

NO.

IN THE SUPREME COURT OF OHIO

12-0250

APPEAL FROM
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO
No. 96776

In re M.M.

A Minor Child.

Appellee

MEMORANDUM IN SUPPORT OF JURISDICTION

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In re M.M., 2011-Ohio-6758

EXPLANATION OF WHY THIS CASE INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION OR ISSUE OF GREAT PUBLIC OR GENERAL INTEREST

This case presents an opportunity for this Court to address the appropriate standard for determining when a substantive issue of law should be reviewed by an appellate court, from a trial in which jeopardy has already attached. The Eighth District held that the State waived its right to appeal a court's decision excluding evidence when it did not seek an interlocutory appeal and that it could not seek an appeal pursuant to R.C. 2945.67(A). This case is important because the Eighth District's heightened standard of when the State can seek leave to appeal poses a high risk of keeping pertinent legal issues from ever being reviewed by an appellate court.

R.C. 2945.67(A) states that "[a] prosecuting attorney . . . 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." Pursuant to R.C. 2945.67(A) this Court has held that "a court of appeals has discretionary authority . . . to decide whether to review substantive law rulings made in a criminal case which results in a judgment of acquittal so long as the verdict itself is not appealed." *State v. Bistricky*, 51 Ohio St.3d 157, 159, 555 N.E.2d 644 (1990) ("*Bistricky* Appeal"). This Court reasoned that since the doctrine of "double jeopardy" precludes a retrial of acquitted defendants, ordinarily it would render any appeal to the appellate court moot, therefore leaving substantive legal issues at the trial level capable of evading any appellate review. Therefore, this Court set forth the standard that "there will be no appellate review *unless* the underlying legal question is capable of repetition yet evading review." *Id.* at 158 (Emphasis added) citing *Storer v. Brown* (1974), 415 U.S. 724, 94 S.Ct 1274 and *In re Protest Filed by Citizens for the Merit Selection of Judges, Inc.* (1990), 49 Ohio St.3d 102, 551 N.E.2d 150.

The Eighth District has imposed an even higher standard for obtaining a *Bistricky* appeal which will result in substantial legal issues from ever facing appellate review. Essentially the Eighth District has held that a *Bistricky* appeal will never be granted if the State had an alternative remedy that they failed to take advantage of, namely that of an interlocutory appeal. The problem with the standard set forth by the Eighth District is that it will allow many substantive legal issues which have a high tendency for repetition from ever being reviewed at the appellate level, which is contrary to *Bistricky*.

The State is limited to when it may take advantage of an interlocutory appeal. If a trial court excludes evidence from trial, the State may only appeal if the trial court's ruling "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." Crim. R. 12(K). Since the State is limited by this standard, whenever a trial court makes a decision that is adverse to the State, the prosecutor must then determine whether that ruling has rendered the State's case to determine whether an interlocutory appeal pursuant to Crim. R. 12(K) and Juv. R. 22(F) is a viable option.

There will likely be instances, such as in this case, where the State will be prohibited from taking an interlocutory appeal pursuant to Crim. R. 12(K) and Juv.R. 22(F) because it has other evidence to present. The Eighth District's holding will preclude the State in future cases from also seeking an appeal pursuant to *Bistricky*, thus substantive legal issues, capable of repetition, will continue to evade any appellate review merely because the State does not and sometimes cannot seek an interlocutory appeal.

The State respectfully requests this Court to grant discretionary review of this case to determine if the State is barred from seeking leave to appeal an evidentiary ruling if it did not seek an interlocutory appeal.

STATEMENT OF THE CASE AND FACTS

The State alleged that M.M. had sexually abused four children sometime in 2009. M.M was charged with the rape of three children, ages eight, six, and four. He was also charged with gross sexual imposition for an act relating to a child two years of age.

Prior to trial, M.M. filed a motion in limine, seeking to suppress some of the victim's statements which had been made to a social worker which may have been admissible under Evid.R 803(4), and statements made to relatives which may have been admissible under Evid.R. 807. The trial court granted the motion in limine as to all the statements the victims made to the social worker and the relatives. In spite of the ruling, the prosecution's remaining evidence consisted of the direct testimony of the child-victims. In light of this evidence, the prosecution believed they still had a case based on the remaining evidence and decided to proceed with the trial. During the proceedings, "[n]one of the of the victims could testify with any particularity about the alleged sexual abuse." *In re M.M.*, 8th Dist. No. 96776, 2011-Ohio-6758, ¶8.

The juvenile court permitted the social worker to testify that she learned of the abuse, including allegation of oral sex by M.M., but did not permit it as substantive evidence, instead allowing it only to show what the social worker had learned. The juvenile court excluded statements made to a relative despite Evid. R. 807 because it determined that the children were available to testify.

The State then sought a discretionary appeal, appealing the trial court's granting of defendant's motion in limine which excluded victim statements made to a social worker and the victim's relatives. The Eighth District Court of Appeals initially granted review of the State's appeal, but after oral argument it held that the appeal had been improvidently granted because the State had an adequate remedy in the form of an interlocutory appeal that the State failed to utilize.

LAW AND ARGUMENT

PROPOSITION OF LAW: THE RIGHT TO FILE AN APPEAL PURSUANT TO *STATE V. BISTRICKY*, 51 OHIO ST.3D 157, 555 N.E.2D 644 (1990) IS NOT WAIVED IF THE STATE DOES NOT PURSUE AN INTERLOCUTORY REMEDY UNDER CRIM. R. 12(K) AND JUV. R. 22(F). THE EXISTENCE OF INTERLOCUTORY REMEDIES DOES NOT PRECLUDE THE STATE FROM APPEALING SUBSTANTIVE LEGAL ISSUES INVOLVING THE SUPPRESSION OR EXCLUSION OF EVIDENCE PURSUANT TO *BISTRICKY*.

The Eighth District's holding narrows the scope of circumstances in which the State may appeal an issue of substantive law pursuant to *Bistricky*. The result is that evidentiary rulings decided adversely to the State will escape future review. The Eighth District held that "[t]he state, therefore, waived its right to appeal by failing to appeal the motion in limine decision prior to the adjudicatory hearing in accordance with Juv.R. 22(F)." *In re M.M.*, 8th Dist. No. 96776, 2011-Ohio-6758, ¶8. The State cannot be faulted for not seeking an interlocutory appeal because it believes it can proceed with trial with the available witnesses and evidence. There may be many instances in which integral evidence is erroneously excluded but its exclusion does not necessarily destroy the prosecution's ability to proceed with prosecution; therefore, the State will review of the excluded evidence under an interlocutory remedy. The erroneous exclusion evidentiary ruling certainly will not be appealed by the State if the State proceeds to trial and the fact finder returns a verdict of guilty (or the defendant enters a guilty plea or a plea of no contest) –

thus an appeal after a conviction is not appropriate remedy to appeal an erroneous evidentiary ruling decided adversely to the State. Even a midtrial appeal can be unpredictable given the unique aspects of each and every case. The only scenario that remains is one where the State proceeds to trial but the fact finder acquits the defendant and the excluded evidence is evidence that could have changed the outcome of the trial. Prosecutors should be allowed to exercise their judgment and be allowed the opportunity to appeal the substantive legal issue by leave of court. Without leave to appeal, the erroneous evidentiary ruling is capable of repetition and evading review. Appellate courts should not hold that prosecutors waived their right to appeal because there was no interlocutory appeal.

In this case, the Eighth District determined that when the trial court granted the defendant's motion in limine it "rendered the state's proof with respect to the pending charge so weak in its entirety that any reasonable possibility of effective prosecution had been destroyed." *In re M.M.*, 8th Dist. No. 96776, 2011-Ohio-6758, ¶8. Based on this analysis, the court held that since "the state had an appropriate remedy in challenging the trial court's evidentiary ruling at the time that it was made . . . any decision as to the admissibility of the evidence would be completely advisory in nature." *Id.* at ¶9. But virtually all *Bistricky* appeals are "advisory in nature" to the extent that the defendant cannot be prosecuted; however, the *Bistricky* remedy provides meaningful review of incorrect legal rulings that can repeat itself.

Moreover, the Eight District's analysis that the State should have pursued an interlocutory appeal is an analysis made in hindsight. At the time a ruling is made at the trial court level, the prosecutor must determine whether the ruling render prosecution "so

weak in its entirety that any reasonable possibility of effective prosecution has been destroyed.” Crim. R. 12(K) and Juv. R. 22(F). At the time the defendant’s motion in limine was granted, the State still had child-witnesses to the alleged offense that did in fact testify. However, when the child-witnesses were placed on the stand their testimony provided insufficient evidence in proving the legal elements of the crimes charged. For example, the following dialogue occurred between the prosecutor and the witness:

PROSECUTOR: Go back in your thoughts and think of maybe one thing that you think was inappropriate that happened, and tell the Court about that. Can you tell the Court if you saw anything else?

WITNESS: I saw him doing inappropriate things to my sisters.

PROSECUTOR: Okay. What did you see?

WITNESS: I saw – I saw him –

PROSECUTOR: You can say it out loud. Which sister did you see something happen?

WITNESS: I don’t remember which one. (Tr. 13)

Enjoying the benefit of hindsight, the Eighth District held that without the excluded evidence, the prosecution’s ability to render an effective prosecution had been destroyed, since “[n]one of the of the victims could testify with any particularity about the alleged sexual abuse.” *In re M.M.*, 8th Dist. No. 96776, 2011-Ohio-6758, ¶8. The Eighth District’s holding that the State’s case had been rendered so weak was made in hindsight. If the prosecutor exercises professional judgment and determines that he can still proceed with the evidence available to him, he cannot be said to have “waived his right to appeal”. The State should still be allowed leave to appeal the legal ruling that is capable of evading future review.

CONCLUSION

The State is not asking this Court to review the substantive legal issue involving the juvenile court's ruling that excluded evidence. Instead, the State asks this Court to accept review of this case and determine whether the State waived its right to seek an appeal under *State v. Bistricky*, 51 Ohio St.3d 157, 159, 555 N.E.2d 644 (1990) when the State opted not to pursue an appeal under Crim.R. 12(K) and Juv.R 22(F). Otherwise, review of erroneous evidentiary issues decided adversely to the State can continue to evade review in the future.

Respectfully submitted,

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SERVICE

A copy of the foregoing Memorandum in Support of Jurisdiction has been mailed this 9th day of February, 2012, to John T. Martin, 310 lakeside Avenue, 2nd Floor, Cleveland, Ohio 44113.


Assistant Prosecuting Attorney

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 96776

IN RE: M.M.

A Minor Child

**JUDGMENT:
DISMISSED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Juvenile Division
Case No. DL-09119512

BEFORE: S. Gallagher, J., Blackmon, P.J., and Cooney, J.

RELEASED AND JOURNALIZED: December 29, 2011

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SEAN C. GALLAGHER, J.:

{¶ 1} This is a discretionary appeal from a judgment of the Cuyahoga County Court of Common Pleas, Juvenile Division for which leave was granted pursuant to R.C. 2945.67(A). Appellant, the state of Ohio, sought to appeal the trial court's exclusion of certain evidence pursuant to Evid.R. 807 and 803(4), which preceded a final decision

dismissing the juvenile complaint against M.M.¹ For the following reasons, the state's appeal is dismissed due to leave being improvidently granted.

{¶ 2} The state alleged that M.M. sexually abused four children. A juvenile complaint charged M.M. with rape for acts relating to three of the children, ages eight, six, and four at the time, and gross sexual imposition for acts relating to a two-year-old victim. The alleged misconduct occurred sometime in 2009.

{¶ 3} Prior to the adjudicatory hearing to determine delinquency, which was held almost two years after the alleged misconduct occurred, M.M. filed a motion in limine to suppress the victims' out-of-court statements made to their relatives, potentially admissible pursuant to Evid.R. 807, and the victims' statements made to a social worker, potentially admissible pursuant to Evid.R. 803(4). The trial court granted the motion in limine as to all statements made to the relatives and social worker. The only remaining evidence for the prosecution came from the direct testimony of the child victims who were determined to be competent to testify, with the exception of the two-year-old victim.

Despite the pretrial evidentiary ruling, the state proceeded to the adjudicatory hearing and again attempted to introduce the Evid.R. 803(4) and 807 evidence. The trial court adhered to the pretrial ruling and, at the close of the state's case in chief, dismissed the complaint pursuant to Juv.R. 29(F).

{¶ 4} The state then sought leave to file a discretionary appeal as to the

¹ The parties are referred to herein by their initials or title in accordance with this court's established policy regarding nondisclosure of identities in juvenile cases.

evidentiary decisions pursuant to R.C. 2945.67(A), acknowledging that jeopardy attached to the dismissal of the juvenile complaint and the scope of review was limited to the evidentiary decisions made during the course of the proceedings below. We granted the state leave to file the appeal over M.M.'s objections. Upon further review of the entire record and arguments made during oral argument, we must reconsider our decision and conclude that leave to appeal was improvidently granted.

{¶ 5} “R.C. 2945.67(A) provides that the state may appeal as a matter of right a motion to dismiss all or any part of an indictment, complaint, or information, a motion to suppress evidence, a motion for the return of seized property, or a motion granting postconviction relief. All other appeals are by leave at the discretion of the court of appeals except, of course, that the state may not appeal a final verdict.” *State v. Empe*, Cuyahoga App. No. 90333, 2008-Ohio-3803, ¶ 2, citing *State v. Matthews* (1998), 81 Ohio St.3d 375, 377-378, 691 N.E.2d 1041. The trial court’s Juv.R. 29 dismissal was a final verdict. *In re N.I.*, 191 Ohio App.3d 97, 2010-Ohio-5791, 944 N.E.2d 1214, ¶ 9.

{¶ 6} This court has the discretionary authority pursuant to R.C. 2945.67(A) to review a trial court’s substantive law rulings made in a criminal case that resulted in a judgment of acquittal as long as the verdict itself is not appealed. *Empe*, 2008-Ohio-3803, ¶ 4 (Blackmon, P.J., dissenting), citing *State v. Bistricky* (1990), 51 Ohio St.3d 157, 555 N.E.2d 644. The Ohio Supreme Court has “ruled that leave to appeal may be granted on evidentiary questions pursuant to R.C. 2945.67, even though not specifically spelled out therein, under the ‘any other decision, except the final verdict

* * * ' language of that statute." *State v. Bireley* (1986), 31 Ohio App.3d 234, 510 N.E.2d 830, citing *State v. Keeton* (1985), 18 Ohio St.3d 379, 481 N.E.2d 629. The rationale behind allowing such appeals is that the substantive issues raised are capable of repetition yet evading review if the appellate court does not render a decision. *Bistricky*, 51 Ohio St.3d at 158. On October 12, 2010, M.M. filed a prehearing motion in limine to suppress the Evid.R. 803(4) and 807 evidence the state sought to introduce. On November 4, 2010, the trial court granted the motion in limine. The state did not appeal that decision prior to the adjudicatory hearing. This omission is dispositive.

{¶ 7} Pursuant to Crim.R. 12(J) and Juv.R. 22(F), the state must file a notice of appeal, challenging the trial court's decision to grant a motion to suppress evidence, within seven days of the entry of judgment or order granting the motion. A "motion to suppress" is defined to include "[a]ny motion, however labeled, which, if granted, restricts the state in the presentation of certain evidence and, thereby, renders 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 * * *." *State v. Davidson* (1985), 17 Ohio St.3d 132, 477 N.E.2d 1141, at the syllabus. In *Davidson*, for example, the defendant filed a pretrial motion in limine seeking to exclude evidence on evidentiary grounds, not constitutional ones. The exclusion of the evidence, however, effectively destroyed the state's ability to effectively prosecute the case. The Ohio Supreme Court, therefore, determined that such motions in limine act as motions to suppress and thereby constitute final, appealable orders that the state may take an appeal as a matter of right.

Id.

{¶ 8} In this case, the trial court granted M.M.'s motion in limine to exclude victim statements made to the victims' relatives and social worker as violative of Evid.R. 803(4) and 807 prior to the adjudicatory hearing. The only remaining evidence was that of the three child victims, ages eight, six, and four at the time of the alleged sexual misconduct. The victim statements made to their relatives and social worker were the only evidence identifying the sexual acts that occurred. None of the victims could testify with any particularity about the alleged sexual abuse, and all were of such an age as to present a question whether the children would be able to effectively remember the events that transpired two years prior to the adjudicatory hearing. The trial court's decision to grant M.M.'s motion in limine rendered the state's proof with respect to the pending charge so weak in its entirety that any reasonable possibility of effective prosecution had been destroyed. The state, therefore, waived its right to appeal by failing to appeal the motion in limine decision prior to the adjudicatory hearing in accordance with Juv.R. 22(F).

{¶ 9} In light of the fact that the state had an appropriate remedy in challenging the trial court's evidentiary ruling at the time it was made and prior to jeopardy attaching, any decision as to the admissibility of the evidence in this case would be completely advisory in nature. *Empe*, 2008-Ohio-3803, ¶ 3. The state had the means to correct any perceived error before the adjudicatory hearing. *State v. Arnett* (1986), 22 Ohio St.3d 186, 489 N.E.2d 284 (Celebrezze, C.J., dissenting) (arguing the majority erred in allowing

discretionary appeals on evidentiary issues after the verdict because the state had an adequate interlocutory remedy). The only rationale behind invoking our discretion to rule on evidentiary issues after acquittal under *Bistricky*, 51 Ohio St.3d 157, is to address substantive issues that are capable of evading review. The state has an adequate interlocutory remedy at its disposal for this precise situation. Thus, this issue is not one that will escape future review. Accordingly, our decision to grant the state leave to appeal was improvidently granted, and the state's appeal is dismissed.

It is ordered that appellee recover from appellant costs herein taxed.

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

SEAN C. GALLAGHER, JUDGE

PATRICIA ANN BLACKMON, P.J., and
COLLEEN CONWAY COONEY, J., CONCUR