his thirty day sentence (four days of which he served) was a criminal sanction. The court of appeals rejected that argument, reasoning : "Because the sanction in the matter sub judice was clearly designed to coerce appellant to comply with the trial court's order, and because appellant would only serve the suspended sentence if he failed to comply with the conditions set forth in the trial court's order, we find the contempt was civil in nature." Addressing analogous facts, the *Birch* court followed the reasoning in *Martin* and likewise held that a suspended sentence of incarceration that was subsequently imposed after the defendant failed to comply with the conditions of suspension was civil in nature and not criminal. Other courts of appeals have held similarly. See *State v. Yacovella* (Feb. 1, 1996), Cuyahoga App. No. 69487 (contempt was civil in nature when the defendant was incarcerated for 30 days after failing to comply with the conditions for suspension of that sentence); *State v. Jones* (June 19, 1995), Clermont App. No. CA94-11-094.

{¶9} Palmer responds that his one day sentence was criminal rather than civil, because there was no provision by which he could avoid the incarceration. Palmer asserts that the second, thirty day contempt sentence sought to compel his compliance whereas the one day sentence of incarceration constituted punishment for his failure to

comply with the trial court's order of repayment. Palmer argues that we should not follow *Birch* and *Martin*, because this case is governed by our prior decision in *Mobley*.

{¶10} We disagree with Palmer that the present circumstance is governed by *Mobley*. In that case, the magistrate found Mobley in contempt of court and sentenced him to 30 days in jail after finding that he had not voluntarily paid "one cent" in child support during the past year and that an arrearage of \$12,138.73 existed. The magistrate's decision did not include any means for purging the contempt. Subsequently, Mobley was indicated on two counts of felony nonsupport of dependents. Mobley challenged the indictment, arguing that the prosecution was precluded under the Double Jeopardy Clause. The trial court agreed, and the state appealed. On appeal, the state agreed with Mobley that the contempt was criminal. It argued, however, that the elements of criminal contempt and felony nonsupport are different and, therefore, that double jeopardy did not apply. Thus, our sole concern in *Mobley* was whether the contempt and the felony charge had identical statutory elements or whether one was a lesser included offense of the other.

{¶11} Palmer asserts that his situation is analogous to that in *Mobley*, arguing that, like Mobley's thirty day sentence, he was unable to purge the one day sentence of incarceration, thus rendering it criminal in nature. Viewed in isolation, there is no indication in the February 28, 2002, order that Palmer could have avoided the sentence or purged it during his incarceration. Thus, at first blush, Palmer's argument has some appeal. However, viewed in the larger context of the two contempt proceedings, we find Palmer's argument unpersuasive.

{¶12} The ten day sentence of incarceration in the June 22, 2001, order was

clearly in the nature of civil contempt. The sentence was suspended on the condition that Palmer pay \$276.25 per month on his current support and \$23.75 per month on his arrearage. This sentence was remedial in nature and was clearly intended to persuade Palmer to pay his current child support obligation and his arrearage. Palmer could have avoided incarceration by complying with the conditions of his suspension. Prior to imposing a sentence, the February 28, 2002, order specifically indicated that Palmer had failed to comply with those conditions. As acknowledged by Palmer in his motion to dismiss, the February 28, 2002, order merely required him to serve one day of that previously suspended sentence upon his noncompliance with the conditions of suspension. In our judgment, because the incarceration occurred as a result of his noncompliance with a civil contempt order, the incarceration was civil in nature. As aptly put by the *Birch* court: "The fact that the sentence came to be subsequently imposed was not so much a result of the court's action, as it was a result of [the defendant's] decision." 2002-Ohio-3734, ¶ 16. Palmer's decision not to pay the monthly support, i.e., his "decision not to purge the contempt[,] did not cause the sentence of the court to change from civil to criminal; it did not cause the sentence to become punitive." *Id.* Although Palmer could not purge the one day incarceration while in jail, he had held the keys to the jailhouse door and had previously decided not to use them. Accordingly, we agree with the reasoning set forth in *Birch* and *Martin*, and we conclude that the one day sentence of incarceration was civil in nature.

{¶13} As stated above, the Double Jeopardy Clause only applies in the context of contempt if the contempt is criminal. In light of our conclusion that the one day sentence was a civil contempt penalty, double jeopardy cannot apply. Accordingly, we

conclude that the trial court erred in dismissing the felony nonsupport of dependents indictment against Palmer on double jeopardy grounds.

{¶14} The state's sole assignment of error is sustained.

{¶15} The judgment will be reversed and remanded for further proceedings.

.....

FAIN, P.J. and BROGAN, J., concur.

Copies mailed to:

Carley J. Ingram
Michael S. Koughan
Hon. Mary E. Donovan

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
MEIGS COUNTY

State of Ohio :
 :
 Plaintiff-Appellant; :
 : Case No. 02CA1
 vs. :
 : DECISION AND JUDGMENT ENTRY
 Robert T. Schoolcraft : Release Date: 10/24/02
 :
 Defendant-Appellee. :

APPEARANCES:

Pat Story, Pomeroy, Ohio, for appellant.

Charles H. Knight, Pomeroy, Ohio, for appellee.

Kline, J:

{¶1} The State appeals the dismissal of its indictment against Robert T. Schoolcraft by the Meigs County Common Pleas Court. It argues that the trial court erred in dismissing the indictment because Crim.R. 7(B) prohibits dismissal of an indictment due to an error in the numerical designation of the statute. Because we find that the trial court dismissed the indictment due only to errors in numerical designation in indictments in this case and other cases, we find that the trial court's dismissal was improper under Crim.R. 7(B). Accordingly, we reverse the decision of the trial court.

I.

{¶2} The Meigs County Grand Jury issued an indictment against Schoolcraft. The indictment charged that Schoolcraft: "COUNT ONE: did knowingly assemble or possess one or more chemicals that may be used to manufacture a controlled substance, to wit: methamphetamine, a Schedule II drug, in violation of Revised Code Section 2925.04, said offense being commonly known as **ILLEGAL ASSEMBLY OR POSSESSION OF CHEMICALS FOR MANUFACTURE OF DRUGS**, a felony of the third degree, in violation of Ohio Revised Code Section 2924.041 (A) * * *." (Emphasis in the original.)

{¶3} The trial court set the case for jury trial on January 3, 2002.

{¶4} In response to Schoolcraft's motion for a bill of particulars, the State filed one that, among other things, identified Count One as being a violation of R.C. 2925.041(A) instead of the section identified in the indictment.

{¶5} On December 31, 2001, the State filed a "Motion for Clerical Correction" in order to correct a typographical error contained in Count One of the indictment. The State asserted that the trial court should change the incorrect Revised Code

section in Count One of the indictment, R.C. 2924.041, to R.C. 2925.041.

{16} On January 3, 2002, the trial court heard oral argument on several defense motions and then impaneled a jury. Once the trial court sent the jury home for the day, the court heard arguments on the State's motion to correct the indictment. The trial court stated: "It appears about every time we get an indictment the statute number is wrong; therefore, I'm going to exclude Count One. We'll go to trial on Count Two." At 3:56 p.m. that day, the State filed a Notice of Appeal pursuant to Crim.R. 12(K) indicating that it intended to appeal the dismissal of Count One of the indictment. Then, at 3:57 p.m., the clerk of courts file-stamped the signed entry denying the State's motion to correct Count One of the indictment and dismissing Count One of the indictment "for the reason that the Revised Code Section numerical designation was incorrect."

{17} The next day, the trial court stated that it needed to give the State a hearing before dismissing Count One of the indictment. The trial court asked the State whether it "want[ed] to have a hearing to see whether or not the Court was in error in dismissing the charge, which I think probably the Court was." The State replied, "Judge, I don't know that we can proceed today as a result of the filing of the Notice of Appeal."

{¶8} In its sole assignment of error, the State asserts that "[t]he trial court erred by dismissing [C]ount [O]ne of the indictment[.]"

II.

{¶9} In its only assignment of error, the State argues that the trial court erred in dismissing Count One of the indictment because Crim.R. 7(B) prohibits dismissal of an indictment for an error in the numerical designation of an offense as long as the mistake did not prejudice the defendant.

{¶10} The misnumbering of the statute in an indictment does not invalidate the indictment. *State ex rel. Dix v. McAllister* (1998), 81 Ohio St.3d 107, 108, citing *State v. Morales* (1987), 32 Ohio St.3d 252, 254, fn. 4. Crim.R. 7(B) provides, in part: "Error in the numerical designation or omission of the numerical designation shall not be ground for dismissal of the indictment or information, or for reversal of a conviction, if the error or omission did not prejudicially mislead the defendant."

{¶11} Here, Count One of the indictment charged Schoolcraft with "knowingly assembl[ing] or possess[ing] one or more chemicals that may be used to manufacture a controlled substance, to wit: methamphetamine, a Schedule II drug in violation of [R.C.] 2925.04, said offense being commonly known as **ILLEGAL ASSEMBLY OR POSSESSION OF CHEMICALS FOR MANUFACTURE OF DRUGS**, a felony of the third degree, in violation of [R.C.]

2924.041 (A)." The bill of particulars contained the same description of Count One, but identified the correct Revised Code Section, which is R.C. 2925.041. The record fails to reveal any prejudice to the defendant suffered because of the incorrect numerical designation in Count One of the indictment. Accordingly, pursuant to Crim.R. 7, the trial court should not have dismissed the indictment.

{12} Schoolcraft argues that the trial court has the power under Crim.R. 48 to dismiss the indictment against him. Schoolcraft asserts that the trial court appropriately used its supervisory powers under Crim.R. 48 in dismissing the indictment because the State has also used incorrect statute numbers in indictments in other cases. Crim.R. 48 provides, in part: "[i]f the court over the objection of the state dismisses an indictment, information, or complaint, it shall state on the record its findings of fact and reasons for the dismissal." The Supreme Court has noted that "[t]he rule does not limit the reasons for which a trial judge might dismiss a case," and found that "a judge may dismiss a case pursuant to Crim.R. 48(B) if a dismissal serves the interests of justice." *State v. Busch* (1996) 76 Ohio St.3d 613, 615. Crim.R. 48 requires the trial court, when dismissing an indictment over the State's objection, to state on the record its findings of fact and its reasons for

the dismissal. *State v. Shy* (June 30, 1996), Pike App. No. 96CA587.

{¶13} Thus, while Crim.R. 48 generally permits a trial court to dismiss a case in the interests of justice, Crim.R. 7(B) specifically provides that error in the numerical designation of the charge "shall not be grounds for dismissal of the indictment[.]"

{¶14} Construing these rules together, we find that, in this instance, the trial court's dismissal was not proper under Crim.R. 48. The trial court's only reason for dismissing the indictment was the errors in the numerical designation of charges in this and other cases. Crim.R. 7 specifically states that this is an improper reason to dismiss an indictment. Accordingly, the trial court's dismissal of the indictment was not proper under Crim.R. 48.

{¶15} Schoolcraft also argues that the State waived its right to raise this issue on appeal because it refused to allow the trial court to revisit its decision after the State filed its notice of appeal.

{¶16} Generally, once a party files a notice of appeal, the trial court loses jurisdiction. *State v. Williams* (1993), 86 Ohio App.3d 37, 40, citing *State ex rel. Special Prosecutors v. Judges, Court of Common Pleas* (1978), 55 Ohio St.2d 94, 97. The trial court, however, retains jurisdiction over issues not

inconsistent with power and jurisdiction of the Appeals Court to review, affirm, modify or reverse the matter appealed. *Id.*

{¶17} In this case, the State appealed the trial court's decision to dismiss Count One of the indictment. The trial court's reconsideration of that issue therefore would have been inconsistent with the power and jurisdiction of this court to review, affirm, modify or reverse the trial court's dismissal of Count One. Thus, because the trial court did not have jurisdiction to revisit its decision to dismiss the indictment once the State filed its notice of appeal, the state did not waive its right to this appeal.

III.

{¶18} In sum, we find that the trial court erred in dismissing the indictment, sustain the State's only assignment of error, and reverse the decision of the trial court.

JUDGMENT REVERSED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE REVERSED and the cause remanded to the trial court for further proceedings consistent with this opinion and that costs herein be taxed to appellee.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Meigs County Common Pleas Court to carry this judgment into execution.

Any stay previously granted by this Court is hereby terminated as the date of this Entry.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

Evans, J. & Harsha, J.: Concur in Judgment and Opinion.

For the Court

BY: _____
Roger L. Kline, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.

COURT OF APPEALS
ASHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellant

vs.

KEITH SONGER

Defendant-Appellee

: JUDGES:
: Hon. William B. Hoffman, P.J.
: Hon. Sheila G. Farmer, J.
: Hon. Julie A. Edwards, J.

: Case No. 03COA051

: OPINION

CHARACTER OF PROCEEDING: Appeal from the Court of Common Pleas,
Case No. 02CRI132

JUDGMENT: Reversed and remanded

DATE OF JUDGMENT ENTRY: March 17, 2004

APPEARANCES:

For Plaintiff-Appellant

For Defendant-Appellee

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Farmer, J.

{¶1} On December 11, 2002, the Ashland County Grand Jury indicted appellee, Keith Songer, on one count of forgery in violation of R.C. 2913.31, one count of theft in violation of R.C. 2913.02 and one count of grand theft in violation of R.C. 2913.02. A jury trial commenced on August 5, 2003. On August 6, 2003, the trial court declared a mistrial, finding Lieutenant Geoff Thomas of the Ashland Police Department and a witness, appellee's brother, Layne Songer, engaged in a conversation in the courthouse hallway.

{¶2} By judgment entry filed August 29, 2003, the trial court permitted a retrial, but ordered the state to post a \$2,500.00 bond to apply to the juror fees and indigent counsel fees upon retrial. Because the bond was not posted, the trial court dismissed the indictment on September 3, 2003.

{¶3} Appellant, the State of Ohio, filed an appeal and this matter is now before this court for consideration. Assignment of error is as follows:

|

{¶4} "THE TRIAL COURT ABUSED ITS DISCRETION BY DISMISSING THE INDICTMENT BECAUSE THE PROSECUTING ATTORNEY DECLINED TO POST A \$2500.00 BOND TO PAY FOR THE RETRIAL NECESSITATED BY THE COURT'S GRANTING THE DEFENDANT'S MOTION FOR MISTRIAL."

|

{¶5} Appellant claims the trial court erred in dismissing the indictment. We agree.

{¶6} The genesis of the dismissal was the granting of a mistrial as a result of contact between Lieutenant Thomas and Layne Songer, a named witness. In permitting a retrial, the trial court specifically found the following:

{¶7} "6. Applying this analysis to the instant case, it becomes clear that no evidence is present that the State, or any of its representatives, intentionally invited or caused this mistrial. In so finding, this Court specifically notes that the unreported 1982 Johnson case cited by the Defendant, has been overruled by the more recent authority set forth hereinabove, in this Court's view.

{¶8} "7. Inherent in this Court's prior decision granting the mistrial motion, is the fact that the jury was tainted with the expectation of the testimony of Layne Songer, thus creating the due process violation. When the case is retried to a new panel, whether Layne Songer actually testifies or not, the matter can be handled in such a way, that the taint will not be present." Judgment Entry filed August 29, 2003.

{¶9} In the same entry, the trial court assessed expenses to the state as follows:

{¶10} "The Court does take note that certain expenses of this re-trial should be assessed to the State of Ohio. This is so, because of this Court's finding that the conduct of the officer has caused the mistrial, and the resultant second trial.

{¶11} "Therefore, this Court ORDERS that the State post \$2,500 with the Clerk of Courts, by the end of the day on Tuesday, September 2, 2003, to apply toward the juror fees and indigent counsel fees in this matter. Failure to do so will result in the matter being dismissed for lack of proper prosecution by the State."

{¶12} In its September 3, 2003 judgment entry dismissing the indictment, the trial court reiterated the following:

{¶13} "1. In its August 29, 2003 Judgment Entry, in which this Court went to great lengths to give the State the opportunity to re-try this Defendant, this Court found***the State or its agents did not goad the Defendant into moving for the mistrial.

{¶14} "2. In so finding, this Court in no way found or implied a lack of wrongdoing by an agent of the State. Indeed, this Court's prior findings clearly and equivocally found wrongdoing by Lt. Thomas, which caused this Court to grant the mistrial motion.

{¶15} "6. In other words, while this Court does not necessarily find the officer's conduct to have been intentional, it was clearly wrong. That improper conduct caused a mistrial. The mistrial was the only proper ruling available to the Court. The officer, or his agency, or the prosecutor, should pay for the additional costs triggered by that wrongful conduct. Failure to do so, under these circumstances, is clearly lack of proper prosecution, and grounds for dismissal, where as here, the State has knowingly refused to obey the Court Order regarding the deposit of funds.

{¶16} "10. In conclusion, this Court finds that when improper conduct of an officer has caused this Court to declare a mistrial, that it is a reasonable and necessary use of this Court's inherent power to condition a second trial upon the State, for whom the officer is a representative, paying in advance upon the cost of re-trial."

{¶17} Appellee defends the dismissal as flowing from the "inherent powers" of the trial court.

{¶18} Crim.R. 48(B) governs dismissals by the court and states, "If the court over objection of the state dismisses an indictment, information, or complaint, it shall state on the record its findings of fact and reasons for the dismissal." In addressing the breadth of Crim.R. 48(B), Justice Pfeiffer in *State v. Busch*, 76 Ohio St.3d 613, 615, 1996-Ohio-82, acknowledged the rule does not limit the reasons for which a trial judge might sua sponte dismiss a case, but "may dismiss a case pursuant to Crim.R. 48(B) if a dismissal serves the interests of justice."

{¶19} The standard of review is abuse of discretion. *Busch*. In order to find an abuse of discretion, we must determine the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983) 5 Ohio St.3d 217.

{¶20} In applying the standard of serving the "interests of justice" to the case sub judice, we fail to find any interests of justice, other than self-serving, to be present. The trial court acknowledged the mistrial was not intentionally caused by the state, and yet ordered the state to pay retrial costs in advance.

{¶21} If the trial court wished to express the justice system's displeasure with Lieutenant Thomas's actions, other remedies such as a contempt action were available to the trial court. Likewise, if the trial court believed the conduct by the state's agent was intentional, the trial court could have found jeopardy had attached and dismissed the case. Neither alternative was found by the trial court to be appropriate or proper.

{¶22} In its order, the trial court assessed jury fees and indigent counsel fees. Both of these fees are specifically provided for by statute, R.C. 2947.23, R.C. 2313.33, R.C. 2313.34, R.C. 120.33, and are payable through the county treasury. R.C. 2335.37.

The general assembly has set forth a plan and scheme for the collection of juror fees and indigent counsel fees. We conclude no interest of justice is served by reassigning this statutory responsibility to another arm of the executive branch of government.

{¶23} Although we are loath to classify any thoughtful determination by any trial court as abuse of discretion, we nonetheless find the punitive assessment against the county prosecutor to be unfounded in law and against the interest of justice.

{¶24} The sole assignment of error is granted.

{¶25} The judgment of the Court of Common Pleas of Ashland County, Ohio is hereby reversed and remanded.

By Farmer, J.

Hoffman, P.J. and

Edwards, J. concur.

[Cite as *State v. Watkins*, 2003-Ohio-668.]

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio, :
 :
 Plaintiff-Appellant, :
 :
 v. : No. 02AP-659
 :
 Clarinda V. Watkins, : (REGULAR CALENDAR)
 :
 Defendant-Appellee. :

D E C I S I O N

Rendered on February 13, 2003

Richard C. Pfeiffer, Jr., City Attorney, and *Lara N. Baker*, for
appellant.

Nika Saunders, for appellee.

APPEAL from the Franklin County Municipal Court.

LAZARUS, J.

{¶1} Plaintiff-appellant, State of Ohio ("prosecution"), appeals from the May 24, 2002 bond entry of the Franklin County Municipal Court sua sponte dismissing the criminal case over the objection of the prosecution. For the following reasons, we reverse and remand.

{¶2} On May 23, 2002, defendant-appellee, Clarinda V. Watkins ("Watkins"), was arrested and charged with domestic violence and assault for knowingly causing physical harm to the father of her children, Geoffrey K. Ferguson ("Ferguson"), by

scratching Ferguson on the left side of his face and the left side of his torso with her fingernails.¹ Columbus Police Officer Michael Secrest swore the complaint.

{¶3} On May 24, 2002, Watkins was arraigned.² Watkins appeared in court, represented by counsel. The trial court, after inquiring as to the wishes of both Watkins and Ferguson, dismissed the criminal case. The prosecution objected to the dismissal of the complaint on the grounds that the trial court's decision was in violation of *State v. Busch* (1996), 76 Ohio St.3d 613, Crim.R. 48, and the local rules of the court.

{¶4} It is from this judgment that the prosecution timely appeals, assigning the following assignment of error:³

{¶5} "The trial court abused its discretion by dismissing the charges against the appellee, over the objection of the prosecutor, in violation of Criminal Rule 48(B), when the court failed to find either that a deprivation of defendant's constitutional and/or statutory rights existed or that the dismissal served the interests of justice."

{¶6} First, the prosecution contends that the trial court dismissed the charges against Ferguson without making the required findings of fact and reasons required by Crim.R. 48(B), which provides:

{¶7} "If the court over objection of the state dismisses an indictment, information, or complaint, it shall state on the record its findings of fact and reasons for the dismissal."

{¶8} Under Crim.R. 48, the trial court may dismiss a case over the prosecution's objection if the defendant's constitutional or statutory rights have been violated or if the dismissal serves the interests of justice. *State v. Clipner* (Sept. 14, 1999), Franklin App. No. 98AP-1477. If the trial court dismisses a case pursuant to Crim.R. 48(B), the trial court is required to make the requisite findings of fact on the record. *Id.* See, also, *State v. Noland* (June 26, 2001), Franklin App. No. 01AP-159 (when entering a dismissal, the trial court must make findings consistent with Crim.R. 48[B]).

¹ Ferguson was also arrested and charged with domestic violence and assault for punching Watkins in her face and pulling her hair.

² Ferguson also appeared in court, with counsel, and was arraigned at the same time.

³ The prosecution also appealed the trial court's bond entry dismissing the criminal complaint against Ferguson (02AP-660). On June 26, 2002, this court denied the prosecution's motion for consolidation of the two appeals, but coordinated the appeals for purposes of oral argument.

{¶9} In this case, the trial court failed to abide by the mandates of Crim.R. 48(B). The trial court stated no findings or reasons for dismissal. The transcript of the arraignment proceedings reads, in pertinent part:

{¶10} "THE COURT: * * * Ms. Watkins, do you wish to proceed against Mr. Ferguson?"

{¶11} "DEFENDANT WATKINS: No, sir.

{¶12} "* * *

{¶13} "THE COURT: Dismissed.

{¶14} "MR. PETERSON [prosecutor]: Judge, we are going to object. Judge, one second - -

{¶15} "THE COURT: No.

{¶16} "(Discussion held off the record.)

{¶17} "MR. PETERSON: Judge, we would object under *State v. Bush* [sic] as well as Criminal Rule 48 as well as local rules. Judge, the prosecuting witnesses in this case are not - - are not the complainants. This is a police filing.

{¶18} "THE COURT: I understand all that. You're right, but I'm dismissing it anyway." (Tr. 4.)

{¶19} The trial court failed to make the required findings of fact and reasons for the dismissal, specifically whether Watkins' rights had been violated or whether the dismissal served the interests of justice. As such, we conclude that the trial court erred in dismissing the domestic violence and assault charges filed against Watkins. See *State v. Lowe* (June 19, 2001), Franklin App. No. 00AP-1130.

{¶20} Additionally, the prosecution argues that continuing to prosecute the case against the wishes of Watkins did not present constitutional or statutory violations. The prosecution contends that dismissing the case upon the wishes of the victim and over the objections of the prosecution was not the intent of the legislature in drafting R.C. 1901.20(A)(2) which prohibits dismissal of charges solely at the request of the complaining witness and over the objection of the prosecution.

{¶21} R.C. 1901.20(A)(2) provides:

{¶22} “A judge of a municipal court does not have the authority to dismiss a criminal complaint, charge, information, or indictment solely at the request of the complaining witness and over the objection of the prosecuting attorney, village solicitor, city director of law, or other chief legal officer who is responsible for the prosecution of the case.”

{¶23} Strictly speaking, R.C. 1901.20(A)(2) is not applicable to this case because the complaining witness, Officer Secrest, did not request that the criminal complaint be dismissed. Thus, R.C. 1901.20(A)(2) does not address the situation here in which an alleged victim, who is not the complaining witness, does not wish to proceed. Here, both the complaining witness and the prosecution were ready and willing to proceed. Nevertheless, the clear intent of the general assembly in enacting R.C. 1901.20(A)(2) is to provide the prosecution with the discretion to proceed on a domestic violence complaint without the active participation, or perhaps even in the face of opposition, from the victim. *Clipner, supra*.

{¶24} In addition, the prosecution contends that the facts of the case do not support a finding that the dismissal should be affirmed on the basis that it served the interests of justice. Specifically, the prosecution contends that the trial court failed to consider the five factors enumerated in *Busch* before dismissing the charges of domestic violence. These factors are:

{¶25} “The seriousness of the injuries, the presence of independent witnesses, the status of counseling efforts, whether the complainant’s refusal to testify is coerced, and whether the defendant is a first-time offender * * *.”

{¶26} While *Busch* has essentially been legislatively superseded, this court has previously held that “the factors provided in *Busch* still provide valuable guidelines which a court should consider before dismissing a charge in a domestic case.” *Clipner, supra*. In this case, the trial court did not articulate on the record any of the *Busch* factors. The trial court simply inquired if Watkins wanted to proceed against Ferguson, and if Ferguson wanted to proceed against Watkins, and thereafter dismissed the case. At arraignment, the prosecution stated that Watkins had no prior acts of violence, but had one order-in in 1998 for failing to appear for court on other matters. (Tr. 3.) The prosecution also stated

that Watkins had not been spoken to regarding her wishes as a victim of the offenses. We find that the trial court erred in dismissing the case without considering the five factors in *Busch* on the record. Accordingly, the prosecution's sole assignment of error is well-taken.

{¶27} For the foregoing reasons, the prosecution's sole assignment of error is sustained. This case is reversed and remanded to the Franklin County Municipal Court with instructions to reinstate the case on its active docket.

*Judgment reversed and
remanded with instructions.*

BRYANT and KLATT, JJ., concur.

R.C. § 2505.02

Baldwin's Ohio Revised Code Annotated Currentness

Title XXV. Courts--Appellate

Chapter 2505. Procedure on Appeal (Refs & Annos)

Final Order

→2505.02 Final order

(A) As used in this section:

(1) "Substantial right" means a right that the United States Constitution, the Ohio Constitution, a statute, the common law, or a rule of procedure entitles a person to enforce or protect.

(2) "Special proceeding" means an action or proceeding that is specially created by statute and that prior to 1853 was not denoted as an action at law or a suit in equity.

(3) "Provisional remedy" means a proceeding ancillary to an action, including, but not limited to, a proceeding for a preliminary injunction, attachment, discovery of privileged matter, suppression of evidence, a prima-facie showing pursuant to section 2307.85 or 2307.86 of the Revised Code, a prima-facie showing pursuant to section 2307.92 of the Revised Code, or a finding made pursuant to division (A)(3) of section 2307.93 of the Revised Code.

(B) An order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is one of the following:

(1) An order that affects a substantial right in an action that in effect determines the action and prevents a judgment;

(2) An order that affects a substantial right made in a special proceeding or upon a summary application in an action after judgment;

(3) An order that vacates or sets aside a judgment or grants a new trial;

(4) An order that grants or denies a provisional remedy and to which both of the following apply:

(a) The order in effect determines the action with respect to the provisional remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy.

(b) The appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action.

(5) An order that determines that an action may or may not be maintained as a class action;

(6) An order determining the constitutionality of any changes to the Revised Code made by Am. Sub. S.B. 281 of the 124th general assembly, including the amendment of sections 1751.67, 2117.06, 2305.11, 2305.15, 2305.234, 2317.02, 2317.54, 2323.56, 2711.21, 2711.22, 2711.23, 2711.24, 2743.02, 2743.43, 2919.16, 3923.63, 3923.64, 4705.15, and 5111.018, and the enactment of sections 2305.113, 2323.41, 2323.43, and 2323.55 of the Revised Code or any changes made by Sub. S.B. 80 of the 125th general assembly, including the amendment of sections 2125.02, 2305.10, 2305.131, 2315.18, 2315.19, and 2315.21 of the Revised Code.

(C) When a court issues an order that vacates or sets aside a judgment or grants a new trial, the court, upon the request of either party, shall state in the order the grounds upon which the new trial is granted or the judgment vacated or set aside.

(D) This section applies to and governs any action, including an appeal, that is pending in any court on July 22, 1998, and all claims filed or actions commenced on or after July 22, 1998, notwithstanding any provision of any prior statute or rule of law of this state.

R.C. § 2945.67

Baldwin's Ohio Revised Code Annotated Currentness

Appendix to Title XXIX Crimes--Procedure (Law Effective Prior to July 1, 1996) (Refs & Annos)

Chapter 2945. Trial

Bill of Exceptions

→~~2945.67~~ When prosecutor may appeal; when public defender to oppose

(A) A prosecuting attorney, village solicitor, city director of law, or the attorney general may appeal as a matter of [FN1] right any decision of a trial court in a criminal case, or any decision of a juvenile court in a delinquency case, which decision grants a motion to dismiss all or any part of an indictment, complaint, or information, a motion to suppress evidence, or a motion for the return of seized property or grants post conviction relief pursuant to sections 2953.21 to 2953.24 of the Revised Code, and may appeal by leave of the court to which the appeal is taken any other decision, except the final verdict, of the trial court in a criminal case or of the juvenile court in a delinquency case.

(B) In any proceeding brought pursuant to division (A) of this section, the court shall, in accordance with Chapter 120. of the Revised Code, appoint the county public defender, joint county public defender, or other counsel to represent any person who is indigent, is not represented by counsel, and does not waive his right to counsel.

(1978 H 1168, eff. 11-1-78)

[FN1] So in original; should this read "of"?

R.C. § 2945.67, OH ST § 2945.67

Current through 1995 File 49 of the 121st GA (1995-1996) apv. 8/10/95

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END OF DOCUMENT

R.C. § 2945.71

Baldwin's Ohio Revised Code Annotated Currentness

Appendix to Title XXIX Crimes--Procedure (Law Effective Prior to July 1, 1996) (Refs & Annos)

Chapter 2945. Trial

Schedule of Trial and Hearings

→~~2945.71~~ Time within which hearing or trial must be held

(A) A person against whom a charge is pending in a court not of record, or against whom a charge of minor misdemeanor is pending in a court of record, shall be brought to trial within thirty days after his arrest or the service of summons.

(B) A person against whom a charge of misdemeanor, other than a minor misdemeanor, is pending in a court of record, shall be brought to trial:

(1) Within forty-five days after his arrest or the service of summons, if the offense charged is a misdemeanor of the third or fourth degree, or other misdemeanor for which the maximum penalty is imprisonment for not more than sixty days;

(2) Within ninety days after his arrest or the service of summons, if the offense charged is a misdemeanor of the first or second degree, or other misdemeanor for which the maximum penalty is imprisonment for more than sixty days.

(C) A person against whom a charge of felony is pending:

(1) Notwithstanding any provisions to the contrary in Criminal Rule 5(B), shall be accorded a preliminary hearing within fifteen consecutive days after his arrest if the accused is not held in jail in lieu of bail on the pending charge or within ten consecutive days after his arrest if the accused is held in jail in lieu of bail on the pending charge;

(2) Shall be brought to trial within two hundred seventy days after his arrest.

(D) A person against whom one or more charges of minor misdemeanor and one or more charges of misdemeanor other than minor misdemeanor, all of which arose out of the same act or transaction, are pending, or against whom charges of misdemeanors of different degrees, other than minor misdemeanors, all of which arose out of the same act or transaction, are pending shall be brought to trial within the time period required for the highest degree of misdemeanor charged, as determined under division (B) of this section.

(E) For purposes of computing time under divisions (A), (B), (C)(2), and (D) of this section, each day during which the accused is held in jail in lieu of bail on the pending charge shall be counted as three days. This division does not apply for purposes of computing time under division (C)(1) of this section.

(F) This section shall not be construed to modify in any way section 2941.401, or

sections 2963.30 to 2963.35 of the Revised Code.

(1981 S 119, eff. 3-17-82; 1980 S 288; 1975 S 83; 1973 H 716; 1972 H 511)

R.C. § 2945.71, OH ST § 2945.71

Civ. R. Rule 41

Baldwin's Ohio Revised Code Annotated Currentness

Rules of Civil Procedure

▣ Title VI. Trials

➔ **Civ R 41 Dismissal of actions**

(A) Voluntary dismissal: effect thereof

(1) *By plaintiff; by stipulation.* Subject to the provisions of Civ. R. 23(E), Civ. R. 23.1, and Civ. R. 66, a plaintiff, without order of court, may dismiss all claims asserted by that plaintiff against a defendant by doing either of the following:

(a) filing a notice of dismissal at any time before the commencement of trial unless a counterclaim which cannot remain pending for independent adjudication by the court has been served by that defendant;

(b) filing a stipulation of dismissal signed by all parties who have appeared in the action.

Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits of any claim that the plaintiff has once dismissed in any court.

(2) *By order of court.* Except as provided in division (A)(1) of this rule, a claim shall not be dismissed at the plaintiff's instance except upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by

a defendant prior to the service upon that defendant of the plaintiff's motion to dismiss, a claim shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under division (A)(2) of this rule is without prejudice.

(B) Involuntary dismissal: effect thereof

(1) *Failure to prosecute.* Where the plaintiff fails to prosecute, or comply with these rules or any court order, the court upon motion of a defendant or on its own motion may, after notice to the plaintiff's counsel, dismiss an action or claim.

(2) *Dismissal; non-jury action.* After the plaintiff, in an action tried by the court without a jury, has completed the presentation of the plaintiff's evidence, the defendant, without waiving the right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Civ. R. 52 if requested to do so by any party.

(3) *Adjudication on the merits; exception.* A dismissal under division (B) of this rule and any dismissal not provided for in this rule, except as provided in division (B)(4) of this rule, operates as an adjudication upon the merits unless the court, in its order for

dismissal, otherwise specifies.

(4) *Failure other than on the merits.* A dismissal for either of the following reasons shall operate as a failure otherwise than on the merits:

(a) lack of jurisdiction over the person or the subject matter;

(b) failure to join a party under Civ. R. 19 or Civ. R. 19.1.

(C) Dismissal of counterclaim, cross-claim, or third-party claim

The provisions of this rule apply to the dismissal of any counterclaim, cross-claim, or third-party claim. A voluntary dismissal by the claimant alone pursuant to division (A)(1) of this rule shall be made before the commencement of trial.

(D) Costs of previously dismissed action

If a plaintiff who has once dismissed a claim in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the claim previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

(Adopted eff. 7-1-70; amended eff. 7-1-71, 7-1-72, 7-1-01)