

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
ERIE COUNTY

State of Ohio

Court of Appeals No. E-10-009

Appellant

Trial Court No. 2007-CR-716

v.

Reginald L. Agee

DECISION AND JUDGMENT

Appellee

Decided: March 30, 2010

* * * * *

Kevin J. Baxter, Erie County Prosecuting Attorney, and
Mary Ann Barylski, Assistant Prosecuting Attorney, for appellant.

Christopher M. Marcinko, for appellee.

* * * * *

PER CURIAM

{¶ 1} This matter is before the court sua sponte. On February 23, 2010, plaintiff-appellant, state of Ohio, filed a notice of appeal from the February 18, 2010 judgment of

the Erie County Court of Common Pleas. In that judgment, the trial court granted the motion to suppress of defendant-appellee, Reginald Agee.

{¶ 2} The state may appeal trial court decisions as a matter of right in certain instances under R.C. 2945.67, which states in relevant part:

{¶ 3} "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 suppress evidence * * *."

{¶ 4} Specifically, Crim.R. 12(K) governs the state's appeal from a judgment granting a motion to suppress, which provides as follows:

{¶ 5} "When the state takes an appeal as provided by law from an order suppressing or excluding evidence, the prosecuting attorney *shall certify* that both of the following apply:

{¶ 6} "(1) the appeal is not taken for the purpose of delay;

{¶ 7} "(2) the ruling on the motion or motions has rendered the state's proof with respect to the pending charge so weak in its entirety that any reasonable possibility of effective prosecution has been destroyed.

{¶ 8} "The appeal from an order suppressing or excluding evidence *shall not be allowed unless the notice of appeal and the certification by the prosecuting attorney are filed* with the clerk of the trial court within seven days after the date of the entry of the

judgment or order granting the motion. Any appeal under this rule shall be prosecuted diligently." (Emphasis added.)

{¶ 9} Appellant filed its notice of appeal within seven days; however, it did not include the certification as required by Crim.R. 12(K).¹

{¶ 10} In determining the conditions under which an appellate court may entertain the state's appeal from a trial court judgment granting a motion to suppress evidence, the Supreme Court of Ohio has held:

{¶ 11} " * * * Crim.R. 12(J) has now formalized the procedure through which the state must represent that prosecution would be 'irretrievably foreclosed,' by requiring the prosecutor to certify 'that (1) the appeal is not taken for the purpose of delay; and (2) the granting of the motion has rendered the state's proof with respect to the pending charge so weak in its entirety that any reasonable possibility of effective prosecution has been destroyed.' Moreover, * * * this court held that the time limitation, diligent prosecution and recognizance provisions of Crim.R. 12(J), as well as the above certification, are valid, mandatory procedural requirements under Section 5(B), Article IV of the Ohio Constitution. * * *" *State v. Schmucker*, 11th Dist. No. 2008-P-0027, 2008-Ohio-1890, ¶ 11, quoting *State v. Buckingham* (1980), 62 Ohio St.2d 14, 16. See, also, *State v. Crockett*, 11th Dist. No. 2006-A-0023, 2206-Ohio-4040 (appeal of order granting motion to suppress dismissed for failure to follow Crim.R. 12(K)).

¹We note that on July 1, 2001, Crim.R. 12(J) was amended and is now denoted as Crim.R. 12(K). No other substantive changes were made. Due to this amendment, any Crim.R. 12(J) references made here are pursuant to Crim.R. 12(K).

{¶ 12} Since the state failed to file the procedurally mandated Crim.R. 12(K) certification in the present appeal, this court lacks jurisdiction to consider its appeal. Accordingly, the appeal is hereby dismissed, sua sponte, for appellant's failure to comply with Crim.R. 12(K). Appellant shall pay the costs of this appeal.

{¶ 13} It is so ordered.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Arlene Singer, J.

JUDGE

Thomas J. Osowik, P.J.

JUDGE

Keila D. Cosme, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: <http://www.sconet.state.oh.us/rod/newpdf/?source=6>.