

**IN THE COURT OF APPEALS OF OHIO
ELEVENTH APPELLATE DISTRICT
ASHTABULA COUNTY**

STATE OF OHIO,

Plaintiff-Appellant,

- vs -

MARK GILLIS,

Defendant-Appellee.

CASE NO. 2026-A-0001

Criminal Appeal from the
County Court, Eastern Division

Trial Court No. 2025 TRC 00949 E

OPINION AND JUDGMENT ENTRY

Decided: August 17, 2026
Judgment: Reversed

April R. Grabman, Ashtabula County Prosecutor, and *Dane R. Hixon*, Assistant Prosecutor, 25 West Jefferson Street, Jefferson, OH 44047 (For Plaintiff-Appellant).

Margaret Brunarski, Ashtabula County Public Defender, and *Edith M. Jonas*, Assistant Public Defender, 22 East Jefferson Street, Jefferson, OH 44047 (For Defendant-Appellee).

JOHN J. EKLUND, J.

{¶1} Appellant, the State of Ohio, appeals the judgment from the Ashtabula County Court, Eastern Division, denying its Motion to Dismiss the traffic citation against Appellee, Mark Gillis, for Operating a Vehicle Under the Influence of Alcohol (“OVI”), failure to yield the right of way, and failure to use a seat belt.

{¶2} Appellant has raised a single assignment of error arguing that the trial court erred in denying its Motion to Dismiss. Appellee is in agreement and jointly argues the trial court erred in failing to dismiss the matter.

{¶3} Having reviewed the record and the applicable caselaw, Appellant's assignment of error has merit. Appellant presented good cause in open court for dismissal of the citation against Appellee pursuant to Crim.R. 48(A), and the trial court erred in denying leave to dismiss.

{¶4} Therefore, the judgment of the Ashtabula County Court, Eastern Division, is reversed.

Substantive and Procedural History

{¶5} On October 2, 2025, Appellee was issued a traffic citation for OVI, a first-degree misdemeanor in violation of R.C. 4511.19(A)(1)(a) (operation of a vehicle while under the influence of alcohol, a drug of abuse, or a combination of them); right-of-way rule at through highways, stop signs, yield signs, a minor misdemeanor in violation of R.C. 4511.43; and failure to wear a driver's safety belt, a minor misdemeanor in violation of R.C. 4513.263.

{¶6} Appellee had three lifetime prior OVI convictions but no convictions within the prior ten-year period. Appellee's breath alcohol test resulted in a .058 blood alcohol content ("BAC"), below the per se limit of .08 imposed by R.C. 4511.19(A)(1)(b).

{¶7} Appellee pled not guilty to the charges.

{¶8} On November 17, 2025, Appellant moved to dismiss the case without prejudice. Appellant asserted

After further review of all evidence, additional evidence requested and further findings, the case against [Appellee] should be dismissed as the State of Ohio is unable to sustain a conviction with the evidence provided. Said evidence shows that [Appellee] was under the legal limit at the time of the offense under two separate breath tests, as such a conviction for OVI cannot be sustained by the State. The State of Ohio contends and argues dismissal is warranted pursuant to *City of Lakewood vs. Pfiefer* (8th Dist., Cuyahoga County) 83 Ohio App. 3d 47.

{¶9} On the same day, the trial court issued a Judgment Entry denying Appellant's Motion to Dismiss.

{¶10} On December 30, 2025, Appellant filed a Renewed Motion to Dismiss based on the trial court's off-the-record statement that it would consider a more thorough and detailed motion to dismiss. Appellant offered that the arresting officer gave Appellee a portable breath test at the scene of the accident, which registered a .068 BAC. The officer added .015 to that figure to account for an hour's worth of alcohol metabolism.

{¶11} Once the officer arrested Appellee, he was given a breath test at the Ohio Highway Patrol Station and tested at .058 BAC. The officer again added an additional .15 BAC but calculated the math incorrectly at .088 BAC rather than .073 BAC. Appellant also noted that two of the three field sobriety tests were not performed. Finally, Appellant said that Appellee's "admission" of drinking "for consumption the evening prior with dinner, not on the evening of the accident."

{¶12} On December 31, 2025, the trial court denied Appellant's Renewed Motion to Dismiss.

{¶13} On January 5, 2026, Appellant timely appealed.

{¶14} On February 27, 2026, Appellant filed a Motion to Correct or Amend the Record Under App.R. 9(E) because the Judgment Entry was not signed by the trial court and because there were additional off-the-record discussions with the trial court relevant to the appeal. Appellant requested limited remand for the trial court to file a properly signed judgment entry and to file an explanation of the off-the-record discussions.

{¶15} On March 2, 2026, we granted a limited remand.

{¶16} On March 6, 2026, the trial court issued a Supplemental Record Journal Entry. In it, the trial court said that pretrial discussions between Appellant, Appellee's trial counsel, and the trial court took place off the record. During those discussions, Appellant requested the case be dismissed, and the trial court requested that Appellant's reasons for the dismissal be cited in a motion.

{¶17} The trial court reviewed Appellant's Renewed Motion to Dismiss and found:

that while the case would provide challenges for a prosecution, a conviction would be sustainable. While the BAC was below the threshold by law, there were still the Trooper's observations including [Appellee] sitting behind the wheel of his pick-up truck which he had crashed into a ditch. He was bleeding from the mouth. Additionally, the Trooper smelled alcohol about [Appellee's] person.

[Appellee] was not charged under the BAC subsection, instead, only under 4511.19(A)(1)(a). The Public Defender, to date, has not filed a motion in limine or a motion to suppress with respect to the low test result or the Trooper's extrapolation calculation.

In this particular case, there are aggravating factors: [Appellee's] prior record and the fact that there was a crash. When an OVI case lines up with all the facts and circumstances in favor of the State of Ohio, Disposition results in a plea. When the facts in an OVI case do not align perfectly for the State of Ohio disposition may result in a trial.

If [Appellee] in this case was a first-time offender with no other aggravating facts or circumstances, the Court "might" consider a dismissal or perhaps a reduction to the charge of Physical Control in violation of Ohio Revised Code 4511.194.

Here, the Court based on its denial of the motion on the aforementioned, the interest of justice and the protection of the public.

Assignment of Error and Analysis

{¶18} Appellant's sole assignment of error states: "THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO DISMISS."

{¶19} The denial of a motion to dismiss is not ordinarily a final appealable order. *State v. Yates*, 2016-Ohio-7356, ¶ 7 (11th Dist.). However, “[t]here 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 affect a substantial right in the action and in effect determine the action and prevent a judgment.” *Lakewood v. Pfeifer*, 83 Ohio App.3d 47, 50 (8th Dist. 1992).

{¶20} A trial court’s denial of the prosecution’s motion to dismiss is one such “exception to the general rule that dismissals are not appealable.” *Id.*; see *United States v. Dupris*, 664 F.2d 169, 173 (8th Cir. 1981).

{¶21} Appellant argues that the trial court abused its discretion by denying the Renewed Motion to Dismiss because Appellant’s motion satisfied the requirements of Crim.R. 48(A).

{¶22} We have recently decided similar issues in *State v. Glover*, 2026-Ohio-1332 (11th Dist.), and *State v. Jackson*, 2026-Ohio-2669 (11th Dist.), where we held that the trial court abused its discretion by denying a motion to dismiss filed pursuant to Crim.R. 48(A). *Glover* at ¶ 36; *Jackson* at ¶ 23.

{¶23} Crim.R. 48(A) provides: “The state may by leave of court and in open court file an entry of dismissal of an indictment, information, or complaint and the prosecution shall thereupon terminate.” Under Crim.R. 48(A), it is the state that “has the ability to request ‘when and which charges should be dropped.’” *Glover* at ¶ 18, quoting *State v. Jones*, 2015-Ohio-1818, ¶ 31 (8th Dist.).

{¶24} Relatedly, R.C. 2941.33 provides: “The prosecuting attorney shall not enter a nolle prosequi in any cause without leave of the court, on good cause shown, in open court. A nolle prosequi entered contrary to this section is invalid.”

{¶25} Pursuant to Crim.R. 48(A) and R.C. 2941.33, the prosecuting attorney may not dismiss a criminal cause unless the motion to dismiss occurs in open court, with the leave of court, and on good cause shown.

{¶26} The trial court’s discretion under this rule is limited by the separation of powers. *Glover*, 2026-Ohio-1332, at ¶ 19 (11th Dist.). “The Ohio Supreme Court has . . . recognized that charging decisions are committed to prosecutorial discretion and are not generally subject to judicial control.” *Id.*

{¶27} “This matter involves the interplay of the respective roles of two separate but co-equal branches of our government.” *Id.* at ¶ 13. “Like the federal Constitution, the Ohio Constitution creates a system of separation of powers.” *Id.*, quoting *TWISM Ents., L.L.C. v. State Bd. of Registration for Professional Engineers & Surveyors*, 2022-Ohio-4677, ¶ 30. “Each branch of government “can exercise such power and such only, as falls within the scope of the express delegation.”” *Id.*, quoting *TWISM Ents.* at ¶ 30, quoting *Scovill v. Cleveland*, 1 Ohio St. 126, 134 (1853).

{¶28} “The decision whether to prosecute turns on factors such as ‘the strength of the case, the prosecution’s general deterrence value, the [g]overnment’s enforcement priorities, and the case’s relationship to the [g]overnment’s overall enforcement plan” *Id.* at ¶ 15, quoting *Wayte v. United States*, 470 U.S. 598, 607 (1985). “The executive routinely undertakes those assessments and is accordingly well-equipped to implement

these determinations.” *Id.* However, the judiciary is not similarly “competent to undertake’ that sort of inquiry.” *Id.* at ¶ 16, quoting *Wayte* at 607.

{¶29} The “leave of court” requirement is a “narrow one.” *Id.* at ¶ 22. The purpose is to “protect a defendant against prosecutorial harassment, e.g., charging, dismissing, and recharging, when the Government moves to dismiss an indictment over the defendant’s objection.” *Rinaldi v. United States*, 434 U.S. 22, 29, fn. 15 (1977). However, the leave of court requirement “has also been held to permit the court to deny a Government dismissal motion to which the defendant has consented if the motion is prompted by considerations clearly contrary to the public interest.” *Id.*

{¶30} Insufficiency of proof “has always been regarded as good cause” for the dismissal of criminal charges. *Glover* at ¶ 26, quoting *Pfeifer*, 83 Ohio App.3d at 51. However, the state must “state in the record the *nature of the insufficiency*.” (Emphasis in original) *Id.*, quoting *Pfeifer* at 51. *Pfeifer* emphasized that “if the prosecution had enunciated or the record revealed more than a purely conclusory basis for the nolle, then the requirements for the nolle should be met.” *Pfeifer* at 52.

{¶31} In this case, Appellant’s Renewed Motion to Dismiss satisfied the requirements of Crim.R. 48(A) and R.C. 2941.33. The Renewed Motion to Dismiss satisfied the first requirement because it was a motion filed in open court.

{¶32} Next, the trial court erred by not granting leave of court to dismiss the case. We note that this case was charged through the issuance of a citation. Appellant did not elect to bring this charge through the prosecutor’s office. Instead, an individual law enforcement officer made the initial decision to issue a citation. Upon review of the case and the evidence, Appellant indicated that it believed there was insufficient evidence to

sustain a conviction. This detail is important because Appellant did not have an opportunity to review the merits of the case before filing the charges. This fact reduces the likelihood that Appellant would abuse the charging process by filing, dismissing, and refiling criminal charges against Appellee. It also offers justification for why Appellant would outright dismiss a case rather than seek to engage in plea negotiations.

{¶33} Appellant's Renewed Motion to Dismiss stated that its review of the evidence suggested insufficient evidence to maintain its case. The leave of court requirement does not allow a trial court to arrogate the executive branch's assessment of the strength of the case and the executive branch's overall enforcement plan. Where a defendant produces a BAC result under the per se criminal limit set forth in R.C. 4511.19(A)(1)(b), the executive branch may, in its independent discretion, determine that prosecuting such a defendant does not support the general deterrence value and enforcement priorities of the executive branch.

{¶34} Appellant was in the best position to make those determinations. Nothing empowers a court to adjudge the wisdom (or to override the prosecutor's judgment of the wisdom) of proceeding except consideration of the fairness to the accused. Judicial overreach in this prosecutorial prerogative also raises a concern that a trial court is prejudging the case by making a pretrial determination of the facts. See Jud.Cond.Canon 1; Jud.Cond.R. 2.10.

{¶35} In the Instant case, while the trial court acknowledged that pursuing the case "would provide challenges for a prosecution," it also said that a large part of its reasoning for denying the Renewed Motion to Dismiss was because of Appellee's prior record of OVI convictions. It said that if Appellee were a first-time offender, the court

“might” consider dismissal or a reduction in the charge. However, Appellee’s prior OVI convictions would not be admissible as evidence and have no bearing on Appellant’s ability to obtain a conviction on the facts available to it.

{¶36} The trial court is correct that there could be a path toward conviction given that Appellee got into a single vehicle accident, the trooper smelled an odor of alcohol, Appellee did have alcohol in his system and lied about when he last consumed alcohol. It is theoretically possible that Appellant could have proved its case and established beyond a reasonable doubt that Appellee was under the influence of alcohol, a drug of abuse, or a combination of them as required by R.C. 4511.19(A)(1)(a).

{¶37} For instance, in *State v. North*, 2020-Ohio-6846 (7th Dist.), the defendant was found guilty after a jury trial of violating R.C. 4511.19(A)(1)(a) despite a .077 BAC result under the per se limit set forth in R.C. 4511.19(A)(1)(b). *Id.* at ¶ 5-9. The prosecution was still able to prove its case because the arresting officer observed multiple marked lane violations, the defendant had glassy bloodshot eyes, a smell of alcohol, failed all three field sobriety tests, and lied about consuming alcohol. *Id.* at ¶ 29. However, we also note that *North* involved a BAC result only .003 below the per se limit while Appellee’s BAC result was .027 below the per se limit.

{¶38} Despite the theoretical possibility of obtaining a conviction in an OVI case where there is a BAC result below the per se limit set forth in R.C. 4511.19(A)(1)(b), it is not for the judiciary to independently weigh whether Appellant’s determination to dismiss a charge was a correct one. “[P]rosecutorial discretion resides in the executive branch, not in the judicial branch. While that discretion is subject to review (to *protect* a defendant’s constitutional rights), it is not unlimited, and it is not the judge’s role to exhort

or even advise a prosecutor in the manner that the executive officer elects to exercise his or her discretion.” (Emphasis in original.) *Glover*, 2026-Ohio-1332, at ¶ 35 (11th Dist.). Nothing in this case suggests that Appellant was attempting to dismiss the charges against Appellee as a means of harassing him by charging, dismissing, and recharging the case. Further, Appellee did not object to the dismissal. Dismissal of an OVI charge in a marginal case such as this one is not clearly contrary to the public interest.

{¶39} Finally, Appellant demonstrated good cause for the dismissal. Appellant identified the nature of the insufficiency of its case, including the BAC result well below the per se legal limit, the difficulty proving blood alcohol metabolism at either a suppression hearing or trial, and the lack of results in two field sobriety tests. These reasons are more than purely conclusory and satisfy the requirements for Appellant to demonstrate good cause for a dismissal.

{¶40} Accordingly, Appellant's sole assignment of error has merit.

{¶41} For the foregoing reasons, the judgment of the Ashtabula County Court, Eastern Division, is reversed.

MATT LYNCH, P.J.,

EUGENE A. LUCCI, J.,

concur.

JUDGMENT ENTRY

For the reasons stated in the opinion of this court, the sole assignment of error has merit. It is the judgment and order of this court that the judgment of the Ashtabula County Court, Eastern Division, is reversed.

Costs to be taxed against the parties equally.

JUDGE JOHN J. EKLUND

PRESIDING JUDGE MATT LYNCH,
concur

JUDGE EUGENE A. LUCCI,
concur

THIS DOCUMENT CONSTITUTES A FINAL JUDGMENT ENTRY
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A certified copy of this opinion and judgment entry shall constitute the mandate pursuant to Rule 27 of the Ohio Rules of Appellate Procedure.
