

NO. 2012-0250

IN THE SUPREME COURT OF OHIO

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

IN RE M.M.

A Minor Child.

MERIT BRIEF OF APPELLANT-STATE OF OHIO

Counsel for Appellant

William D. Mason (#0037540)
Cuyahoga County Prosecutor

Daniel T. Van (#0084614)
Assistant Prosecuting Attorney
1200 Ontario Street, 8th Floor
Cleveland, Ohio 44113
(216) 443-7800
dvan@cuyahogacounty.us *email*

Counsel for Appellee

John T. Martin (#0020606)
Assistant Public Defender
310 Lakeside Avenue, Suite 200
Cleveland, OH 44113

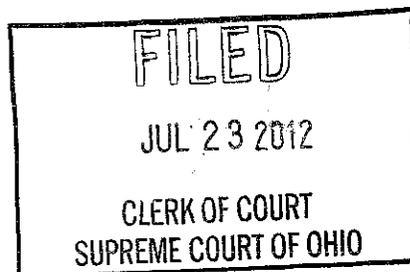
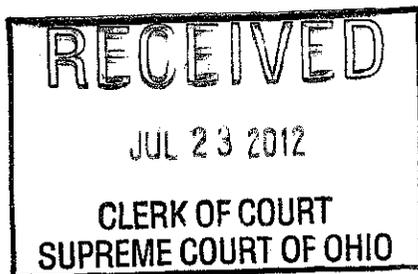


TABLE OF CONTENTS

ISSUE PRESENTED FOR REVIEW1

STATEMENT OF THE CASE AND FACTS.....1

LAW AND ARGUMENT.....2

 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.
 2

 I. INTRODUCTION.....2

 II. THE INSTANCES IN WHICH THE STATE MAY APPEAL IS PROVIDED
 FOR IN THE REVISED CODE AND THE RULES OF CRIMINAL
 PROCEDURE AND RULES OF JUVENILE PROCEDURE EXPLAIN THE
 SPECIFIC REQUIRES FOR APPEALS FROM MOTIONS TO SUPPRESS.3

 III. *STATE V. BISTRICKY*, 51 OHIO ST.3D 157 ALLOWS PROSECUTION
 TO APPEAL SUBSTANTIVE LEGAL RULINGS AND CONTINUES TO
 APPROVE APPEALS OF CERTAIN EVIDENTIARY RULINGS DESPITE
 ACQUITTALS SO LONG AS JUDGMENT OF ACQUITTAL ITSELF IS NOT
 DISTURBED.....6

 IV. THE STATE'S ABILITY TO APPEAL IS NOT WAIVED WHERE IT DID
 NOT SEEK AN INTERLOCUTORY APPEAL.....8

CONCLUSION.....10

CERTIFICATE OF SERVICE11

TABLE OF AUTHORITIES

Cases

<i>In re M.M.</i> , 8 th Dist. No. 2011-Ohio-6758	3, 8
<i>State v. Arnett</i> , 22 Ohio St.3d 186, 489 N.E.2d 284 (1986).....	7, 8, 9
<i>State v. Bistricky</i> , 51 Ohio St.3d 157	1, 2, 6, 7, 8, 9
<i>State v. Davidson</i> , 17 Ohio St.3d 132, 17 O.B.R. 277, 477 N.E.2d 1141 (1985).....	6
<i>State v. Keeton</i> , 18 Ohio St.3d 379, 481 N.E.2d 629 (1985).....	7, 8, 9
<i>State v. Payne</i> , 114 Ohio St.3d 502, 2007-Ohio-4642, 873 N.E.2d 306, ¶23	3, 8
<i>State v. Ross</i> , 128 Ohio St.3d 283, 2010-Ohio-6282, 943 N.E.2d 992.....	8

Statutes

R.C. 2945.67.....	1, 2, 4, 6, 7, 10
R.C. 2945.67(A).....	1, 2, 4, 6, 7, 10

Rules

Crim. R. 12(K).....	1, 2, 4, 5, 6, 9
Juv. R. 22(F)	1, 2, 3, 5, 6, 8, 9

APPENDIX:

Journal Entry & Opinion, Eighth District Court of Appeals No. 96776, <i>In re M.M.</i> , 2011-Ohio-6758.....	1-7
Notice of Appeal to the Ohio Supreme Court, <i>In re M.M.</i> , a minor child, filed February 10, 2012, Ohio Supreme Case No. 2012-0250.....	8-9
R.C. § 2945.67.....	10-11
Criminal Rule 12.....	12-17
Juvenile Rule 22.....	18-22

ISSUE PRESENTED FOR REVIEW

This case is about whether the state waives its ability to seek leave to appeal from a decision of the trial court on the admissibility of evidence, notwithstanding the acquittal of the defendant because it did not seek an interlocutory remedy. Nothing in R.C. 2945.67(A) provides that the state waives or forfeits its ability to seek leave to appeal. This Court should hold:

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*.

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. During the proceedings, "[n]one 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 leave to appeal from the Eighth District Court of Appeals, appealing the trial court's decision which excluded victim statements made to a social worker and the victim's relatives. The Eighth District initially granted the State leave to appeal but it was subsequently dismissed because the Eighth District determined the State had waived its ability to appeal the trial court rulings.

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.

I. Introduction

A prosecuting attorney may appeal by leave, "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). The Eighth District holds that it is possible for a prosecuting attorney to waive their ability to seek leave to appeal any other decision, except the final verdict, if they had an alternative adequate remedy at law. However, nothing in R.C. 2945.67(A) specifically states any circumstance in which

the State waives its ability to seek leave to appeal. The statute provides the circumstance in which the state can seek an appeal by right and states that any other legal issue, except the final verdict can be appealed by leave. A waiver must be understood to mean intentional relinquishment or abandonment of a known right or privilege as opposed to forfeiture which is a failure to preserve the objection. Forfeitures do not extinguish a claim of plain error. See *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, 873 N.E.2d 306, ¶23. In this case, the Eighth District held, “The state [***] 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. 2011-Ohio-6758.

The question before this Court is whether the state is barred from seeking leave to appeal an evidentiary ruling from a case that resulted in an acquittal where the state did not seek to appeal that evidentiary ruling by way of interlocutory appeal. The State does not challenge the court of appeals’ continued discretion in whether to accept a prosecutor’s request to seek leave to appeal. Nor the State asks this Court to resolve the legal questions that were initially accepted for review by the Eighth District but later dismissed. The State only asks this Court to resolve the question as to whether the failure or decision not to seek an interlocutory appeal serves as an absolute bar to later seek an appeal by leave. Stated differently, can the state’s statutory right to seek leave to appeal be waived?

II. The instances in which the State may appeal is provided for in the Revised Code and the Rules of Criminal Procedure and Rules of Juvenile Procedure explain the specific requires for appeals from motions to suppress.

The Revised Code along with provisions of the Rules of Criminal Procedure and Rules of Juvenile Procedure provides the instances in which a prosecutor may appeal. R.C. 2945.67 provides:

(A) A 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. In addition to any other right to appeal under this section or any other provision of law, a prosecuting attorney, city director of law, village solicitor, or similar chief legal officer of a municipal corporation, or the attorney general may appeal, in accordance with section 2953.08 of the Revised Code, a sentence imposed upon a person who is convicted of or pleads guilty to a felony.

This rule indicates that the state has the right to appeal in a criminal case when all or parts of the indictment are dismissed, or likewise in a juvenile delinquency case, when all or parts of the complaint are dismissed, from a motion to suppress evidence, a motion for return of property or when post conviction relief is granted. R.C. 2945.67(A) provides the state, the ability to appeal from a motion to suppress as of right. The rule also provides that any other decision, except the final verdict, can be appealed by leave of court.

Crim. R. 12(K) applicable to criminal trials provide the following rule when the state elects to appeal the suppression of evidence:

(K) When the state takes an appeal as provided by law from an order disclosure of evidence, the prosecuting attorney shall certify that both of the following apply:

(1) the appeal is not taken for the purpose of delay;

(2) the ruling on the motion or motions 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, or the pretrial disclosure of evidence ordered by the court will have one of the effects enumerated in Crim. R. 16(D).

The appeal from an order suppressing or excluding evidence shall not be allowed unless the notice of appeal and the certification by the prosecuting attorney are filed with the clerk of the trial court within seven days after the date of the entry of the judgment or order granting the motion. Any appeal taken under this rule shall be prosecuted diligently.

If the defendant previously has not been released, the defendant shall, except in capital cases, be released from custody on the defendant's own recognizance pending appeal when the prosecuting attorney files the notice of appeal and certification.

This appeal shall take precedence over all other appeals.

If an appeal from an order suppressing or excluding evidence pursuant to this division results in an affirmance of the trial court, the state shall be barred from prosecuting the defendant for the same offense or offenses except upon a showing of newly discovered evidence that the state could not, with reasonable diligence, have discovered before filing of the notice of appeal.

Crim. R. 12(K) specifically requires that a prosecutor certify that the suppression or exclusion of evidence has rendered the state's proof so weak, that the reasonable possibility of effective prosecution has been destroyed and that if the prosecutor is unsuccessful, the state is barred from prosecuting the defendant.

Juv. R. 22(F) likewise provides:

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.

Juv. R. 22(F) is similar to Crim. R. 12(K) except that Juv. R. 22(F) omits a provision requiring the dismissal of the juvenile complaint if the prosecutor is unsuccessful with the Juv. R. 22(F) appeal. For purposes of R.C. 2945.67 and the procedural rules, "Any 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, is, in effect, a motion to suppress," and is appealable pursuant to *State v. Davidson*, 17 Ohio St.3d 132, 17 O.B.R. 277, 477 N.E.2d 1141 (1985), syllabus.

Davidson holds that evidentiary rulings such as rulings on motion in limine that effectively destroys reasonable possibility of effective prosecution will make rulings on those motions is in effect a motion to suppress within the meaning of R.C. 2945.67(A). *Davidson* should not be read to mean that all motion in limine should be treated as the functional equivalent of a motion to suppress for purposes of the state's appeal of right under R.C. 2945.67(A), Crim. R. 12(K) and Juv. R. 22(F).

III. *State v. Bistricky*, 51 Ohio St.3d 157 allows prosecution to appeal substantive legal rulings and continues to approve appeals of certain evidentiary rulings despite acquittals so long as judgment of acquittal itself is not disturbed.

In *State v. Keeton*, 18 Ohio St.3d 379, 481 N.E.2d 629 (1985), this Court held that, “[i]n addition to those rulings in which the state is granted an appeal as of right pursuant to R.C. 2945.67(A) the state may, by leave of the appellate court, appeal any decision of a trial court in a criminal case which is adverse to the state except a final verdict.” *Keeton*, 18 Ohio St.3d 379, paragraph one of the syllabus. The state in *Keeton* sought leave to appeal evidentiary rulings made by the court that excluded evidence and had contended that the evidentiary rulings were erroneous because the problems relating to the evidence related to the weight of the evidence and not the admissibility. The exclusion of evidence occurred when conflicting testimony was given at the preliminary hearing and at trial. The following year, this Court held, “Pursuant to R.C. 2945.67(A), a court of appeals has jurisdiction to grant the state leave to appeal from a decision of the trial court on the admissibility of evidence, notwithstanding the acquittal of the defendant.” *State v. Arnett*, 22 Ohio St.3d 186, 489 N.E.2d 284 (1986). In *Arnett*, the defendant supports his defense with expert testimony, to which the state objected to. The experts testified, and the state appealed after the jury returned a verdict of acquittal.

This Court in *State v. Bistricky*, 51 Ohio St.3d 157 reaffirmed the principle that the state can seek leave to appeal substantive law question and also cited with approval this Court’s holdings in *State v. Keeton*, 18 Ohio St.3d 379, 18 OBR 434, 481 N.E.2d 629 (1985) and *State v. Arnett*, 22 Ohio St.3d 186, 22 OBR 272, 489 N.E. 2d 284 (1986), that the state can appeal evidentiary ruling despite a judgment of

acquittal, so long as the state does not appeal the acquittal itself. This Court concluded that there was no distinction between appealing an evidentiary ruling and a ruling on an issue of law. *Bistricky* provides the baseline rule that substantive legal issues may be appealed and provides continued support that evidentiary rulings may be appealed, notwithstanding the judgment of acquittal. Both are ultimately legal conclusions.

Bistricky, *Arnett*, and *Keeton* were recently cited by this Court in *State v. Ross*, 128 Ohio St.3d 283, 2010-Ohio-6282, 943 N.E.2d 992, in which this Court acknowledged that the state is permitted to appeal substantive legal rulings and evidentiary rulings. These appeals are permitted to the extent that the underlying legal question is capable of repetition yet evading review. *Bistricky*, at 158.

IV. The State's Ability To Appeal Is Not Waived Where It Did Not Seek an Interlocutory Appeal

The Eighth District in this case found the matter the failure to seek an interlocutory appeal dispositive and served as a waiver. *In re M.M.*, 8th Dist. No. 96776, 2011-Ohio-6758, ¶6, 9. In doing so the majority cited the dissent in *Arnett*, 22 Ohio St.3d 186. *Id.*

As indicated above, a waiver must be understood to mean intentional relinquishment or abandonment of a known right or privilege as opposed to forfeiture which is a failure to preserve the objection. Forfeitures do not extinguish a claim of plain error. See *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, 873 N.E.2d 306, ¶23. The Eighth District cited to the lack of a Juv. R. 22(F) appeal as a waiver. The general rule now is that when the state does not seek an interlocutory

remedy, then it has waived its ability to seek leave to appeal under a different rule. The failure or decision not to seek an appeal under Crim. R. 12(K) or Juv. R. 22(F) is not an intentional relinquishment or abandonment of a known right or privilege. Thus, it is the State's position, that it still has the ability to appeal; however, the State recognizes that *Bistricky*, *Arnett*, and *Keeton* hold that such appeals are by leave of court.

Even if the reasoning is that evidentiary rulings will not evade review because the state has an interlocutory remedy and therefore any opinion would be advisory, an appellate court should not employ a bright line rule. It may be that the state must appeal under Crim. R. 12(K) or Juv. R. 22(F) in cases where the only evidence that exists is suppressed, i.e. drugs found in a traffic stop, but in other circumstances it may be inappropriate in others. The failure to seek an interlocutory appeal does not render all cases involving the suppression of evidence incapable of repetition yet evading review. The state has to exercise judgment before seeking to appeal under Crim. R. 12(K) or Juv. R. 22(F). This requires the state to make a determination as to whether their reasonable possibility of effective prosecution has been destroyed. If the state is unsuccessful, at least under the clear language of Crim. R. 12(K) then their prosecution would be dismissed. The state's position is that a bright line rule that the lack of a Crim. R. 12(K) appeal or Juv. R. 22(F) appeal forfeits the state's ability to later seek leave to appeal is inappropriate because not all evidentiary rulings are appropriate for a Crim. R. 12(K) or Juv. R. 22(F) appeal. The lack of a Crim. R. 12(K) or Juv. R. 22(F) appeal in and of itself

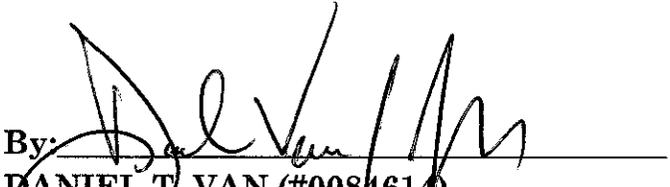
should not stand for the proposition that an evidentiary ruling is incapable of repetition yet evading review.

CONCLUSION

This Court should hold that, pursuant to R.C. 2945.67(A), a court of appeals has jurisdiction to grant the state leave to appeal from a decision of the trial court on the admissibility of evidence, after a judgment of acquittal. The state does not waive its ability to seek leave to appeal because it did not seek an interlocutory remedy challenging the decision of the trial court on the admissibility of evidence as a waiver must be an intentional relinquishment.

Respectfully submitted,

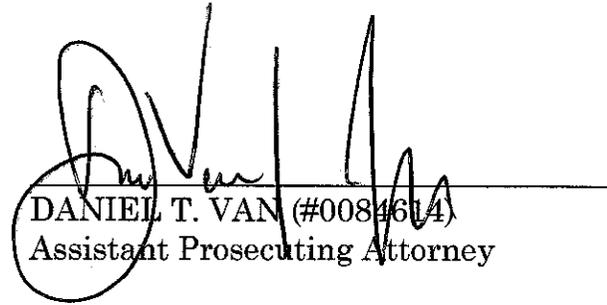
**WILLIAM D. MASON
CUYAHOGA COUNTY PROSECUTOR**

By: 
DANIEL T. VAN (#0084614)
Assistant Prosecuting Attorney

The Justice Center
1200 Ontario Street
Cleveland, Ohio 44113
(216) 443-7800
dvan@cuyahogacounty.us *email*

CERTIFICATE OF SERVICE

A copy of the foregoing has been sent this 20th day of July, 2012 via U.S. Mail to John T. Martin (#0020606), Assistant Public Defender, 310 Lakeside Avenue, Suite 200, Cleveland, Ohio 44113.



DANIEL T. VAN (#0084614)
Assistant Prosecuting Attorney

[Cite as *In re M.M.*, 2011-Ohio-6758.]

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

ATTORNEYS FOR APPELLANT, STATE OF OHIO

William D. Mason
Cuyahoga County Prosecutor

BY: Daniel T. Van
Assistant Prosecuting Attorney
The Justice Center, 8th Floor
1200 Ontario Street
Cleveland, Ohio 44113

ATTORNEYS FOR APPELLEE

Robert Tobik
Chief Public Defender

BY: John T. Martin
Assistant Public Defender
310 Lakeside Avenue, Suite 200
Cleveland, Ohio 44113

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

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

NOTICE OF APPEAL TO THE SUPREME COURT OF OHIO

Counsel for Appellant

William D. Mason (#0037540)
Cuyahoga County Prosecutor

DANIEL T. VAN (#0084614)
Assistant Prosecuting Attorney
1200 Ontario Street, 8th Floor
Cleveland, Ohio 44113
(216) 443-7800

Counsel for Appellee

JOHN T. MARTIN (#0020606)
Assistant Public Defender
310 Lakeside Avenue, Suite 200
Cleveland, OH 44113

OFFICE OF THE OHIO PUBLIC DEFENDER
250 East Broad Street, 14th Floor
Columbus, Ohio 43215

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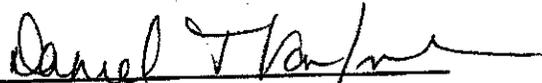
NOTICE OF APPEAL OF APPELLANT STATE OF OHIO

Now comes the State of Ohio and hereby gives Notice of Appeal to the Supreme Court of Ohio from a judgment and final order of the Court of Appeals for Cuyahoga County, Ohio, Eighth Judicial District, journalized in Court of Appeals Case No. CA 96776 entered December 29, 2011

Said cause did not originate in the Court of Appeals, is a felony, and involves a substantial constitutional question or a question of public or great general interest.

Respectfully submitted,

**WILLIAM D. MASON
CUYAHOGA COUNTY PROSECUTOR**



DANIEL T. VAN (0084614)
Assistant Prosecuting Attorney
The Justice Center, 8th Floor
1200 Ontario Street
Cleveland, Ohio 44113
(216) 443-7800

SERVICE

A copy of the foregoing Notice of Appeal has been sent by regular U.S. Mail this 31st day of January, 2012, to John T. Martin, 310 Lakeside Avenue, 2nd Floor, Cleveland, Ohio 44113 and to the Office of the Ohio Public Defender, 250 East Broad Street, 14th Floor, Columbus, Ohio 43215.



Assistant Prosecuting Attorney

R.C. § 2945.67

Baldwin's Ohio Revised Code Annotated Currentness

Title XXIX. Crimes--Procedure (Refs & Annos)

▣ Chapter 2945. Trial (Refs & Annos)

▣ Bill of Exceptions

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

(A) A prosecuting attorney, village solicitor, city director of law, or the attorney general may appeal as a matter of 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. In addition to any other right to appeal under this section or any other provision of law, a prosecuting attorney, city director of law, village solicitor, or similar chief legal officer of a municipal corporation, or the attorney general may appeal, in accordance with section 2953.08 of the Revised Code, a sentence imposed upon a person who is convicted of or pleads guilty to a felony.

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

CREDIT(S)

(1995 S 2, eff. 7-1-96; 1978 H 1168, eff. 11-1-78)

HISTORICAL AND STATUTORY NOTES

Ed. Note: Former 2945.67 repealed by 1978 H 1168, eff. 11-1-78; 1977 H 219; 131 v H 231; 1953 H 1; GC 13446-1.

Pre-1953 H 1 Amendments: 113 v 192, Ch 25, § 1

Amendment Note: 1995 S 2 added the second sentence in division (A); and made other changes to reflect gender neutral language.

LEGISLATIVE SERVICE COMMISSION

1973:

This section permits the state to appeal an adverse decision on a motion to suppress evidence in a criminal case, on the merits of the particular case. Under former law, the state could appeal motions to quash, pleas in abatement, demurrers, and motions in arrest of judgment on the merits, but an appeal on a motion to quash was permitted only to determine the law to govern in future cases and could not affect the case at bar. See *State v. Collins*, 24 Ohio St. 2d 107 (1970). (Ed. note: This comment applied to former RC 2945.70, the tenor of which

R.C. § 2945.67

is no incorporated in RC 2945.67.)

R.C. § 2945.67, OH ST § 2945.67

Current through all 2011 laws and statewide issues and 2012
Files 70 through 126, 130, 132 to 137 and 139 to 142 of the
129th GA (2011-2012).

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END OF DOCUMENT

Crim. R. Rule 12

Baldwin's Ohio Revised Code Annotated Currentness
Rules of Criminal Procedure (Refs & Annos)

→ **Crim R 12 Pleadings and motions before trial: defenses and objections**

(A) Pleadings and motions

Pleadings in criminal proceedings shall be the complaint, and the indictment or information, and the pleas of not guilty, not guilty by reason of insanity, guilty, and no contest. All other pleas, demurrers, and motions to quash, are abolished. Defenses and objections raised before trial which heretofore could have been raised by one or more of them shall be raised only by motion to dismiss or to grant appropriate relief, as provided in these rules.

(B) Filing with the court defined

The filing of documents with the court, as required by these rules, shall be made by filing them with the clerk of court, except that the judge may permit the documents to be filed with the judge, in which event the judge shall note the filing date on the documents and transmit them to the clerk. A court may provide, by local rules adopted pursuant to the Rules of Superintendence, for the filing of documents by electronic means. If the court adopts such local rules, they shall include all of the following:

- (1) The complaint, if permitted by local rules to be filed electronically, shall comply with Crim. R. 3.
- (2) Any signature on electronically transmitted documents shall be considered that of the attorney or party it purports to be for all purposes. If it is established that the documents were transmitted without authority, the court shall order the filing stricken.
- (3) A provision shall specify the days and hours during which electronically transmitted documents will be received by the court, and a provision shall specify when documents received electronically will be considered to have been filed.
- (4) Any document filed electronically that requires a filing fee may be rejected by the clerk of court unless the filer has complied with the mechanism established by the court for the payment of filing fees.

(C) Pretrial motions

Prior to trial, any party may raise by motion any defense, objection, evidentiary issue, or request that is capable of determination without the trial of the general issue. The following must be raised before trial:

- (1) Defenses and objections based on defects in the institution of the prosecution;
- (2) Defenses and objections based on defects in the indictment, information, or 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, including but not limited to statements and identification testimony, on the ground that it was illegally obtained. Such motions shall be filed in the trial court only.

(4) Requests for discovery under Crim. R. 16;

(5) Requests for severance of charges or defendants under Crim. R. 14.

(D) Motion date

All pretrial motions except as provided in Crim. R. 7(E) and 16(M) shall be made within thirty-five days after arraignment or seven days before trial, whichever is earlier. The court in the interest of justice may extend the time for making pretrial motions.

(E) Notice by the prosecuting attorney of the intention to use evidence

(1) *At the discretion of the prosecuting attorney.* At the arraignment or as soon thereafter as is practicable, the prosecuting attorney may give notice to the defendant of the prosecuting attorney's intention to use specified evidence at trial, in order to afford the defendant an opportunity to raise objections to such evidence prior to trial under division (C)(3) of this rule.

(2) *At the request of the defendant.* At the arraignment or as soon thereafter as is practicable, the defendant, in order to raise objections prior to trial under division (C)(3) of this rule, may request notice of the prosecuting attorney's intention to use evidence in chief at trial, which evidence the defendant is entitled to discover under Crim. R. 16.

(F) Ruling on motion

The court may adjudicate a motion based upon briefs, affidavits, the proffer of testimony and exhibits, a hearing, or other appropriate means.

A motion made pursuant to divisions (C)(1) to (C)(5) of this rule shall be determined before trial. Any other motion made pursuant to division (C) of this rule shall be determined before trial whenever possible. Where the court defers ruling on any motion made by the prosecuting attorney before trial and makes a ruling adverse to the prosecuting attorney after the commencement of trial, and the ruling is appealed pursuant to law with the certification required by division (K) of this rule, the court shall stay the proceedings without discharging the jury or dismissing the charges.

Where factual issues are involved in determining a motion, the court shall state its essential findings on the record.

(G) Return of tangible evidence

Where a motion to suppress tangible evidence is granted, the court upon request of the defendant shall order the property returned to the defendant if the defendant is entitled to possession of the property. The order shall be stayed pending appeal by the state pursuant to division (K) of this rule.

(H) Effect of failure to raise defenses or objections

Failure by the defendant to raise defenses or objections or to make requests that must be made prior to trial, at the time set by the court pursuant to division (D) of this rule, or prior to any extension of time made by the court, shall constitute waiver of the defenses or objections, but the court for good cause shown may grant relief

from the waiver.

(I) Effect of plea of no contest

The plea of no contest does not preclude a defendant from asserting upon appeal that the trial court prejudicially erred in ruling on a pretrial motion, including a pretrial motion to suppress evidence.

(J) Effect of determination

If the court grants a motion to dismiss based on a defect in the institution of the prosecution or in the indictment, information, or complaint, it may also order that the defendant be held in custody or that the defendant's bail be continued for a specified time not exceeding fourteen days, pending the filing of a new indictment, information, or complaint. Nothing in this rule shall affect any statute relating to periods of limitations. Nothing in this rule shall affect the state's right to appeal an adverse ruling on a motion under divisions (C)(1) or (2) of this rule, when the motion raises issues that were formerly raised pursuant to a motion to quash, a plea in abatement, a demurrer, or a motion in arrest of judgment.

(K) When the state takes an appeal as provided by law from an order suppressing or excluding evidence, or from an order directing pretrial disclosure of evidence, the prosecuting attorney shall certify that both of the following apply:

- (1) the appeal is not taken for the purpose of delay;
- (2) the ruling on the motion or motions 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, or the pretrial disclosure of evidence ordered by the court will have one of the effects enumerated in Crim. R. 16(D).

The appeal from an order suppressing or excluding evidence shall not be allowed unless the notice of appeal and the certification by the prosecuting attorney are filed with the clerk of the trial court within seven days after the date of the entry of the judgment or order granting the motion. Any appeal taken under this rule shall be prosecuted diligently.

If the defendant previously has not been released, the defendant shall, except in capital cases, be released from custody on the defendant's own recognizance pending appeal when the prosecuting attorney files the notice of appeal and certification.

This appeal shall take precedence over all other appeals.

If an appeal from an order suppressing or excluding evidence pursuant to this division results in an affirmance of the trial court, the state shall be barred from prosecuting the defendant for the same offense or offenses except upon a showing of newly discovered evidence that the state could not, with reasonable diligence, have discovered before filing of the notice of appeal.

CREDIT(S)

(Adopted eff. 7-1-73; amended eff. 7-1-75, 7-1-80, 7-1-95, 7-1-98, 7-1-01; 7-1-10, 7-1-11.)

(Rules 1 to 12)

HISTORICAL AND STATUTORY NOTES

Amendment Note: The 7-1-11 amendment, in division (D), substituted '16(M)' for '16(F)'.

Amendment Note: The 7-1-10 amendment deleted "Appeal by state" following the division designation (K); inserted "or from an order directing pretrial disclosure of evidence," following "an order suppressing or excluding evidence," in the first sentence of division (K); inserted ", or the pretrial disclosure of evidence ordered by the court will have one of the effects enumerated in Crim. R. 16(D)" at the end of subdivision (K)(2); inserted "from an order suppressing or excluding evidence" following "If an appeal" at the beginning of the last paragraph of division (K); and made other nonsubstantive changes in division (K).

Amendment Note: The 7-1-01 amendment inserted new division (B) and redesignated prior divisions (B) through (J) as new divisions (C) through (K), respectively; and made other nonsubstantive changes.

Amendment Note: The 7-1-98 amendment inserted "from an order suppressing or excluding evidence" twice in division (J); and made changes to reflect gender neutral language and other nonsubstantive changes.

Amendment Note: The 7-1-95 amendment rewrote the first paragraph in division (B), division (E), and the first paragraph in division (J); and added the final paragraph in division (J). Prior to amendment, the first paragraph in division (B), division (E), and the first paragraph in division (J), read:

"(B) Pretrial motions

"Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion. The following must be raised before trial by motion. The following must be raised before trial:

"(E) Ruling on motion

"A motion made before trial other than a motion for change of venue, shall be timely determined before trial. Where factual issues are involved in determining a motion, the court shall state its essential findings on the record.

"(J) State's right of appeal upon granting of motion to return property or motion to suppress evidence

"The state may take an appeal as of right from the granting of a motion for the return of seized property, or 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 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."

STAFF NOTES

2001:

Rule 12(B) Filing with the Court Defined

The amendments to this rule were part of a group of amendments that were submitted by the Ohio Courts Digital Signatures Task Force to establish minimum standards for the use of information systems, electronic signatures, and electronic filing. The substantive amendment to this rule was the addition of division (B). Comparable amendments were made to Civil Rule 5 and 73 (for probate courts), Juvenile Rule 8, and Appellate Rule 13.

As part of this electronic filing and signature project, the following rules were amended effective July 1, 2001: Civil Rules 5, 11, and 73; Criminal Rule 12; Juvenile Rule 8; and Appellate Rules 13 and 18. In addition, Rule 26 of the Rules of Superintendence for Courts of Ohio was amended and Rule of Superintendence 27 was added to complement the rules of procedure. Superintendence Rule 27 establishes a process by which minimum standards for information technology are promulgated, and requires that courts submit any local rule involving the use of information technology to a technology standards committee designated by the Supreme Court for approval.

1998:

Rule 12(D) Notice by the prosecuting attorney of the intention to use evidence

The style use for rule references was changed and masculine references were made gender-neutral. There were no substantive amendments to this division.

Rule 12(F) Return of tangible evidence

The 1998 amendment to this division deleted the word "lawful" that formerly preceded "possession" as superfluous. Also, the style used for rule references was changed and masculine references were made gender-neutral. The amendments are grammatical only and no substantive change is intended.

Rule 12(G) Effect of failure to raise defenses or objections

The 1998 amendment to this division was to make several grammatical changes; no substantive change is intended.

Rule 12(I) Effect of determination

The style used for rule references was changed and masculine references were made gender-neutral. There were no substantive amendments to this division.

Rule 12(J) Appeal by state

After amendments to this division took effect July 1, 1995, questions arose whether those amendments intended that the state must file a certification in every case in which an appeal is taken under the rule and that the state must appeal within seven days. It was always the intent of the Rules Advisory Committee that drafted the 1995 amendment to require certification in an interlocutory appeal and require such appeal within seven days. The 1998 amendment simply clarifies this intent.

1995:

Rule 12. Pleadings and Motions Before Trial: Defenses and Objections

Crim. R. Rule 12

The 1995 amendments to Crim. R. 12 make three changes: (1) they encourage the state and the defendants to seek pretrial resolution of critical evidentiary and constitutional issues; (2) they set forth the procedure a trial court is to follow in the event of a mid-trial appeal; and (3) they clarify the certification requirement. See *State v. Ullis* (1992), 65 Ohio St. 3d 83; *State v. Malinovsky* (1991), 60 Ohio St. 3d 20; *Defiance v. Kretz* (1990), 60 Ohio St. 3d 1.

Because Rule 12(B) motions can encompass a wide range of factual and legal issues, division (E) was amended to clarify that a trial court may employ any appropriate procedural device in order to decide a pretrial motion. When the state has made a pretrial motion that is decided adverse to the state during trial, the second paragraph of division (E) protects the state from a Double Jeopardy claim following a successful appeal pursuant to Crim. R. 12(J). Cf. *Malinovsky v. Court of Common Pleas of Lorain County* (C.A. 6, 1993), 7 F. 3d 1263.

The addition of the last paragraph to division (J) clarifies the certification by the state.

Rules Crim. Proc., Rule 12, OH ST RCRP Rule 12

Current with amendments received through January 1, 2012.

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END OF DOCUMENT

This document has been updated. Use KEYCITE.

Baldwin's Ohio Revised Code Annotated Currentness
Rules of Juvenile Procedure (Refs & Annos)

→ Juv R 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.

CREDIT(S)

(Adopted eff. 7-1-72; amended eff. 7-1-77, 7-1-94, 7-1-01)

HISTORICAL AND STATUTORY NOTES

Amendment Note: The 7-1-01 amendment added new division (D)(5); and rewrote division (E), which prior thereto read:

"All prehearing motions shall be filed by the earlier of (1) seven days prior to hearing, or (2) ten days after the appearance of counsel. 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 subsection (D)(3) to be made at the time such evidence is offered."

Amendment Note: The 7-1-94 amendment added the third sentence in division (B).

STAFF NOTES

2001:**Rule 22(D) Prehearing motions**

Rule 22 (D) was amended to add a fifth category of prehearing motions, the motion of the prosecuting attorney to have the court hold a probable cause hearing to determine whether or not a child is eligible under Revised Code sections 2152.11 or 2152.13 to receive a sentence as a serious youthful offender. These motions provide a timely opportunity for the needed probable cause determination of eligibility for treatment as a serious youthful offender, in circumstances in which the prosecuting attorney does not have sufficient time to seek a grand jury determination of such eligibility.

Rule 22(E) Motion time

Rule 22(E) was amended to conform to Sub. Sen. Bill 179 (effective date January 1, 2002) by reflecting that motions for determination of eligibility for treatment as a serious youthful offender are subject to a different time frame than other prehearing motions. It is important for the prosecuting attorney to have sufficient time to investigate before making the significant charging decision to pursue serious youthful offender sentencing. Revised Code section 2152.13(B) provides that the prosecuting attorney has twenty days after a child's initial appearance within which to file a notice of intent to pursue a serious youthful offender dispositional sentence. Juvenile rule time frames applicable in all other cases would truncate this statutory latitude. For instance, Juvenile Rule 29(A) contemplates that ordinarily the adjudicatory hearing of a child held in detention must occur within ten days. Since these are the most serious cases, it is not unlikely that the child will be in detention. Thus, the ordinary time frames of Rule 22(E) would require the motion to be filed well before the statutory period of twenty days has elapsed. Amended Rule 22(E) also clarifies that the prosecuting attorney has the statutory twenty-day time period for filing a notice of intent to pursue serious youthful offender dispositional sentencing after a transfer is denied.

Finally, Rule 22(E) as amended specifically provides that a Rule 22(D)(5) motion shall serve as the statutory "notice of intent" to pursue serious youthful offender dispositional sentencing. This serves to create a recognized procedural mechanism for the notice and to clarify that a motion is indeed the required notice. It also clarifies that the motion starts the speedy trial time clock running [see also Revised Code section 2152.13(D)(1)].

Other changes to Rule 22(E) were in form only, and were not intended to be substantive.

1994:**Rule 22 Pleadings and Motions; Defenses and Objections**

The revision to Juv. R. 22(B) prohibits the amendment of a pleading after the commencement or termination of the adjudicatory hearing unless the amendment conforms to the evidence presented and also amounts to a lesser included offense of the crime charged. Because juveniles can be bound over as adults and become subject to the jurisdiction of the criminal division of the common pleas courts, it is important that Juv. R. 22(B) conform with Crim. R. 7(D), which similarly prohibits any amendment which would result in a change in the identity of the crime charged.

EDITOR'S COMMENT

Pleadings and motions	1
Amendment of pleadings	2
Answer	3
Prehearing motions	4
Motion time	5
State's right to appeal upon granting a motion to suppress	6

1. Pleadings and motions

Division (A) is similar to Crim R 12(A), modified to conform with juvenile court practice.

2. Amendment of pleadings

Division (B) is an amalgamation of Crim R 7(D) and Civ R 15(B), and is intended to provide the parties with broad latitude in amending pleadings, while complying with the due process requirements of adequate notice. The prohibition contained in Crim R 7(D) against changing the name or identity of the crime charged is included in the juvenile rule with respect to delinquency complaints. The defense of variance is probably appropriate in delinquency cases, and the opportunity for a party to obtain time in which to respond to an amendment avoids due process complications in non-delinquency cases.

3. Answer

Division (C) conforms to present practice, in that no answer is required. If an answer is filed, the requirement of concise admissions or denials contained in Civ R 8(B) attaches.

4. Prehearing motions

Division (D) is basically Crim R 12(B), slightly modified grammatically and follows the holding in *State v Davis*, 1 OS(2d) 28, 203 NE(2d) 357 (1964).

5. Motion time

Division (E) adopts the structure of Crim R 12(C), but with time periods shortened to conform with the need for expeditious action in juvenile proceedings. Though it may appear to set extremely short periods, time extensions are available.

6. State's right to appeal upon granting a motion to suppress

Division (F) is basically Crim R 12(J) providing the right of appeal to the state. Also, the mandatory release of a criminal defendant required by Crim R 12(J) pending appeal has not been adopted. A child in detention or shelter care may be kept there pending the appellate decision.

The rule provides that appeal on the granting of a motion to suppress shall take precedence over all other appeals in order to avoid delay in prosecution of the matter.

Juvenile Procedure, Rule 22, OH ST JUV P Rule 22

Current with amendments received through January 1, 2012.

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