

[Cite as *State v. Brown*, 2004-Ohio-5587.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 84229

STATE OF OHIO

:
:

Plaintiff-Appellant :

JOURNAL ENTRY

vs.

:
:

and

DELRONE BROWN

:
:

OPINION

Defendant-Appellee :

:
:

DATE OF ANNOUNCEMENT
OF DECISION:

October 21, 2004

CHARACTER OF PROCEEDING:

Criminal appeal from
Court of Common Pleas
Case No. CR-443787

JUDGMENT:

DISMISSED

DATE OF JOURNALIZATION:

APPEARANCES:

For Plaintiff-Appellant:

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For Defendant-Appellee:

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COLLEEN CONWAY COONEY, J.:

{¶ 1} The State appeals the trial court’s dismissal of the felony charges against defendant-appellee, Delrone Brown (“Brown”). For the reasons discussed below, we dismiss this appeal for lack of jurisdiction.

{¶ 2} On October 22, 2003, Brown was charged with aggravated burglary, robbery, domestic violence, and disrupting a public service. A pretrial was held on November 20, which was continued at Brown’s request until December 5. Brown subpoenaed the victim to appear at the December 5 pretrial. When the victim failed to appear at the pretrial, Brown requested another continuance until December 18. The victim, although subpoenaed, again failed to appear at the pretrial. Brown requested another continuance of the pretrial until January 13, 2004, and subpoenaed the victim. The victim failed to appear again, and the trial court, sua sponte, dismissed the case over the State’s objection. Following a hearing, the State’s motion to vacate and to reinstate the case was denied.

{¶ 3} The State appeals the trial court’s dismissal, raising three assignments of error. We need not address the merits of the appeal because the record contains no final appealable order.

{¶ 4} R.C. 2505.02(B) defines a final order, in pertinent part, as follows:

{¶ 5} **“(B) An order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is one of the following:**

- (1) An order that affects a substantial right in an action that in effect determines the action and prevents a judgment;**
- (2) An order that affects a substantial right made in a special proceeding or upon a summary application in an action after judgment;**
- (3) An order that vacates or sets aside a judgment or grants a new trial;**

(4) An order that grants or denies a provisional remedy and to which both of the following apply:

- (a) The order in effect determines the action with respect to the provisional remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy.**
- (b) The appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action.**

(5) An order that determines that an action may or may not be maintained as a class action; * * *

{¶ 6} A conflict exists among appellate districts as to whether a dismissal under Crim.R. 48(B) constitutes a final, appealable order. The Tenth Appellate District has contended that dismissals involving Crim.R. 48(B) constitute final appealable orders. See *State v. Watkins* (Feb. 13, 2003), Franklin App. No. 02AP-659; *State v. Ferguson*, Franklin App. No. 02AP-660, 2003-Ohio-665; *State v. Noland* (June 26, 2001), Franklin App. No. 01AP-159; *State v. Clipner* (Sept. 14, 1999), Franklin App. No. 98AP-1477. However, this Court has repeatedly held that, in the absence of a notation that the matter was dismissed with prejudice, a dismissal pursuant to Crim.R. 48(B) is not a final appealable order. See *Fairview Park v. Fleming* (Dec. 7, 2000), Cuyahoga App. Nos. 77323, 77324; *Cleveland v. Stifel* (Sept. 2, 1999), Cuyahoga App. No. 75761, citing *State v. Dixon* (1984), 14 Ohio App.3d 396, 471 N.E.2d 864.

{¶ 7} Crim.R. 48 provides the procedure for the dismissal of a criminal case by either the State or the court. Subsection (B) provides that “if the court over the objection of the state dismisses an indictment, information, or complaint, it shall state on the record its findings of fact and reasons for the dismissal.” This rule does not provide for a dismissal with prejudice. See *Stifel*, supra, citing *Dixon*, supra.

{¶ 8} In the instant case, the judgment entry of dismissal does not indicate that this matter was dismissed with or without prejudice. This court has held that, when a trial court does not specify whether the dismissal was with or without prejudice, we are to presume it was intended to be without prejudice. See, *Fleming*, supra, citing *Stifel*, supra. In *Fleming*, this court stated:

{¶ 9} “Crim.R. 48(B) does not provide for a dismissal with prejudice; the court has the inherent power to dismiss with prejudice only where it is apparent that the defendant has been denied a constitutional or statutory right, the violation of which would, in itself, bar prosecution. *State v. Dixon* (1984), 14 Ohio App.3d 396, 471 N.E.2d 864; *State v. Sutton* (1979), 64 Ohio App.2d 105, 411 N.E.2d 818.

• * *

{¶ 10} A dismissal without prejudice does not affect a ‘substantial right’ within the meaning of R.C. 2505.02 because the state can bring the action again. The entry does not deny the state a judgment in its favor. *State v. Eberhardt* (1978), 56 Ohio App. 2d 193, 198, 381 N.E.2d 1357; *State v. Tankersley*, 1996 Ohio App. LEXIS 4791, *7-8 (Oct. 31, 1996), Cuyahoga App. Nos. 70068 and 70069, unreported. A dismissal is not a final determination of the parties’ rights if the complaint can be refiled. *Stifel*, at 7-8. Therefore, a dismissal without prejudice is not a final order under R.C. 2505.02(B)(1) and (2).

{¶ 11} The orders of dismissal are not final orders under R.C. 2505.02(B)(3) and (5) because a dismissal does not vacate a judgment, grant a new trial, or determine whether an action may be maintained as a class action. These also are not orders that grant or deny a ‘provisional remedy’ under R.C. 2505.02(B)(4); the dismissal of a criminal complaint cannot be considered a ‘proceeding ancillary to [the] action.’ See R.C. 2505.02(A)(3) (defining a provisional remedy).” *Fleming*, supra.

{¶ 12} The trial court in the instant case made no finding that Brown was denied a constitutional or statutory right when it dismissed the charges against him. The trial court dismissed the action prior to trial and, therefore, jeopardy had not attached. Because this action may be refiled without infringing upon Brown’s constitutional or statutory rights, the dismissal was not a final determination of the parties’ rights and, thus, does not affect a substantial right. *Fleming*, supra; citing *Stifel*, supra. Therefore, a dismissal of a criminal complaint, without prejudice, is not a final order, and this court lacks jurisdiction to consider the State’s appeal.

Appeal dismissed.

It is, therefore, considered that said appellant shall pay the costs herein.

It is ordered that a special mandate be sent to the Cuyahoga County Court of Common Pleas 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.

ANN DYKE, P.J. and

TIMOTHY E. McMONAGLE, J. CONCUR

JUDGE
COLLEEN CONWAY COONEY

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).