

IN RE M.M., A MINOR,

Appellee,

v.

STATE OF OHIO,

Appellant.

No. 2012-0250

On Appeal from the
Cuyahoga County Court of
Appeals, Eighth Appellate
District, Case No. 96776

MERIT BRIEF OF AMICUS CURIAE OHIO PUBLIC DEFENDER IN SUPPORT OF
APPELLEE M.M.

WILLIAM MASON (0037540)
Cuyahoga County Prosecutor
DANIEL T. VAN (0084614)
Assistant Prosecuting Attorney (of record)

1200 Ontario, 9th Floor
Cleveland, Ohio 44113
216/443-7800
216/443-7806 (fax)
Counsel for Appellant State of Ohio

ROBERT L. TOBIK (0029286)
Cuyahoga County Public Defender
JOHN MARTIN (0020606)
Assistant Public Defender (of record)

1200 West Third Street
100 Lakeside Place
Cleveland, Ohio 44113-1569
216/443-7583
216/443-3632 (fax)
Counsel for Appellee M.M.

JASON A. MACKE (0069870)
Office of the Ohio Public Defender

250 E. Broad Street, Suite 1400
Columbus, Ohio 43215
614/466-5394
614/752-5167 (fax)
mackej@opd.ohio.gov

Counsel for Amicus Curiae
Ohio Public Defender

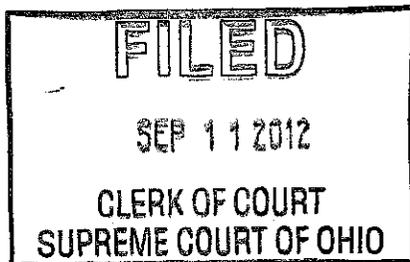


TABLE OF CONTENTS

Page No.

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES ii

STATEMENT OF INTEREST OF AMICUS CURIAE 1

STATEMENT OF THE CASE AND FACTS 1

ARGUMENT OF AMICUS CURIAE OHIO PUBLIC DEFENDER 2

 Proposition of Law of Amicus Curiae:

 Ohio Const. Art. IV Sec. 3(A)(2) precludes the state from seeking an advisory opinion as to the validity of a trial court decision, as an advisory opinion does not “review and affirm, modify, or reverse” a judgment or final order [*City of Euclid v. Heaton*, 15 Ohio St.2d 65 (1968), paragraph four of the syllabus, and *Eastman v. State*, 131 Ohio St. 1 (1936), paragraph twelve of the syllabus, approved and followed] 2

CONCLUSION..... 10

CERTIFICATE OF SERVICE..... 11

TABLE OF AUTHORITIES

Page No.

CASES:

City of Euclid v. Heaton, 15 Ohio St. 2d 65 (1968).....7,8,9

Eastman v. State, 131 Ohio St. 1 (1936).....3,6,8

Eisler v. United States, 338 U.S. 189 (1949).....3

Hayburn’s Case, 2 Dall. 409 (1792)3

In Re M.M., 8th Dist. 96776, 2011-Ohio-6758.....3

State v. Baughman, 38 Ohio St. 455 (1882)6

State v. Bistricky, 51 Ohio St.3d 157 (1990)8,9,10

State v. Bistricky, 66 Ohio App.3d 395 (1990)8

State v. Dodge, 10 Ohio App.2d 92 (1967)7,8,9

State v. Edmonson, 92 Ohio St.3d 393 (2001).....9

State ex rel Leis v. Kraft, 10 Ohio St.3d 34 (1984).....5

State v. Keeton, 18 Ohio St.3d 379 (1985)8,9,10

State v. Matthews, 82 Ohio St.3d 375 (1998)5

State v. Matthews, 81 Ohio St.3d 375 (1998)8

State v. Muncie, 91 Ohio St.3d 440 (2001)8

State v. Upshaw, 110 Ohio St.3d 189, 2006-Ohio-42538

Travis v. Public Utilities Comm’n, 123 Ohio St. 355 (1931).....6

United States v. Sharpe, 470 U.S. 675 (1985).....3

TABLE OF AUTHORITIES

Page No.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES:

Section 3, Article IV, Ohio Constitution *passim*

Sec. 3, Art. IV, Ohio Const. (1968 version)4

Sec. 6, Art. IV, Ohio Const. (1913 version)4

Sec. 6, Art. IV, Ohio Const. (1945 version)4

Sec. 6, Art. IV, Ohio Const. (1959 version)4

Sec. 3, Art. IV, Ohio Const. (2008 Baldwin's O.R.C. Ann.)5

Article III, United States Constitution.....3

R.C. 2945.67 *passim*

Former 4945.708

R.C. 2505.02.....5

S. Ct. Prac. R. II1

S. Ct. Prac. R. IV.....1

S. Ct. Prac. R. XIV1

Juv.R. 22.....3

SECONDARY SOURCES:

Thomas R. Swisher, Ed., Ohio Constitution Handbook (1990 ed).4

William H. Wolff, Jr., James A. Brogan and Shauna K. McSherry, Appellate Practice and Procedure in Ohio (2007)5

STATEMENT OF INTEREST OF AMICUS CURIAE

The Office of the Ohio Public Defender is a state agency charged with the duty to represent criminal defendants and to coordinate criminal defense efforts throughout Ohio. The Ohio Public Defender has an enduring interest in protecting the integrity of the justice system, and a special role in ensuring that the development and application of the criminal law is in accordance with the rights of Ohio's citizens. This Court has recognized this special role of the Ohio Public Defender as it relates to criminal appeals by the state, and has required that "[i]n a case involving a felony, when a county prosecutor files a notice of appeal under S. Ct. Prac. R. II or an order certifying a conflict under S. Ct. Prac. R. IV, the county prosecutor shall also serve a copy of the notice or order on the Ohio Public Defender." S. Ct. Prac. R. XIV, Sec. 2(A).

This case presents important questions regarding the permissible range of appeals by the state in criminal cases; as such, the Office of the Ohio Public Defender and the clients it serves will be directly affected by any action taken by the Court in this case. Moreover, the Office of the Ohio Public Defender is able to provide an important perspective on the issues that will not otherwise be presented to this Court. Accordingly, the Office of the Ohio Public Defender offers this amicus curiae brief in support of the appellee in this case.

STATEMENT OF THE CASE AND FACTS

Amicus Curiae hereby adopts and incorporates the Statement of the Case and Facts contained in the Merit Brief of the Appellant.

ARGUMENT OF AMICUS CURIAE
OHIO PUBLIC DEFENDER

The state's attempts to appeal this case demonstrate that the state has lost sight of its role in Ohio's justice system. In addition to misunderstanding the statutory limits on its right to appeal as described in the appellant's brief, the state's suggestion that it is entitled to a post-trial advisory opinion as to the validity of the judgment suppressing evidence against M.M. reveals a complete misunderstanding of the language of the Ohio Constitutional provision creating the District Courts of Appeal, as well as this Court's precedent regarding that provision.

To allow the state's appeal in this case, this Court must revisit several of its earlier judgments, and overrule at least two of them. Moreover, it must disregard the plain text of a statute and a state constitutional provision and expand the jurisdiction and caseload of both the District Courts of Appeal and of the Court itself. For these reasons, this Court should adopt the proposition of law offered by the Ohio Public Defender and reject both the appeal presented by the state.

Proposition of Law of Amicus Curiae:

Ohio Const. Art. IV Sec. 3(A)(2) precludes the state from seeking an advisory opinion as to the validity of a trial court decision, as an advisory opinion does not "review and affirm, modify, or reverse" a judgment or final order [*City of Euclid v. Heaton*, 15 Ohio St.2d 65 (1968), paragraph four of the syllabus, and *Eastman v. State*, 131 Ohio St. 1 (1936), paragraph twelve of the syllabus, approved and followed]

The jurisdiction of the District Courts of Appeals is, first and foremost, a creation of the Ohio Constitution. Without a constitutional grant of authority, there is no

jurisdiction. See *Eastman v. State*, 131 Ohio St. 1 (1936), par. 12 of syllabus.¹ Ohio Constitution Article IV, Section 3(B)(2) addresses the appellate jurisdiction of the courts of appeals with respect to lower courts:

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

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

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

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

Here, the state had the opportunity to seek review of the trial court’s decision to exclude testimony prior to the juvenile’s adjudicatory hearing, but chose not to do so. Compare Juv.R. 22(F) (“Such appeal shall not be allowed unless . . . filed with the clerk of the juvenile court within seven days after the entry of the judgment granting the motion.”) See also *In Re M.M.*, 8th Dist. 96776, 2011-Ohio-6758 ¶¶ 7-9. Instead, the state

¹ Compare *Eisler v. United States*, 338 U.S. 189, 194 (1949) (jurisdiction of the United States Supreme Court set forth in Article III of the United States Constitution and limited to cases and controversies; because constitutional provision did not allow advisory opinions,) and *United States v. Sharpe*, 470 U.S. 675, 728 fn. 17 (1985) (Stevens, J. dissenting) (discussing *Hayburn’s Case*, 2 Dall. 409 (1792), noting that first U.S. Supreme Court declined to provide advisory opinion to President Washington, and stating that the “practice of rendering advisory opinions at the request of the Executive [is] a practice that the Court abjured at the beginning of our history.”)

instead chose to wait file an appeal until after the juvenile was found not culpable and jeopardy had attached. *Id.* at ¶19. And as the appellate court correctly observed, because in future cases the state “has an adequate interlocutory remedy at its disposal for this precise situation,” the issue will not escape future review, thus rendering any decision in this case completely advisory. *Id.* For this reason, the Eighth District correctly concluded that the state’s appeal should be dismissed.

But in addition to the statute and rule-based reasons why the appellate court dismissed the state’s appeal, the appeal is impermissible under the Ohio Constitution and under this Court’s controlling case law.

Ohio Const. Art. IV Sec. 3 establishes Ohio’s District Courts of Appeals and provides for their original and appellate jurisdiction. Relevant to this case, Article IV Section 3(B)(2) states that “Courts of Appeals shall have such jurisdiction as may be provided by law to review and affirm, modify, or reverse judgments or final orders of the courts of record inferior to the court of appeals within the district” This same language has survived substantively unchanged since 1913, when amendments establishing the limits of the jurisdiction of the Courts of Appeals and the Ohio Supreme Court were incorporated into the Ohio Constitution. See Ohio Const. Art. IV Sec. 6 (1913 version), Ohio Const. Art. IV Sec. 6 (1945 version), Ohio Const. Art. IV Sec. 6 (1959 version), Ohio Const. Art. IV Sec. 3 (1968 version). See also Thomas R. Swisher, Ed., Ohio Constitution Handbook (1990 ed). As the compilers of one of Ohio’s annotated revised codes observed:

Until 1912, the practice was to leave to the legislature the task of providing the details of jurisdiction of the appellate courts. The Constitution gave the district courts created in 1851 the same original jurisdiction as the Supreme Court, plus appellate jurisdiction as provided by law, and this

formula was continued when the district courts were replaced by the circuit courts in 1883. The 1912 amendments discarded this practice, so that the jurisdiction of the courts of appeals was spelled out in some detail—in substance, much the same as present §3, Article IV.

Ohio Const. Art. IV Sec. 3 (2008 Baldwin's O.R.C. Ann.), 1990 Editor's Comment.

As a result of the 1912 amendments, most of the legislative attention regarding appellate jurisdiction revolves around the question of whether the order to be reviewed is a "final order" that is reviewable under the relevant statutes. See R.C. 2505.02 and William H. Wolff, Jr., James A. Brogan and Shauna K. McSherry, *Appellate Practice and Procedure in Ohio* (2007) at 16-42 (discussing appealability and focusing on final orders). Moreover, Ohio's most recent revisions to the final orders statute restrict the jurisdiction of courts of appeals to seven specified types of final orders. R.C.

2505.02(B)(1 – 7) ("An order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, *when it is one of the following . . .*") (emphasis added). Other decisions of this Court indicate that the state must have in place a "final order" under R.C. 2505.02 in addition to complying with R.C. 2945.67. See *State ex rel Leis v. Kraft*, 10 Ohio St.3d 34, 37 (1984) (holding that an order granting defendant a polygraph at state expense was a final order under R.C. 2505.02 and is appealable by leave under R.C. 2945.67) and *State v. Matthews*, 82 Ohio St.3d 375, 379 (1998) (holding that the granting of a motion for new trial is a final order under R.C. 2505.02 and is appealable by leave under R.C. 2945.67).

But there is another aspect to the constitutional text. Even if the trial court order in question is a "judgment or final order", the Constitution specifically enumerates what actions the appellate court may take when reviewing that order. The appellate jurisdiction of Ohio's district courts cannot be expanded beyond the authority to "review

and affirm, modify, or reverse judgments or final orders” of trial courts.

The state in this case claims to seek an advisory opinion regarding the trial court's judgment of law. Since as far back as 1882, this Court has recognized the inherent problems with the issuance of advisory opinions. In *State v. Baughman*, 38 Ohio St. 455 (1882), this Court refused to issue an advisory opinion to the Ohio Attorney General regarding the constitutionality of a specific question presented in a joint resolution of the general assembly. The Court held that it could not “decide hypothetical questions of law not involved in a judicial proceeding in a cause before it” and that such a decision would be “unauthorized, and dangerous in its tendency.” *Id.* at 459. Similarly, in *Travis v. Public Utilities Comm’n*, 123 Ohio St. 355 (1931), the Court noted that its duty was to “decide actual controversies where the judgment can be carried into effect, and not to give opinions upon moot questions, or abstract propositions, or to declare principles or rules of law which cannot affect the matter at issue in the case before it.” *Id.* at paragraph 2 of the syllabus.

More directly to the issue before this Court, in *Eastman v. State*, 131 Ohio St. 1(1936), the Court determined that a set of statutes granting the power to a state prosecutor to seek an advisory opinion from the Ohio Supreme Court under the general code was unconstitutional under the Ohio Constitution. *Id.* at 11-12. The Court observed:

These statutes provide that the decree of this court shall *not* affect the judgment of the court of common pleas in *said* cause, but they also contain the further provision that the decree of this court *shall* determine the law to govern in a *similar* case. Just what sort of process is this? It has been said that this is not an exercise of judicial power. Of course it could not well be argued otherwise, inasmuch as this power is concededly controlled by the Constitution alone, except in the case of revisory jurisdiction of the proceedings of administrative officers. But if the power

involved in these statutes is not judicial, what is it? Legislative? Certainly not the latter, because all courts insistently deny any indulgence in judicial legislation. Then what becomes of the axiom that the exclusive sources of law are the legislative and judicial processes? Although the purpose of these statutes is a laudable one, it is apparent that they are in conflict with sections 2 and 6 of article IV of the Constitution of Ohio, and therefore void.

Id. Thirty years later, this Court squarely faced the issue of whether the state could seek review of a criminal case following an acquittal. In *City of Euclid v. Heaton*, 15 Ohio St.2d 65, 72 (1968), five members of the Court affirmed and adopted the rationale of *State v. Dodge*, 10 Ohio App.2d 92 (1967), and held that insofar as the statutes governing such appeals allowed the state to seek an advisory opinion, they were unconstitutional. The *Dodge* court specifically and thoroughly considered how the language of the Ohio Constitution affected its ability to issue post-verdict advisory opinions in criminal cases:

We conclude from the various authorities and from its ordinary use and meaning that, as used in Section 6, Article IV of the Ohio Constitution, the word 'review' has reference to the general appellate process, which may be more specifically defined and prescribed by the General Assembly, and which produces, or results in, the affirmance, modification, setting aside, or reversal of a judgment or final order. . . . We therefore further conclude that under present constitutional provisions the exercise by Courts of Appeals of their appellate jurisdiction to 'review' a judgment or final order of a trial court must always produce, or result in, the affirmance, modification, setting aside, or reversal of that judgment or final order, and thereby must necessarily 'affect the judgment of the trial court in said cause.' [A]ny attempt by the General Assembly to bestow upon the Courts of Appeals jurisdiction to entertain a proceeding which results in a decision which 'shall not affect the judgment of the trial court in said cause' but merely 'shall determine the law to govern in a similar case' is an attempt to enlarge the jurisdiction, as well as the judicial power, of such courts beyond that prescribed by Section 6, Article IV of the Constitution, as amended effective January 1, 1945, and is, therefore, unconstitutional and void.

Dodge, 10 Ohio App.3d at 102-03 (affirmed and reasoning adopted by *Heaton*, 15 Ohio St.2d at 72).² *Heaton*'s subsequent affirmance and adoption of *Dodge* renders its opinion the controlling Ohio law on the subject—*Eastman*, *Heaton* and *Dodge* have never been overruled.

To be sure, this Court has since allowed State's appeals that arguably did nothing but seek advisory opinions.³ See, e.g., *State v. Keeton*, 18 Ohio St.3d 379 (1985), and *State v. Bistricky*, 51 Ohio St.3d 157 (1990), *on remand* at 66 Ohio App.3d 395 (1990). But the majority opinions in these cases, by focusing solely on whether there was a statutory grant of appellate jurisdiction set forth in R.C. 2945.67, never looked at the "affirm, modify or reverse" requirement of Article IV, Section 3(B) as interpreted by *Heaton*. And while *Keeton*, *Bistricky*, and decisions following those cases appear to allow the state to seek advisory opinions under R.C. 2945.67, that is because

² Although the Court unanimously affirmed the judgment in *Dodge*, the *Heaton* opinion merely reports that "five members of the court, affirming and adopting the rationale of the Court of Appeals in its opinion in *Dodge*, concurred in the proposition that the statutes referred to are constitutionally inoperative to permit an 'appeal' in a criminal case on behalf of the prosecutor from any judgment of a trial court not included within the exceptions enumerated in [former] Section 2945.70." *Heaton*, 15 Ohio St.2d at 76. The opinion contains no further analysis of this proposition, largely because of the procedural morass surrounding the case, which related to the adoption of the Modern Courts Amendment after the case was argued but prior to the issuance of the opinion. See *id.* at 72-76. But the ultimate result is that the controlling law on this issue is contained in *Dodge*, and it is that opinion that has been quoted and analyzed herein.

³ Once it is clear that R.C. 2945.67's discretionary appeal provision does not permit the state to seek advisory opinions, the question arises whether the statutory language allowing the State to seek leave to appeal "any other decision, except the final verdict" has any meaning. It does—R.C. 2945.67(A) still allows the State to appeal by leave of court a myriad of decisions by trial courts, that the State has no absolute right to appeal. For example, "other decision[s]" would include the granting of a motion for a new trial, *State v. Matthews*, 81 Ohio St.3d 375 (1998), an order denying forced medication, compare *State v. Muncie*, 91 Ohio St.3d 440, 446 (2001), or an order finding the defendant incompetent to stand trial. *State v. Upshaw*, 110 Ohio St.3d 189, 2006-Ohio-4253. There are many others.

the issue *was not presented to the Court*. In *Keeton*, counsel appointed to argue against the state filed a three-page merit brief and conceded that the appellate court had discretion to allow an appeal. See *Brief of Appellee* filed in *Keeton*, No. 1984-1753 (April 15, 1985) at 5. And in *Bistricky*, the defendants notified the Court that they had no intent of participating—the only briefs filed were by the appellant and amici, and none of those briefs cited *Dodge*, *Heaton*, or Ohio Const. Art. IV Sec. 3. See generally *Briefs and Correspondence* filed in *Bistricky*, No. 1989-0708. In short, because no individual defendant was invested in the outcome of either case, no party had the incentive that our adversary system demands to raise the constitutional issue.

Moreover, the analysis offered in *Dodge* and adopted in *Heaton* seems intuitively correct—the language “review and affirm, modify, or reverse” seems to be a very specific grant of judicial power under the Ohio Constitution, and the legislative lacks the power to change it. Were courts allowed to take actions that did not “review and affirm, modify or reverse” the judgment of a trial court, they would be engaging in an exercise that seems odd and nonjudicial. This Court recognized the strangeness of this scenario in *State v. Edmonson*, 92 Ohio St.3d 393, 395 (2001):

Because it rejected the legal conclusion reached by the trial court, the court of appeals originally reversed the trial court's judgment and remanded for further proceedings. The court of appeals later issued an amended entry in which it affirmed the trial court's judgment finding Edmondson guilty only of the lesser-included offenses *The court of appeals' correction of its judgment was necessary insofar as reversal and remand would have been a futile exercise; double-jeopardy principles barred the state from pursuing the grand theft charges because the trial court's finding of guilt on the lesser-included offenses operated as an acquittal of the greater offenses* Although the state's appeal had no effect on Edmonson's case, the court of appeals had statutory authority to exercise jurisdiction over it [under R.C. 2945.67].

The language in *Edmonson* is careful to note that Ohio Supreme Court's jurisdiction is

constitutional and properly based on the appellate court's certification of a conflict, *id.* at 396, but it specifically avoids addressing whether the appellate court's exercise of jurisdiction was constitutionally proper. Instead, it merely notes that "the court of appeals had statutory authority" to decide the case, in accordance with *Keeton* and *Bistricky. Id.*

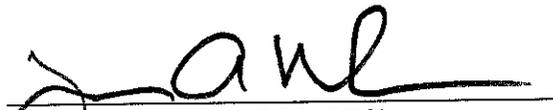
While it does not appear that the advisory opinion procedure under R.C. 2945.67 has created problems to date, amicus curiae assert that this case—in which the state simply challenges the trial court's ruling on an evidentiary matter after the juvenile has already been deemed not responsible—demonstrates that there are serious problems ahead. For all these reasons, this Court should adhere to its established precedent and conclude Ohio Const. Art. IV Sec.3(B)(2) precludes the state from seeking an advisory opinion under R.C. 2945.67(A).

CONCLUSION

The Ohio Public Defender respectfully requests this Court to reject the state's proposition of law, to reject the Ohio Attorney General's proposition of law and to affirm the judgment of the Court of Appeals for the Eighth Appellate District dismissing the state's appeal. The Ohio Public Defender further respectfully requests this Court to adhere to its prior caselaw and adopt the amicus proposition of law offered in response to the state's appeal.

Respectfully submitted,

OFFICE OF THE OHIO PUBLIC DEFENDER



Jason A. Macke (0069870)
Assistant State Public Defender

250 E. Broad Street, Suite 1400
Columbus, Ohio 43215
614/466-5394
614/752-5167 (fax)
mackeja@opd.ohio.gov

Counsel for Amicus Curiae
Ohio Public Defender

CERTIFICATE OF SERVICE

I certify a copy of the foregoing document has been served upon the following persons, by regular mail on this 11th day of September, 2012:

WILLIAM MASON (0037540)
Cuyahoga County Prosecutor
DANIEL T. VAN (0084614)
Assistant Prosecuting Attorney

Cuyahoga County Prosecutor's Office
1200 Ontario, 9th Floor
Cleveland, Ohio 44113
216/443-7800
216/443-7806 (fax)

Counsel for Appellant State of Ohio

ROBERT L. TOBIK (0029286)
Cuyahoga County Public Defender
JOHN MARTIN (0020606)
Assistant Public Defender

Cuyahoga County Public Defender's Office
1200 West Third Street
100 Lakeside Place
Cleveland, Ohio 44113-1569
216/443-7583
216/443-3632 (fax)

Counsel for Appellee M.M.



Jason A. Macke (0069870)
Assistant State Public Defender

Counsel for Amicus Curiae
Ohio Public Defender