

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

City of Toledo

Court of Appeals No. L-12-1015

Appellant

Trial Court No. TRC-11-15755

v.

Todd M. Pryll

DECISION AND JUDGMENT

Appellee

Decided: April 19, 2013

* * * * *

David L. Toska, City of Toledo Chief Prosecuting Attorney,
and Jimmie Jones, Assistant Prosecuting Attorney, for appellant.

Dennis P. Strong, for appellee.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} The city of Toledo appeals a judgment of the Toledo Municipal Court, journalized on January 11, 2012, that granted, in part, a motion in limine filed by appellee, Todd M. Pryll, in criminal proceedings brought against Pryll for driving while

under the influence of alcohol in violation of Toledo Municipal Code § 333.01(a)(1)(A). The charges arise out of Pryll's operation of a boat on July 17, 2011.

{¶ 2} The evidence at the hearing on the motion in limine disclosed that on July 17, 2011, while Pryll was operating his boat, a passenger fell from the boat and into the Maumee River. Pryll called for emergency assistance. After the Coast Guard responded to the scene of the incident, Pryll allegedly pulled his boat out of the water, hitched the boat to the back of his truck and left the scene. Toledo police stopped Pryll about a mile away in Toledo, on Manhattan Boulevard.

{¶ 3} The arresting police officer returned Pryll to the marina near the scene of the incident. Toledo police placed Pryll in an Ohio Department of Natural Resources' ("ODNR") boat to assist in an investigation into the boating accident. While he was on the boat, an ODNR officer conducted a field sobriety test of Pryll. The test was a horizontal gaze and nystagmus test and Pryll failed the test.

{¶ 4} The city brought charges against Pryll in Toledo Municipal Court for driving while under the influence of alcohol, in violation of Toledo Municipal Code § 333.01(a)(1)(A). On August 2, 2011, Pryll filed a request for the city to produce documents and things, including a request for the city to produce the set of keys allegedly taken from Pryll by firefighter Kathy Rickheim on the night of the incident. Pryll filed a motion to compel discovery on October 5, 2011, asserting that the city had failed to provide the material sought in the discovery request.

{¶ 5} At a pretrial hearing on October 31, 2011, the trial court ordered the city to produce all discovery materials by November 30, 2011. The court specifically ordered the city to produce for inspection the keys allegedly confiscated from Pryll.

{¶ 6} At a pretrial conference on December 7, 2011, the court ordered appellant to file any motion to suppress and any motion in limine by December 22, 2011, for the city to file its response by January 6, 2012, and for the appellant to file any reply brief by January 9, 2012. The trial court indicated that it would rule on motions to suppress and motions in limine at a mandatory pretrial conference scheduled for January 9, 2012.

{¶ 7} Pryll filed a motion in limine on December 13, 2011. In the motion, Pryll sought three orders. First, Pryll sought an order prohibiting the city from offering into evidence at trial any evidence supporting contentions by the city that Pryll's keys were taken away from him on July 17, 2011, after the incident and in an effort to stop him from driving, allegedly due to Pryll's alleged intoxication. Second, Pryll sought an order in limine barring evidence at trial of the field sobriety test conducted of him. Third, Pryll sought an order barring evidence at trial of the fact and circumstances of the death of the passenger who fell from Pryll's boat in the July 17, 2011 incident. The trial court conducted an evidentiary hearing on the motion in limine on January 9, 2012.

{¶ 8} In its judgment, the trial court granted the motion in limine with respect to evidence of an alleged confiscation of Pryll's keys to prevent him from driving. The court denied the motion in limine with respect to evidence of the field sobriety test. The

parties resolved the issue of evidence concerning the death of the passenger and circumstances of the incident causing his death.

{¶ 9} The city of Toledo filed a notice of appeal of the judgment on January 12, 2012. The notice was not accompanied by any certification under Crim.R. 12(K).

{¶ 10} Crim.R. 12(K) governs the state's appeal from a judgment granting a motion to suppress or otherwise excluding evidence, which provides in part:

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:

(1) the appeal is not taken for the purpose of delay;

(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 * * *

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.)

{¶ 11} In *State v. Agee*, 6th Dist. No. E-10-009, 2010-Ohio-1367, we applied Crim.R. 12(J), now Crim.R. 12(K), and dismissed a state appeal for failure to file certifications by the prosecutor as required under the rule. We concluded:

“Crim.R. 12(J) [since amended to (K)] 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, 402 N.E.2d 536. *See also State v. Crockett*, 11th Dist. No. 2006-A-0023, 2006-Ohio-4040 (appeal of order granting motion to suppress dismissed for failure to follow Crim.R. 12(K)). *Agee* at ¶ 11.

{¶ 12} Since the state failed to file the procedurally mandated Crim.R. 12(K) certification here, this court lacks jurisdiction to consider its appeal. Accordingly, the

appeal is hereby dismissed for appellant's failure to comply with Crim.R. 12(K).

Pursuant to App.R. 24, appellant shall pay the costs of this appeal.

Appeal dismissed.

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

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, P.J.

JUDGE

Thomas J. Osowik, 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>.