

[Cite as *State v. Winland*, 2001-Ohio-2539.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
HOCKING COUNTY

State of Ohio,

Plaintiff-Appellee,

No. 01CA17

v.

Henry E. Winland,

DECISION & JUDGMENT
ENTRY

Defendant-Appellant.

Release 11/5/01

APPEARANCES:

COUNSEL FOR APPELLANT: Will Kernen, Logan, Ohio

COUNSEL FOR APPELLEE: Larry Beal, Hocking County Prosecutor,
Logan, Ohio

PER CURIAM:

It appearing that the judgment from which appellant, Henry Winland, appealed that denied his motion to dismiss, was not a final appealable order pursuant to R.C. 2505.02, this court ordered Winland to file a memorandum addressing that issue. Winland filed a memorandum in support of jurisdiction. Appellee did not respond.

As a general rule, an order denying a motion to dismiss is not a final appealable order. See *State v. Eberhardt* (1978), 56 Ohio App.2d 193; *State v. Torco Termite Pest Control* (1985), 27 Ohio App.3d 233; *State v. Lile* (1974), 42 Ohio App.2d 89.

Appellant asserts that this case is, in all practical aspects, identical to *State v. Thomas* (1980), 61 Ohio St.2d 254, which held that the overruling of a motion to dismiss on the grounds of double jeopardy was a final appealable order. Appellant fails to note, however, that *Thomas* was overruled ten years later by *State v. Crago* (1990), 53 Ohio St.3d 243. See, also, generally, *State v. Heckman* (Nov. 21, 2000), Montgomery App. No 18441, unreported; *State v. Ouellette* (Feb. 5, 1999), Miami App. No. 98-CA-25, unreported.

We further note that the trial court noted on its judgment below that "This is a final appealable order." However, this court is not bound by a trial court's determination on that issue. See *Ft. Frye Teachers Assn. v. Ft. Frye Local School Dist. Bd. of Edn.* (1993), 87 Ohio App.3d 840. See, also, *Pickens v. Pickens* (Aug. 27, 1992), Meigs App. No. 459, unreported, at 4.

Upon consideration, this court finds that the Judgment Entry from which this appeal is taken is not a final appealable order pursuant to R.C. 2505.02 and this court does not have jurisdiction to consider the merits of this appeal.

APPEAL DISMISSED. Costs to appellant.

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No. 01CA17, Hocking County

JUDGMENT ENTRY

It is ordered that the **APPEAL BE DISMISSED** and that appellee recover of appellant costs herein taxed.

It is further ordered that a special mandate issue out of this Court directing the Hocking County Court of Common Pleas to carry this judgment into execution.

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

Abele, J. and Evans, J. Concur

FOR THE COURT

By: _____
Roger L. Kline, Administrative Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.