

IN THE SUPREME COURT OF OHIO

IN RE: A.J.S.,
A MINOR CHILD

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Case No. 2007-1451

On Appeal from the Franklin
County Court of Appeals
Tenth Appellate District

C.A. Case No. 06AP-597

REPLY BRIEF OF A.J.S.

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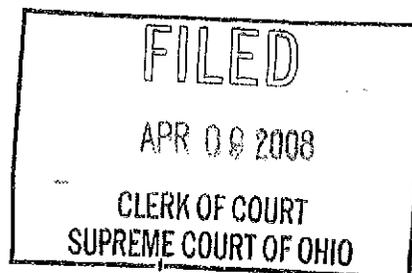


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STATEMENT OF FACTS

Appellant rests on his Statement of the Case and Facts as were raised in his Merit Brief.

ARGUMENT

FIRST PROPOSITION OF LAW

Courts of appeals must apply an abuse of discretion standard when reviewing the trial court's probable cause determination in mandatory bindover proceedings.

Appellee's argument that a de novo standard is the appropriate standard of review to review probable cause determinations in Ohio is misplaced. Answer, p. 5. Ohio's juvenile courts retain discretion in determining whether a child should be transferred to adult court; thus, an abuse of discretion standard is the appropriate standard to be employed by Ohio's courts of appeals. See, R.C. 2152.10; 2152.12.

Generally, juvenile courts possess exclusive original jurisdiction over children alleged to be delinquent for committing an act that would constitute a crime if committed by an adult. State v. Iacona, 93 Ohio St.3d 83, 2001-Ohio-1292; State v. Watson, (1989), 47 Ohio St.3d 93, 95, 547 N.E.2d 1181; R.C. 2151.23(A)(1); R.C. 2152.10. But under certain circumstances, a child will be transferred to the court of common pleas to be tried as an adult. R.C. 2152.10; R.C. 2152.12. The type of transfer procedure enacted by a state dictates the type of process that is due to a child facing bindover.

States are divided into three basic categories: prosecutorial waiver, legislative waiver, and judicial waiver. Bree Langemo, *Serious Consequences for Serious Juvenile Offenders: Do Juveniles Belong in Adult Court*, 30 OHIO N.U. L. REV. 141 (2004).

A. Prosecutorial Waiver States

In prosecutorial waiver states, the decision to place a juvenile in adult court lies solely with the prosecutor. Lisa S. Beresford, *Is Lowering the Age at Which Juveniles Can Be Transferred to Adult Court the Answer to Juvenile Crime? A State-By-State Assessment the Age at Which a Child Should be Held Responsible for His or Her Actions Has Been Debated for*

Centuries, 37 SAN DIEGO L. REV. 783 (2000), 812-814. The prosecutor has the authority to charge the child in adult court and to bypass the juvenile court directly. *Id.* This structure has been criticized because it essentially “strip[s] the judiciary of its independent jurisdictional role in the adjudication of children by granting the charging authority with unbridled discretion to unilaterally decide which forum has jurisdiction . . . [and, thus,] depriv[es] children . . . [of] the judicial counterweight which they are constitutionally entitled to receive.” See Langemo at 159. (Internal Citations Omitted.) Moreover, in these states, the prosecutor’s decision to transfer the child to the adult system is not appealable. *Id.*

B. Legislative Waiver (also referred to as “direct file” or “automatic waiver”) States

In legislative waiver states, the focus is on the offense that was committed. See Beresford at 805. Therefore, a child will automatically be transferred to the adult system based on the offense that he or she was charged with, and the juvenile court never has jurisdiction over the child; therefore, the juvenile court does not retain jurisdiction to hold a hearing to determine if transfer is appropriate. *Id.*

C. Judicial Waiver States

In judicial waiver states, juvenile courts retain discretion to determine whether a child should be transferred to adult court. See Langemo at 146-147. In the forty states that utilize judicial waiver, a juvenile must be given a hearing prior to being transferred so the juvenile court can make a case-by-case determination as to the appropriateness of transfer. See Beresford at 795.

Ohio is considered a “judicial waiver” state. Ohio is unique in that there are two types of transfer provisions under our statutory scheme: discretionary and mandatory bindover. R.C. 2152.10; R.C. 2152.12. In discretionary bindover proceedings, the juvenile court has the ability

to consider certain individual factors that are not statutorily provided for in mandatory bindover proceedings. R.C. 2152.10. Nevertheless, the juvenile court is entrusted with the ability and has the discretion to make a probable cause determination to determine whether bindover is appropriate in mandatory bindover proceedings.

Therefore, the State's interpretation of the holding in State v. Hanning (2000), 89 Ohio St.3d 86, 90, 2000-Ohio-436 and its contention that the difference between mandatory and discretionary bindover evidences the general assembly's intent to remove discretion from juvenile court judges is simply incorrect. Answer, pp. 6, 9. If Ohio's General Assembly intended to remove all discretion from Ohio's juvenile courts, it could have enacted a prosecutorial waiver or automatic waiver statute. Instead, the General Assembly specifically provided Ohio's juvenile courts with discretion to make transfer decisions in both mandatory and discretionary bindover proceedings. R.C. 2152.10; R.C. 2152.12.

An abuse of discretion standard is the appropriate standard of review to be applied to probable cause determinations because Ohio's juvenile courts retain discretion to determine whether a child should be transferred to adult court. If the General Assembly's intent was to completely remove discretion from the juvenile court, it would have enacted a direct file statute or a prosecutorial discretion statute and removed the discretion from juvenile courts in their entirety.

SECOND PROPOSITION OF LAW

An appellate court is without jurisdiction to review a trial court's finding of probable cause because it is not a final appealable order.

I. The Tenth District lacked a final appealable order.

Appellee concedes that a mandatory bindover proceeding is a preliminary hearing “to determine whether the juvenile court retains jurisdiction to proceed to a final adjudication on the merits.” Answer, p. 7. It is not a hearing that “results in an adjudication on the merits.” State v. Whisenant (1998), 127 Ohio App.3d 75, 85, 711 N.E.2d 1016. This is further evidenced by the express language of Juv.R. 30(E), which provides, “[i]f the court retains jurisdiction, it shall set the proceedings for a hearing on the merits.” Because a probable cause determination does not result in an automatic adjudication on the merits, a court of appeals lacks a final appealable order until the court enters a disposition for each of the charges.

In this case, there was no adjudication on the merits and no resolution or disposition as to any of the charges; thus, there was no final appealable order. At the conclusion of the probable cause hearing and in its judgment entry, the juvenile court found no probable cause as to the six counts of attempted murder. (T.pp. 271-273); (A-2). Notably, these six charges remain unresolved because the juvenile court has never held a hearing on the merits pursuant to Juv.R. 30(E). Further, the charges were not dismissed at the conclusion of the probable cause hearing, and were not dismissed by the juvenile court in its entry. (T.pp. 271-273); (A-2).

There were other charges arising out of the same incident at issue here—two counts of felonious assault. These charges are also unresolved, are still pending in the juvenile court. Because there was no resolution, or final disposition as to any of the charges, there was no final appealable order. Accordingly, the Tenth District was without jurisdiction to entertain the State's appeal and it should have dismissed the appeal sua sponte. R.C. 2505.02(A).

II. The Tenth District did not have jurisdiction in this matter because the State failed to perfect its appeal.

The State's failure to ensure that the charges were dismissed and its failure to seek leave prior to appealing left the Tenth District without jurisdiction to consider the case and to issue an opinion. See, e.g. Ohio Constitution, Article IV, Section 3(B)(2); R.C. 2505.02; R.C. 2945.67; App.R. 5(C). It is well-established that the State may appeal a [* * *] case only when a statute gives it express authority to do so. See, State v. Hensley, Montgomery App. No. 18886, 2002-Ohio-1887, citing Ohio Constitution, Article IV, Section 3(B)(2). The general authority for the State to appeal is provided, in relevant part, as follows:

A prosecuting attorney [* * *] may appeal as a matter of right any decision [* * *] 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, [* * *], 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.

R.C. 2945.67(A).

A juvenile court's determination as to probable cause does not fall under any of the "appeal as a matter of right" categories provided in R.C. 2945.67(A). The only circumstances in which the State has an "appeal as a matter of right," in a delinquency matter, occurs after a motion to dismiss or a motion to suppress has been granted. *Id.*; Juv.R.22(F)¹; App.R.4(A)(4). Because this rule specifically provides the State with an appeal as of right following the granting of a motion to dismiss or a motion to suppress, and does not include the right to an automatic appeal after probable cause determination, it is clear that the State did not have an appeal as of

¹ Juv.R. 22(F) specifically provides the State with an appeal as of right from the granting of a motion to suppress upon certification "that (1) the appeal is not taken for purpose of delay and (2) the granting of the motion has rendered proof available to the state so weak in its entirety that any reasonable possibility of proving the complaint's allegations have been destroyed."

right in this situation. Therefore, the State's contention that it can appeal "as a matter of right" is unfounded. Answer, pp. 12-14; (A-3).

The State could have attempted to perfect its appeal by moving the court to dismiss the attempted murder charges at the conclusion of the probable cause hearing. R.C. 2945.67(A). However, the State failed to take this simple action. (T.pp. 271-273.) The State does not contest this fact and instead, asserts that it has a right to appeal when there is a "functional equivalent of a dismissal of [the] charges." Answer, p. 13. This contention is unsupported in law; and in fact, the opposite is true. R.C. 2945.67(A). The State must move the court to gain a dismissal of the charges in order to obtain a final appealable order. *Id.* If the State fails to do this, the court of appeals does not have a final appealable order and does not have jurisdiction to consider the merits of its appeal. R.C. 2505.02.

Appellee further argues that the State properly appealed because the State would have been denied a remedy absent an appeal at this stage of the proceedings. Answer, p. 13. This is also not true, because had the State moved the court to dismiss the charges and had the court denied its motion, the State could have sought leave from the Tenth District to perfect its appeal. R.C. 2945.67(A).

The Appellate Rules of Practice and Procedure and Ohio's rules and statutory provisions provide clear direction on how to perfect an appeal. But the State did not comply with any of these provisions. Because the State did not have a basis to appeal as of right, it should have moved the court to obtain a final appealable order. R.C. 2945.67(A). In the alternative, the State should have sought leave to appeal pursuant to R.C. 2945.67(A) and App.R. 5(C). But the State's own failures to act or its erroneous belief that the juvenile court dismissed the charges in this case, deprived the Tenth District Court of Appeals of jurisdiction to hear this case.

Because the Tenth District lacked a final appealable order and erred when it accepted jurisdiction, this Court should vacate the Tenth District's decision and remand the matter to the juvenile court for a hearing on the merits pursuant to Juv.R. 30(E).

CONCLUSION

An abuse of discretion standard is the appropriate standard of review to be applied to probable cause determinations because Ohio's juvenile courts retain discretion to determine whether a child should be transferred to adult court.

Furthermore, because there was no final resolution or disposition as to any of the charges in this case, there was no final appealable order; therefore, the Tenth District should have dismissed the State's appeal. Because the state did not have a final appealable order and did not perfect its appeal under R.C. 2945.67(A), this Court should adopt A.J.S.'s two propositions of law, vacate the Tenth District Court of Appeals decision, and remand the matter to the juvenile court for a final hearing on the merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **Reply Brief of A.J.S.** was forwarded by regular U.S. Mail this 9th day of April, 2008, to the office of Katherine J. Press, Assistant Franklin County Prosecutor, 14th Floor, Hall of Justice, 373 South High Street, Columbus, Ohio 43215.



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#275541v3

IN THE SUPREME COURT OF OHIO

IN RE: A.J.S.,
A MINOR CHILD

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Case No.

On Appeal from the Franklin
County Court of Appeals
Tenth Appellate District

C.A. Case No. 06-AP-597

APPENDIX TO

REPLY BRIEF OF A.J.S.

IN THE COURT OF COMMON PLEAS OF FRANKLIN COUNTY, OHIO 0597J14
DIVISION OF DOMESTIC RELATIONS
AND JUVENILE BRANCH

ANDRE J. STATON
ALLEGED DELINQUENT MINOR

06JU-04-5932
JUDGE CAROLE SQUIRE

HEARING DATE: MAY 5, 2006

STATUS: HEARING ON A MOTION TO RELINQUISH JURISDICTION FILED MARCH 23, 2006

THE COURT FINDS THAT THE ABOVE MATTER IS WITHIN THE JURISDICTION OF THE COURT. THE PARENTS, GUARDIAN OR PERSON HAVING CUSTODY OF THE CHILD HAVE BEEN CITED TO APPEAR AS REQUIRED UNDER SECTION 2151.28 OF THE OHIO REVISED CODE, AND THE FOLLOWING PERSON(S) WERE PRESENT:

Zach Swisher, Assistant Prosecutor
Scott Gaugler, Assistant Prosecutor
David Rowland, Attorney for Minor
Andre Staton, Father
Vanessa Staton, Mother
Andre J. Staton, Minor

Mr. Swisher stated all parties have agreed to stipulate to Andre J. Staton's date of birth being, September 15, 1989, making Andre J. Staton, 16 years of age at the time of the alleged offense.

Mr. Noel stated his agreement with the stipulation as presented by Mr. Swisher.

Magistrate proceeded to hear SWORN testimony from the following persons:

State's Witnesses

- 1 - Detective Steven Brown
- 2 - Joseph Morgan
- 3 - Michael Miracle
- 4 - Antwan Smith
- 5 - Markala Cooper
- 6 - Rochelle Farr

The following exhibits were introduced into evidence:

State's Exhibits

- 1 - 2 Photos of Grease Trap (Admitted)
- 3 - 4 Photo Arrays
- 5 - Photo (Admitted)
- 6 - Mike Miracle's Pants (Admitted)

Defendant's Exhibits

- A - I Photos of Building (Admitted)

All exhibits were maintained by the respective parties.

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IN THE COURT OF COMMON PLEAS OF FRANKLIN COUNTY, OHIO
DIVISION OF DOMESTIC RELATIONS
AND JUVENILE BRANCH

ANDRE J. STATON
ALLEGED DELINQUENT MINOR
PAGE 2 CONTINUED

06JU-04-5932
JUDGE CAROLE SQUIRE

FINDINGS:

The Court finds that the parties have agreed to stipulate to the date of birth of Andre J. Staton, being September 15, 1989, making him 16 years of age at the time of the alleged offenses. Based upon the testimony and exhibits as submitted, the Court finds that the State has failed to prove beyond a reasonable doubt, the Motion to Relinquish Jurisdiction filed March 23, 2006.

IN VIEW OF THE FOREGOING FACTS:

ON MAY 5, 2006, THE COURT FINDS THAT ALL PARTIES HAVE STIPULATED TO ANDRE J. STATON'S, DATE OF BIRTH BEING SEPTEMBER 15, 1989, MAKING HIM 16 YEARS OF AGE AT THE TIME OF THE ALLEGED OFFENSES. THE COURT DENIES THE MOTION TO RELINQUISH JURISDICTION FILED MARCH 23, 2006.

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Common Pleas

IN THE COURT OF APPEALS OF FRANKLIN COUNTY, OHIO
~~TENTH APPELLATE DISTRICT~~

2006
Division of Domestic Relations
and Juvenile Branch

59685E11

IN RE: ANDRE J. STATON, Case No. 06JU-5932
A Delinquent Minor Child, Regular Calendar

Appellant.

NOTICE OF APPEAL

Pursuant to Sections 2950.09(B)(4), 2905.02 and 2505.03 of the Ohio Revised Code, the State of Ohio, by and through the Franklin County Prosecuting Attorney, hereby appeals as a matter of right to the Court of Appeals of Franklin County, Tenth Appellate District, from the judgment entry filed on May 31, 2006.

Respectfully submitted,

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LEXSEE 2002 OHIO 1887

STATE OF OHIO, Plaintiff-Appellant vs. ROBERT M. HENSLEY, Defendant-Appellee

C.A. CASE NO. 18886

COURT OF APPEALS OF OHIO, SECOND APPELLATE DISTRICT, MONTGOMERY COUNTY

2002 Ohio 1887; 2002 Ohio App. LEXIS 1900

April 19, 2002, Rendered

PRIOR HISTORY: [*1] T.C. CASE NO. 01TRC02431.

DISPOSITION: Appeal was dismissed for lack of jurisdiction.

COUNSEL: Mathias H. Heck, Jr., Pros. Attorney; Claudia J. Turrell, Asst. Pros. Attorney, New Lebanon, Ohio, Attorney for Plaintiff-Appellant.

Robert M. Hensley, Brookville, Ohio, Defendant-Appellee, Pro se.

JUDGES: GRADY, J. FAIN, J. and YOUNG, J. concur.

OPINION BY: GRADY

OPINION

GRADY, J.

This is an appeal by the State from a judgment entered by the Montgomery County Area One District Court, finding Defendant, Robert Hensley, not guilty of a charge of operating a motor vehicle while under the influence of alcohol.

On April 26, 2001, at 10:45 p.m., Sgt. Wright of the Ohio Highway Patrol observed Defendant's vehicle traveling westbound on I-70 in a construction zone near S.R. 49. Defendant's vehicle was weaving badly within his lane of travel and it crossed over the marked line dividing the lanes of travel one time. Defendant's vehicle was also obstructing traffic due to its very slow speed, five to ten miles per hour. Sgt. Wright initiated a traffic stop, and approached Defendant's vehicle.

Sgt. Wright could smell an odor of alcohol emitting from Defendant's [*2] vehicle. Sgt. Wright asked De-

fendant to perform three field sobriety tests; the horizontal gaze nystagmus test, the walk and turn test, and the one leg stand test. Defendant failed all three tests, and was arrested for driving under the influence of alcohol. Once inside the patrol car, Sgt. Wright noticed a strong odor of alcohol whenever Defendant spoke. Defendant was transported to the Dayton Patrol Post where he refused to take a breath test.

Defendant was charged by traffic citation with operating a motor vehicle while under the influence of alcohol, *R.C. 4511.19(A)(1)*, and a marked lanes violation, *R.C. 4511.33*. On May 15, 2001, Defendant entered a no contest plea to both charges. After asking Defendant for an explanation of his conduct on the day in question, the trial court * stated: "This test of 0.000 tells me you weren't under the influence, so whatever may have been wrong with you, I guess you were exceptionally tired." The trial court found Defendant not guilty on the OMVI charge, but guilty of the marked lanes violation. The trial court assessed court costs against Defendant.

* The record reflects that the Defendant, Robert M. Hensley, and the judge, Hon. James A. Hensley, Sr., are unrelated and never met prior to Defendant's appearance before Judge Hensley.

[*3] On May 22, 2001, the State filed its notice of appeal to this court from the decision and entry entered by the trial court on May 15, 2001.

ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED WHEN IT FOUND THE DEFENDANT NOT GUILTY OF THE VIOLATION OF *R.C. 4511.19(A)(1)* IN THAT IT WAS AN ABUSE OF DISCRETION TO FIND HENSLEY NOT GUILTY ON A NO CONTEST PLEA WHEN THE COMPLAINT CONTAINED SUFFICIENT ALLEGATIONS TO STATE AN OFFENSE.

R.C. 4511.19(A)(1) is a misdemeanor offense. A defendant's plea of no contest to a misdemeanor offense "constitute(s) a stipulation that the judge or magistrate may make [a] finding of guilty or not guilty from the explanation of circumstances . . ." *R.C. 2937.07*. That section otherwise provides that the court must call for the explanation from "the affiant or complainant or his representatives," that is, from the arresting officer or the prosecutor.

The trial court failed to call for the explanation [*4] of circumstances that *R.C. 2937.01* requires. If the arresting officer was present, he was not called upon. The transcript of the proceeding does not reflect that a legal representative of the State was even present. That is possibly explained by the fact that the notice filed May 1, 2002, setting the proceeding at which Defendant entered his no contest plea, bears no instruction to serve a copy on the prosecuting attorney or arresting officer.

The court did call on the Defendant for an explanation of the circumstances leading to his OMVI charge. The Defendant denied that he'd consumed any alcohol at all. That prompted the court to examine the "BAC Datamaster Evidence Ticket" in the file, which reflected no finding that Defendant had any concentration of alcohol in his breath. On that basis, the court concluded that Defendant could not have been under the influence of alcohol and it acquitted him on the OMVI charge.

The fact that the BAC Datamaster Evidence Ticket reflects no alcohol content in the Defendant's breath is easily explained; the printed notation on the BAC Datamaster Evidence Ticket states that the test was "Refused." The Defendant's refusal [*5] is further reported in the "Test Report Form" the arresting officer filed, as well as in his written narrative. The court apparently overlooked those reports. The court clearly misread the "BAC Datamaster Evidence Ticket."

We indulge in the presumption of regularity to conclude that the trial court's failure to understand the plain meaning of the materials in its file was an inadvertent failure. However, we cannot condone the court's decision to adjudicate the Defendant's guilt or innocence on his plea absent the presence and participation of the prosecuting attorney. Had she been present, the prosecutor would surely have made the court aware that the Defendant refused the test, avoiding the court's misunderstanding of that fact.

The prosecutor states in her brief on appeal that "no contest pleas . . . are routinely accepted (by this trial court) without the prosecutor present." (Brief, p. 5). The practice, if it exists, is wholly improper. It suggests a lack of the diligence and impartiality that *Canon 3 of the Code of Judicial Conduct* requires of a judge. That same Canon, at paragraph (D)(1), [*6] requires another judge

who has knowledge of its violation "to report the violation to a tribunal or other authority empowered to investigate or act upon the violation." Further instances of this kind will require us to discharge our reporting responsibilities.

The State asks us to reverse and vacate Defendant's acquittal because the trial court abused its discretion when it entered that judgment on the record before it. We agree that it did. However, we must first determine whether we have jurisdiction to review the State's appeal from that judgment.

The State may appeal in a criminal case only when a statute gives it express authority to do so. *Ohio Constitution, Article IV, Section 3(B)(2)*; *State ex rel Leis v. Kraft* (1984), 10 Ohio St.3d 34, 460 N.E.2d 1372; *State v. Rogers* (1996), 110 Ohio App.3d 106, 673 N.E.2d 666. That authority for the State to appeal is set out in *R.C. 2945.67*, which provides in relevant part:

(A) A [*7] prosecuting attorney, village solicitor, city director of law, or the attorney general may appeal as a matter of 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.

A judgment of acquittal by the trial judge in a criminal case is a final verdict within the meaning of *R.C. 2945.67(A)*, which is not appealable by the State either as a matter of right, or by leave to appeal. *State v. Keeton* (1985), 18 Ohio St.3d 379, 481 N.E.2d 629; *State ex rel. Yates v. Court of Appeals of Montgomery County* (1987), 32 Ohio St.3d 30, 512 N.E.2d 343. [*8] In cases resulting in a judgment of acquittal, however, the prosecution may nevertheless appeal, by leave of court, evidentiary rulings and rulings on issues of law, because those rulings fall within the language of "any other decision, except the final verdict," in *R.C. 2945.67(A)*. *State v. Arnett* (1986), 22 Ohio St.3d 186, 489 N.E.2d 284; *State v. Bistricky* (1990), 51 Ohio St.3d 157, 555 N.E.2d 644. However, because appeals from such rulings do not fall within one of the four categories where the State is granted an appeal as of right by *R.C. 2945.67*, in order to prosecute such appeals the State must obtain leave of the appellate court, follow the procedures outlined in *State v. Wallace* (1975), 43 Ohio St.2d 1, 330 N.E.2d 697, and comply with *App.R. 5. Bistricky, supra*; *State v. Perroni*

(June 26, 1998), 1998 Ohio App. LEXIS 2932, Lake App. No. 96-L-107, unreported; R.C. 2945.67(A).

In this case the State is not appealing an evidentiary ruling or a ruling on some issue of law. Rather, as the State concedes in [*9] its appellate brief, it is appealing "the finding of not guilty on the driving under the influence charge." What the State seeks in this appeal is a finding by this court that the trial court abused its discretion in finding Defendant not guilty of OMVI, given Defendant's no contest plea to that charge and the evidence before the trial court at that time. In other words, the State appeals from the judgment of acquittal in this case, not an evidentiary ruling by the court. That is clearly an

impermissible appeal of the final verdict, expressly prohibited by R.C. 2945.67(A). *Keeton, supra; Yates, supra; State v. Rogers, supra.*

Furthermore, in any event, in prosecuting this appeal the State failed to obtain leave of this court, failed to follow the procedures outlined in *State v. Wallace, supra* and failed to comply with App.R.5. *Bistricky, supra; Perroni, supra, 1998 Ohio App. LEXIS 2932.*

Accordingly, this court lacks jurisdiction to hear this appeal, and the appeal is dismissed.

FAIN, J. and YOUNG, J. concur.

LEXSTAT OHIO JUV R 22

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*** RULES CURRENT THROUGH APRIL 1, 2008 ***
*** ANNOTATIONS CURRENT THROUGH JANUARY 1, 2008 ***

Ohio Rules Of Juvenile Procedure

Ohio Juv. R. 22 (2008)

Rule 22. Pleadings and motions; defenses and objections

(A) Pleadings and motions.

Pleadings in juvenile proceedings shall be the complaint and the answer, if any, filed by a party. A party may move to dismiss the complaint or for other appropriate relief.

(B) Amendment of pleadings.

Any pleading may be amended at any time prior to the adjudicatory hearing. After the commencement of the adjudicatory hearing, a pleading may be amended upon agreement of the parties or, if the interests of justice require, upon order of the court. A complaint charging an act of delinquency may not be amended unless agreed by the parties, if the proposed amendment would change the name or identity of the specific violation of law so that it would be considered a change of the crime charged if committed by an adult. Where requested, a court order shall grant a party reasonable time in which to respond to an amendment.

(C) Answer.

No answer shall be necessary. A party may file an answer to the complaint, which, if filed, shall contain specific and concise admissions or denials of each material allegation of the complaint.

(D) Prehearing motions.

Any defense, objection or request which is capable of determination without hearing on the allegations of the complaint may be raised before the adjudicatory hearing by motion. The following must be heard before the adjudicatory hearing, though not necessarily on a separate date:

- (1) Defenses or objections based on defects in the institution of the proceeding;
- (2) Defenses or objections based on defects in the complaint (other than failure to show jurisdiction in the court or to charge an offense which objections shall be noticed by the court at any time during the pendency of the proceeding);
- (3) Motions to suppress evidence on the ground that it was illegally obtained;
- (4) Motions for discovery;
- (5) Motions to determine whether the child is eligible to receive a sentence as a serious youthful offender.

(E) Motion time.

Except for motions filed under division (D)(5) of this rule, all prehearing motions shall be filed by the earlier of:

- (1) seven days prior to the hearing, or
- (2) ten days after the appearance of counsel.

Rule 22(D)(5) motions shall be filed by the later of:

- (1) Twenty days after the date of the child's initial appearance in juvenile court; or
- (2) Twenty days after denial of a motion to transfer.

The filing of the Rule 22(D)(5) motion shall constitute notice of intent to pursue a serious youthful offender disposition.

The court in the interest of justice may extend the time for making prehearing motions.

The court for good cause shown may permit a motion to suppress evidence under division (D)(3) of this rule to be made at the time the evidence is offered.

(F) State's right to appeal upon granting a motion to suppress.

In delinquency proceedings the state may take an appeal as of right from the granting of a motion to suppress evidence if, in addition to filing a notice of appeal, the prosecuting attorney certifies that (1) the appeal is not taken for the purpose of delay and (2) the granting of the motion has rendered proof available to the state so weak in its entirety that any reasonable possibility of proving the complaint's allegations has been destroyed.

Such appeal shall not be allowed unless the notice of appeal and the certification by the prosecuting attorney are filed with the clerk of the juvenile court within seven days after the date of the entry of the judgment or order granting the motion. Any appeal which may be taken under this rule shall be diligently prosecuted.

A child in detention or shelter care may be released pending this appeal when the state files the notice of appeal and certification.

This appeal shall take precedence over all other appeals.

HISTORY: Amended, eff 7-1-77; 7-1-94; 7-1-01.

LEXSTAT OHIO APP R. 4

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Ohio Rules Of Appellate Procedure
 Title II Appeals From Judgments And Orders Of Court Of Record

Ohio App. Rule 4 (2008)

Rule 4. Appeal as of right--when taken

(A) Time for appeal.

A party shall file the notice of appeal required by *App.R. 3* within thirty days of the later of entry of the judgment or order appealed or, in a civil case, service of the notice of judgment and its entry if service is not made on the party within the three day period in *Rule 58(B) of the Ohio Rules of Civil Procedure*.

(B) Exceptions.

The following are exceptions to the appeal time period in division (A) of this rule:

(1) Multiple or cross appeals. If a notice of appeal is timely filed by a party, another party may file a notice of appeal within the appeal time period otherwise prescribed by this rule or within ten days of the filing of the first notice of appeal.

(2) Civil or juvenile post-judgment motion. In a civil case or juvenile proceeding, if a party files a timely motion for judgment under *Civ. R. 50(B)*, a new trial under *Civ. R. 59(B)*, vacating or modifying a judgment by an objection to a magistrate's decision under *Civ. R. 53(E)(4)(c)* or *Rule 40(E)(4)(c) of the Ohio Rules of Juvenile Procedure*, or findings of fact and conclusions of law under *Civ. R. 52*, the time for filing a notice of appeal begins to run as to all parties when the order disposing of the motion is entered.

(3) Criminal post-judgment motion. In a criminal case, if a party timely files a motion for arrest of judgment or a new trial for a reason other than newly discovered evidence, the time for filing a notice of appeal begins to run when the order denying the motion is entered. A motion for a new trial on the ground of newly discovered evidence made within the time for filing a motion for a new trial on other grounds extends the time for filing a notice of appeal from a judgment of conviction in the same manner as a motion on other grounds. If made after the expiration of the time for filing a motion on other grounds, the motion on the ground of newly discovered evidence does not extend the time for filing a notice of appeal.

(4) Appeal by prosecution. In an appeal by the prosecution under *Crim.R. 12(K)* or *Juv.R. 22(F)*, the prosecution shall file a notice of appeal within seven days of entry of the judgment or order appealed.

(5) Partial final judgment or order. If an appeal is permitted from a judgment or order entered in a case in which the trial court has not disposed of all claims as to all parties, other than a judgment or order entered under *Civ.R. 54(B)*, a party may file a notice of appeal within thirty days of entry of the judgment or order appealed or the judgment or order that disposes of the remaining claims. Division (A) of this rule applies to a judgment or order entered under *Civ.R. 54(B)*.

(C) Premature notice of appeal.

A notice of appeal filed after the announcement of a decision, order, or sentence but before entry of the judgment or order that begins the running of the appeal time period is treated as filed immediately after the entry.

Ohio App. Rule 4

(D) Definition of "entry" or "entered".

As used in this rule, "entry" or "entered" means when a judgment or order is entered under *Civ.R. 58(A)* or *Crim.R. 32(C)*.

HISTORY: Amended, eff 7-1-72; 7-1-85; 7-1-89; 7-1-92; 7-1-96; 7-1-02.

LEXSTAT OHIO APP. RULE 5

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Ohio Rules Of Appellate Procedure
 Title II Appeals From Judgments And Orders Of Court Of Record

Ohio App. Rule 5 (2008)

Rule 5. Appeals by leave of court

(A) Motion by defendant for delayed appeal.

(1) After the expiration of the thirty day period provided by *App. R. 4(A)* for the filing of a notice of appeal as of right, an appeal may be taken by a defendant with leave of the court to which the appeal is taken in the following classes of cases:

- (a) Criminal proceedings;
- (b) Delinquency proceedings; and
- (c) Serious youthful offender proceedings.

(2) A motion for leave to appeal shall be filed with the court of appeals and shall set forth the reasons for the failure of the appellant to perfect an appeal as of right. Concurrently with the filing of the motion, the movant shall file with the clerk of the trial court a notice of appeal in the form prescribed by *App. R. 3* and shall file a copy of the notice of the appeal in the court of appeals. The movant also shall furnish an additional copy of the notice of appeal and a copy of the motion for leave to appeal to the clerk of the court of appeals who shall serve the notice of appeal and the motions upon the prosecuting attorney.

(B) Motion to reopen appellate proceedings.

If a federal court grants a conditional writ of habeas corpus upon a claim that a defendant's constitutional rights were violated during state appellate proceedings terminated by a final judgment, a motion filed by the defendant or on behalf of the state to reopen the appellate proceedings may be granted by leave of the court of appeals that entered the judgment. The motion shall be filed with the clerk of the court of appeals within forty-five days after the conditional writ is granted. A certified copy of the conditional writ and any supporting opinion shall be filed with the motion. The clerk shall serve a copy of a defendant's motion on the prosecuting attorney.

(C) Motion by prosecution for leave to appeal.

When leave is sought by the prosecution from the court of appeals to appeal a judgment or order of the trial court, a motion for leave to appeal shall be filed with the court of appeals within thirty days from the entry of the judgment and order sought to be appealed and shall set forth the errors that the movant claims occurred in the proceedings of the trial court. The motion shall be accompanied by affidavits, or by the parts of the record upon which the movant relies, to show the probability that the errors claimed did in fact occur, and by a brief or memorandum of law in support of the movant's claims. Concurrently with the filing of the motion, the movant shall file with the clerk of the trial court a notice of appeal in the form prescribed by *App. R. 3* and file a copy of the notice of appeal in the court of appeals. The movant also shall furnish a copy of the motion and a copy of the notice of appeal to the clerk of the court of appeals who shall serve the notice of appeal and a copy of the motion for leave to appeal upon the attorney for the defendant who, within thirty days from the filing of the motion, may file affidavits, parts of the record, and brief or memorandum of law to refute the claims of the movant.

(D) Motion by defendant for leave to appeal consecutive sentences pursuant to R.C. 2953.08(C).

(1) When leave is sought from the court of appeals for leave to appeal consecutive sentences pursuant to R.C. 2953.08(C), a motion for leave to appeal shall be filed with the court of appeals within thirty days from the entry of the judgment and order sought to be appealed and shall set forth the reason why the consecutive sentences exceed the maximum prison term allowed. The motion shall be accompanied by a copy of the judgment and order stating the sentences imposed and stating the offense of which movant was found guilty or to which movant pled guilty. Concurrently with the filing of the motion, the movant shall file with the clerk of the trial court a notice of appeal in the form prescribed by App.R. 3 and file a copy of the notice of appeal in the court of appeals. The movant also shall furnish a copy of the notice of appeal and a copy of the motion to the clerk of the court of appeals who shall serve the notice of appeal and the motion upon the prosecuting attorney.

(2) Leave to appeal consecutive sentences incorporated into appeal as of right.

When a criminal defendant has filed a notice of appeal pursuant to App. R. 4, the defendant may elect to incorporate in defendant's initial appellate brief an assignment of error pursuant to R.C. 2953.08(C), and the assignment of error shall be deemed to constitute a timely motion for leave to appeal pursuant to R.C. 2953.08(C).

(E) Determination of the motion.

Except when required by the court the motion shall be determined by the court of appeals on the documents filed without formal hearing or oral argument.

(F) Order and procedure following determination.

Upon determination of the motion, the court shall journalize its order and the order shall be filed with the clerk of the court of appeals, who shall certify a copy of the order and mail or otherwise forward the copy to the clerk of the trial court. If the motion for leave to appeal is overruled, except as to motions for leave to appeal filed by the prosecution, the clerk of the trial court shall collect the costs pertaining to the motion, in both the court of appeals and the trial court, from the movant. If the motion is sustained and leave to appeal is granted, the further procedure shall be the same as for appeals as of right in criminal cases, except as otherwise specifically provided in these rules.

HISTORY: Amended, eff 7-1-88; 7-1-92; 7-1-94; 7-1-96; 7-1-03.