[Cite as *In re N.I.*, 2010-Ohio-5791.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 95085

IN RE: N.I.

A Minor Child

JUDGMENT:
DISMISSED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Juvenile Division
Case No. DL 09115123

BEFORE: Boyle, J., Blackmon, P.J., and Jones, J.

RELEASED AND JOURNALIZED: November 24, 2010

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MARY J. BOYLE, J.:

{¶ 1} Plaintiff-appellant, state of Ohio, appeals from a judgment of the Cuyahoga County Common Pleas Court, Juvenile Division, dismissing a complaint against defendant-appellee, N.I., after it determined that it was in the

"best interest of the child and community."[1] For the reasons that follow, we dismiss the appeal.

{¶ 2} In August 2009, a complaint for rape was brought against N.I., "a child of about the age of 13." In January 2010, the trial court found that the state proved the complaint beyond a reasonable doubt and found N.I. to be delinquent of rape.

{¶ 3} In March 2010, N.I. moved the court to reconsider its finding of delinquency, or in the alternative, dismiss the complaint pursuant to his best interest under Juv.R. 29(F)(2)(d).

{¶ 4} After holding a dispositional hearing, the court then found that "substantial grounds exist to mitigate the delinquent child's conduct" and ordered the complaint against N.I. be "dismissed pursuant to Juv.R.29(F)(2)(d) as the court finds that the dismissal is in the best interest of the child and community."

{¶ 5} It is from this judgment that the state moved for leave to appeal pursuant to R.C. 2945.67(A), which this court granted. In its sole assignment of error, the state maintains that:

{¶ 6} "The trial court abused its discretion when it dismissed the complaint pursuant to Juv.R. 29(F)(2)(d)."

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[1] The state originally requested the record on appeal include the complete transcript pursuant to App.R. 9(B). But it later amended its praecipe to App.R. 9(A), requesting that only the original papers and exhibits be included, as well as a certified copy of the docket and journal entries. Thus, there is no transcript of any of the proceedings on appeal.

Jurisdiction

{¶ 7} The state may appeal a juvenile court's delinquency decision only in limited circumstances. Section 3(B)(2), Article IV, Ohio Constitution; R.C. 2945.67; *State ex rel. Leis v. Kraft* (1984), 10 Ohio St.3d 34, 460 N.E.2d 1372. Pursuant to R.C. 2945.67(A), the state "may appeal as a matter of right any decision *** of a juvenile court in a delinquency case, which 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 *** and may appeal by leave of court to which the appeal is taken any other decision, except the final verdict *** of the juvenile court in a delinquency case."

{¶ 8} Thus, "[p]ursuant to R.C. 2945.67(A), the General Assembly has given the courts of appeals discretionary authority to decide whether to hear an appeal from a decision adverse to the state other than a final verdict." *State v. Bistricky* (1990), 51 Ohio St.3d 157, 2008-Ohio-3803, 555 N.E.2d 644, citing *State v. Fisher* (1988), 35 Ohio St.3d 22, 517 N.E.2d 911.

{¶ 9} Here, the trial court dismissed the complaint against N.I. after the dispositional hearing, concluding that it was in N.I.'s best interest to do so. Although the state normally has the right to appeal a decision by the trial court granting a motion to dismiss, in this case the trial court's decision to do so was a

"final verdict" to which double jeopardy attached. *In re Arnett*, 3d Dist. No. 5-04-20, 2004-Ohio-5766, ¶21.

{¶ 10} In *Arnett*, the court explained:

{¶ 11} "In *Breed v. Jones*, the United States Supreme Court stated that 'in terms of potential consequences, there is little to distinguish an adjudicatory hearing *** from a traditional criminal prosecution.' *Breed v. Jones* (1975), 421 U.S. 519, 530, 95 S.Ct. 1779 (holding that after adjudicating a case in juvenile court, the subsequent filing of the same charges in 'adult' court violated the defendant's right against double jeopardy). Furthermore, the Court announced that '[j]eopardy attached when respondent was "put to trial before the trier of the facts," that is when the Juvenile Court, as the trier of the facts, began to hear evidence.' Id. at 531 (citing *United States v. Jorn* (1971), 400 U.S. 470, 479, 91 S.Ct. 547, 27 L.Ed.2d 543) (internal citations omitted). See, also, *State v. Penrod* (1989), 62 Ohio App.3d 720, 724, 577 N.E.2d 424." *Arnett* at ¶20. Here, there is no question that N.I. was "put to trial before the trier of the facts," and that the trier of fact "began to hear evidence." Indeed, the trier of fact heard all of the evidence and found N.I. to be delinquent.

{¶ 12} Thus, a "[Juv.R.] 29(F)(2)(d) dismissal effectively stands as an acquittal of the charges. As a result, the Double Jeopardy Clause of the Fifth Amendment of the United States Constitution as applied to the states through the Fourteenth Amendment and Article I, Section 10 of the Constitution of the State

of Ohio prevents the state from initiating any further criminal proceedings against [the juvenile] based on the allegations stated in this complaint." *Arnett* at ¶21.

{¶ 13} Even when there is a final verdict, however, an appellate court may review substantive rulings of law when it is presented with an underlying legal question that is capable of repetition yet evading review. *State v. Bistricky*, 51 Ohio St.3d at syllabus. But if there is no "underlying legal question that is capable of repetition yet evading review," then the appellate court would be merely issuing advisory opinions and potentially impliedly commenting on the final verdict, which it cannot do. See, e.g., *State v. Brown* (Jan. 24, 2000), 5th Dist. No. 1999CA00188.

{¶ 14} Here, the state concedes that the principles of double jeopardy bar the retrial of N.I. because the juvenile court's dismissal effectively resulted in his acquittal. But the state maintains that the juvenile court's actions "raise a substantive legal issue, capable of repetition, and should be addressed by this court."

{¶ 15} The question before this court then is whether the state's appeal presents a substantive law issue that does not affect the verdict. Although we initially granted the state leave to appeal in this case, after further review, we find that there is no underlying substantive legal issue for us to review.

{¶ 16} "Substantive law" is defined as "[t]he part of the law that creates, defines, and regulates the rights, duties, and powers of parties." Black's Law Dictionary, (8th Ed.2004) 1470.

{¶ 17} In its brief, the state does not explicitly point us to a legal question it wants us to answer. Rather, it argues that the trial court abused its discretion in dismissing the complaint against N.I. for myriad reasons. But if we were to delve into these alleged abuse of discretion reasons, we would be required to engage in a factual analysis of this case — which we will not do. See *In re Tripplett* (Dec. 10, 1999), 11th Dist. No. 98-L-161.

{¶ 18} Accordingly, because a final verdict rather than a substantive legal issue is challenged in this matter, we are without jurisdiction, and must therefore dismiss this appeal.

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

It is ordered that a special mandate be sent to said 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.

MARY J. BOYLE, JUDGE

PATRICIA ANN BLACKMON, P.J., and

LARRY A. JONES, J., CONCUR