[Cite as *State v. Hensley*, 2002-Ohio-1887.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO :

Plaintiff-Appellant : C.A. CASE NO. 18886

vs. : T.C. CASE NO. 01TRC02431

ROBERT M. HENSLEY :

Defendant-Appellee :

. . . . . .

O P I N I O N

Rendered on the 19th day of April, 2002.

. . . . . .

Mathias H. Heck, Jr., Pros. Attorney; Claudia J. Turrell, Asst. Pros. Attorney, 129 W. Main Street, New Lebanon, Ohio 45345, Atty. Reg. No. 0016482
Attorney for Plaintiff-Appellant

Robert M. Hensley, 5542 Sulphur Springs, Brookville, Ohio 45309
Defendant-Appellee, *pro se*

. . . . . .

GRADY, J.

{¶1} This is an appeal by the State from a judgment entered by the Montgomery County Area One District Court, finding Defendant, Robert Hensley, not guilty of a charge of operating a motor vehicle while under the influence of alcohol.

{¶2} On April 26, 2001, at 10:45 p.m., Sgt. Wright of the Ohio Highway Patrol observed Defendant's vehicle traveling westbound on I-70 in a construction zone near S.R.

49. Defendant's vehicle was weaving badly within his lane of travel and it crossed over the marked line dividing the lanes of travel one time. Defendant's vehicle was also obstructing traffic due to its very slow speed, five to ten miles per hour. Sgt. Wright initiated a traffic stop, and approached Defendant's vehicle.

{¶3} Sgt. Wright could smell an odor of alcohol emitting from Defendant's vehicle. Sgt. Wright asked Defendant to perform three field sobriety tests; the horizontal gaze nystagmus test, the walk and turn test, and the one leg stand test. Defendant failed all three tests, and was arrested for driving under the influence of alcohol. Once inside the patrol car, Sgt. Wright noticed a strong odor of alcohol whenever Defendant spoke. Defendant was transported to the Dayton Patrol Post where he refused to take a breath test.

{¶4} Defendant was charged by traffic citation with operating a motor vehicle while under the influence of alcohol, R.C. 4511.19(A)(1), and a marked lanes violation, R.C. 4511.33. On May 15, 2001, Defendant entered a no contest plea to both charges. After asking Defendant for an explanation of his conduct on the day in question, the trial court* stated: "This test of 0.000 tells me you weren't under the influence, so whatever may have been wrong with

*The record reflects that the Defendant, Robert M. Hensley, and the judge, Hon. James A. Hensley, Sr., are unrelated and never met prior to Defendant's appearance before Judge Hensley.

you, I guess you were exceptionally tired." The trial court found Defendant not guilty on the OMVI charge, but guilty of the marked lanes violation. The trial court assessed court costs against Defendant.

{¶5} On May 22, 2001, the State filed its notice of appeal to this court from the decision and entry entered by the trial court on May 15, 2001.

ASSIGNMENT OF ERROR

{¶6} "THE TRIAL COURT ERRED WHEN IT FOUND THE DEFENDANT NOT GUILTY OF THE VIOLATION OF R.C. 4511.19(A)(1) IN THAT IT WAS AN ABUSE OF DISCRETION TO FIND HENSLEY NOT GUILTY ON A NO CONTEST PLEA WHEN THE COMPLAINT CONTAINED SUFFICIENT ALLEGATIONS TO STATE AN OFFENSE."

{¶7} R.C. 4511.19(A)(1) is a misdemeanor offense. A defendant's plea of no contest to a misdemeanor offense "constitute(s) a stipulation that the judge or magistrate may make [a] finding of guilty or not guilty from the explanation of circumstances . . . " R.C.2937.07. That section otherwise provides that the court must call for the explanation from "the affiant or complainant or his representatives," that is, from the arresting officer or the prosecutor.

{¶8} The trial court failed to call for the explanation of circumstances that R.C. 2937.01 requires. If the arresting officer was present, he was not called upon. The transcript of the proceeding does not reflect that a legal representative of the State was even present. That is possibly explained by the fact that the notice filed May 1,

2002, setting the proceeding at which Defendant entered his no contest plea, bears no instruction to serve a copy on the prosecuting attorney or arresting officer.

{¶9} The court did call on the Defendant for an explanation of the circumstances leading to his OMVI charge. The Defendant denied that he'd consumed any alcohol at all. That prompted the court to examine the "BAC Datamaster Evidence Ticket" in the file, which reflected no finding that Defendant had any concentration of alcohol in his breath. On that basis, the court concluded that Defendant could not have been under the influence of alcohol and it acquitted him on the OMVI charge.

{¶10} The fact that the BAC Datamaster Evidence Ticket reflects no alcohol content in the Defendant's breath is easily explained; the printed notation on the BAC Datamaster Evidence Ticket states that the test was "Refused." The Defendant's refusal is further reported in the "Test Report Form" the arresting officer filed, as well as in his written narrative. The court apparently overlooked those reports. The court clearly misread the "BAC Datamaster Evidence Ticket."

{¶11} We indulge in the presumption of regularity to conclude that the trial court's failure to understand the plain meaning of the materials in its file was an inadvertent failure. However, we cannot condone the court's decision to adjudicate the Defendant's guilt or innocence on his plea absent the presence and participation of the

prosecuting attorney. Had she been present, the prosecutor would surely have made the court aware that the Defendant refused the test, avoiding the court's misunderstanding of that fact.

{¶12} The prosecutor states in her brief on appeal that "no contest pleas . . . are routinely accepted (by this trial court) without the prosecutor present." (Brief, p. 5). The practice, if it exists, is wholly improper. It suggests a lack of the diligence and impartiality that Canon 3 of the Code of Judicial Conduct requires of a judge. That same Canon, at paragraph (D)(1), requires another judge who has knowledge of its violation "to report the violation to a tribunal or other authority empowered to investigate or act upon the violation." Further instances of this kind will require us to discharge our reporting responsibilities.

{¶13} The State asks us to reverse and vacate Defendant's acquittal because the trial court abused its discretion when it entered that judgment on the record before it. We agree that it did. However, we must first determine whether we have jurisdiction to review the State's appeal from that judgment.

{¶14} The State may appeal in a criminal case only when a statute gives it express authority to do so. Ohio Constitution, Article IV, Section 3(B)(2); *State ex rel Leis v. Kraft* (1984), 10 Ohio St.3d 34; *State v. Rogers* (1996), 110 Ohio App.3d 106. That authority for the State to appeal is set out in R.C. 2945.67, which provides in relevant part:

{¶15} "(A) 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 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."

{¶16} A judgment of acquittal by the trial judge in a criminal case is a final verdict within the meaning of R.C. 2945.67(A), which is not appealable by the State either as a matter of right, or by leave to appeal. ***State v. Keeton*** **(1985), 18 Ohio St.3d 379;** ***State ex rel. Yates v. Court of Appeals of Montgomery County*** **(1987), 32 Ohio St.3d 30. In cases resulting in a judgment of acquittal, however, the prosecution may nevertheless appeal, by leave of court, evidentiary rulings and rulings on issues of law, because those rulings fall within the language of "any other decision, except the final verdict," in R.C. 2945.67(A).** ***State v. Arnett*** **(1986), 22 Ohio St.3d 186;** ***State v. Bistricky*** **(1990), 51 Ohio St.3d 157. However, because appeals from such rulings do not fall within one of the four categories where the State is granted an appeal as of right by R.C. 2945.67, in order to prosecute such appeals the State must obtain leave of the appellate court, follow the procedures outlined in** ***State v. Wallace*** **(1975), 43 Ohio**

St.2d 1, and comply with App.R. 5. *Bistricky, supra; State v. Perroni* (June 26, 1998), Lake App. No. 96-L-107, unreported; R.C. 2945.67(A).

{¶17} In this case the State is not appealing an evidentiary ruling or a ruling on some issue of law. Rather, as the State concedes in its appellate brief, it is appealing "the finding of not guilty on the driving under the influence charge." What the State seeks in this appeal is a finding by this court that the trial court abused its discretion in finding Defendant not guilty of OMVI, given Defendant's no contest plea to that charge and the evidence before the trial court at that time. In other words, the State appeals from the judgment of acquittal in this case, not an evidentiary ruling by the court. That is clearly an impermissible appeal of the final verdict, expressly prohibited by R.C. 2945.67(A). *Keeton, supra; Yates, supra; State v. Rogers, supra.*

{¶18} Furthermore, in any event, in prosecuting this appeal the State failed to obtain leave of this court, failed to follow the procedures outlined in *State v. Wallace, supra* and failed to comply with App.R.5. *Bistricky, supra; Perroni, supra.*

{¶19} Accordingly, this court lacks jurisdiction to hear this appeal, and the appeal is dismissed.

FAIN, J. and YOUNG, J. concur.

Copies mailed to:

Claudia J. Turrell, Esq.
Robert M. Hensley
Hon. James A. Hensley, Sr.