ORIGINAL

NO. 2012-0250

IN THE SUPREME COURT OF OHIO

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

STATE OF OHIO,

Plaintiff-Appellant

-vs-

In Re: M.M., a Minor Child

Defendant-Appellee

REPLY BRIEF OF APPELLANT, STATE OF OHIO

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REPLY BRIEF

M.M. argues that there is no authority for an appellate court to consider the State's appeal. This case initiated in the Eighth District Court of Appeals when the State sought an appeal pursuant to *State v. Bistricky,* 51 Ohio St.3d 157, 555 N.E.2d 644 (1990). *Bistricky* in turn relies upon the authority set forth 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). Thus, M.M. seeks to have this Court overturn *Bistricky, Keeton* and *Arnett. Bistricky,* was recently cited by this Court in *State v. Ross,* 128 Ohio St.3d 283, 2010-Ohio-6282, 943 N.E.2d 992. This Court should decline M.M.'s invitation to do so.

M.M. argues that the State's arguments are simply asking for an advisory opinion, and M.M. submits to this Court that advisory opinions are unconstitutional. M.M. asks this Court to adopt the following rule:

> The Ohio Constitution does not permit appellate courts to issue advisory opinions. In matters invoking the exclusion of evidence at trial, the State of Ohio has no right to seek discretionary review of a decision of the trial court that excludes or suppresses evidence at trial.

Ordinarily, advisory opinions are not allowed. The exception is cases in which the legal question is capable of repetition yet evading review. See *Bistricky,* at 158. M.M.'s argument, if adopted and applied in other circumstances, would require this Court to adopt a rule that would prevent appellate court's from reaching or reviewing legal questions that are capable of repetition yet evading review. It is the State's position that the legal questions that are capable of repetition yet evading review are within the appellate court's jurisdiction to, "review and affirm, modify or

reverse judgments or final orders of the courts of records inferior to the court of appeals within the district."

LAW AND ARGUMENT

M.M. argues that Article IV, Section 3(B)(2) of the Ohio Constitution guides the outcome of this case. That provision states that

> Court of appeals shall have jurisdiction as may be provided by law to review and affirm, modify or reverse judgments or final orders of the courts of records inferior to the court of appeals within the district [...]

(Appellee Brief, pg. 4).

M.M. states that,

> By its plain language, the constitutional provision thus hinges appellate jurisdiction on three criteria,
>
> (1) There must be a further statutory grant of jurisdiction ("shall have jurisdiction as may be provided by law")
>
> (2) The statutory grant must enable the court of appeals "to review and affirm, modify or reverse" a lower court's ruling, and
>
> (3) The ruling subject to affirmance, modification or reversal must be a "judgment or final order."

(Appellee Brief, pg. 4).

Statutory Jurisdiction Has Been Determined

The Court in *State v. Keeton,* 18 Ohio St.3d 379, 18 OBR 434, 481 N.E.2d 629 (1985), citing R.C. 2945.67(A) (which at the time provided for a right to appeal a motion to suppress evidence and an appeal by leave any other decision of the trial court or juvenile court), determined that, "the evidentiary rulings in this case, while

they do not fall within the provisions of R.C. 2945.67(A) granting an appeal as of right, do fall within the language of "any other decision, except the final verdict * * * " in R.C. 2945.67(A) which permits an appeal to the court of appeals after leave has first been obtained." *Keeton* at 381. The Court reiterated the rule in and *State v. Arnett,* 22 Ohio St.3d 186, 22 OBR 272 489 N.E.2d 284 (1986). Accordingly, R.C. 2945.67(A) has been interpreted to permit appeals of certain evidentiary rulings after a judgment of acquittal. M.M. relies upon *State v. Davidson,* 17 Ohio St.3d 132 (1985), to stress the availability of the interlocutory appeal remedy as of right. But the crux of the State's argument is that not all evidentiary rulings satisfy the requirements of a Crim. R. 12(K) or Juv. R. 22(F) appeal, as the exclusion of evidence in those circumstances may not destroy the State's case. There may be compelling reasons; however, for the State to seek an appeal by leave, where it did not seek the interlocutory appeal. M.M. asks this Court to limit the State's ability to appeal evidentiary rulings, to those circumstances, in which the evidentiary ruling has hindered the State's ability to effectively prosecute.

Simply put, when the State asked for leave to appeal, it was doing so based on case law which indicated that the State was allowed to do so.

Constitutional Authority Exists For An Appellate Court To Review and Decide a Legal Question That Is Capable of Repetition Yet Evading Review

M.M. stresses that any review of the evidentiary rulings in this case or similar cases is tantamount to an advisory opinion and that no constitutional authority exists because the appellate court by issuing an advisory opinion is not being called upon "to review and affirm, modify or reverse" a lower court's ruling.

While M.M. argues that an appellate court has no jurisdiction to issue an advisory opinion, M.M. does not appear to discuss whether a court is allowed to consider a legal question that is capable of repetition yet evading review.

M.M. relies upon *Eastman v. State,* 131 Ohio St. 1 (1936) and *City of Euclid v. Heaton,* 15 Ohio St.2d 65, 72 to support the contention that courts should not issue advisory opinions. By asking this Court to overrule *Bistricky,* M.M.'s argument would seem to require this Court to eliminate any appeal that involves a question that is capable of repetition yet evading review, as M.M. appears to argue that an appellate court's ability, in Ohio, to review and affirm, modify or reverse judgments or final orders of the courts of records inferior to the court of appeals within the district where there is a controversy at issue. Moreover, *Eastman* and *Heaton* predate early cases in which this Court discussed the principle of cases in which the legal issue is capable of repetition yet evading review. See *City of Urbana ex rel. Newlin v. Downing,* 43 Ohio St.3d 109, 539 N.E.2d 140 (1989), *State ex rel. The Repository, Div. of Thompson Newspapers, Inc. v. Unger,* 28 Ohio St.3d 418, 504 N.E.2d 37 (1986) and *State, ex rel. Plain Dealer Publishing Co., v. Barnes* (1988), 38 Ohio St.3d 165, 527 N.E.2d 807.

This Honorable Court held in *Bistricky,* that "[o]rdinarily when there is no case in controversy or any ruling by an appellate court that would result in an advisory opinion, there will be no appellate review unless the underlying legal question is capable of repetition yet evading review." *State v. Bistricky* , 51 Ohio St.3d 157, 158, 555 N.E.2d 644 (1990). Thus, the Court in *Bistricky* recognized that

ordinarily there is no appellate review where the result would be an advisory opinion. In recognizing The Eighth District in the opinion below determined that any decision in this case would be purely *advisory,* holding that the legal question was not "capable of repetition yet evading review," due to the existence of the interlocutory appellate remedy. It is this determination that the State is challenging. Issues that are "capable of repetition yet evading review," are not limited to criminal cases but can exist in other legal cases.

In footnote eight of *Storer v. Brown*, 415 U.S. 724, 94 S.Ct. 1274, the United States Supreme Court considered a challenge to provisions of California election law:

> The 1972 election is long over, and no effective relief can be provided to the candidates or voters, but this case is not moot, since the issues properly presented, and their effects on independent candidacies, will persist as the California statutes are applied in future elections. This is, therefore, a case where the controversy is 'capable of repetition, yet evading review.' The 'capable of repetition, yet evading review' doctrine, in the context of election cases, is appropriate when there are 'as applied' challenges as well as in the more typical case involving only facial attacks. The construction of the statute, an understanding of its operation, and possible constitutional limits on its application, will have the effect of simplifying future challenges, thus increasing the likelihood that timely filed cases can be adjudicated before an election is held.

Brown, footnote eight (internal citations omitted).

The United States Supreme Court noted that although, the respective parties could not receive relief, the legal issues presented could be considered as it was "Capable of repetition yet evading review." Legal question that are capable of repetition yet evading review are not limited to the criminal context, these cases

have been seen in election cases. See for example *Anderson v. Celebrezze,* 460 U.S. 780, 103 S.Ct. 1564 (1983) and of *Storer v. Brown,* 415 U.S. 724, 94 S.Ct. 1274 (1974).

The State submits that the evidentiary rulings presented in the instant appeal can go on if erroneous evidentiary rulings persist in cases in which the State is unable to take a Crim. R. 12(K) or Juv. R. 12(J) appeal. These cases are within an appellate court's constitutional authority to review and affirm, modify or reverse judgments.

The State's Argument Does Not Offend the Separation of Powers and Traditional Role of the Judiciary

M.M. briefly argues that the State's argument is inconsistent with traditions of separation of powers, arguing that the executive branch should not be able to call upon the judicial branch to undertake legal analysis and promulgate opinions that are independent of any controversy. (Appellee Brief, pg. 8). To support this point, *Hayburn's Case,* 2 U.S. 408, 2 Dall. 409, 1 Ld. 436 (1792). But in that case, the Court determined it was unconstitutional for the legislature or executive to assign the judiciary branch a non-judicial function, in *Hayburn's Case,* that was to certify to the Secretary of War the eligibility of Revolutionary War veterans to receive benefits and that those duties at issue were non-judicial because they were subject to review and revision by the executive and the legislature. See *In re Extradition of Chan Seong-I,* 346 F.Supp.2d 1149 (D.N.M. 2004) citing *Hayburn's Case.*

By seeking an appeal of an evidentiary ruling or substantive legal question pursuant to *Bistricky,* 51 Ohio St.3d 157, 555 N.E.2d 644, *Keeton,* 18 Ohio St.3d

379, 18 OBR 434, 481 N.E.2d 629 and *Arnett,* 22 Ohio St.3d 186, 22 OBR 272 489 N.E.2d 284, the State does not seek to engage in a process in which the judiciary is being called upon to engage in a non-judicial capacity. Instead the State asks the appellate court to review the legal rulings of an inferior court and issue an opinion on an issue that is capable of repetition yet evading review.

CONCLUSION

Ordinarily advisory opinions are not allowed. The exceptions are in cases in which the legal question is capable of repetition yet evading review. Because appellate courts can consider issues that are capable of repetition yet evading review, this Court should decline to adopt M.M.'s rule of law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing Reply Brief of Appellant State of Ohio has been mailed this the 1st day of October 2012 via U.S. regular mail to:

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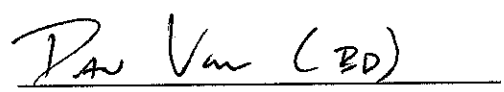

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