

[Cite as *State v. Morgan*, 2006-Ohio-3947.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 87293

STATE OF OHIO	:	
	:	
Plaintiff-Appellant	:	JOURNAL ENTRY
	:	
-vs-	:	AND
	:	
LANCE MORGAN	:	OPINION
	:	
Defendant-Appellee	:	

Date of Announcement of Decision:	AUGUST 3, 2006
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Character of Proceeding:	Criminal appeal from Court of Common Pleas Case No. CR-468742
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Judgment:	Appeal dismissed.
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Date of Journalization:

Appearances:

For Plaintiff-Appellant:	WILLIAM D. MASON Cuyahoga County Prosecutor JON W. OEBKER, Assistant Prosecuting Attorney 1200 Ontario Street Cleveland, Ohio 44113
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For Defendant-Appellee:	ROBERT L. TOBIK Cuyahoga County Public Defender DAVID KING, Assistant Public Defender WALTER CAMINO, Assistant Public Defender 100 Lakeside Place
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1200 West Third Street
Cleveland, Ohio 44113

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JAMES J. SWEENEY, P.J.:

{¶ 1} Plaintiff-appellant, State of Ohio, appeals from the trial court's order that dismissed the felonious assault and domestic violence charges against defendant-appellee, Lance Morgan, for want of prosecution due to the victim's repeated failure to appear for trial. In the absence of language to the contrary, such dismissal is presumed to be without prejudice and, therefore, not a final, appealable order. *State v. Brown*, Cuyahoga App. No. 84229, 2004-Ohio-5587, citing *State v. Fleming* (Dec. 7, 2000), Cuyahoga App. Nos. 77323, 77324; *Cleveland v. Stifel* (Sept. 2, 1999), Cuyahoga App. No. 75761, citing *State v. Dixon* (1984), 14 Ohio App.3d 396.

Appeal dismissed.

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

It is ordered that a special mandate issue out of this Court directing the Court of Common Pleas to carry this judgment into execution.

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

KENNETH A. ROCCO, J., CONCURS. (See
attached separate concurring opinion.)
CHRISTINE T. McMONAGLE, J., DISSENTS.
(See attached separate dissenting opinion.)

JAMES J. SWEENEY
PRESIDING JUDGE

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. 112, Section 2(A)(1).

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NO. 87293

STATE OF OHIO,	:	
	:	
Plaintiff-Appellant	:	D I S S E N T I N G
	:	
v.	:	O P I N I O N
	:	
LANCE MORGAN	:	
	:	
	:	
Defendant-Appellee	:	

DATE: AUGUST 3, 2006

CHRISTINE T. McMONAGLE, J., DISSENTING:

{¶ 2} Respectfully, I dissent from the decision of the majority dismissing this appeal before argument, and in perfunctory fashion.

Plaintiff-appellant, the State of Ohio, has done a thorough and complete job of outlining reasons this court should abandon precedent of declaring dismissals without prejudice in criminal cases not to be final appealable orders. Defendant-appellee, Lance Morgan, has likewise done a complete and thorough job of distinguishing the state's cases and arguing against overruling Eighth District precedent. The issue is ripe for review, and frankly well-presented by both appellant and appellee.

{¶ 3} I would not dismiss this case before argument, and I would specifically address the errors alleged.

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	:	
vs.	:	OPINION
	:	
LANCE MORGAN	:	
	:	
Defendant-appellee	:	

DATE: AUGUST 3, 2006

KENNETH A. ROCCO, J., CONCURRING:

{¶ 4} Until the Ohio Supreme Court chooses to decide the question, our Eighth District precedent should stand on the issue whether a dismissal without prejudice is a final appealable order. Repetitive re-argument of decided issues is contrary to the judicial principle of stare decisis.

{¶ 5} Rather than asking us to revisit the precedent which precludes a direct appeal, the state should re-indict the defendant and contemporaneously file a writ of mandamus to compel the judge to proceed to trial. This procedure would allow the state to raise the very important legal question it attempts to argue here: whether a trial for domestic violence can proceed without the

victim-witness. Alternatively, of course, the state could also petition the judge to recuse herself.