[Cite as *State v. Harvey*, 2019-Ohio-4022.]

.IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellant,	:	
		No. 19AP-165
v.	:	(M.C. No. 2019ERB-70338)
Brianna Harvey,	:	(ACCELERATED CALENDAR)
Defendant-Appellee.	:	

D E C I S I O N

Rendered on September 30, 2019

On brief: *Zachary M. Klein*, City Attorney, *Bill R. Hedrick*, and *Orly Ahroni*, for appellee. **Argued:** *Orly Ahroni*.

On brief: *Vincent A. Dugan, Jr.* **Argued:** *Vincent A. Dugan, Jr.*

ON MOTION FOR LEAVE TO APPEAL

BEATTY BLUNT, J.

{¶ 1} Plaintiff-appellant, State of Ohio, has filed a motion for leave to appeal a decision from the Franklin County Municipal Court, Environmental Division, finding there was no probable cause to seize and impound the dogs owned by defendant-appellee, Brianna Harvey, pursuant to a search warrant executed by animal control following a cruelty complaint. Because we conclude that we have no jurisdiction to accept this appeal, the motion for leave to appeal is denied and the appeal is dismissed.

I. FACTS AND PROCEDURAL HISTORY

{¶ 2} On February 6, 2019, Columbus Humane received a complaint from a veterinarian at MedVet Hilliard concerning a Great Dane that had been brought in. The veterinarian reported the dog was lateral and emaciated, with pressure sores on his body.

Appellee was a co-owner of the dog. Ultimately, the Great Dane was humanely euthanized at the choice of appellee.

{¶ 3} According to testimony from the subsequent probable cause hearing, on February 8, 2019, Columbus Humane Agent Sean Dundar responded to the complaint by visiting the residence of appellee. Although there was no answer at the door upon knocking, Agent Dundar observed two dogs at the residence, both of whom he thought were visibly underweight.

{¶ 4} On February 13, 2019, Agent Dundar, Chief Columbus Humane Agent Kerry Manion, Agent Johnson and Agent-in-Training Burris (collectively, the "humane agents") executed a search warrant. Agent Dundar and the other humane agents seized and impounded two dogs. On February 18, 2019, appellee was charged with two counts of prohibitions concerning companion animals, in violation of R.C. 959.131(D)(2), for depriving the two dogs of necessary sustenance.

{¶ 5} On February 22, 2019, the trial court held a hearing, pursuant to R.C. 959.132(E), to determine whether the humane agents had probable cause to seize the dogs. At the hearing, Agents Dundar and Manion testified on behalf of the State. The trial court found that no probable cause existed to seize the two dogs and ordered the dogs to be returned to appellee. Subsequently, appellee entered a plea of not guilty on March 20, 2019.

{¶ 6} In the meantime, on March 22, 2019, pursuant to R.C. 2945.67(A) and App.R. 3 and 4, the State filed an appeal as of right of the trial court's decision which found no probable cause existed to seize the two dogs. The State also filed a motion for leave to appeal pursuant to R.C. 2945.67(A) and App.R. 5(C).

II. ASSIGNMENT OF ERROR

{¶ 7} Appellant asserts one assignment of error for our review:

> The trial court erred when it found no probable cause to seize and impound the dogs.

III. JURISDICTION

{¶ 8} As a threshold matter, this court must determine whether this appeal may proceed as of right and, if not, whether appellant's March 22, 2019 motion for leave to

appeal should be granted. Section 3(B)(2), Article IV of the Ohio Constitution provides that appellate courts have jurisdiction only to "affirm, modify, or reverse judgments or final orders of the courts of record inferior to the court of appeals within the district." If a lower court's order is not final, then an appellate court does not have jurisdiction to review the matter and the appeal must be dismissed. *Gen. Acc. Ins. Co. v. Ins. Co. of N. Am.*, 44 Ohio St.3d 17, 20 (1989).

{¶ 9} R.C. 2505.02(B) states, in pertinent part:

> 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:
>
> * * *
>
> (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.

{¶ 10} In *State v. Muncie*, 91 Ohio St.3d 440, 446 (2001), the Supreme Court of Ohio held that pursuant to R.C. 2505.02(B)(4), an order granting or denying a provisional remedy is a final appealable order if it satisfies the following three-part test:

> (1) the order must either grant or deny * * * a "provisional remedy," (2) the order must both determine the action with respect to the provisional remedy and prevent a judgment in favor of the appealing party with respect to the provisional remedy, and (3) the reviewing court must decide that the party appealing from the order 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.

(Emphasis omitted.)

{¶ 11} Under R.C 2505.02(A)(3), " '[p]rovisional remedy' means "a proceeding ancillary to an action, including, but not limited to, a proceeding for a preliminary injunction, attachment, discovery of privileged matter, [or] suppression of evidence." A "proceeding ancillary to an action" is " 'one that is attendant upon or aids another proceeding.' " *Muncie, supra*, at 449, quoting *Bishop v. Dresser Industries, Inc.*, 134 Ohio App.3d 321, 324 (3d Dist.1999). A trial court's determination that there was no probable cause to seize animals pursuant to R.C. 959.132 is a provisional remedy. *State v. Beck*, 11th Dist. No. 2014-P-0050, 2015-Ohio-1069, ¶ 37. Thus, the first prong of the court's analysis is satisfied.

{¶ 12} As for the second prong of the test, we find it is not satisfied. Despite the dogs being returned to appellee following the trial court's hearing on probable cause, the State could have presented photographic evidence of the condition of the dogs at the time they were initially seized as well as the testimony of the humane agents regarding the condition of the dogs at the time the dogs were observed at the residence of appellee. Therefore, the trial court's order finding no probable cause to seize the dogs and ordering the dogs be returned to appellee does not both determine the action with respect to the order and prevent a judgment in favor of the State at trial.

{¶ 13} Finally, we find the third prong of the test is also not satisfied. As discussed above, at the trial of appellee, the State is free to present the photographic evidence of the condition of the dogs at the time appellee was charged with animal cruelty and is free to put on as witnesses the humane agents who observed the condition of the dogs at the time they were originally seized. In addition, during the pendency of the action the State can continue its investigation into the matter by any means it sees fit, such as by interviewing other potential witnesses to glean information relevant to the charges of animal cruelty, including friends, neighbors, and any veterinarians who may have been currently treating and/or otherwise following the dogs. Any additional evidence the State thereby amasses can likewise be presented at trial. Furthermore, in the event appellee is ultimately convicted, the trial court could order the dogs to be forfeited as part of a sentence. Therefore, we cannot say that the State 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.

{¶ 14} Accordingly, having determined that although the first prong of the test set forth in *Muncie*, *supra*, has been met, the other two prongs have not been met, we find that the trial court's order returning the seized dogs to appellee is not a final order so as to vest this court with jurisdiction to hear this appeal.

{¶ 15} Furthermore, we do not construe R.C. 2945.67(A) as obviating the requirement that an order be a final one before we may review an appeal from such order. Although the statute itself is not clear on this point and we acknowledge that case law on the issue has been inconsistent, we note that we have previously issued a decision which at least implied that an appeal as of right brought pursuant to R.C. 2945.67(A) must be both one of the types of orders enumerated in the statute *and* a final appealable order under R.C. 2505.02. *In re A.E.*, 10th Dist. No. 08AP-59, 2008-Ohio-4552 (dismissal without prejudice of complaint against juvenile based on truancy was not a final appealable order and the court lacked jurisdiction to hear the state's appeal filed pursuant to R.C. 2945.67(A)).

{¶ 16} We find the analysis set forth in a recent decision issued by the Second Appellate District to be instructive. In *State v. Jones*, 2d Dist. No. 27354, 2017-Ohio-5758, the court discussed at length the various decisions which engaged in the construction of R.C. 2945.67(A) and specifically whether an appeal as of right or with leave under the statute must be from a final order as determined by R.C. 2505.02. While candidly acknowledging the lack of clarity in the statute itself, the inconsistency within the case law and resulting confusion on the issue, the *Jones* court ultimately concluded that both section 3(B)(2), Article IV of the Ohio Constitution imbuing courts of appeals with jurisdiction and the language of App.R. 5(C) governing appeals by leave of court compelled the conclusion that an appeal for leave under R.C. 2945.67(A) must be from an order that is "final and appealable" as defined by R.C. 2505.02.

{¶ 17} The court in *Jones* further observed that the foregoing conclusion was "in accord with other practical and policy concerns." *Jones* at ¶ 23. These concerns included that some interlocutory decisions are subject to modification by the trial court later in the proceedings and the premature review of such decisions by courts of appeals could lead to the generation of "a body of mid-case, quasi-advisory opinions on virtually any subject"; that "the record of an appeal taken mid-case may be insufficient to fully analyze the matter";

and that certain types of assignments of error could require courts of appeals to "speculate about the outcome and content of a trial that has not yet occurred." *Id*.

{¶ 18} Moreover, the court in *Jones* aptly discerned that "a finding that the State can immediately seek leave to appeal at any stage of the case risks major delays in criminal proceedings, even if [the] court ultimately rejects the State's requests for leave and dismisses its appeals." *Id*. at ¶ 24. While acknowledging that some case law seems to suggest that such appeals are permitted, the court in *Jones* concluded that such a result could not have been intended by the General Assembly when it enacted R.C. 2945.67(A).

{¶ 19} We find the reasoning in *Jones*, *supra*, to be sound. We further find that, although the *Jones* decision specifically concerned an appeal by leave of court pursuant to R.C. 2945.67(A) and App.R. 5(C), the reasoning is equally sound as applied to an appeal claimed as of right pursuant to R.C. 2945.67(A) and App.R. 3 and 4.

{¶ 20} Therefore, we hereby hold that when the State is appealing an order as of right under R.C. 2945.67(A) and App.R. 3 and 4 or is seeking leave to appeal an order pursuant to R.C. 2945.67(A) and App.R. 5(C), the order must be a final order so as to vest this court with jurisdiction. Because we have determined that the order from which the State has filed its appeal is not a final order, we do not have jurisdiction over the instant appeal and we may not review the State's assignment of error.

IV. CONCLUSION

{¶ 21} Because the State does not appeal from a final order of the trial court, this court lacks jurisdiction to consider the State's sole assignment of error. Accordingly, the motion for leave to appeal pursuant to R.C. 2945.67(A) is denied and the appeal is dismissed.

Motion denied; appeal dismissed.

BRUNNER and NELSON, JJ., concur.