

[Cite as *State v. Gordon*, 2006-Ohio-1732.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 86562

| | | |
|---------------------|---|---------------|
| STATE OF OHIO | : | |
| | : | |
| Plaintiff-Appellant | : | JOURNAL ENTRY |
| | : | |
| vs. | : | and |
| | : | |
| | : | OPINION |
| SHANNON GORDON | : | |
| | : | |
| Defendant-Appellee | : | |

DATE OF ANNOUNCEMENT
OF DECISION: April 6, 2006

CHARACTER OF PROCEEDING: Criminal appeal from
Court of Common Pleas
Case No. CR-462733

JUDGMENT: DISMISSED

DATE OF JOURNALIZATION: _____

APPEARANCES:

For Plaintiff-Appellant: WILLIAM D. MASON
Cuyahoga County Prosecutor
KERRY A. SOWUL, Assistant
1200 Ontario Street
Cleveland, Ohio 44113

For Defendant-Appellee: ROBERT L. TOBIK
Cuyahoga County Public Defender
ROBERT M. INGERSOLL, Assistant
1200 West Third Street
Cleveland, Ohio 44113

COLLEEN CONWAY COONEY, P.J.:

{¶ 1} Plaintiff-appellant, the State of Ohio, appeals the trial court's amendment of a criminal charge. Finding no jurisdiction, we dismiss the appeal for lack of a final appealable order.

{¶ 2} In 2005, defendant-appellee, Shannon Gordon ("Gordon") was indicted on one count of receiving stolen property in violation of R.C. 2913.51 for being in receipt of a stolen license plate validation sticker. R.C. 2913.51 provides that:

"(A) No person shall receive, retain, or dispose of property of another knowing or having reasonable cause to believe that the property has been obtained through commission of a theft offense. * * *

"(C) Whoever violates this section is guilty of receiving stolen property. Except as otherwise provided in this division, receiving stolen property is a misdemeanor of the first degree. If the value of the property involved is five hundred dollars or more and is less than five thousand dollars, if the property involved is any of the property listed in section 2913.71 of the Revised Code, receiving stolen property is a felony of the fifth degree. * * *"

{¶ 3} The State charged Gordon with a felony of the fifth degree, arguing that the validation sticker qualified as property listed in R.C. 2913.71.¹ Gordon filed a motion to dismiss the indictment, claiming that the validation sticker fell outside the scope of the statute. The trial court agreed and found that Gordon's crime as charged was a misdemeanor of the first degree.

¹ R.C. 2913.71 provides in part that, regardless of the property's value, a violation of R.C. 2913.51 is a felony of the fifth degree if the property involved is a license plate, a temporary license placard, or a windshield sticker.

The trial court then amended the indictment to reflect its ruling.

Gordon pled guilty to the misdemeanor, was given a six-month suspended sentence and a fine, and was placed on probation.

{¶ 4} The State now appeals, raising one assignment of error. In its sole assignment of error, the State argues that the trial court erred in granting Gordon's motion to dismiss.

State's Right to Appeal

{¶ 5} The State does not have an absolute right to appeal a trial court's ruling; in fact, the State's right to appeal is limited by statute. R.C. 2945.67(A) provides:

"A prosecuting attorney *** may appeal as a matter of right any decision of a trial court in a criminal case *** which decision grants a motion to dismiss all or any part of an indictment, complaint, or information, *** and may appeal by leave of the court *** any other decision, except the final verdict, of the trial court in a criminal case ***."

{¶ 6} Ohio courts have interpreted the statute to mean that the State has a right to appeal the dismissal of all or part of an indictment when such dismissal concerns the substantive elements of the charged offense. *State v. Skala*, Cuyahoga App. No. 80331, 2002-Ohio-2962, ¶9; *State v. Cook* (1987), 35 Ohio App.3d 20, 519 N.E.2d 419. "Where such a dismissal would destroy the state's case or inhibit the state from proceeding with the charges, the state would have a right to appeal." *Cook*, supra at 23.

{¶ 7} If the State wishes to appeal a judgment of the trial court not expressly provided for in R.C. 2945.67(A), it must seek leave to appeal under App.R. 5(C) and its motion must be filed concurrently with the notice of appeal. See *State v. Fisher* (1988), 35 Ohio St.3d 22, 25, 517 N.E.2d 911.²

{¶ 8} The State proposes to appeal the trial court's decision to dismiss the indictment against Gordon without seeking leave to file an appeal under the assumption that the appeal is as a matter of right.

{¶ 9} The court stated in its journal entry that the motion to dismiss "is granted in part, denied in part; [the] court finds that the motion to dismiss charge of receiving stolen property is denied, but the degree of offense is a M-1."

{¶ 10} The State's argument is misplaced because the court did not dismiss any part of the indictment. Gordon was charged with one count of receiving stolen property. She pled guilty to that count. The court did not change the nature or charge of the indictment. Rather, the parties agree that the court amended the indictment to a first degree misdemeanor.³ The amendment did not

² App.R. 5(C) states in pertinent part: "When leave is sought by the prosecution from the court of appeals to appeal a judgment or order of the trial court, a motion for leave to appeal shall be filed with the court of appeals within thirty days from the entry of the judgment and order sought to be appealed * * * ."

³ Crim.R. 7 provides that "the court may at any time before, during, or after a trial amend the indictment * * * in respect to any defect, imperfection, or omission in form or substance, or of any variance with the evidence, provided no change is made in the name or identity of the crime charged." The level of the offense with which Gordon was charged was omitted from the indictment.

destroy the State's case or change a substantive element of the charged offense. If Gordon had chosen to go to trial, the State would have been able to proceed with the same charge, receiving stolen property.

{¶ 11} Therefore, the trial court's ruling is not one that the State may appeal as a matter of right under R.C. 2945.67; thus, the State must obtain leave of this court. Since leave to appeal the trial court's decision was not obtained, we lack a final, appealable order and must dismiss the appeal.

{¶ 12} This cause is dismissed.

It is ordered that appellee recover of appellant the costs herein taxed.

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

CHRISTINE T. McMONAGLE, J. CONCURS
IN JUDGMENT ONLY (SEE SEPARATE
CONCURRING OPINION);

DIANE KARPINSKI, J. CONCURS IN JUDGMENT
ONLY AND CONCURS WITH JUDGE McMONAGLE'S
CONCURRING OPINION

PRESIDING JUDGE
COLLEEN CONWAY COONEY

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also S.Ct.Prac.R. II, Section 2(A)(1)

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| Plaintiff-Appellant | : | C O N C U R R I N G |
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| v. | : | O P I N I O N |
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| SHANNON GORDON, | : | |
| | : | |
| Defendant-Appellee | : | |

DATE: April 6, 2006

CHRISTINE T. McMONAGLE, J.:

{¶ 13} I respectfully concur in judgment only. I agree that this appeal by the State of Ohio should be dismissed, but on a different understanding of the law. The State appealed on grounds that the trial court erred when it granted appellee's motion to dismiss and further erred when it amended the indictment. However, the record is clear, albeit by poorly drafted entry, that the court *denied* the motion to dismiss and, further, at no time did the trial court amend

the indictment.¹ The trial court did not dismiss anything; it merely found that the indictment as written was a misdemeanor of the first degree. Nothing was amended, nothing was "plea-bargained." The defendant merely pled to the indictment, and the court imposed a sentence appropriate to a misdemeanor of the first degree. The judgment entry reads in pertinent part as follows:

{¶ 14} "Defendant fully advised in open court of his/her constitutional rights and penalties. Defendant retracts former plea of not guilty and enters a plea of guilty to receiving stolen property/2913.51-M1 as charged in the indictment. Court accepts Defendant's guilty plea."

{¶ 15} I also disagree with the lead opinion's observation that the court placed the defendant on community control sanctions (which would be appropriate to a felony conviction). The court in fact placed the defendant on "probation," which is the appropriate disposition of a misdemeanor.

{¶ 16} This attempted appeal by the State is without merit and, as provided in the lead opinion, the State should bear the costs.

¹The court found that the indictment as written was in fact a misdemeanor. The indictment reads "**** that the above named Defendant(s), on or about the date of the offense set forth above, in the County of Cuyahoga, unlawfully did receive, retain or dispose of a license plate validation sticker, the property of Robert L. Smith, knowing or having reasonable cause to believe that it had been obtained through the commission of a theft offense contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio."