

[Cite as *State v Empe*, 2008-Ohio-3803.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
No. 90333

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**STATE OF OHIO**

PLAINTIFF-APPELLANT

vs.

**RUEL EMPE**

DEFENDANT-APPELLEE

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**JUDGMENT:  
DISMISSED**

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Criminal Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CR-485834

**BEFORE:** Stewart, J., Blackmon, P.J., and Dyke, J.

**RELEASED:** July 31, 2008

**JOURNALIZED:**

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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. II, Section 2(A)(1).

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MELODY J. STEWART, J.:

{¶ 1} This is a discretionary appeal from a judgment of the Cuyahoga County Court of Common Pleas, for which leave was granted pursuant to R.C. 2945.67(A). Appellant, the state of Ohio, wished to appeal the trial court's refusal to certify one of the state's witnesses as an "expert" witness.

{¶ 2} R.C. 2945.67(A) provides that the state may appeal as a matter of right a motion to dismiss all or any part of an indictment, complaint, or information, a motion to suppress evidence, a motion for the return of seized property, or a motion granting postconviction relief. All other appeals are by leave at the discretion of the court of appeals except, of course, that the state may not appeal a final verdict. *State v. Matthews* (1998), 81 Ohio St.3d 375, 377-378.

{¶ 3} In this case, although the trial court's Crim.R. 29 judgment of acquittal was a final verdict and, thus, not appealable and not subject to being reversed, we initially granted leave to appeal the issue involving the expert witness certification. However, after oral argument and upon further examination of the record, we now conclude that a decision on that issue would be purely advisory and an improper exercise of judicial authority. Consequently, we conclude that leave was improvidently granted. We therefore dismiss this appeal.

It is ordered that defendant-appellee recover of plaintiff-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.

MELODY J. STEWART, JUDGE

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ANN DYKE, J., CONCURS

PATRICIA ANN BLACKMON, P.J., DISSENTS  
WITH SEPARATE OPINION

PATRICIA ANN BLACKMON, P.J., DISSENTING:

{¶ 4} I respectfully dissent from the Majority Opinion's conclusion to dismiss this appeal. The Ohio Supreme Court in *State v. Arnett*<sup>1</sup> and *State v. Bistricky*<sup>2</sup> has made it clear that although the State may not appeal a final verdict, this court has the discretionary authority to review under R.C. 2945.67(A) a trial court's substantive law rulings made in a criminal case, which resulted in a judgment of acquittal, so long as the verdict itself is not appealed.<sup>3</sup> In requesting such review, the State must comply with App.R. 5(A).<sup>4</sup>

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<sup>1</sup>(1986), 22 Ohio St.3d 186.

<sup>2</sup>(1990), 51 Ohio St.3d 157.

<sup>3</sup>See *State v. Brodie*, 165 Ohio App.3d 668, 2006-Ohio-982, where the court granted the State leave to appeal and reviewed the trial court's interpretation of the felony murder statute, although the defendant had been acquitted.

<sup>4</sup>*State v. Bistricky*, *supra*.

{¶ 5} Consequently, I note that this court has not been asked to advise the State; rather, it has been asked to review an allegedly erroneous legal conclusion reached by the trial court regarding the expert report requirements under Loc.R. 21.<sup>5</sup>

{¶ 6} I understand the Majority Opinion's concern that this appeal "looks like and smells like" a request for an advisory opinion; however, *State v. Bistricky* concludes that the issue raised in this appeal is justiciable and rules in favor of the need to resolve issues that might otherwise go unresolved.

{¶ 7} Finally, I believe that this court may very well have erred when it required the State to serve the defendant's attorney in the underlying case. In the *Bistricky* appeal, no opposing counsel appeared or responded; the appellate court noted this fact implying that one is not necessary. The Court held that the possibility of the perpetuation of an erroneous and prejudicial interpretation of the law by the lower court was sufficient to create a justiciable issue.

{¶ 8} I am aware that *Bistricky* involved an issue of mootness, but I am convinced that *Bistricky* also applies to the advisory opinion preclusion. It is the issue that is justiciable, not the existence of a party defendant. Nevertheless, the advisory opinion preclusion issue makes this an interesting concern for the appellate courts to address.

{¶ 9} I would grant the State's leave to appeal, and review the substantive law issue raised. Although the public defender was allowed to argue in this case, it is not mandated.

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<sup>5</sup>*State v. Brodie, supra.*