

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellant,	:	
v.	:	No. 10AP-1109 (C.P.C. No. 10CR02-1190)
Emmanuel Hampton,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

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D E C I S I O N

Rendered on July 14, 2011

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*Ron O'Brien*, Prosecuting Attorney, and *Steven L. Taylor*, for appellant.

*Jonathan T. Tyack* and *Thomas M. Tyack*, for appellee.

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APPEAL from the Franklin County Court of Common Pleas

KLATT, J.

{¶1} Plaintiff-appellant, the state of Ohio, seeks to appeal as a matter of right and with leave of court a judgment of the Franklin County Court of Common Pleas granting defendant-appellee, Emmanuel Hampton's, motion for judgment of acquittal pursuant to Crim.R. 29. Because the state cannot appeal the trial court's judgment, we dismiss the state's appeal and deny the state's motion for leave to appeal.

**Factual and Procedural Background**

{¶2} On March 5, 2010, a Franklin County grand jury indicted Hampton with a number of charges arising from a violent home invasion, including attempted murder in violation of R.C. 2923.02 and 2903.02, aggravated burglary in violation of R.C. 2911.11, and kidnapping in violation of R.C. 2905.01. The indictment alleged that Hampton committed these offenses in Franklin County. Hampton entered a not guilty plea to the charges and proceeded to a trial.

{¶3} At trial, testimony in the state's case-in-chief made it clear that the home invasion did not occur in Franklin County. After the state rested its case, Hampton moved, pursuant to Crim.R. 29, for a judgment of acquittal based in part on the state's failure to prove proper venue. Hampton argued that pursuant to Section 10, Article I, of the Ohio Constitution, a defendant shall be subject to a trial in the county in which the offense is alleged to have been committed. See also R.C. 2901.12(A). Although not a material element of any offense, venue is a fact the state must prove beyond a reasonable doubt. *State v. Headley* (1983), 6 Ohio St.3d 475, 477. The trial court reserved its ruling on the motion. Hampton then rested his case without presenting any evidence and renewed his motion for acquittal. After a hearing on the motion, the trial court stated on the record that it would grant Hampton's motion only as to the venue issue. In a subsequent judgment entry, the trial court granted Hampton's motion for judgment of acquittal, based solely on the state's failure to prove venue, and ordered Hampton discharged.

{¶4} The state seeks to appeal the trial court's judgment entry and assigns the following errors:

I. THE TRIAL COURT ERRED BY FINDING THAT VENUE  
HAD NOT BEEN WAIVED BY DEFENDANT.

II. EVEN IF THE VENUE CHALLENGE WAS PROPERLY PRESERVED, THE TRIAL COURT ERRED BY REFUSING TO ORDER A MISTRIAL.

### **R.C. 2945.67(A) and the State's Authority to Appeal in Criminal Cases**

{¶5} We first address the state's authority to appeal the trial court's judgment entry.

{¶6} R.C. 2945.67(A) provides:

A prosecuting attorney \* \* \* 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[.]

{¶7} Simply put, this statute allows the state to appeal certain specified decisions as a matter of right and any other decision in a criminal case, except the final verdict, by leave of court.

{¶8} Here, the trial court entered a judgment of acquittal pursuant to Crim.R. 29. That rule allows trial courts to "order the entry of a judgment of acquittal of one or more offenses charged in the indictment, information, or complaint, if the evidence is insufficient to sustain a conviction of such offense or offenses."

{¶9} In *State v. Keeton* (1985), 18 Ohio St.3d 379, the Supreme Court of Ohio considered a judgment of acquittal granted pursuant to Crim.R. 29(A) and concluded that a "directed verdict of acquittal by the trial judge in a criminal case is a 'final verdict' within the meaning of R.C. 2945.67(A) which is not appealable by the state as a matter of right or by leave to appeal pursuant to that statute." *Id.* at paragraph two of the syllabus. Similarly, the Supreme Court of Ohio noted in another case that "[a] judgment of acquittal

by the trial judge, based upon Crim.R. 29(C), is a final verdict within the meaning of R.C. 2945.67(A) and is not appealable by the state as a matter of right or by leave to appeal pursuant to that statute." *State ex rel. Yates v. Court of Appeals for Montgomery Cty.* (1987), 32 Ohio St.3d 30, syllabus. Thus, a judgment of acquittal made pursuant to either Crim.R. 29(A) or (C) is a final verdict and, as such, is not appealable by the state. *Id.* at 32-33.

{¶10} Here, the trial court's judgment entry states that:

For the reasons set forth on the record at the time of hearing on Tuesday October 12, 2010, Defendant's Motion for Judgment of Acquittal pursuant to Rule 29 of the Ohio Rules of Criminal Procedure based strictly on the issue of Venue is well taken, and is hereby granted as to Counts One, Two, Three and Four. The clerk shall note Defendant's acquittal in the Court record, and Defendant is hereby discharged in this matter.

On its face, the trial court's judgment entry grants Hampton a judgment of acquittal pursuant to Crim.R. 29. Such a judgment is not appealable by the state as a matter of right or by leave to appeal pursuant to R.C. 2945.67(A). *Yates*.

{¶11} The state, however, contends that the trial court did not acquit Hampton. Instead, the state argues that the trial court "dismissed" the case, one of the specified decisions the state may appeal as a matter of right pursuant to R.C. 2945.67(A). Notwithstanding the clear language of the trial court's judgment entry, the state notes that the trial court stated at the hearing that it would grant Hampton's Crim.R. 29 motion "to dismiss the case." (Tr. 170.) We reject the state's argument.

{¶12} Hampton's counsel requested a judgment of acquittal pursuant to Crim.R. 29 after it became apparent that the state could not prove venue. The trial court granted the request, and its judgment entry is clear: "Defendant's Motion for Judgment of Acquittal pursuant to Rule 29 of the Ohio Rules of Criminal Procedure based strictly on

the issue of Venue is well taken, and is hereby granted as to Counts One, Two, Three and Four. The clerk shall note Defendant's acquittal in the Court record, and Defendant is hereby discharged in this matter."

{¶13} In spite of the trial court's clear language, the state seeks to divine the trial court's true "intent" through statements it made at the hearing. However, "[i]t is well-established that a court only speaks through its journal entries and not by oral pronouncement or through decisions." *State v. Smith*, 12th Dist. No. CA2009-02-038, 2010-Ohio-1721, ¶59 (citing *Schenley v. Kauth* (1953), 160 Ohio St. 109); *State v. Wimer* (Oct. 16, 2001), 10th Dist. No. 01AP-288. Here, the trial court entered a judgment of acquittal.

{¶14} The state also argues that the trial court must have dismissed the case for lack of venue because venue issues cannot be resolved by a Crim.R. 29 motion for acquittal. We disagree.

{¶15} The plain language of Crim.R. 29 allows trial courts to grant an acquittal if "the evidence is insufficient to sustain a conviction of such offense or offenses." The Supreme Court of Ohio, however, set forth the following standard of review for trial courts to apply when analyzing a motion for judgment of acquittal: "[A] court shall not order an entry of judgment of acquittal if the evidence is such that reasonable minds can reach different conclusions as to whether each *material element of a crime* has been proved beyond a reasonable doubt." *State v. Bridgeman* (1978), 55 Ohio St.2d 261, syllabus (emphasis added). Based upon that standard, the state argues that the trial court could not grant a judgment of acquittal based on improper venue because venue is not a material element of the offense. In support of this argument, the state cites *State v. Johanson* (2007), 156 N.H. 148, 157-58, 932 A.2d 848, 858.

{¶16} We are not persuaded by the authority offered by the state on this issue. We find more persuasive cases from appellate courts in this state that have expressly or implicitly concluded that improper venue is an issue that can be addressed by a Crim.R. 29 motion for acquittal.

{¶17} For example, in *State v. Spak* (July 5, 1996), 11th Dist. No. 95-P-0092, the Eleventh District Court of Appeals reversed a trial court's pretrial dismissal of a number of offenses based on improper venue and remanded those charges for trial. However, the court noted that it would be incumbent on the state to prove venue at trial, and that "[s]hould the facts and circumstances presented by the [state] fail to demonstrate \* \* \* venue is proper, appellee may move the court for acquittal on those charges pursuant to Crim.R. 29." Similarly, the Ninth District Court of Appeals consistently notes that absent a defect in the indictment regarding venue, "a defendant may only raise the issue of improper venue at trial via a Crim.R. 29 motion for acquittal." See *State v. Simpson*, 9th Dist. No. 21475, 2004-Ohio-602, ¶74; *State v. Reed*, 9th Dist. No. 07CA0026-M, 2008-Ohio-1880, ¶15.

{¶18} The Twelfth District Court of Appeals also allows Crim.R. 29 motions for acquittal to challenge venue. *State v. Clapp* (June 29, 1987), 12th Dist. No. CA87-01-001 (concluding that trial court erred in denying Crim.R. 29 motion for judgment of acquittal because the "state had failed to prove the action was properly venued"); *State v. Piersall* (Feb. 22, 1988), 12th Dist. No. CA87-06-052 (citing *Clapp* to address situation where defendant asserted venue challenge in motion for acquittal); See also *State v. Lahmann*, 12th Dist. No. CA2006-03-058, 2007-Ohio-1795, ¶45 (concluding trial counsel was ineffective because counsel failed to move for judgment of acquittal pursuant to Crim.R.

29 and that such a motion would have been successful because the state failed to prove venue).

{¶19} Other Ohio courts have reached the same conclusion by implication. *State v. Matz*, 5th Dist. No. 08COA021, 2009-Ohio-3048, ¶16-17 (affirming denial of Crim.R. 29 motion for acquittal based on venue because state presented sufficient evidence of venue); *State v. Baxla* (June 13, 1988), 4th Dist. No. 656 (failure to assert insufficient evidence of venue in Crim.R. 29 motion waived issue in appeal); *State v. Coe*, 153 Ohio App.3d 44, 2003-Ohio-2732, fn. 6 (considering hypothetical situation where the state failed to present evidence of venue at trial and noting that a defendant would then move for judgment of acquittal, which could be granted by the trial court).

{¶20} The import of these cases is clear: venue is a proper issue for determination by a Crim.R. 29 motion for acquittal. We agree. Thus, the trial court could enter a judgment of acquittal in Hampton's favor based on the state's admitted failure to prove venue in this case. A judgment of acquittal is a final verdict for purposes of R.C. 2945.67(A) and cannot be appealed by the state.

{¶21} Accordingly, we deny the state's motion for leave to appeal and dismiss the state's purported appeal as a matter of right.

*Motion for leave to appeal denied;  
case dismissed.*

BRYANT, P.J., and CONNOR, J., concur.

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