

ORIGINAL

NO. 10-1925

IN THE SUPREME COURT OF OHIO

APPEAL FROM
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO
NO. 95593

STATE OF OHIO
Plaintiff-Appellant

-vs-

DANIEL GINLEY,
Defendant-Appellee

RESPONSE BRIEF OF APPELLEE

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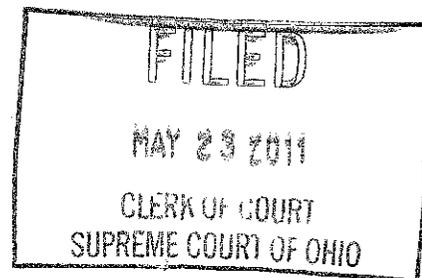


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INTRODUCTION AND SUMMARY

Mr. Ginley requests that this Honorable Court dismiss its grant of Jurisdiction as having been improvidently granted in light of the fact that the trial court's ruling on the State's motion in limine to not call the State's witness as a court's witness under Evid. R. 614(A), was not a final appealable order; the State's appeal was filed in violation of App.R. 5(A) leaving this Court without subject-matter jurisdiction; because the court of appeals did not abuse its discretion in denying the State's *Motion for Leave to Appeal* the trial court's decision; and, the State has failed to demonstrate that the trial court abused its discretion in refusing to grant the State's request of an Evid.R. 614(A) motion.

Mr. Ginley contends that the State is incorrect in its assertion of its Proposition of Law that characterized the trial court's ruling as having added an additional requirement of a showing of proof of a threat before utilizing Evid. R. 614(A). The record does not support the State's contention, and the court in rendering its decision, stated it did not have any such requirement for the granting of the motion. As such, the trial court did not abuse its discretion in denying the State's request.

In summary, the State is attempting to appeal an interlocutory order which was not final and attempting to appeal without privilege to do so under R.C. 2945.67(A) and App. R. 5; the State has failed to show first that the court of appeals abused its discretion by denying the State's *Motion for Leave to Appeal*; and, the State failed to show that the trial court abused its discretion in denying the State's request to call its witness as a court's witness.

STATEMENT OF THE CASE AND RELEVANT FACTS

Mr. Ginley accepts the State's *Statement of Case and Relevant Fact* with the following exceptions: the State's main argument for the trial court's abuse of discretion focused on one

paragraph of a six page opinion by the court, and incorrectly emphasized that portion, taking it out of context from the rest of the opinion. The opinion of the court was that the State failed to justify the court's grant of an Evid. R. 614(A), under the facts of the case and the State failed to make an additional requirement of a showing of threats as was stated in the State's Proposition of Law. (Tr. 16)

Furthermore, the State failed to reveal in its recitation of facts that the Eighth District's docket reflected identical treatment of the State's Crim. R. 12(K) appeal in Case No. 95592; and its discretionary appeal in Case No. 95593, signifying that the court of appeals had considered all grounds asserted and had dismissed the appeals jointly, albeit after having been untimely filed by the State.

Lastly, it should be emphasized that there was never a trial held on the guilt of Mr. Ginley, and the State is appealing a pre-trial ruling of the trial court which amounted to a motion in limine of an evidentiary ruling. As such, the State does not have a final appealable order on which to rely. Since this was not an issue reviewed by the court of appeals as such where the granting of the motion has rendered the State's proof with respect to the pending charge so weak in its entirety that any reasonable possibility of effective prosecution has been destroyed under Crim. R. 12(K), the court of appeals arguably found the appeal to be pre-mature, untimely, or moot as it stated in its journal entry.

LAW AND ARGUMENT

PROPOSITION OF LAW ONE: A COURT OF APPEALS DOES NOT ABUSE ITS DISCRETION IN DECLINING TO HEAR A STATE'S DISCRETIONARY APPEAL FROM A RULING IN LIMINE THAT DENIES THE STATE'S SUGGESTION THAT A TRIAL COURT MAKE THE ALLEGED CRIME VICTIM A COURT'S WITNESS.

In response to the State's proposition of law, Mr. Ginley argues that this Court does not have jurisdiction to consider the State's appeal because the trial court's order denying the State's motion to reconsider its denial of Evid. R. 614(A), is not a final, appealable order. The State is seeking to appeal a motion in limine ruling from the trial court before the trial had begun. Courts have held that a motion in limine, "the disposition of which is interlocutory[.] *** does not ordinarily give rise to immediate appellate review." *State v. Jackson* (1993), 92 Ohio App.3d 467, 469; *State v. Dixon*, 2010-Ohio-5032, 09CA3312 (OHCA4) (See *State v. Edwards*, 107 Ohio St.3d 169, 2005-Ohio-6180, 837 N.E.2d 752, at ¶17, where the court held that an objection to a motion in limine was not a final order when issued.)

The nature of a motion in limine, is designed to test the admissibility of proffered evidence before trial and outside the presence of the jury. *State v. Edwards*, 107 Ohio St.3d 169, 2005-Ohio-6180, 837 N.E.2d 752, at ¶17. Accordingly, a trial court's ruling on a motion in limine is tentative, interlocutory, and precautionary and cannot serve as the basis for an assignment of error on appeal. See *State v. Baker*, 170 Ohio App. 3d 331, 2006-Ohio-7085, 867 N.E.2d 426, at ¶9. For such a ruling to be appealable, it must effectively manifest itself in evidence actually admitted at trial and counsel must record an objection. See *State v. Brown* (1988), 38 Ohio St.3d 305, 311-312, 528 N.E.2d 523. Any claimed error regarding a trial court's decision on a motion in limine must be preserved at trial by an objection, proffer, or ruling on the record. *Id.* In the case at hand, the State did not proceed to trial and thus the trial court was not

afforded the opportunity to make a ruling relevant to the evidence that would be presented at trial.

This Court has noted *State v. Grubb* (1986), 28 Ohio St.3d 199, 201-203, that:

"At trial it is incumbent upon a defendant, who has been temporarily restricted from introducing evidence by virtue of a motion *in limine*, to seek the introduction of the evidence by proffer or otherwise in order to enable the court to make a final determination as to its admissibility and to preserve any objection on the record for purposes of appeal. ***A motion in limine is a tentative, interlocutory, precautionary ruling by the trial court and reflects its anticipatory treatment of the evidentiary issue. ***A motion in limine is directed to the discretion of the trial judge regarding an evidentiary issue that is anticipated, but has not yet been presented in full context. *Id.*

Because it is not a final order, a ruling in limine cannot serve as the basis of an appeal. *State v. Baker*, 170 Ohio App.3d 331, 2006-Ohio-7085, 867 N.E.2d 426, at ¶ 9. Unless the claimed error is timely objected to at trial, it is not reviewable on appeal. *Id.* Thus, the issue is not ripe for review. *State v. Williams*, 2010-Ohio-3334, 189 Ohio App.3d 111, 937 N.E.2d 624 (Ohio App. 2 Dist. 2010)

A ruling on a motion in limine reflects the court's "anticipatory treatment of the evidentiary issue. In virtually all circumstances finality does not attach when the motion is granted. Therefore, should circumstances subsequently develop at trial, the trial court is certainly at liberty 'to consider the admissibility of the disputed evidence in its actual context.'" *State v. Grubb* (1986), 28 Ohio St.3d 199, 201-202, quoting *State v. White* (1982), 6 Ohio App.3d 1, 4. For those reasons, a motion in limine generally does not preserve for purposes of appeal any error in the disposition of the motion in limine. *State v. Davis*, Montgomery App. No. 20709, 2005-Ohio-5783, ¶27.

Should this Court determine that the trial court's denial of the State's motion in limine was a final appealable order, Mr. Ginley next argues that this Court lacks jurisdiction because the State was not granted leave to appeal as is required under R.C. 2945.67(A). Under the Ohio

Constitution, Ohio's courts of appeals "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 court of appeals within the district" Ohio Const. Art. IV § 3(B)(2). The language of Article IV Section 3(B)(2) "empower[s] the General Assembly to alter the appellate jurisdiction of the Court of Appeals." *State v. Collins*, 24 Ohio St. 2d 107, 108 (1970).

The Ohio General Assembly, in Section 2505.03(A) of the Ohio Revised Code, has provided:

"[e]very final order, judgment, or decree of a [lower] court *** may be reviewed on appeal ***"

Section 2505.02(B) defines "final order." Under that section, "[a]n order is a final order *** 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***or any changes made by Sub. S.B. 80 of the 125th general assembly *** [or]
- (7) An order in an appropriation proceeding that may be appealed pursuant to Section 163.09(B)(3) of the Ohio Revised Code.

Furthermore, this Court held in *In re A.J.S.*, 120 Ohio St.3d 185, 2008-Ohio-5307, at ¶30 the following:

"While R.C. 2505.03 generally provides that every final order or judgment may be reviewed on appeal, R.C. 2945.67(A) specifically governs appeals by the state in criminal and juvenile delinquency proceedings. It provides that the state may appeal as of right an order that (1) grants a motion to dismiss all or any part of an indictment, complaint, or information, (2) grants a motion to suppress evidence, (3) grants a motion for the return

of seized property, and (4) grants postconviction relief. It further provides that with the exception of final verdicts, **the state may appeal any other decision in a criminal or juvenile delinquency proceeding by leave of the appellate court.**" (Emphasis added)

In *State v. Keeton*, 18 Ohio St.3d 379, 481 N.E.2d 629 (Ohio 1985), this Court held that evidentiary rulings do not fall within the provisions of R.C. 2945.67(A) granting an appeal as of right, they do fall within the language of "any other decision, except the final verdict * * * " in R.C. 2945.67(A) which permits an appeal to the court of appeals **after leave** has first been obtained.

An appellate court has discretionary authority to review evidentiary rulings and substantive law rulings in cases resulting in a judgment of acquittal so long as the verdict itself is not challenged. *State v. Edmondson*, 92 Ohio St.3d 393, 396, 2001-Ohio-210; *State v. Bistricky*, 51 Ohio St.3d at 159; *State v. Burroughs*, 165 Ohio App.3d 172, 2005-Ohio-6411, at ¶10. In seeking such discretionary review, the State must comply with the procedural requirements set forth in *State v. Wallace* (1975), 43 Ohio St.2d 1, and App.R. 5(C). In *Wallace*, this Court held that because the State failed to obtain leave to appeal, the judgment of the Courts of Appeals, dismissing the appeal, was affirmed.

Similarly, in the case at hand, the State failed to obtain the requisite leave of court to appeal, as such an appeal by the State under R.C. 2945.67(A) should be deemed as not properly before this Court. (See generally *State v. Mitchell* Lucas App. No. L-03-1270, 2004-Ohio-2460, 2004 WL 1088380, ¶11-12; see also *State v. Tate*, 179 Ohio App.3d 71, 2008-Ohio-5686, 900 N.E.2d 1018, ¶ 51.)

Lastly, Mr. Ginley argues that the State's appeal should not be granted because the State failed to establish that the court of appeals abused its discretion in denying the State leave to file an appeal of the motion in limine. As has been previously argued, the State's motion in limine

was not a final appealable order and absent a showing of prejudice under Crim. R. 12 (K) which was not at issue in the State's request, the court of appeals found the request to be moot, implying that it was prematurely brought.

"The decision to grant or deny a motion for leave to appeal by the state in a criminal case is solely within the discretion of the court of appeals." *State v. Fisher* (1988), 35 Ohio St.3d 22, 26, citing *State v. Ferman* (1979), 58 Ohio St.2d 216. In *Fisher*, the appellate court denied the state's motion for leave to appeal by simply issuing a journal entry stating the following:

"On authority of *State v. Wallace* (1975), 43 Ohio St.2d 1 [330 N.E.2d 697], appellant, State of Ohio's motion for leave to appeal is denied. Costs to be taxed against appellant."

This Court surmised in *Fisher* that by referring to *Wallace, supra*, the court of appeals apparently was indicating that the state's motion failed to abide by the rules governing leave to appeal. The syllabus in *Wallace, supra*, states: "A motion for leave to appeal by the state in a criminal case shall be governed by the procedural requirements of App.R. 5 and the time requirements of App.R. 4(B)." This Court concluded that the court of appeals did not abuse of discretion under these circumstances.

Similarly, in *State v. Holzappel*, 2010-Ohio-2856, 10AP-17, 10AP-18 (OHCA10) the State filed a motion for leave to appeal pursuant to App.R. 5(C), R.C. 2505.02(B)(3), 2505.03(A), and 2945.67(A). In *Holzappel*, the State sought leave to appeal a judgment from the Franklin County Municipal Court granting defendant-appellee, motion for a new trial. The court of appeals found no abuse of discretion, and because the State had failed to sufficiently demonstrate a probability that its claimed errors did in fact occur, the court denied the State's motion for leave to appeal.

In the case at hand, the dockets of 95592 and 95593, contain many of the same entries, effectively considering both appellate case numbers simultaneously. The State distinguished the

two case numbers as 95592, being the court of appeals denial of the state's Crim. R. 12(K) appeal; and 95593 being the denial of the state's motion for leave to appeal. However, it appears that the court considered the merits of the case in 95593 when in the docket, the court utilized the same language of 95592. The docket for 95593 reflects the following:

09/24/2010 N/A JE SUA SPONTE, APPEAL 95593 IS DISMISSED FOR FAILURE TO COMPLY WITH MANDATORY REQUIREMENT OF CRIM.R. 12(K). VOL. 713 PG. 709. NOTICE ISSUED.

09/24/2010 N/A BL SUA SPONTE, APPEAL 95593 IS DISMISSED FOR FAILURE TO COMPLY WITH MANDATORY REQUIREMENT OF CRIM.R. 12(K). VOL. 713 PG. 709. NOTICE ISSUED.

09/24/2010 N/A JE MOTION BY APPELLANT FOR LEAVE TO APPEAL IS DENIED AS MOOT. VOL. 713 PG. 690. NOTICE ISSUED.

As the record reflects, both the denial of the leave to file as moot and the dismissal for failure to comply with Crim.R. 12(K), occurred on the same date suggesting that the court took into consideration the arguments advanced by the state and determined them to have insufficient probability that its claimed errors did in fact occur as in *Holzappel*, supra.

In order to find an abuse of discretion, the Court must determine that the Eighth District 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, 450 N.E.2d 1140. Additionally, the abuse of discretion standard is defined as "[a]n appellate court's standard for reviewing a decision that is asserted to be grossly unsound, unreasonable, illegal, or unsupported by the evidence." *State v. Boles*, Montgomery App. No. 23037, 2010-Ohio-278, ¶18, quoting Black's Law Dictionary, Eighth Edition (2004), at 11. In the case at hand, the court of appeals cannot be said to have abused its discretion by acting unreasonably, arbitrarily, or unconscionably when it denied the State's *Motion for Leave to Appeal* because it concluded that the State failed to meet the threshold requirement under Crim.R. 12(K) and therefore implicitly failed to survive a discretionary review as well. Obviously, the State concedes that it failed to satisfy the

requirements of Crim.R. 12(K), otherwise the state would assuredly have appealed that denial as well.

The language utilized by the court of appeals in Case No.95593 stating: "MOTION BY APPELLANT FOR LEAVE TO APPEAL IS DENIED AS MOOT," further suggests that since it had already considered the claims under a Crim.R. 12(K) analysis and found them unpersuasive, a discretionary appeal was also without grounds and also suggests that the court of appeals recognized that the appeal involved an interlocutory ruling prematurely brought before the court. It may be argued by the State that this was an error of law or judgment but because this is an abuse of discretion standard such an argument should fail. What the trial court did in this case was present a well reasoned decision, the legal correctness notwithstanding, and as such the trial court did not abuse its discretion.

However, despite the court of appeals consideration that a grant for leave to appeal was inappropriate based on the arguments in the State's motion, the Eighth District never made a ruling on the merits of the State's appeal for which it now seeks review by this Court. Instead, the court of appeals simply denied the State's discretionary *Motion for Leave to Appeal*. Therefore, any decision by this Court on the merits advanced by the State would be improper. If this Court agrees with this Proposition of Law One, the Court has two options: one, This Court can affirm the Eighth District Court of Appeals decision; or, two decide that the appeal was improvidently decided.

STATE'S PROPOSITION OF LAW: WHEN A DOMESTIC VIOLENCE VICTIM RECANTS HIS OR HER STATEMENT TO POLICE PRIOR TRIAL, EVID R. 614(A) DOES NOT REQUIRE SPECIFIC PROOF OF A THREAT IN ORDER FOR THE TRIAL COURT TO CALL THE VICTIM AS A COURT'S WITNESS.

The State argues that the trial court abused its discretion when it required a showing by the State that there was "proof of a threat as a criterion to Evid. R. 614(A)." (Appellant brief p. 9) However, the State incorrectly characterized the holding of the court. What the court did was carefully detail the events of what had occurred both on and off the record regarding the State's request to call a State's witness as a court's witness. (Tr. 11) First, the court reiterated that on July 29, 2010, the State indicated that it intended to call the alleged victim as a court's witness. (Tr. 12) Then, on August 4, 2010, the State filed a motion to call the alleged victim as a court's witness, yet the motion did not contain a request for an oral hearing. (Tr. 12) The court stated that it read the motion and cited the facts from the motion which averred that the alleged victim stated that she had made up the previous allegations against the defendant and was willing to testify to that fact under oath. (Tr. 13) The court placed on the record the fact that he told the State that he read the motion and that it was denied. (Tr. 13) At that time, the State requested an oral hearing which the court granted, providing the defense with additional time to respond to the request. (Tr. 13)

The oral hearing was then held on August 11, 2010. At this hearing, the court recognized that Evid. R. 614(A) was a discretionary rule, and stated the following:

The Court did indicate that it would be helpful to the State's motion if there was any indication that the defendant had a hand in the alleged victim's change of heart. The Court categorically denies making any statement regarding the level or type of proof necessary to ensure a successful motion or that would preclude granting the motion. (Tr. 14)

The court continued by stating that every motion for a court's witness is treated individually and governed by the laws of Ohio, and that the court was not forcing the State to produce any

particular type of proof in support of this motion. (Tr. 15) In fact, the court went to great length in clarifying this point when it again stated “[t]here is no particular type of proof necessary. There is no bright-line test. Rather, each case is decided upon its own facts and merits.” (Tr. 15) Furthermore, the court argued by example, citing *State v. Curry*, , that the court of appeals found it proper for the court to call as its own witness an individual who was fearful for their own safety. In *Curry*, the issue centered around the witnesses credibility because after stating that he refused to testify out of safety concerns; he stated that he would testify if he were offered a benefit from the state in exchange for his testimony. *Id* at ¶17. The court of appeals explained that this situation was proper for utilization of Evid. R. 614(A) in light of the witnesses conflicting motivations. *Id.* at ¶18.

In the case *sub judice*, the court carefully and appropriately considered the application of Evid.R. 614(A). Although, ultimately finding the rule inapplicable, the court certainly did not act unreasonably, arbitrarily or unconscionably, which is the standard under an abuse of discretion. To the contrary, the court gave the State several opportunities to establish the applicability of Evid. R. 614(A) and the court simply disagreed. The court reviewed the State’s written motion and rendered a decision, and when the State was dissatisfied with that ruling, the court allowed an oral hearing as well. (Tr. 13) This conduct substantiates the assertion that the court carefully considered its ruling and did not act arbitrarily.

Finally, the crux of the State’s Merit Brief argues that the court erred in denying the State’s motion to call the alleged victim as a State’s witness. However, what the State seeks to introduce at trial is impeachment evidence improperly advanced by the State and presented to the jury as substantive evidence. As the Sixth Circuit cautiously warned in *United States v. Dye*, courts should be alert to prevent abuse of the prior inconsistent statement rule by the

prosecution's use of extra-judicial statements in the guise of impeaching witnesses, when the true purpose is to get before the jury substantive evidence which is not otherwise available. 508 F.2d 1226 (6th Cir. 1974); *See also United States v. Crowder*, 346 F.2d 1 (6th Cir.), cert. denied, 382 U.S. 909, 86 S.Ct. 249, 15 L.Ed.2d 161 (1965). In the instant case, the State is attempting to do precisely what the rules of evidence seek to prevent. Affording the State the opportunity to impeach the woman who admitted that she made a false police report and retained counsel to protect her from possible criminal prosecution as a result is an abuse of Evid.R. 614(A). However, even if the court was incorrect in its conclusion that Evid. R. 614(A) was inappropriate, the State should not prevail because the court was simply exercising its discretion after careful review of the facts.

Furthermore, the State is incorrect in its Proposition of Law when it stated that the court placed an additional requirement of a threat before calling a victim as a State's witness. The court made several statements to the contrary, and specifically clarified that it was not requiring the state to meet any particular type of proof before it would agree to call the witness. (Tr. 15) The State deliberately selected only a paragraph to support the proposition, taking it out of context of 6 page decision by the court. What the court was alluding to in the cited paragraph was merely part of the court of appeals rational in *Curry* justifying the application of Evid. R. 614(A); not that a showing of threats was a bright line test or threshold requirement. (Tr. 16) To the contrary, the court was simply providing an explanation for its decision based on what the court in *Curry* utilized to justify the application. (Tr. 16)

CONCLUSION

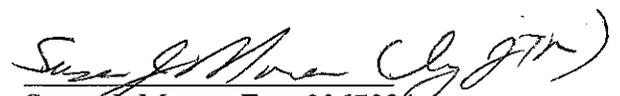
The trial court did not abuse its discretion in denying the State's motion to call its witness as a State's witness and the trial court did not place an additional requirement on the State to demonstrate that the witness was threatened into changing her story. The trial court carefully considered the State's request before issuing a denial and the court offered sound reasoning as to why the Evid. R. 614 was not appropriate in this case. As such, the State has failed to demonstrate that it abused its discretion when rendering a decision well within the bounds of the law.

Respectfully submitted,


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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Appellee's Brief was hand delivered to William D. Mason, Cuyahoga County Prosecutor, 1200 Ontario Street, Cleveland, Ohio 44113, on this 23RD day of May, 2011.


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