[Cite as *State v. Powers*, 2015-Ohio-5124.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellant,	:	
v.	:	No. 15AP-422 and No. 15AP-424
Rafael R. Powers,	:	(C.P.C. No. 12CR-1261)
Defendant-Appellee.	:	(REGULAR CALENDAR)

D E C I S I O N

Rendered on December 10, 2015

Ron O'Brien, Prosecuting Attorney, and *Michael P. Walton*, for appellant.

Kravitz, Brown & Dortch, LLC, Paula Brown, and *Richard Parsons*, for appellee.

ON MOTION TO DISMISS

BRUNNER, J.

{¶ 1} Defendant-appellee, Rafael R. Powers, requests that this court dismiss the state's appeals in this consolidated case for want of jurisdiction. Because we find that the trial court's orders do not fit any of the categories of matters that are appealable by the state as of right and as such must be strictly construed, and because the sealing in this case was not a separate civil matter, we find that the state should have requested leave to appeal. Since the state failed to request leave, we lack jurisdiction to consider these consolidated appeals and find that they must be dismissed.

I. FACTS

{¶ 2} On March 9, 2012, Powers was indicted for cocaine possession. On September 17, 2012, Powers filed a motion requesting intervention in lieu of conviction pursuant to R.C. 2951.041. The parties and the trial court agreed to continue the case to allow Powers to be evaluated by NetCare Forensic Psychiatry Center to determine his

suitability for intervention, and the trial court filed an order on November 6, 2012 requiring such an evaluation.

{¶ 3} A clinical and forensic psychologist with NetCare reported his evaluation of Powers to the trial court by letter dated December 3, 2012. The psychologist indicated that he had evaluated Powers on November 21, 2012, and had determined that Powers' "drug use was a factor leading to the criminal offense," that he is a "drug dependent person and that intervention would reduce the probability of his engaging in future criminal activity." Following the report, the trial court, on December 12, 2012, held a hearing at which the parties jointly recommended intervention in lieu of conviction. Accordingly, the trial court accepted a guilty plea from Powers, granted the request for intervention in lieu of conviction, and stayed the case pending successful compliance with intervention in lieu of conviction. The trial court filed an entry setting forth the terms of Powers' intervention in lieu program in more detail on December 14, 2012. The trial court set a community control period of three years and set forth a number of conditions of the intervention in lieu plan:

> 1 The defendant shall abstain from the use of illegal drugs and alcohol for the period of supervision
>
> 2 The defendant shall submit to regular random drug and alcohol testing
>
> 3 The defendant shall successfully complete in-patient drug treatment and follow any recommended aftercare
>
> 4 The defendant shall avoid contact with known drug users
>
> 5 Following the completion of treatment, the defendant shall obtain/maintain verifiable employment
>
> 6 The defendant shall attend three (3) 12 step meetings per week and maintain weekly contact with his sponsor [Followed by a handwritten note stating:] Probation to be Flexible work within & aid his work schedule
>
> 7 The defendant shall pay supervision fee and court costs
>
> 8 The defendant shall follow any and all recommendations of the court intervention plan.

{¶ 4} More than two years later, on February 13, 2015, the probation department filed with the trial court a statement listing the following alleged violations:

> 1. The defendant failed to drop on 12/12/13, 02/25/13 and 01/29/15.
>
> 2. The defendant provided a Negative Diluted Urine screen on 11/25/14, 08/28/14, 07/31/14, 05/29/14, 04/24/14, 01/30/14[,] 07/18/13 and 07/14/13.
>
> 3. The defendant failed to report to the probation office on 12/18/14, 10/30/14, 09/25/14, 06/26/14, 09/19/13, 08/22/13 and 06/20/13[.]
>
> 4. The defendant has failed to show proof of attending AA/NA meetings.
>
> 5. The defendant has failed to obtain or verify a sponsor or working the 12 steps of AA or NA.
>
> 6. The defendant has failed to maintain employment.
>
> 7. The defendant tested positive for marijuana and cocaine on 09/30/14.
>
> 8. The defendant has had contact with known drug users.

{¶ 5} On February 19, 2015, the trial court attempted to serve a hearing notice on Powers notifying him of his obligation to appear at a revocation hearing. However, the notice was returned undeliverable. On March 19, 2015, the trial court issued a capias for Powers' arrest. On March 30, 2015, a Franklin County Sheriff's Officer reported to the trial court that the capias had been executed on March 26, 2015.

{¶ 6} On April 2, 2015, the trial court held a hearing based on the probation department's statement of violations. Powers did not contest the violations at the hearing. Powers was represented by counsel and offered the following in mitigation:

> THE COURT: I talked to probation. I talked to Dave Buckley. I talked to your lawyer. You did a lot of things. You had an office administrative hearing. It's my understanding you were working, but you basically couldn't get off marijuana. It's marijuana and cocaine.
>
> What would you like to tell me in mitigation, if anything?
>
> [DEFENSE COUNSEL]: Well, as we discussed yesterday, Your Honor, Mr. Powers is 35 years old. He has two children. He has a son who is a senior in high school, and he has a younger son, eight years old.

> As Mr. Buckley said, Mr. Powers has always tried to keep a job. He's had some problems with that felony on the record, but he's always done temp work. He's had no criminal record and is really trying to do the right thing with his family.
>
> THE COURT: How many days jail credit does he have?
>
> [DEFENSE COUNSEL]: He has 26 days.
>
> THE COURT: Anything you would like to tell me directly, sir?
>
> DEFENDANT: Thank you.
>
> THE COURT: Anything you would like to tell me?
>
> DEFENDANT: I'm truly sorry that I didn't hold up my end of the bargain that you gave me the last time when I stood before you.
>
> THE COURT: Well, you basically have been through more than anybody would have been through on a charge like this, because intervention is more difficult, I think, than probation in some ways. You spent time in jail on an F-5 when you have no record. That doesn't usually happen either.
>
> I'm going to close this case out for 26 days served. I'm going to grant the intervention in lieu. The case will be dismissed. I'm going to treat it as if he completed it. That's it. You're released. It will take you all day to get out, but you will be out. Good luck to you. Happy Easter.

(Apr. 2, 2015 Tr. 4-5.)

{¶ 7} Thereafter, on April 8, 2015, the trial court filed an entry finding as follows:

> On December 12, 2012, * * * [t]he Defendant * * * entered a plea of guilty to Count One of the Indictment, to wit: **POSSESSION OF COCAINE**, a violation of R.C. 2925.11, and a Felony of the Fifth Degree.
>
> The Court found the Defendant guilty of the charge(s) to which the plea was entered.
>
> On December 12, 2012, the Defendant was sentenced to **TREATMENT IN LIEU OF CONVICTION**.
>
> On April 2, 2015, a revocation hearing was held pursuant to R.C. 2951.041(f). * * * Upon stipulated violations of said Treatment in Lieu of Conviction, it is hereby **ordered** that Defendant's Treatment in Lieu of Conviction is hereby **REVOKED**.

* * *

> The Court has considered all maters [sic] required by Section 2929.12 and 2951.02 of the Ohio Revised Code and it is the sentence of this Court that the Defendant pay the cost of this action and serve a term of **TWENTY-SIX (26) DAYS AT THE FRANKLIN COUNTY JAIL - CASE CLOSED FOR TIME SERVED AND INTERVENTION IS CONSIDERED SUCCESSFUL AND COMPLETE AND THIS CASE IS HEREBY DISMISSED. COURT COSTS WAIVED. NO FINE IMPOSED.**
>
> The Court finds that the Defendant has -26- days of jail credit and hereby certifies the time to the Ohio Department of Corrections. The Defendant is to receive jail time credit for all additional jail time served while awaiting transportation to the institution from the date of the imposition of this sentence.

One day later, on April 9, 2015, the trial court filed a subsequent entry based on the successful completion of intervention in lieu, ordering that all the records relating to the dismissed case be sealed.

{¶ 8} On April 17, 2015, the state filed a notice that it was appealing the trial court's entry that operated to dismiss the case. The appeal of this entry became case No. 15AP-422. Nearly simultaneously, the state filed a second notice of appeal, this time of the trial court's April 9, 2015 sealing order. The appeal of this entry became case No. 15AP-424. On May 6, 2015, we consolidated the two cases. On July 20, 2015, Powers moved to dismiss the consolidated appeals on grounds that the state was required to seek leave to appeal and did not do so. The state has responded and Powers has replied. This decision now follows.

II. DISCUSSION

{¶ 9} "[T]he state may appeal in a criminal case only when a statute gives the state express authority to do so." *State v. Thompson*, 10th Dist. No. 03AP-841, 2004-Ohio-3229, ¶ 11, citing Ohio Constitution, Article IV, Section 3(B)(2); *State v. Fraternal Order of Eagles Aerie 0337 Buckeye*, 58 Ohio St.3d 166, 167 (1991); *State ex rel. Leis v. Kraft*, 10 Ohio St.3d 34, 35 (1984); *State v. Brenneman*, 36 Ohio St.2d 45, 46 (1973); *State v. Hughes*, 41 Ohio St.2d 208, 210 (1975); *Mick v. State*, 72 Ohio St. 388 (1905), paragraph one of the syllabus. The Supreme Court of Ohio has held that exceptions to the general rule prohibiting the state's appeals in criminal prosecutions must be strictly

construed. *State v. Bassham*, 94 Ohio St.3d 269, 271 (2002); *State v. Caltrider*, 43 Ohio St.2d 157 (1975), paragraph one of the syllabus.

{¶ 10} The types of matters the state may appeal as a matter of right are set forth by statutes.

> 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, 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 * * *. In addition to any other right to appeal under this section or any other provision of law, a prosecuting attorney * * * 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.

R.C. 2945.67(A).

> In addition to any other right to appeal and except as provided in division (D) of this section, a prosecuting attorney * * * may appeal as a matter of right a sentence imposed upon a defendant who is convicted of or pleads guilty to a felony or, in the circumstances described in division (B)(3) of this section the modification of a sentence imposed upon such a defendant, on any of the following grounds:
>
> (1) The sentence did not include a prison term despite a presumption favoring a prison term for the offense for which it was imposed, as set forth in section 2929.13 or Chapter 2925. of the Revised Code.
>
> (2) The sentence is contrary to law.
>
> (3) The sentence is a modification under section 2929.20 of the Revised Code of a sentence that was imposed for a felony of the first or second degree.

R.C. 2953.08(B).

{¶ 11} In addition to the enumerated types of actions appealable as a matter of right, the state "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." (Emphasis added.) R.C. 2945.67(A). Where a matter to be appealed is not one of the enumerated types, the state must seek leave to appeal within 30 days of the judgment that is being appealed. App.R. 5(C); *State v. Roey*, 8th Dist. No. 97484, 2012-Ohio-2207, ¶ 9; *State v. Tate*, 179

Ohio App.3d 71, 2008-Ohio-5686, ¶ 45-51 (7th Dist.); *State v. Crawford*, 5th Dist. No. 07 CA 8, 2007-Ohio-3516, ¶ 9-26; *State v. Mitchell*, 6th Dist. No. L-03-1270, 2004-Ohio-2460, ¶ 8-12. If the state is required to seek leave for an appeal but fails to timely do so, the appellate court never obtains jurisdiction over the matter. *Roey* at ¶ 9; *Tate* at ¶ 47, 51; *Crawford* at ¶ 26; *Mitchell* at ¶ 12. In short, whether the state is permitted to appeal as of right or should have filed a motion for leave to appeal is a jurisdictional issue and is established by the answer to this question: What matter of judgment does the state seek to appeal?

15AP-422

{¶ 12} In a typical case involving intervention in lieu of conviction, after a court determines that an offender is eligible for intervention in lieu and decides to grant his or her request to enter the program, the trial court "accept[s] the offender's plea of guilty and waiver of the defendant's right[s]." R.C. 2951.041(C). Then, it stays "all criminal proceedings" and orders the defendant to comply with a number of terms and conditions imposed by the court in an intervention in lieu of conviction plan for a period of at least one year. R.C. 2951.041(C) and (D). If the court finds that the defendant has successfully completed the plan for intervention in lieu of conviction, the offender is never adjudicated guilty, the proceedings are dismissed against him or her, and the previous charges pled to do not constitute a criminal conviction "for purposes of any disqualification or disability imposed by law and upon conviction of a crime, and the court may order the sealing of records related to the offense in question in the manner provided in sections 2953.31 to 2953.36 of the Revised Code." R.C. 2951.041(E). If, however, "the court determines that the offender has failed to comply with any of those terms and conditions, it shall enter a finding of guilty and shall impose an appropriate sanction under Chapter 2929. of the Revised Code." R.C. 2951.041(F).

{¶ 13} The trial court's approach in its entry appealed in case No. 15AP-422 does not neatly "track" the statute authorizing and governing intervention in lieu of conviction (R.C. 2951.041). Nor can the trial court's judgment entry be said to characterize any of the specific judgments authorizing and governing appeals by a prosecutor as of right (R.C. 2945.67 and 2953.08(B)). Some parts of the trial court's judgment entry read as if Powers failed his intervention in lieu program and was "revoked." Other parts of the trial court's judgment entry read as intervention in lieu was completed successfully and the case was dismissed prior to sentencing. Taking just the latter portion of the trial court's entry in

case No. 15AP-422, the trial court entered a separate order sealing Powers' criminal records, constituting the basis of appeal in case No. 15AP-424.

{¶ 14} As for the prior language of the trial court's judgment entry, the trial court appears to have handled its statutory responsibilities for adjudging Powers' success or lack thereof in the treatment in lieu program much as it would for community control. The trial court revoked Powers' participation in the treatment in lieu of conviction program and sentenced Powers according to his guilty plea and conviction for time served and costs. For example, the order includes language that the "Court found the Defendant guilty." The judgment entry then recites that "[u]pon stipulated violations of * * * Treatment in Lieu of Conviction, it is hereby **ordered** that Defendant's Treatment in Lieu of Conviction is hereby **REVOKED.**" (Emphasis sic.) The order also includes this language: "it is the sentence of this Court that the Defendant pay the cost of this action and serve a term of **TWENTY -SIX (26) DAYS AT THE FRANKLIN COUNTY JAIL - CASE CLOSED FOR TIME SERVED**." (Emphasis sic.) Thereafter, within the same sentence indicating that Powers is required to pay court costs and serve jail time, the trial court stated, "**INTERVENTION IS CONSIDERED SUCCESSFUL AND COMPLETE AND THIS CASE IS HEREBY DISMISSED. COURT COSTS WAIVED. NO FINE IMPOSED.**" (Emphasis sic.)

{¶ 15} The state argues that, if the trial court's judgment entry is viewed as a dismissal or as a conviction and sentencing entry, it is entitled to appeal as of right. That is, if the trial court's order is viewed as a dismissal, the state argues that it is entitled to appeal, because the order would constitute a "decision [that] grants a motion to dismiss all or any part of an indictment, complaint, or information." R.C. 2945.67(A). Additionally, the state argues that, if the trial court's order is viewed as constituting a conviction and sentence, the state is entitled to appeal because the sentence is contrary to law. R.C. 2953.08(B)(2). Finally, the state argues that it is entitled to appeal in case No. 15AP-424 regardless of how the intervention order is characterized, because the final judgment entry in 15AP-424 re-characterizes the judgment entry as a termination of intervention in lieu of treatment and waives any disability through sealing Powers' record pursuant to R.C. 2953.32 through 2953.36, and the state always enjoys an appeal as of right from sealing orders. R.C. 2951.041(E).

{¶ 16} We acknowledge that when a court sua sponte grants dismissal, the requirements of R.C. 2945.67(A) granting the state an appeal as of right may be satisfied.

In re S.J., 106 Ohio St.3d 11, 2005-Ohio-3215 ¶ 13 ("Here, the juvenile court dismissed the murder charge and amended the felony-murder charge on its own motion. This dismissal is the equivalent of a 'decision grant[ing] a motion to dismiss' under R.C. 2945.67(A). *State v. Ryan* (1984), 17 Ohio App.3d 150, 151, 17 OBR 250, 478 N.E.2d 257."). Concurrently, however, we also recognize that we have previously held that the state does not have an appeal as of right from a termination of intervention in lieu, because that is not equivalent to a "decision [that] grants a motion to dismiss all or any part of an indictment, complaint, or information." R.C. 2945.67(A); *State v. Tully*, 10th Dist. No. 14AP-740, ¶ 12 (Dec. 16, 2014) (memorandum decision).

{¶ 17} While the trial court dismissed the case, it did so after making stipulated findings that Powers had not complied with the terms of his intervention in lieu plan, "revoking" his status. The trial court thereafter appears to have "sentenced" Powers for time served and thereafter modified sentence through an intervention in lieu analysis, dismissing Powers' case, and by separate entry, sealing Powers' record of "conviction." The trial court's sealing of Powers' criminal records occurred pursuant to R.C. 2951.041 and not by a separate civil action or a separate postconviction action pursuant to R.C. 2953.31 et seq.

{¶ 18} To begin our analysis of the case now under review, we must adhere to the simple analysis that a trial court speaks through its entry.

> First, a court speaks only through its journal entries. *State ex rel. Worcester v. Donnellon*, 49 Ohio St.3d 117, 118, 551 N.E.2d 183 (1990). Neither the parties nor a reviewing court should have to review the trial court record to determine the court's intentions. Rather, the entry must reflect the trial court's action in clear and succinct terms.

Infinite Sec. Solutions, L.L.C. v. Karam Properties II, Ltd., 143 Ohio St.3d 346, 2015-Ohio-1101, ¶ 29. To the extent that the trial court's entry resulted in conflicting legal judgments, we find that the trial court, speaking through its judgment entry, (1) found that Powers had not met the requirements of his treatment in lieu plan and "revoked" his intervention in lieu (using language similar to revoking community control or probation), (2) imposed a sentence of 26 days and found that time had been served, in addition to requiring the payment of court costs, similar to a sentence on a revocation hearing, and (3) inconsistently found that "intervention was successful" and dismissed the case (presumably pursuant to R.C. 2951.041(E)), purporting to activate R.C. 2951.041(E) and

thereby the statutes relating to the sealing of records pursuant to R.C. 2953.32 to 2953.36. Most simply put, it appears that in the same judgment entry the trial court found Powers' participation in intervention in lieu to be both unsuccessful and successful. Having characterized the "matter of judgment" our task at hand is to determine our jurisdiction in response to Powers' motion.

EXAMINING THE UNDERLYING OFFENSE

{¶ 19}Reviewing the underlying charge in Powers' case, he was indicted for a single fifth-degree felony count of drug possession. As his only offense, the trial court, under non-intervention in lieu circumstances, was required (after considering certain sentencing factors) to either sentence him up to one year in prison or sentence him to at least one year of community control. R.C. 2929.13(B)(1)(a). In any event, a prison sentence was not presumed. Upon having "revoked" Powers' intervention in lieu status, the trial court acknowledged that Powers had already spent two years on an intervention plan and had spent some time in jail. In sentencing Powers upon "revoking" his participation in intervention in lieu, the trial court appeared to give Powers some credit for his time spent in the program and in jail (for violating the terms of his plan), and imposed court costs when it "revoked" his intervention in lieu status.

{¶ 20}Thereafter, the trial court seemed to pivot on the word "complete" to hold that "**INTERVENTION IS CONSIDERED SUCCESSFUL *AND COMPLETE* AND THIS CASE IS HEREBY DISMISSED.**" (Emphasis added.) According to the plain terms of the trial court's entry in case No. 15AP-422, the only "sentence" imposed by the trial court was for time served for unsuccessful completion of intervention in lieu of conviction. That trial court can be said to have modified its prior "sentence" and converted it to successful completion of treatment in lieu of conviction, entering the second judgment entry in case No. 15AP-424, occurring not pursuant to R.C. 2953.31 et seq., but rather, pursuant to the self-implementing sealing of records provisions of R.C. 2951.041(E). The trial court's entry essentially allowed Powers to be reinstated to intervention in lieu for the purpose of successfully dismissing his case.

{¶ 21}In determining the nature of the state's appeal rights under R.C. 2945.67(A) or 2953.08(B) under these circumstances, we look to the legislature's rules of statutory construction:

> When a *special provision* is made in a *remedial law* as to service, pleadings, competency of witnesses, *or in any other*

> *respect inconsistent with the general provisions of sections of the Revised Code relating to procedure in the court of common pleas and procedure on appeal, the special provision shall govern*, unless it appears that the provisions are cumulative.

(Emphasis added.) R.C. 1.12.

> The distinction between substantive and remedial statutes can be difficult to define, as a statute often contains attributes of both. Generally, though, the Ohio Supreme Court has found a statute to be substantive if it impairs or takes away vested rights, affects an accrued substantive right, imposes new or additional burdens, duties, obligations or liabilities as to a past transaction, creates a new right, or gives rise to or takes away the right to sue or defend actions at law. *Van Fossen v. Babcock & Wilcox Co.* (1988), 36 Ohio St.3d 100, 107, 522 N.E.2d 489. On the other hand, "remedial laws are those affecting only the remedy provided." Id. *Laws of a remedial nature are often characterized as those that provide rules of practice, courses of procedure, methods of review, or a new or more appropriate remedy.* Id. at 108; 522 N.E.2d 489; *In re Thompson* (Apr. 26, 2001), Franklin App. No. 00AP-1358. *Thus, a remedial law may affect the procedure by which a right is enforced, but it should not affect the right itself. Van Fossen*, supra, at 108; 522 N.E.2d 489.

(Emphasis added.) *Heyman v. Heyman*, 10th Dist. No. 05AP-475, 2006-Ohio-1345, ¶ 12. R.C. 2945.67 does not remove the rights of the state to appeal; that is, it is not a substantive law. Rather, as a remedial law, it simply provides how the state's appeals in criminal matters must be exercised—by right or with leave. When R.C. 2945.67 is applied in the context of R.C. 2951.041, a substantive law, the remedial statute governs.[1] R.C. 2945.67(A) must be strictly construed:

> 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*

[1] It follows that intervention in lieu is substantive as opposed to remedial from the standpoint of statutory construction pursuant to R.C. 1.12. Moreover, if intervention in lieu were a relatively new procedure, there may become basis to consider that the trial court's judgment was "contrary to law" either under R.C. 2945.67 or 2953.08. However, intervention in lieu became effective in July 1976, and the General Assembly has never acted to expand the state's ability to appeal as of right to cases resolved by intervention in lieu. Am.Sub.H.B. No. 565, 136 Ohio Laws, Part II, 2311, 2332-39. In addition, the state cites no case in which the state was permitted to appeal an intervention in lieu without first seeking leave.

> *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*.

(Emphasis added.) R.C. 2945.67 specifies which matters may be appealed as of right, and we may not judicially expand these terms. Moreover, other matters not subject to an appeal as of right may be appealed with leave from the court of appeals.

{¶ 22} Applying R.C. 1.12 to R.C. 2953.08(B), we find the same analysis to be apropos in that R.C. 2953.08(B) is a remedial statute providing the state with appeal rights and that also must be strictly construed. It provides:

> [A] prosecuting attorney, a city director of law, village solicitor, or similar chief legal officer of a municipal corporation, or the attorney general, if one of those persons prosecuted the case, *may appeal as a matter of right a sentence imposed upon a defendant who is convicted of or pleads guilty to a felony or, in the circumstances described in division (B)(3) of this section the modification of a sentence imposed upon such a defendant, on any of the following grounds:*
>
> (1) *The sentence did not include a prison term despite a presumption favoring a prison term for the offense for which it was imposed*, as set forth in section 2929.13 or Chapter 2925. of the Revised Code.
>
> (2) *The sentence is contrary to law*.
>
> (3) *The sentence is a modification under section 2929.20 of the Revised Code of a sentence that was imposed for a felony of the first or second degree.*

(Emphasis added.) R.C. 2953.08(B). We cannot find that the state has a right to appeal under R.C. 2953.08(B) without leave, because (1) the felony for which Powers was sentenced did not carry with it a presumed prison term under R.C. 2929.13, (2) the

sentence imposed upon revocation of treatment in lieu was not contrary to law, and (3) even if we consider the dismissal of the "revocation" of Powers' treatment in lieu participation to be a sentence modification, it is not a modification under R.C. 2953.08(B)(3) for a first- or second-degree felony pursuant to R.C. 2929.20 (judicial release).

{¶ 23} Even viewing the trial court's judgment entry as a modification of sentence that is contrary to law, we cannot find a basis to support the state's argument that it may appeal the trial court's judgment entry in case No. 15AP-422 as a matter of right pursuant to R.C. 2953.08(B)(2). In regard to a R.C. 2953.08(B)(2) argument concerning the modification of a sentence that is not a first- or second-degree felony judicial release modification, the Supreme Court has opined that strict construction prevents such an application. *State v. Cunningham*, 113 Ohio St.3d 108, 2007-Ohio-1245, ¶ 27 ("Since it is our responsibility to interpret the law, and not to make it, we are constrained by the language used in R.C. 2953.08 to conclude that the General Assembly has granted the prosecuting attorney a limited right to appeal the modification of a sentence granting judicial release for a felony of the first or second degree."). Accordingly, we find no basis for the state to appeal as of right the judgment entry in case No. 15AP-422, and this is jurisdictional. *State ex rel. Steffen v. Court of Appeals, First Appellate Dist.*, 126 Ohio St.3d 405, 2010-Ohio-2430, ¶ 35.

15AP-424

{¶ 24} Powers does not directly request that we dismiss the appeal in case No. 15AP-424. However, we lack jurisdiction to consider an appeal where the state has no right to appeal. *Id.* Because the question at hand is one of jurisdiction, we also sua sponte consider whether the state should have sought leave to appeal in case No. 15AP-424 and if, as a result of having failed to do so, we lack jurisdiction to consider the case. *See, e.g.*, *In re A.E.*, 10th Dist. No. 08AP-59, 2008-Ohio-4552, ¶ 7.

{¶ 25} The state has a right to appeal expungements and sealing judgments, because such cases are civil in nature, and thus, the same restrictions on the state's right to appeal such matters do not apply as they would in the criminal context. *State v. Bissantz*, 30 Ohio St.3d 120, 121 (1987); *In re Proffitt*, 10th Dist. No. 06AP-363, 2006-Ohio-6642, ¶ 3; *State v. C.A.*, 10th Dist. No. 14AP-738, 2015-Ohio-3437, ¶ 17. However, a simple criminal/civil action characterization analysis falls short of the specific facts and circumstances presented by the state's appeal of this trial court's judgment entry.

{¶ 26} Intervention in lieu is an outcome in a criminal case and includes record sealing as part of the process. R.C. 2951.041(E) provides that following completion of intervention in lieu, a court "may order the sealing of records related to the offense in question in the manner provided in" the sealing statutes. *See State v. Niesen-Pennycuff*, 132 Ohio St.3d 416, 2012-Ohio-2730, ¶ 18-23. In addition, courts have authority to seal their own records in unusual or exceptional circumstances. *Schussheim v. Schussheim*, 137 Ohio St.3d 133, 2013-Ohio-4529, ¶ 3, 17. We do not, at this juncture, offer an opinion on the propriety of sealing the records in this case. But the record is clear that the trial court ordered Powers' records sealed within the original criminal case, not as part of a separate civil expungement/sealing proceeding as contemplated in R.C. Chapter 2953 from which the state would have enjoyed an appeal as of right. In other words, the trial court appears to have ordered the sealing within the criminal case by relying on its inherent powers or division (E) of R.C. 2951.041 that allow sealing "in the manner provided" in the sealing statutes. *Id.*; *Niesen-Pennycuff* at ¶ 18-23. Therefore, the principle that operates to permit an appeal in *Bissantz* and its progeny (that the appeal is from a civil rather than a criminal proceeding) does not apply here. While the action of the trial court is unconventional and does not neatly track R.C. 2951.041, we are jurisdictionally constrained from addressing the state's concerns with it, because the state did not seek leave to appeal. We lack jurisdiction to consider case No. 15AP-424.

III. CONCLUSION

{¶ 27} Because the state had no right to appeal without leave and did not timely seek leave, we lack jurisdiction to consider these consolidated appeals. We hereby grant appellee's motion and dismiss the state's consolidated appeals in case Nos. 15AP-422 and 15AP-424.

Motion to dismiss granted;
appeals dismissed.

TYACK, J., concurs.
LUPER SCHUSTER, J., dissents.

LUPER SCHUSTER, J., dissenting.

{¶ 28} Because I believe the state had the right to appeal and did not need to seek leave to appeal, I respectfully dissent.

{¶ 29} Though I agree with the majority that a court speaks through its entries, I do not agree with the majority's characterization of the judgment entry in case No. 15AP-422. Indeed, the judgment entry contains internal contradictions. However, the entry in case No. 15AP-424 is explicit that the trial court deemed the completion of intervention in lieu of conviction successful and dismissed the case. Thus, I would construe the judgment entry in case No. 15AP-422 as finding that Powers successfully completed intervention in lieu of conviction and dismissing the case.

{¶ 30} The majority notes that a court's dismissal of a criminal charge on its own motion is the equivalent of a decision granting a motion to dismiss under R.C. 2945.67(A), giving the state an appeal as of right from the dismissal. *See State ex rel. Steffen v. Court of Appeals, First Appellate Dist.*, 126 Ohio St.3d 405, 2010-Ohio-2430, ¶ 31, citing *In re S.J.*, 106 Ohio St.3d 11, 2005-Ohio-3215, ¶ 13. The majority then cites a memorandum decision from this court, *State v. Tully*, 10th Dist. No. 14AP-740 (Dec. 16, 2014), for the proposition that the state does not have an appeal as of right from a termination of intervention in lieu of conviction. I believe the majority's reliance on *Tully* is misplaced. In *Tully*, the state sought an appeal as of right from the trial court's judgment terminating the defendant *unsuccessfully* from intervention in lieu of conviction. *Tully* at ¶ 1. Here, the trial court stated in both the April 8, 2015 judgment entry and the April 9, 2015 entry that Powers *successfully* completed the intervention in lieu of conviction. Additionally, this court was explicit in *Tully* that the state did not have an appeal as of right in that case because the trial court, in terminating the unsuccessful intervention in lieu of conviction, did not dismiss the indictment. *Tully* at ¶ 13. Instead, we expressly noted that the indictment in *Tully* "remain[ed] in existence" after the trial court's judgment terminating the intervention. *Id*. at ¶ 13. Because I would construe the judgment entry in this case as dismissing the case, I find reliance on *Tully* inapposite.

{¶ 31} Considering together the judgment entry in case No. 15AP-422 and the entry in case No. 15AP-424, it seems clear the trial court intended to dismiss the case based on a successful completion of intervention in lieu of conviction. Thus, I would conclude that the state has an appeal as of right under R.C. 2945.67(A) because the trial

court's judgment entry is the equivalent of a decision granting a motion to dismiss. Accordingly, I would deny Powers' motion to dismiss the state's appeal in case No. 15AP-422.

{¶ 32} Similarly, I disagree with the majority's position that the state does not have an appeal as of right from the trial court's entry in case No. 15AP-424.

{¶ 33} The majority acknowledges that the state has an appeal as of right in expungements and sealing judgments. *See State v. Bissantz*, 30 Ohio St.3d 120, 121 (1987). The majority then concludes, however, that because expungements are civil in nature and the expungement here did not occur as the result of a separately initiated civil proceeding, the state does not enjoy an appeal as of right due to this procedural irregularity.

{¶ 34} The intervention in lieu of conviction statute specifically allows for the sealing of records related to the offense following successful completion of intervention in lieu of conviction. In pertinent part, R.C. 2951.041(E) provides that if the court finds the offender successfully completes the intervention plan, the court shall dismiss the proceedings, "and the court may order the sealing of records related to the offense in question in the manner provided in sections 2953.31 to 2953.36 of the Revised Code." R.C. 2953.31 to 2953.36 are commonly known as the expungement statutes. Thus, the statue governing intervention in lieu of conviction expressly contemplates sealing of records pursuant to the expungement statutes.

{¶ 35} *State v. Niesen-Pennycuff*, 132 Ohio St.3d 416, 2012-Ohio-2730, which the majority cites, explains that the phrase "in the manner provided" as used in R.C. 2951.041, the intervention in lieu of conviction statute, "is less prescriptive and more in the nature of guidance than a command," meaning "trial courts may refer to [the expungement statutes] for guidance in matters of procedure but are not bound to follow those provisions" when considering applications to seal the record of intervention in lieu of conviction offenders. *Id*. at ¶ 20, 22. Though *Niesen-Pennycuff* affords more discretion to trial courts in sealing the records of intervention in lieu of conviction offenders than the expungement statutes otherwise proscribe, I interpret *Niesen-Pennycuff* to mean that the trial court's authority to seal the records in intervention cases flows from R.C. 2951.041 and the expungement statutes. I do not believe that the civil/criminal distinction changes the general principle that the sealing occurred because of the relationship between the intervention statute and the expungement statutes.

Accordingly, because the trial court acts under the umbrella of the expungement statutes when it seals the record of an intervention in lieu of conviction offender, and because there is no dispute that the state enjoys an appeal as of right to appeal expungements, I would conclude that the state has an appeal as of right in case No. 15AP-424. Therefore, I do not agree with the majority's sua sponte dismissal of the state's appeal in case No. 15AP-424.