[Cite as *State v. Gump*, 2005-Ohio-5689.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 85693

STATE OF OHIO	:	JOURNAL ENTRY
	:	AND
Plaintiff-appellant	:	OPINION
	:	
-vs-	:	
	:	
MICHAEL GUMP	:	
	:	
Defendant-appellee	:	

DATE OF ANNOUNCEMENT
OF DECISION: OCTOBER 27, 2005

CHARACTER OF PROCEEDING: Criminal appeal from the Court of Common Pleas Case No. CR-457768

JUDGMENT: Dismissed.

DATE OF JOURNALIZATION:

APPEARANCES:

For Plaintiff-Appellant:

WILLIAM D. MASON, ESQ.
CUYAHOGA COUNTY PROSECUTOR
BY: OSCAR E. RODRIGUEZ, ESQ.
JON W. OEBKER, ESQ.
ASST. COUNTY PROSECUTORS
Justice Center
1200 Ontario Street

Cleveland, Ohio 44113

For Defendant-Appellee: JAMIE P. SERRAT, ESQ.
1370 Ontario Street
2000 Standard Building
Cleveland, Ohio 44113

ANN DYKE, P.J.:

{¶ 1} The State of Ohio brings this appeal following the trial court's determination that defendant Michael Gump was not guilty of possession of criminal tools, a charge to which Gump pled no contest. For the reasons set forth below, we dismiss for lack of jurisdiction.

{¶ 2} On October 21, 2004, defendant was indicted pursuant to a three-count indictment which charged defendant with possession of drugs, drug trafficking with a schoolyard specification and possession of criminal tools. On November 30, 2004, defendant pled no contest as to all charges. The trial court then found defendant guilty of drug possession and drug trafficking with the schoolyard specification but found defendant not guilty of the charge of possession of criminal tools. Herein, the state "appeals the trial court's finding the Defendant not guilty of the charge of Possession of Criminal Tools." State's Brief at 1.

{¶ 3} The state of Ohio asserts the following error for our review:

{¶ 4} "The trial court erred in finding Defendant guilty after a plea of no contest."

{¶ 5} Within this assignment of error, the state relies upon *State v. Bird*, 81 Ohio St.3d 582, 1998-Ohio-606, 692 N.E.2d 1013, in which the Supreme Court held that according to Crim.R. 11(B)(2), a no contest plea is "not an admission of defendant's guilt, but is an admission of the truth of the facts alleged in the indictment * * *." Therefore, where the indictment, information, or

complaint contains sufficient allegations to state a felony offense and the defendant pleads no contest, the court must find the defendant guilty of the charged offense.

{¶ 6} Although *State v. Bird*, supra, clearly remains the valid law of this state, we are without jurisdiction to review the instant matter.

{¶ 7} Pursuant to R.C. 2945.67(A):

{¶ 8} "[The state] may appeal as a matter of right any decision of a trial court in a criminal 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." (Emphasis added).

{¶ 9} In this matter, the lower court proceedings, state's brief and the assignment of error asserted by the state convince a majority of this court that the state is appealing a final verdict of not guilty and we are therefore without jurisdiction.

{¶ 10} In *State v. Mayfield*, Cuyahoga App. No. 81924, 2003-Ohio-2312, the defendant entered a no contest plea to one count of domestic violence in the court of common pleas. The court accepted the plea, heard evidence from both parties, and then acquitted the defendant of the charge. Upon the state's appeal, this court dismissed and held that the appeal was prohibited by R.C. 2945.67 and that we were without jurisdiction. Id., citing *In re: Sebastian Lee* (2001), 145 Ohio App.3d 167, 169, 762 N.E.2d 396. This Court stated:

{¶ 11} "Here, the trial court accepted the defendant's no contest plea and then found him not guilty of domestic violence. Thus, the trial court reached a final verdict in this case, and the State is

statutorily precluded from appealing that verdict. Id. We cannot review an acquittal, even though erroneously based, without putting the defendant in double jeopardy. Id.; see, also, *State v. Ginnard* (Jan. 23, 1992), Cuyahoga App. No. 61964, 1992 Ohio App. LEXIS 213."

{¶ 12} In this matter, the state notes that we have jurisdiction to "review the issues of law pertaining to no contest pleas" in accordance with the Supreme Court's holding in *State v. Bistricky* (1990), 51 Ohio St.3d 157, 555 N.E.2d 644, syllabus (a "court of appeals has discretionary authority pursuant to R.C. 2945.67[A] to review substantive law rulings made in a criminal case which result in a judgment of acquittal so long as the judgment itself is not appealed").

{¶ 13} In this particular matter, however, a majority believes that the final verdict is being appealed, in light of the proceedings below, the state's brief, and assignment of error ("The trial court erred in finding Defendant guilty after a plea of no contest.").

{¶ 14} Moreover, the state has not followed the procedure outlined in *State v. Bistricky*, supra. The Court held that in "seeking such appeal by leave of court, the state must follow the procedure outlined in *State v. Wallace* (1975), 43 Ohio St.2d 1, 330 N.E. 2d 697, and comply with App.R. 5(A)."

{¶ 15} The provisions then in effect under App.R. 5(A) are now contained in App.R. 5(C) which states:

{¶ 16} "(C) Motion by prosecution for leave to appeal. --When leave is sought by the prosecution from the court of appeals to appeal a judgment or order of the trial court, a motion for leave to appeal shall be filed with the court of appeals within thirty days from the entry of the judgment and order sought to be appealed and shall set forth the errors that the movant claims occurred in the proceedings of the trial court. The motion shall be accompanied by affidavits, or by

the parts of the record upon which the movant relies, to show the probability that the errors claimed did in fact occur, and by a brief or memorandum of law in support of the movant's claims. Concurrently with the filing of the motion, the movant shall file with the clerk of the trial court a notice of appeal in the form prescribed by App.R. 3 and file a copy of the notice of appeal in the court of appeals. The movant also shall furnish a copy of the motion and a copy of the notice of appeal to the clerk of the court of appeals who shall serve the notice of appeal and a copy of the motion for leave to appeal upon the attorney for the defendant who, within thirty days from the filing of the motion, may file affidavits, parts of the record, and brief or memorandum of law to refute the claims of the movant."

{¶ 17} Such leave to appeal was not obtained in the required manner in this particular instance.

{¶ 18} Accordingly, because a final verdict rather than a substantive legal issue is challenged in this matter, we are without jurisdiction and must therefore dismiss this matter.

{¶ 19} Finally, we note that although erroneous applications of Crim.R. 11(B)(2) are clearly capable of repetition yet can evade review where the appellate court is without jurisdiction, we note a remedy fashioned by Justice Stratton in *State v. Mayfield,* 102 Ohio St. 3d 1240, 2004-Ohio-3440, 811 N.E.2d 81:

{¶ 20} "The prosecution should have entered an objection and requested that the court reject the no-contest plea and allow the parties to proceed to trial if the defendant denied the very facts of the charge to which he had just pled no contest."

Dismissed.

[Cite as *State v. Gump*, 2005-Ohio-5689.]

It is ordered that appellee recover of appellant his costs herein taxed.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

KENNETH A. ROCCO, J., CONCURS.

CHRISTINE T. MCMONAGLE, J., DISSENTS.

(SEE ATTACHED DISSENTING OPINION)

ANN DYKE
PRESIDING JUDGE

[Cite as *State v. Gump*, 2005-Ohio-5689.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 85693

STATE OF OHIO,	:	
	:	
Plaintiff-Appellant	:	D I S S E N T I N G
	:	
vs.	:	O P I N I O N
	:	
MICHAEL GUMP,	:	
	:	
Defendant-Appellee	:	

DATE: OCTOBER 27, 2005

CHRISTINE T. McMONAGLE, J., DISSENTING:

{¶ 21} Respectfully, I dissent. I would find that the State adequately sought leave to appeal in this matter; that prohibitions against double jeopardy and the issuance of advisory opinions are not implicated here; and that the procedure complained of was objected to in a timely fashion and the issue preserved for appeal. I would proceed to the merits of this matter and address the error involved in finding a defendant not guilty after a plea of no contest to a properly pled felony indictment as one capable of repetition, yet evading review.

{¶ 22} The grand jury returned a three-count indictment against defendant Michael Gump, charging him with drug possession, drug trafficking and possession of criminal tools. The charges arose after the police conducted a search of Gump's truck during a traffic stop and found five grams of cocaine in the glove compartment. The drug counts are not a subject of this appeal. The possession of criminal tools count referred to money and a cell phone found in Gump's possession, and the truck itself as a means for transporting the drugs.

{¶ 23} Gump pleaded no contest to all three counts, and the court found Gump guilty of the two drug offenses. As to the possession of criminal tools count, the court reviewed R.C. 2923.24 and determined that "[t]here is nothing in the facts that the State has presented which would indicate prima facie evidence of possession of criminal tools." Rather, the court stated that "there is certainly evidence to the contrary." Based on these findings, the court found Gump not guilty of possession of criminal tools and entered a judgment of acquittal on that count. The State appeals, arguing that the court had no authority to enter a judgment of acquittal upon a plea of no contest to a felony charge.

{¶ 24} Before addressing any argument relating to the propriety of the court's judgment of acquittal, one must first consider whether the State has the right to appeal from that verdict. The majority says "no."

{¶ 25} It is a very basic proposition of constitutional law that an acquittal on a criminal charge invokes the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution to bar a retrial on the same charge. See *Arizona v. Washington* (1978), 434 U.S. 497, 503-505. In *Green v. United States* (1957), 355 U.S. 184, 187-188, the United States Supreme Court stated:

{¶ 26} "The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty."

{¶ 27} To that end, we have held that a reviewing court cannot review a judgment of acquittal entered upon a no contest plea in a criminal case, even though "erroneously based." See

State v. Mayfield, Cuyahoga App. No. 81924, 2003-Ohio-2312, appeal dismissed, 102 Ohio St.3d 1240, 2004-Ohio-3440. Consequently, the State has no right to appeal from a judgment of acquittal, even if that acquittal was erroneous. See *Foo v. United States* (1962), 369 U.S. 141.

{¶ 28} Nevertheless, the State seeks leave to appeal under R.C. 2945.67(A), which grants courts of appeals the discretion to grant the State leave to appeal under certain circumstances. In *State v. Bistricky* (1990), 51 Ohio St.3d 157, the syllabus states:

{¶ 29} "A court of appeals has discretionary authority pursuant to R.C. 2945.67(A) to review substantive law rulings made in a criminal case which result in a judgment of acquittal so long as the judgment itself is not appealed."

{¶ 30} The State appears to stipulate in its brief that double jeopardy would bar Gump's retrial based on a judgment of acquittal, and it affirmatively conceded this point at oral argument. Although double jeopardy bars Gump's retrial, neither the mootness doctrine nor the policy against issuing advisory opinions bar the courts of appeals from considering substantive law issues if they are "capable of repetition yet evading review." Id. at 158; *State v. Curry* (1991), 76 Ohio App.3d 175, 177. If the court did err by entering a judgment of acquittal upon a no contest plea, it would be an error "capable of repetition yet evading review," because the error would be one that the court could again commit. I recognize that the panel in *Mayfield* did not grant, or discuss whether to grant, leave for the State to appeal. But that informs the decision here, because the exact fact pattern has arisen in this case; hence, the issue is certainly capable of repetition. I therefore believe we should exercise our discretion and grant the State leave to bring this appeal on the substantive issue of law relating to the correct disposition of a no contest plea in a felony matter.

{¶ 31} The majority focuses on the technicalities of App.R. 5, which covers the means and manner of requesting leave to appeal. I concede the State erroneously requested this leave in the body of its brief. However, all the substantive requirements of App.R. 5 have been met: leave was timely requested, substantive briefs outlining the issue were filed, and the record and all exhibits were filed and transmitted to this Court. To avoid addressing this issue because a separate, albeit identical, filing was not made, is to elevate form over substance.

{¶ 32} The majority then argues that we should not address this issue because the issue was not preserved by proper objection at trial. That finding is simply inconsistent with the record. After entering the "not guilty" verdict upon Gump's no contest plea, the court specifically stated, "I will note the State's objection for the record. I will also note that in a previous case, the State has taken this issue to the Court of Appeals. I am perfectly ready and willing and able to hear what a three-judge panel has to say about this particular issue." I cannot imagine a clearer and more well-preserved objection.

{¶ 33} In sum, the State's failure to seek leave to appeal by separate motion, while technically incorrect, was vitiated by the State's full compliance with the substance of the rule in this particular filing. This is not an error of such egregious proportion that we should utilize our discretion to deny the State hearing on this issue. This is particularly true since even the trial court requested guidance upon this legal issue. Denial of leave to appeal does a disservice in this case, not only to the State, but also to all conscientious judges seeking to "do the right thing."

{¶ 34} I would find that leave to appeal should be granted to the State. I would find that the error complained of was properly objected to and preserved for our review, and, further, I would find that the State's stipulation that it is not attacking the underlying verdict of not guilty, but requesting

review of a substantive law issue capable of repetition, fully complies with the dictates of *State v. Bistricky*, supra. Accordingly, I would proceed to the merits and find as follows.

{¶ 35} Crim.R. 11(B)(2) states:

{¶ 36} "The plea of no contest is not an admission of defendant's guilt, but is an admission of the truth of the facts alleged in the indictment, information, or complaint, and the plea or admission shall not be used against the defendant in any subsequent civil or criminal proceeding."

{¶ 37} "[W]here the indictment, information, or complaint contains sufficient allegations to state a felony offense and the defendant pleads no contest, the court must find the defendant guilty of the charged offense." *State v. Bird*, 81 Ohio St.3d 582, 584, 1998-Ohio-606, citing *State ex rel. Stern v. Mascio* (1996), 75 Ohio St.3d 422, 425, 1996-Ohio-93.

{¶ 38} An indictment sufficiently charges an offense if it mirrors the language found in the charging statute. Id. at 585.

{¶ 39} Count three of Gump's indictment charged that he "unlawfully possessed or had under his control a substance, device, instrument, or article, with purpose to use it criminally, to-wit: money and/or a 1995 Chevrolet and/or cellular phone, and such substance, device, instrument, article was intended for use in the commission of a felony, in violation of Section 2923.24 of the Ohio Revised Code." This language is consistent with that of R.C. 2923.24(A), which states that "[n]o person shall possess or have under the person's control any substance, device, instrument, or article, with purpose to use it criminally." Thus, Gump's failure to contest the facts charged in count three of the indictment constituted an admission that the indictment sufficiently charged the offense and the court had no choice but to find him guilty of possession of criminal tools.

{¶ 40} Moreover, the State correctly notes that principles of statutory construction very strongly suggest that a court may not enter a judgment of acquittal in felony no contest pleas. R.C. 2937.07 deals with misdemeanor offenses and states that, "[a] plea to a misdemeanor offense of 'no contest' or words of similar import shall constitute a stipulation that the judge or magistrate may make a finding of guilty or not guilty from the explanation of the circumstances of the offense." There is no such statute for felony no contest pleas. Hence, the maxim of *unius est exclusio alterius* --the expression of one thing implies the exclusion of another-- applies. When the General Assembly chooses to give a specific list of circumstances in which a statute applies, that list is intentionally to the exclusion of others.

{¶ 41} There being no other indication of legislative intent to treat felony no contest pleas in the same manner as misdemeanor no contest pleas, I agree that the court's only options would have been to find Gump guilty or, assuming the indictment adequately alleged a crime, to have refused the plea under Crim.R. 11(C)(2) and to have instructed Gump to enter a plea of not guilty, or to have entered such plea itself under Crim.R. 11(A) and (G). See *State v. Cohen* (1978), 60 Ohio App.2d 182*; State v. Journey* (Feb. 10, 1993), Scioto App. No. 92 CA 2077. The court's failure to follow this procedure was erroneous.

{¶ 42} Accordingly, I would hold that when a defendant pleads no contest to a felony charge and the indictment (or information) adequately alleges the crime charged, the court cannot find the defendant not guilty. It can only find the defendant guilty, or change the plea to not guilty and conduct a trial on the merits.