

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

STATE OF OHIO,	:	MEMORANDUM OPINION
Plaintiff-Appellant,	:	
- VS -	:	CASE NO. 2012-A-0001
RICHARD BRYSKI,	:	
Defendant-Appellee.	:	

Criminal Appeal from the Ashtabula County Court of Common Pleas, Case No. 2011 CR 435.

Judgment: Appeal dismissed.

Thomas L. Sartini, Ashtabula County Prosecutor, and *Shelley M. Pratt*, Assistant Prosecutor, Ashtabula County Courthouse, 25 West Jefferson Street, Jefferson, OH 44047-1092 (For Plaintiff-Appellant).

Joseph A. Humpolick, Ashtabula County Public Defender, Inc., 4817 State Road, Suite 202, Ashtabula, OH 44004-6927 (For Defendant-Appellee).

THOMAS R. WRIGHT, J.

{¶1} This court issued a judgment entry requesting that the parties submit briefs on the issue of our authority to hear the merits of the underlying matter. Both parties timely submitted briefs in support of their respective positions. For the reasons set forth below, this court holds that this appeal must be dismissed.

{¶2} To summarize briefly, the state filed a notice of appeal from an adverse ruling on appellee, Richard Bryski's, motion to suppress evidence one day *after* the trial

court granted the *state's* Crim. R. 48(A) motion to dismiss the case. This sequence raised the issue of whether a current and pending controversy remains for our consideration.

{¶3} In its brief, the state maintains that a current and pending controversy still exists because if this court should determine that the trial court erred in its ruling and the state prevails on appeal, the state would then have the necessary evidence to prove that appellee was in possession of cocaine, and thus, be able to resume its prosecution of appellee. Appellee counters that when the state sought and was granted dismissal of the case after the adverse ruling on appellee's motion to suppress, there was no longer a viable suppression ruling from which to appeal, and therefore, no pending case to which this court could remand for further proceedings. We agree with appellee.

{¶4} In *State v. Manns*, 5th Dist. No. 11-CA-28, 2012-Ohio-234, the state filed a motion to dismiss one of the counts in the indictment against appellant, and pursuant to judgment entry, that count was dismissed without prejudice because the state was satisfied with appellant's convictions on two other counts. *Id.* at ¶4. Appellant filed an appeal from his conviction and sentence, and the appellate court affirmed. *Id.* at ¶5; *see also State v. Manns*, 5th Dist. No. 08-CA-101, 2009-Ohio-3262. Subsequently, appellant filed a motion seeking to be retried on the dismissed count. *Id.* at ¶6. In its entry overruling appellant's motion for retrial, the court stated that "[t]here is no such charge pending." *Id.* at ¶7. "When a criminal case is dismissed, *it is over* – except in the case where the dismissal is appealed. This dismissal was not appealed ***." (Emphasis sic). *Id.* at ¶30. "In the case at bar, any retrial of appellant upon the dismissed charge[d] (sic) would necessitate a new indictment and therefore constitute a new proceeding." *Id.* at ¶32.

{¶5} In support of its above pronouncement, the *Manns* court quoted *Douglas v. Allen*, 56 Ohio St. 156, 159 (1897), wherein the Ohio Supreme Court stated “that a prosecution ended by a [dismissal] has the same effect as one ended by an acquittal – that ‘there can thereafter be no conviction of the accused *in that proceeding*.’” *Manns*, 2012-Ohio-234, at ¶29, quoting *Douglas, supra*, at 159.

{¶6} Applying the foregoing authorities to the case at hand, once the state sought and obtained dismissal of the underlying case against appellant, the dismissed case no longer existed, and any retrial would require a new indictment and an entirely new proceeding. Succinctly stated, the case was over upon dismissal as a result of the state’s motion to dismiss. The case cannot simply be resumed if this court were to reverse the ruling on appellee’s suppression motion.

{¶7} We further note that, as pointed out by appellee, the outcome would be different if the trial court had dismissed the case on its own motion prior to the state’s timely filing of a notice of appeal pursuant to Crim. R. 12(K) and R.C. 2945.67 from the adverse ruling on appellee’s motion to suppress. “[R.C. 2945.67] provides the state with a *substantive* right of appeal where the trial court has ruled adversely to its position with respect to [a motion to suppress].” (Emphasis sic). *City of Toledo v. Fogel*, 20 Ohio App.3d 146, 147 (6th Dist.1985). Thus, if the trial court had interfered with the state’s right to appeal by dismissing the case prior to the expiration of the seven-day time limit specified in Crim. R. 12(K), the state could have appealed that dismissal and argued that a pending and justiciable controversy exists. However, that set of facts is not before us now.

{¶8} Based on the foregoing, we agree with appellee that a present and justiciable controversy does not exist because the case was “over” when the trial court

granted the state's motion to dismiss. See *Manns*, 2012-Ohio-234, at ¶30. Accordingly, any opinion issued would be merely advisory. As this court has previously recognized, "Ohio courts do not render advisory opinions." *Cafaro Leasing Co., v. K-M-I, Assocs.* 11th Dist. No. 2006-T-0115, 2007-Ohio-6723, ¶27, quoting *R.A.S. Entertainment, Inc. v. Cleveland*, 130 Ohio App.3d 125, 728 (8th Dist.1998) (Internal citations omitted). Courts of appeal are not required to give mere advisory opinions or to rule on questions of law which cannot affect the matters in issue in the case. See *Ohio Patrolmen's Benevolent Assn. v. McFaul*, 144 Ohio App.3d 311, 314 (8th Dist.2001).

{¶9} Furthermore, despite the state's Crim.R. 12(K)(2) certification that the adverse ruling on appellee's motion to suppress has rendered its proof with respect to the *pending* charge so weak that there is no reasonable possibility of effective prosecution, the state cannot fulfill that requirement because no "pending charge" exists due to the trial court's dismissal of the case upon the state's motion prior to the appeal. Accordingly, the state cannot meet this requirement for taking an appeal from an order suppressing evidence.

{¶10} Pursuant to this court's finding that it does not have the authority to hear the merits of this appeal, the appeal is hereby dismissed.

TIMOTHY P. CANNON, P.J.,

MARY JANE TRAPP, J.,

concur.