

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, : No. 2007-1640
Appellant, :
v. : On Appeal from the
RITA RODDY, : Cuyahoga County Court of Appeals,
Appellee. : Eighth Appellate
District, Case No. 88759

MERIT BRIEF OF APPELLEE RITA RODDY

WILLIAM MASON (0037540)
Cuyahoga County Prosecutor
MATTHEW E. MEYER (0075253)
Assistant Prosecuting Attorney (of record)
MICHAEL E. GRAHAM (0078000)
Assistant Prosecuting Attorney
1200 Ontario 9th Floor
Cleveland, Ohio 44113
216/443-7800
216/443-7806 (fax)
Counsel for Appellant State of Ohio

ROBERT L. TOBIK (0029286)
Cuyahoga County Public Defender
JOHN MARTIN (0020606)
Assistant Public Defender (of record)
1200 West Third Street
100 Lakeside Place
Cleveland, Ohio 44113-1569
216/443-7583
216/443-3632 (fax)
Counsel for Appellee Rita Roddy

WILLIAM P. MARSHALL (0038077) (of record)
Solicitor General
KELLY A. BORCHERS (0081254)
Assistant Solicitor
30 E. Broad St., 17th Floor
Columbus, Ohio 43215
614/466-8980
614/466-5087 (fax)
wmarshall@ag.state.oh.us

JASON A. MACKE (0069870)
Office of the Ohio Public Defender
8 E. Long St., 6th Floor
Columbus, Ohio 43215
614/466-5394
614/728-8091 (fax)
mackej@opd.ohio.gov

Counsel for Amicus Curiae
Ohio Attorney General

Counsel for Amicus Curiae
Ohio Public Defender

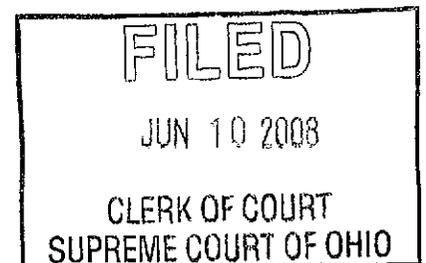


TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES ii

SUMMARY OF ARGUMENT 1

STATEMENT OF THE CASE AND FACTS 2

ARGUMENT 2

In Response to the State’s Proposition of Law (as posited by the State, verbatim):

The Double Jeopardy Principles contained within the United States Constitution and Ohio Constitution allow the government to appeal, and allow the court of appeals to review, a trial court’s substantive law rulings after the trial court enters judgment of acquittal pursuant to Criminal Rule 29(C).

CONCLUSION.....10

SERVICE.....10

TABLE OF AUTHORITIES

CASES

<i>Agee v. Russell</i> (2001), 92 Ohio St.3d 240	4
<i>City of Euclid v. Heaton</i> (1968), 15 Ohio St. 2d 65.....	4, 5
<i>Eastman v. State</i> (1936), 131 Ohio St. 1.....	3
<i>Eisler v. United States</i> (1949), 338 U.S. 189.....	3
<i>State v. Adams</i> (1980), 62 Ohio St.2d 151.....	9
<i>State v. Bistricky</i> (1990), 51 Ohio St.3d 157.....	5, 8, 9
<i>State v. Dodge</i> (1967), 10 Ohio App.2d 92.....	4
<i>State v. Edmonson</i> (2001), 92 Ohio St.3d 393.....	3, 5
<i>State ex rel. Yates v. Court of Appeals</i> (1987), 32 Ohio St.3d 30.....	7
<i>State v. Fisher</i> (1988), 35 Ohio St.3d 22	9
<i>State v. Jones</i> (June 30, 1981), Gallia App. No. 79-CA-9, unreported.....	7
<i>State v. Keeton</i> (1985), 18 Ohio St.3d 379	7
<i>State v. Matthews</i> (1998), 81 Ohio St.3d 375	6
<i>State v. Muncie</i> (2001), 91 Ohio St.3d 440.....	6
<i>State v. Upshaw</i> , 110 Ohio St.3d 189, 2006-Ohio-4253.....	6

CONSTITUTIONAL PROVISIONS

Section 3, Article IV, Ohio Constitution	passim
Article III, United States Constitution	3

STATUTES AND RULES

R.C. 2945.67	passim
18 U.S.C. 3731.....	1, 8
Crim. R. 29.....	passim

SUMMARY OF ARGUMENT

Relying on R.C. 2945.67, the State of Ohio asks this Court to hold that the State has the right, with leave of the appellate court, to appeal the trial court's reasoning underlying a directed acquittal entered pursuant to Crim. R. 29(C) after the jury's guilty verdict. In order to make this statutory argument, the State attempts to distinguish between the acquittal itself, which the State concedes may not be appealed, and the reasoning underlying the acquittal. As the appellant, the State of Ohio, represented by the Cuyahoga County Prosecutor, has acknowledged that the verdict of acquittal may not be disturbed on appeal, the Ohio Attorney General, writing as amicus curiae, goes one step further and argues that a court of appeals may actually reverse the trial court's acquittal and reinstate the jury's guilty verdict.

Neither the State nor its amicus are correct. The State, while generally recognizing that there are statutory limits on its ability to appeal verdicts, fails to address a fundamental constitutional question that was decided by this Court forty years ago and remains in place today: The Ohio Constitution does not permit appellate courts to issue advisory opinions because appellate courts have jurisdiction to hear cases only where they can "review and affirm, modify or reverse judgments or final orders" of lower courts. Ohio Const. Art. IV, Section 3(B)(2). An advisory opinion does none of these things because it has no more legal effect on the parties than a moot court.

On the other hand, the Attorney General, citing a host of federal cases, fails to recognize that the jurisdiction of the appellate courts to hear appeals by the prosecutor is also a creature of statute. R.C. 2945.67 does not provide State prosecutors the broad appellate rights enjoyed by federal prosecutors pursuant to 18 U.S.C. 3731.

Moreover, even if R.C. 2945.67 could ever constitutionally countenance the rendering of advisory opinions by courts of appeals, the statute's prohibition on appeals from the final verdict is not so narrow as to allow the State to appeal the rationale underlying the acquittal, particularly where, as here, that rationale was part of the "decision" that the State had not provided sufficient evidence of all the elements of the crime charged.

Finally, even if it were incorrect in its analysis, the court of appeals did not act so aberrantly as to have abused its discretion to dismiss an appeal that the State of Ohio acknowledges the court of appeals was not required to hear in the first place.

STATEMENT OF THE CASE AND FACTS

For purposes of this appeal only, and without conceding any factual circumstances should this case be remanded for further consideration by the court of appeals, the salient facts and circumstances can be gleaned from the State's Brief of Appellant.

ARGUMENT

In Opposition to the State of Ohio's Proposition of Law (as posited by the State, verbatim):

The Double Jeopardy Principles contained within the United States Constitution and Ohio Constitution allow the government to appeal, and allow the court of appeals to review, a trial court's substantive law rulings after the trial court enters judgment of acquittal pursuant to Criminal Rule 29(C).

At the outset, it is important to understand what the State is seeking in this case. Should the State prevail, this Court will reverse the decision of the court of appeals dismissing the appeal and remand the case to the court of appeals for further consideration of the State's discretionary appeal. The court of appeals will still have the discretion to determine whether to allow the appeal to proceed. Moreover, even if the court of appeals were to fully entertain the State's appeal, the State of Ohio concedes that the court of appeals can only say whether the trial court was correct or incorrect in granting the directed acquittal pursuant to Crim. R. 29(C) – the

State of Ohio acknowledges that it cannot seek reinstatement of the jury's guilty verdict and further acknowledges that it has never requested leave to do so.

Thus, the determination of the issues presented in this case have no effect on the life of Rita Roddy. Her acquittal is secure. The charges against her are over. *State v. Edmonson* (2001), 92 Ohio St.3d 393, 395 (State's post-verdict appeal with leave of court pursuant to R.C. 2945.67(A) "has no practical effect on this appellant.").

Ironically, it is this legal impotency that causes this case to present an important issue for this Court – when in a criminal case can the State appeal decisions of a trial court with which it disagrees? As discussed below, the answer to this question requires both a constitutional and statutory analysis.

Ohio Constitution Article IV, Section 3(B): Conferring Appellate Jurisdiction

The jurisdiction of the courts of appeals is, first and foremost, a creature of the Ohio Constitution. Without a constitutional grant of authority, there is no jurisdiction. See, *Eastman v. State* (1936), 131 Ohio St. 1, par. 12 of syllabus; see also, *Eisler v. United States* (1949), 338 U.S. 189, 194 (jurisdiction of the United States Supreme Court set forth in Article III of the United States Constitution and limited to cases and controversies; Court noted that, because constitutional provision did not allow for issuing advisory opinions, first Court declined to provide advisory opinion to President Washington). Article IV, Section 3(B)(2) addresses the appellate jurisdiction of the courts of appeals with respect to lower courts:

Courts of appeals shall have such jurisdiction as may be provided by law to review and affirm, modify or reverse judgments or final orders of the courts of record inferior to the courts of appeals within the district . . .

By its plain language, the constitutional provision thus hinges appellate jurisdiction on three criteria:

- (1) There must be a further statutory grant of jurisdiction (“shall have jurisdiction as may be provided by law”)
- (2) The statutory grant must enable the court of appeals “to review and *affirm, modify or reverse*” a lower court’s ruling, and
- (3) The ruling subject to affirmance, modification or reversal must be a “judgment or final order.”

It is the second criteria that is at issue in this portion of this brief: “to review and affirm, modify or reverse” a lower court’s ruling:

We therefore conclude that under present constitutional provisions, the exercise by Courts of Appeals of their appellate jurisdiction to “review” a judgment or final order of a trial court must always produce, or result in, the affirmance, modification, setting aside or reversal of that judgment or final order, and thereby must necessarily “affect the judgment of the trial court in said cause.” . . . any attempt by the General Assembly to bestow upon the Courts of Appeals jurisdiction to entertain a proceeding which results in a decision which “shall not affect the judgment of the trial court in said cause” is an attempt to enlarge the jurisdiction, as well as the judicial power, of such courts . . . and is, therefore, unconstitutional and void.

State v. Dodge (1967), 10 Ohio App.2d 92, 102-03, *aff’d sub nom. City of Euclid v. Heaton* (1968), 15 Ohio St.2d 65 (adopting the reasoning of *Dodge*).

Dodge and *Heaton* specifically recognized that the predecessor to R.C. 2945.67 was unconstitutional to the extent that it permitted the State to seek advisory opinions that would have no effect on the trial court’s judgment. Under the same rationale, R.C. 2945.67, to the extent that it would permit review of a “decision” of a trial court that would have no effect on the outcome of the case, is unconstitutional. Accordingly, the court of appeals correctly dismissed the appeal. See, *Agee v. Russell* (2001), 92 Ohio St.3d 240 (this Court will affirm correct judgments of courts of appeals, even when the judgment was based on a different rationale than employed by this Court).

To be sure, this Court has since countenanced State's appeals that did nothing but seek advisory opinions. E.g., *State v. Bistricky* (1990), 66 Ohio App.3d 395, *Edmonson*. But the majority opinions in these cases, by focusing solely on whether there was a statutory grant of appellate jurisdiction set forth in R.C. 2945.67 never looked at the "affirm, modify or reverse" requirement of Article IV, Section 3(B) as interpreted by *Heaton*.

Put a different way, this Court's modern jurisprudence has focused on Article IV, Section 3(B)(2)'s first jurisdictional criterion that courts of appeals shall "have jurisdiction as may be provided by law," but has not addressed Article IV, Section 3(B)(2)'s second criterion, that the jurisdiction "provided by law" must still be limited to the ability to "review and affirm, modify or reverse" a lower court's judgment or final order.

In the process, this Court has not disturbed its precedent in *Heaton*. In *Edmonson*, this Court noted that the court of appeals below while disagreeing with the trial court's judgment, was still required to *affirm* the trial court because the R.C. 2945.67(A) appeal "could not effect *Edmonson's* conviction." Nonetheless, no constitutional analysis under Article IV, Section 3(B) was undertaken.

This is not to suggest that this Court's omission of an Ohio constitutional analysis in cases such as *Bistricky* and *Edmonson* was a failure on the part of the Court. Rather, common law tradition places it upon the parties to present salient issues, both constitutional and statutory, to the Court. But, while other litigants in these post-*Heaton* cases may have failed to bring the effect of Article IV, Section 3(B) to this court's interpretation of R.C. 2945.67, Ms. Roddy hereby urges this Court to adopt the following holding in accordance with *Heaton* and the Ohio Constitution:

R.C. 2945.67 cannot be so broadly interpreted as to create jurisdiction for a court of appeals to review a case where the court's decisions will have no effect on the judgment of the lower court.

Such a holding is consistent with *Heaton* and requires affirmance in this case.

Interpreting R.C. 2945.67(A) in Light of Ohio Const. Art. IV, Section 3(B)(2)

Obviously, this Court must interpret statutes so as to preserve their constitutionality. The question then arises as to whether R.C. 2945.67's discretionary appeal provision, allowing the State to seek leave to appeal "any other decision,"¹ except the final verdict" in a criminal case, has any meaning. The answer is "yes." R.C. 2945.67(A) still allows the State to appeal by leave of court a myriad of decisions by trial courts, that the State has no absolute right to appeal. For example, "other decision[s]" would include the granting of a motion for a new trial,² an order denying forced medication,³ or an order finding the defendant incompetent to stand trial.⁴ But each of these cases has something that the instant appeal lacks – the ability of the court of appeals to make any difference in the case then under consideration.

Further Constitutional Analysis: The Double Jeopardy Clause

Although not addressing Article IV, Section 3(B), the State and amicus Attorney General give great attention to the effect of the Double Jeopardy Clause. Both correctly note that double jeopardy principles do not preclude the State's appeal in this case because the reversal of the trial court would not result in a retrial of the defendant.

¹ The term "other decision" is required to juxtapose those cases where the State has a right to appeal, e.g., "a motion to dismiss all or any part of an indictment," a "motion to suppress evidence," and a motion that "grants post-conviction relief."

² *State v. Matthews* (1998), 81 Ohio St.3d 375.

³ Cf. *State v. Muncie* (2001), 91 Ohio St.3d 440, 446.

⁴ *State v. Upshaw*, 110 Ohio St.3d 189, 2006-Ohio-4253.

But simply because an appellate court's jurisdiction is not *precluded* by double jeopardy does not mean that the appellate court has been *granted* jurisdiction. As discussed supra, the problem for the State is that the court of appeals lacks jurisdiction because the Ohio Constitution has never created it. And, whereas the federal Bill of Rights can limit State actions, it cannot create an independent justification for those actions.

Addressing the Attorney General's Argument: Can an Acquittal be Appealed?

The Attorney General claims that the State of Ohio has the ability not only to appeal the trial court's reasoning that led up to the acquittal in this case but the actual acquittal itself. The State of Ohio does not appear to join in this argument. The Attorney General is wrong as a matter of statutory interpretation. As discussed above, Article IV, Section 3(B)(2) first criterion for jurisdiction of an appellate court is that the jurisdiction be "provided by law." Thus, for purposes of this portion of the brief, this Court must examine what Ohio law provides for the consideration of appeals by the prosecution. Once again, the operative statute is R.C. 2945.67.

R.C. 2945.67 provides that a prosecuting attorney may appeal as a matter of right any decision of a trial court in a criminal case *except the final verdict*. In *State v. Keeton* (1985), 18 Ohio St. 3d 379, this Court held, at paragraph 2 of its syllabus that "[a] directed verdict 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 as a matter of right or by leave to appeal pursuant to that statute." Similarly, in *State ex rel. Yates, v. Court of Appeals for Montgomery Cty.* (1987), 32 Ohio St. 3d 30, syllabus, this Court held that "[a] judgment of acquittal by the trial judge, based upon Crim. R. 29(C), is a final verdict within the meaning of R.C. 2945.67(A) and is not appealable by the state as a matter of right or by leave to appeal pursuant to that statute." Accord, e.g., *State v. Jones*, (June 30, 1981), Gallia App. No. 79-CA-9, unreported.

The State's reliance on federal authority is misplaced. Federal appellate procedure, unlike Ohio appellate procedure, allows such an appeal because, the federal statutory authority for prosecution appeals allows government appeals "unless the double jeopardy clause of the United States Constitution prohibits further prosecution." 18 U.S.C. 3731 (permitting government appeals of dismissals of indictments). Ohio's R.C. 2945.67 does not similarly extend to the prosecution the right to appeal an acquittal entered by the trial judge after a jury verdict of guilty.

Statutory Interpretation of R.C. 2945.67

Assuming *arguendo* that the State can traverse the constitutional hurdles regarding appellate jurisdiction, *supra*, the question remains as to whether R.C. 2945.67 allows the State to parse between the judgment of acquittal, which the State concedes cannot be appealed, and the *reasons* for the judgment of acquittal, which the State maintains can be appealed.

The State's attempt to distinguish between the judgment of acquittal and its rationale is a distinction that should not be entertained by this Court. It is axiomatic that the common law develops not simply by what a court says but by what a court does. A "decision," is not merely the rationale but the action that accompanies the rationale. To separate the words from the action is to take those words out of their factual context. If a trial court says "I don't think the evidence is sufficient because I think a defendant's testimony is always to be believed" but nonetheless denies a Crim. R. 29 motion, the trial court has *decided* that the evidence is sufficient, regardless of what it said.

While this Court, in *Bistricky*, noted that a trial court's conclusion that the defendants enjoyed statutory immunity could be reviewed, such a circumstance is different. There, the decision by the trial court was one that, while leading up to the final verdict of acquittal, was apart from the verdict of acquittal. The decision in *Bistricky* that was appealed concerned the

scope of immunity for police officers. That decision – that the officers were immune – “result[ed] in a judgment of acquittal. *Id.*, at 160.

But the decision in *Bistricky* was more than a rationale for the acquittal – it was a decision of independent force (police officers are immune in drug cases and immunity is not an affirmative defense) that, combined with the facts of the case, resulted in an acquittal. In contrast, the State’s appeal in this case relates solely to the manner in which the trial court analyzed the facts themselves in arriving at the final verdict. The State cannot point to a conclusion enunciated by the trial court in this case that stands apart from the final verdict of acquittal. And this distinguishes this case from *Bistricky*.

The Trial Court’s Analysis in This Case Does Not Constitute An Abuse of Discretion

Finally, regardless of how it determines the other issues presented herein, this Court should still affirm the court of appeals’ dismissal of this appeal because the dismissal does not constitute an abuse of discretion. See *State v. Fisher* (1988), 35 Ohio St.3d 22, 26 (abuse of discretion is standard of review). As this Court is well aware, 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.” *State v. Adams* (1980), 62 Ohio St.2d 151, 157.

Here, the trial court conscientiously reviewed this Court’s prior precedent regarding R.C. 2945.67 and the State’s ability to appeal a final verdict. Opinion below at 4-5. It also reviewed the United States Supreme Court’s prior precedent regarding double jeopardy. *Id.* at 204. Even if this Court were to conclude that the court of appeals erred, this Court should not conclude that the error constituted an abuse of discretion.

CONCLUSION

Wherefore, the judgment of the court of appeals should be affirmed.

Respectfully submitted,


JOHN T. MARTIN, ESQ., No. 0020606
Assistant Public Defender
Counsel for Appellant

SERVICE

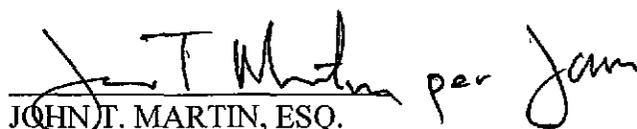
I certify a copy of the foregoing document has been served upon the following persons,
by regular mail on this 10th day of June, 2008:

MATTHEW E. MEYER (0075253)
Assistant County Prosecutor
Cuyahoga County Prosecutor's Office
1200 Ontario 9th Floor
Cleveland, Ohio 44113

Counsel for Appellant State of Ohio

WILLIAM P. MARSHALL (0038077)
Solicitor General
Office of the Ohio Attorney General
30 E. Broad St., 17th Floor
Columbus, Ohio 43215
614/466-8980

Counsel for Amicus Curiae
Ohio Attorney General


JOHN T. MARTIN, ESQ.
Assistant Public Defender