

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
ASHTABULA COUNTY, OHIO**

STATE OF OHIO,	:	MEMORANDUM OPINION
Plaintiff-Appellee,	:	
- vs -	:	CASE NO. 2010-A-0037
MICHAEL RIVERA,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 2008 CR 390.

Judgment: Appeal dismissed.

Thomas L. Sartini, Ashtabula County Prosecutor, Ashtabula County Courthouse, 25 West Jefferson Street, Jefferson, OH 44047-1092 (For Plaintiff-Appellee).

Malcolm Stewart Douglas, 525 Lake Avenue, Ashtabula, OH 44004 (For Defendant-Appellant).

TIMOTHY P. CANNON, J.

{¶1} On August 9, 2010, appellant, Michael Rivera, by and through counsel, filed a notice of appeal from a July 12, 2010 entry of the Ashtabula County Court of Common Pleas. In that entry, the trial court denied appellant's motion to disqualify the entire prosecuting attorney's office and ordered that the matter be scheduled for trial to jury on September 28, 2010, at 9:00 a.m.

{¶2} According to Section 3(B)(2), Article IV of the Ohio Constitution, a judgment of a trial court can be immediately reviewed by an appellate court only if it

constitutes a “final order” in the action. *Germ v. Fuerst*, 11th Dist. No. 2003-L-116, 2003-Ohio-6241, at ¶3. If a lower court’s order is not final, then an appellate court does not have jurisdiction to review the matter and the matter must be dismissed. *Gen. Acc. Ins. Co. v. Ins. of N. Am.* (1989), 44 Ohio St.3d 17, 20. For a judgment to be final and appealable, it must satisfy the requirements of R.C. 2505.02 and if applicable, Civ.R. 54(B).

{¶3} Pursuant to R.C. 2505.02(B), there are seven categories of “final orders,” and if a trial court’s judgment satisfies any of them, it will be considered a “final order” which can be immediately appealed and reviewed by a court of appeals.

{¶4} R.C. 2505.02(B) states, in part, that:

{¶5} “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:

{¶6} “(1) An order that affects a substantial right in an action that in effect determines the action and prevents a judgment;

{¶7} “(2) An order that affects a substantial right made in a special proceeding or upon a summary application in an action after judgment;

{¶8} “(3) An order that vacates or sets aside a judgment or grants a new trial;

{¶9} “(4) An order that grants or denies a provisional remedy and to which both of the following apply:

{¶10} “(a) The order in effect determines the action with respect to the provisional remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy.

{¶11} “(b) The appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action.

{¶12} “(5) An order that determines that an action may or may not be maintained as a class action;

{¶13} “(6) An order determining the constitutionality of any changes to the Revised Code ***;

{¶14} “(7) An order in an appropriation proceeding ***.”

{¶15} The court in *Freer v. Loma Ent., Inc.* (Dec. 30, 1999), 7th Dist. No. 98 CA 194, 1999 Ohio App.LEXIS 6422, held that an order denying a motion for disqualification of counsel is not an order that determines an entire action, vacates or sets aside a judgment, grants a new trial, or determines class action status, thereby making R.C. 2505.02(B)(1), (3), and (5) inapplicable. Additionally, the recent amendments to the statute, R.C. 2505(B)(6) and (7), having to do with the constitutionality of any changes to the Revised Code and appropriation proceedings, do not apply to the present matter.

{¶16} Furthermore, regardless of whether a substantial right has been affected in this case, the order was not made after judgment under R.C. 2505.02(A)(2). Moreover, the order was not made in a special proceeding as the underlying criminal action does not fit its definition as set forth in R.C. 2505.02(B)(2). See *State v. Saadey* (June 30, 2000), 7th Dist. No. 99 CO 49, 2000 Ohio App.LEXIS 3552, at ¶7; *State v. Williams*, 6th Dist. No. L-03-1070, L-03-1071, 2003-Ohio-2533, at ¶21.

{¶17} Therefore, in order to be final and immediately reviewable by this court, it would have to be determined that the denial of the motion to disqualify is a provisional remedy under R.C. 2505.02(A)(3). In *Freer*, at ¶7, the court held that “*** a motion for disqualification of counsel is ancillary to the main action and thus constitutes a provisional remedy as defined by R.C. 2505.02(A)(3).”

{¶18} The next step in the provisional remedy analysis would be to examine whether the requirements of R.C. 2505.02(B)(4) have been satisfied. When a court rules on a motion for disqualification, the resulting order determines the action with respect to the motion and prevents a judgment in favor of the appealing party with respect to the motion. *Freer* at ¶8. Thus, we concede that the order in the present case satisfies the first prong of provisional remedy. The only remaining issue to examine is whether the second prong of provisional remedy, that the appealing party would not be afforded a meaningful or effective remedy by an appeal after the final judgment, which in this case would be appellant’s jury trial and any subsequent judgment entry of conviction and sentence, has been satisfied.

{¶19} In concluding that the denial of a motion to disqualify is not a final appealable order and effectively reviewable after final judgment, the *Freer* court held that “any allegation of damage to appellants’ defense can be rectified. For instance, if appellants establish that they were prejudiced by the court’s refusal to disqualify appellees’ counsel, then appellants may receive a new trial. As a result, a decision in favor of appellants on an appeal after final judgment will not be a hollow victory.” *Id.* at ¶9. In addition, “an immediate appeal is not mandated to afford appellants a meaningful

or effective review. Id. at ¶10. See, also, *Bernbaum v. Silverstein* (1980), 62 Ohio St.2d 445.

{¶20} Accordingly, since the trial court's judgment entry denying appellant's motion to disqualify is not a final appealable order, we lack jurisdiction.

{¶21} Appeal dismissed.

MARY JANE TRAPP, P.J.,

DIANE V. GRENDALL, J.,

concur.