

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 103150

STATE OF OHIO

PLAINTIFF-APPELLANT

vs.

FERNANDO COLON

DEFENDANT-APPELLEE

**JUDGMENT:
DISMISSED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-04-458174-A

BEFORE: Blackmon, J., E.A. Gallagher, P.J., and E.T. Gallagher, J.

RELEASED AND JOURNALIZED: February 23, 2016

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PATRICIA ANN BLACKMON, J.:

{¶1} The state of Ohio appeals from the trial court’s granting defendant Fernando Colon’s postconviction motion for discovery and assigns the following error for our review:

I. The trial court erred in granting a criminal defendant’s motion for post-conviction discovery.

{¶2} Having reviewed the record and pertinent law, the merit panel determines that the state’s motion for leave to appeal was improvidently granted. Accordingly, we dismiss this case for lack of a final appealable order. The apposite facts follow.

{¶3} On September 6, 2005, Colon was found guilty of molesting his step-daughters¹ A.C. and E.C. The court sentenced Colon to community control sanctions. Colon did not appeal.

{¶4} At trial, Colon testified in his own defense, denying the allegations of sexual abuse, and alleging that the victim’s biological father framed him. Colon testified that the biological father initiated the prosecution to “exact revenge” on Colon for being involved with the mother, who the biological father viewed as his “personal property.” According to Colon, the family was “terrified” of the biological father, who was “extraordinarily abusive” to the mother.

{¶5} Seven-and-a-half years later, in the summer of 2013, the biological father, whose name is Ariel Castro, was indicted on hundreds of counts — including rape, kidnapping, and aggravated murder — regarding three females he had held captive in his house for approximately a decade. Before the end of 2013, Castro pled guilty to the

¹ Although Colon was not married to the victims’ mother, the family resided together for several years, and Colon refers to himself as the victims’ stepfather in his court-filed documents.

crimes, was sentenced to life in prison plus 1,000 years, and, not long after being sentenced, committed suicide.

{¶6} In February 2015, after 21 months of unsuccessful attempts to “obtain additional information to support his claim” that Castro had framed him, Colon filed a motion for leave to file a motion for a new trial and a motion for limited discovery. The court held a hearing on these two motions, and on June 10, 2015, issued a journal entry and opinion granting them.

{¶7} On June 17, 2015, the state filed a motion for leave to appeal arguing that the court erred in granting Colon’s motion for discovery. The state did not challenge the court’s granting Colon leave to file a motion for new trial. On July 1, 2015, this court granted the state’s motion for leave to appeal.

{¶8} As a general rule, the state may not file an appeal except as provided by R.C. 2945.67. *State ex rel. Leis v. Kraft*, 10 Ohio St.3d 34, 460 N.E.2d 1372 (1984). Pursuant to R.C. 2945.67(A), the state has a right to appeal only when the court grants a motion: 1) to dismiss counts in an indictment; 2) to suppress evidence; 3) to return property; or 4) for postconviction relief. Additionally, the state “may appeal by leave of * * * court * * * any other decision, except the final verdict * * *.” *Id.* See also App.R. 5(C) (outlining the procedure the state must follow when requesting leave to appeal).

{¶9} It is within this court’s discretion to grant or deny the state’s request for leave to appeal. Although in the instant case this court granted the state’s motion for leave, upon further analysis, we find the leave to appeal under R.C. 2945.67(A) was improvidently allowed.

{¶10} “An interlocutory order is subject to revision by the trial court at any time prior to the entering of a final judgment in the case. Once a final judgment is entered, all interlocutory orders are merged into the final judgment of the court and become appealable.” (Citations omitted.) *Marc Glassman, Inc. v. Fagan*, 8th Dist. Cuyahoga No. 87164, 2006-Ohio-5577, ¶ 11. “Discovery orders have long been recognized as interlocutory,” and are neither final nor appealable. *Klein v. Bendix-Westinghouse Automotive Air Brake Co.*, 13 Ohio St.2d 85, 87, 234 N.E.2d 587 (1968).

{¶11} When ruling on the state’s motion for leave to appeal, courts must consider R.C. 2945.67 in conjunction with R.C. 2505.02 and 2505.03(A). *See State v. Matthews*, 81 Ohio St.3d 375, 380, 691 N.E.2d 1041 (1998). As the Second District Court of Appeals aptly put it in *State v. Sanders*, 2d Dist. Miami No. 94-CA-48, 1994 Ohio App. LEXIS 5485 (Nov. 30, 1994), “We do not read R.C. 2945.67 as allowing the state to appeal, or enabling appellate courts to review, decisions of trial courts that the state would like to construe as falling within the terms of the statute.”

{¶12} Types of orders that are final and appealable can be found in R.C. 2505.02. For example, under R.C. 2505.02(A)(3), discovery of a privileged matter may constitute a final appealable order if the elements of R.C. 2505.02(B)(4) are met. However, in the case at hand, the state is not claiming that any of the information contemplated in Colon’s discovery motion is privileged. Rather, the state is claiming that the court lacked jurisdiction to rule on the discovery motion because it was filed postconviction. However, this court has held that the denial of a motion to dismiss for lack of jurisdiction is not a final appealable order. *Nejman v. Charney*, 8th Dist. Cuyahoga No.

102584, 2015-Ohio-4087, ¶ 15 (“[a]n error in deciding personal jurisdiction can be corrected after the final judgment”).

{¶13} Another interlocutory order that may become final and appealable upon ruling is an order that grants a new trial. R.C. 2505.02(B)(3). In *Matthews*, the Ohio Supreme Court held as follows: “We are now clarifying that under R.C. 2505.02 and 2505.03(A), a trial court’s order granting a defendant a new trial in a criminal case is a final appealable order which the state may appeal by leave of court.” The *Matthews* court also explained that “we have already implicitly held that R.C. 2505.02 applies to all appeals, civil and criminal.” *Id.* at 377.

{¶14} Upon review, we find that the trial court’s granting Colon’s motion for discovery is purely interlocutory, and that the state failed to establish that it is final and appealable at this time. Accordingly, this appeal is dismissed.

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

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

PATRICIA ANN BLACKMON, JUDGE

EILEEN A. GALLAGHER, P.J., and
EILEEN T. GALLGHER J., CONCUR