

[Cite as *State v. Mitchell*, 2017-Ohio-94.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 104314

STATE OF OHIO

PLAINTIFF-APPELLEE

VS.

LUANN MITCHELL

DEFENDANT-APPELLANT

**JUDGMENT:
DISMISSED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-15-601296-A

BEFORE: Kilbane, J., Keough, A.J., and S. Gallagher, J.

RELEASED AND JOURNALIZED: January 12, 2017

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MARY EILEEN KILBANE, J.:

{¶1} Defendant-appellant, Luann Mitchell (“Mitchell”), appeals from the trial court’s order denying her motion to quash an indictment charging her with perjury. For the reasons set forth below, we dismiss this appeal for lack of jurisdiction.

{¶2} Mitchell and Wilfred Anderson (“Anderson”) have had an acrimonious relationship. The initial dispute between Anderson and Mitchell involved Mitchell’s retention of the cremated remains of Angelina Johnson (“Johnson”). Anderson asserted that he was entitled to the remains because he was married to Johnson. Ultimately, the trial court concluded that Anderson and Johnson never married and Mitchell was entitled to Johnson’s remains. Anderson appealed the trial court’s judgment to this court, which was affirmed. *Anderson v. Mitchell*, 8th Dist. Cuyahoga No. 99876, 2014-Ohio-1058.

{¶3} In another dispute in 2014, Anderson filed a complaint against Cuyahoga Metropolitan Housing Authority and Mitchell, in which he alleged that they conspired to accuse him of practicing medicine without a license. During the pendency of that litigation, the trial court declared Anderson to be a vexatious litigator and ordered as follows:

Plaintiff Wilfred Anderson is hereby prohibited from doing one or more of the following without first obtaining leave of this court to proceed: (1) instituting legal proceedings in the court of claims or in a court of common pleas, municipal court, or county court; (2) continuing any legal proceedings that the plaintiff has instituted in any of the courts listed above prior to the entry of this order; and (3) making any application, other than an application for leave to proceed. *See* R.C. 2323.52(D)(1)(A-C).

See Anderson v. Cuyahoga Metro Hous. Auth., Cuyahoga C.P. No. CV-14-820828.

{¶4} Then, on May 1, 2015, Mitchell accused Anderson of stalking her in two separate incidents. The common pleas court held a hearing on the matter on May 20, 2015, and issued Mitchell a five-year civil stalking protection order against Anderson. *See Mitchell v. Anderson*, Cuyahoga C.P. No. 15-CV-844989. On February 4, 2016, after Anderson met with the police and provided an alibi for his whereabouts on March 29, 2015, the date of one of the incidents that served as the basis for the protection order, Mitchell was indicted in the instant matter for one count of perjury for allegedly making a false statement to police.

{¶5} On March 8, 2016, Mitchell filed a motion to quash the indictment, arguing that the Cuyahoga County Grand Jury had previously issued a no bill concerning the alleged perjury, and the City of Richmond Heights Prosecutor had also previously declined to issue charges in this matter. Mitchell also argued that Anderson has been declared a vexatious litigator in *Anderson*, Cuyahoga C.P. No. CV-14-820828, and he did not obtain prior court approval before meeting with the police and reporting Mitchell's alleged perjury.

{¶6} The trial court denied Mitchell's motion to quash and Mitchell now appeals, assigning one error for our review.¹

¹Before briefs were filed in this matter, the state filed a motion to dismiss the appeal for lack of jurisdiction. Since Mitchell maintained that the indictment issued against her "represents double jeopardy and is impermissible at law," this court, in an abundance of caution, denied the state's motion to dismiss and permitted the parties to brief and orally argue their positions. At argument, Mitchell limited her argument as to whether the indictment is simply a vehicle for Anderson to continue his pattern of vexatious litigation. She is no longer

Assignment of Error

The trial court erred in not granting [Mitchell's] motion to quash.

{¶7} In her sole assignment of error, Mitchell argues that the trial court erred in denying her motion to quash the perjury indictment because it is the product of Anderson's continued vexatious litigation. She argues that Anderson has engaged in forum shopping by repeatedly meeting with various city and county prosecutors until an indictment was issued. She also argues that the civil protection order she obtained was not based upon a single incident, but was based upon Anderson's pattern of conduct, and therefore, Anderson's alibi evidence for March 29, 2015, does not provide a basis for the perjury charge issued against her.

{¶8} "A criminal defendant has the right to appeal from a trial court's final orders." *State v. Davidson*, 17 Ohio St.3d 132, 134, 477 N.E.2d 1141 (1985).

{¶9} As explained in *State v. Matthews*, 81 Ohio St.3d 375, 1998-Ohio-433, 691 N.E.2d 1041, final orders are defined in R.C. 2505.02, which provides that

an order that affects a substantial right in an action which in effect determines the action and prevents a judgment, an order that affects a substantial right made in a special proceeding or upon a summary application in an action after judgment, or an order that vacates or sets aside

advancing a double jeopardy argument, and there was no prior criminal conviction that bars the instant indictment. Mitchell has limited her argument as to whether the indictment is simply a vehicle for Anderson to continue his pattern of vexatious litigation.

a judgment or grants a new trial is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial.

Id. at 376.

{¶10} It is well established that the common pleas court's denial of a motion to dismiss an indictment is an interlocutory order that is not immediately appealable. *See State v. Crawley*, 96 Ohio App.3d 149, 155-156, 644 N.E.2d 724 (12th Dist.1994); *State v. Hawkins*, 30 Ohio App.3d 259, 507 N.E.2d 425 (8th Dist.1986); *State v. Loshin*, 34 Ohio App.3d 62, 68, 517 N.E.2d 229 (1st Dist.1986); *State v. Eberhardt*, 56 Ohio App.2d 193, 381 N.E.2d 1357 (8th Dist.1978) (denial of defendant's motion to dismiss the indictment was not a final order until the trial court issued nolle prosequi, thereby "commit[ting] the appellant to the uncertainty of possible reindictment and trial.").

{¶11} In *Eberhardt*, this court explained:

Generally speaking, the overruling of a motion to dismiss in a criminal or a civil case is not considered a final appealable order. *State v. Lile* (1974), 42 Ohio App.2d 89, 330 N.E.2d 452 * * *. Ordinarily, after a motion to dismiss is overruled, the case will proceed to trial and in the event of judgment adverse to the moving party, the trial court's action overruling the motion may become one of the assignments of error on appeal. * * *.

The foregoing is consistent with the general rule in Ohio that there should be one trial and one appeal. The general rules recited above do not mean, however, that these orders are not final appealable orders as a matter of law. There are unusual instances when orders[,] which standing alone are not considered final appealable orders[,] become appealable by virtue of the exceptional circumstances under which they are rendered. In the final analysis, all such orders must satisfy the three requirements of R.C. 2505.02 — that the order effect a substantial right in the action and in effect determine the action and prevent a judgment.

Id. at 198. *See also Lakewood v. Pfeifer*, 83 Ohio App.3d 47, 50, 613 N.E.2d 1079 (8th

Dist.1992).²

{¶12} In this case, Mitchell argues that the trial court erred in denying her motion to dismiss the perjury indictment because it is simply a vehicle through which Anderson is continuing his pattern of vexatious litigation against her. However, the denial of Mitchell's motion to dismiss based upon Anderson's status as a vexatious litigant is not a final appealable order because it did not determine the action and prevent a judgment. Moreover, as noted in *Eberhardt*, these issues can be fully addressed later because Mitchell may raise this issue on appeal if convicted. *Eberhardt*, 56 Ohio App.2d 193, 381 N.E.2d 1357 (8th Dist.1978). Conversely, if Mitchell is acquitted, the denial of the motion to dismiss would become moot. *Id.*

{¶13} Appeal dismissed.

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

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court 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.

²We recognize that the Ohio Supreme Court has carved out a narrow exception to this rule where the criminal defendant asserts that he or she has previously been placed in jeopardy for the offense that is the subject of the new indictment. *State v. Anderson*, 138 Ohio St.3d 264, 2014-Ohio-542, 6 N.E.3d 23. However, this exception is not applicable herein, as no prior charges were issued against Mitchell in connection with this matter.

MARY EILEEN KILBANE, JUDGE

KATHLEEN ANN KEOUGH, A.J., and
SEAN C. GALLAGHER, J., CONCUR