

IN THE COURT OF COMMON PLEAS OF THE STATE OF DELAWARE

IN AND FOR SUSSEX COUNTY

STATE OF DELAWARE : CASE NO. 0305012170

Vs. :

JAMES A. JOHNSON : Submitted August 9, 2004
Defendant : Decided September 14, 2004

George G. Strott, Esquire, appearing for Defendant
Carole E.L. Davis, Esquire, Deputy Attorney General, appearing for the State.

FACTS

James A. Johnson (hereafter “Johnson”) was arrested and charged with Driving under the Influence of Alcohol under 21 *Del. C.* § 4177(a) and for an improper lane change under 21 *Del. C.* § 4122. On November 10, 2003, this Court heard testimony and argument on Johnson’s Motion to Suppress evidence collected subsequent to the stop of Johnson’s vehicle. The Motion to Suppress was granted. After the ruling, the Court inquired whether the State could proceed any further with the prosecution of the case and was advised that it could not. At that point, defense counsel

requested that the Court dismiss the charges. The State neither objected to the request for dismissal nor did it certify that the suppressed evidence was essential to the prosecution. The Court dismissed the charges pursuant to the Defendant's Motion to Dismiss under *Court of Common Pleas Criminal Rule 48(b.)*

On December 8, 2003, two days prior to the tolling of the thirty day appeal time provided in 10 Del. C. § 9904, the State sent a letter to the Court certifying that the evidence suppressed was essential to the prosecution and asked that the case be dismissed so that it could seek appellate review of the Court's order to suppress in accordance with 10 *Del. C.* § 9902(b). The Court reviewed the certification letter on December 9, 2003, but took no action as it had previously dismissed the matter on other grounds.

On December 10, 2003, the State sent a notice of appeal to the Superior Court. The Superior Court dismissed the appeal on April 22, 2004. *State v. Johnson*, Del. Super., Cr.A. No. 0305012170, Graves, J. (April 22, 2004). The Superior Court held that it did not have jurisdiction to hear the appeal because the requirements of 10 *Del. C.* § 9902(b) were not met since the trial court did not dismiss the case based upon the State's

certification. *Id.* On April 23, 2004, the State refiled, in this Court, its request to dismiss this matter pursuant to 10 *Del. C.* § 9902(b). Oral arguments were heard on August 9, 2004. This is the Court's decision.

DISCUSSION

The issue before the Court is whether the State's certification and request for dismissal is viable after a final order of dismissal has been entered by the Court pursuant to other grounds.

A. Requirements of 10 *Del. C.* § 9902(b)

The State alleges that it perfected its right to appeal under 10 *Del. C.* § 9902(b) by way of a letter sent to the Court on December 8, 2003. The State admits that it failed to properly certify at the close of the suppression hearing. The State also admits that the Court's dismissal of the case on November 10, 2003 in response to a *Rule* 48(b) defense request was a proper ruling at the time it was made. The State, however, argues that it maintained its right to appeal through the certification and request for dismissal in the December 8, 2003 letter and argues that this Court may dismiss a case twice on different grounds.

In order to preserve its appellate rights, the State must satisfy the requirements of 10 *Del. C.* § 9902(b). The language of this statute reads:

When any order is entered before trial in any court suppressing or excluding substantial and material evidence, the court, upon certification by the Attorney General that the evidence is essential to the prosecution of the case, shall dismiss the complaint, indictment or information or any count thereof to the proof of which the evidence suppressed or excluded is essential. Upon ordering the complaint, indictment or information or any count thereof dismissed pursuant to the Attorney General's certification, the reasons of the dismissal shall be set forth in the order entered upon the record.

Under subsection 9902(b), the State has an absolute right to appeal any pretrial order by the court suppressing or excluding substantial and material evidence. In order to preserve its right to appeal, however, the State must certify that the evidence being suppressed is “essential to the prosecution of the case,” and request that the case be dismissed. Upon this certification, the Court “shall” dismiss the case. *State v. Cooley*, 430 A.2d 789, 791 (Del. 1981).

The Superior Court, in its review of the case at bar, held that it did not have jurisdiction to hear the State's appeal since the Court of Common Pleas did not dismiss the case pursuant to the State's certification. *State v.*

Johnson, Del. Super., Cr.A. No. 0305012170, Graves, J. (April 22, 2004). Judge Graves explained that subsection 9902(c) requires:

- (1) that the State must certify to the court that the suppressed evidence is essential to the prosecution of the case; and
- (2) that the court, acting upon the State's certification that such evidence is essential, must dismiss the action.

Id. citing *State v. Cooley*, 473 A.2d 818, 821 (Del. Super. Ct.).

In the case *sub judice*, the second element is missing. This Court dismissed the action, not based upon the certification and request for dismissal by the State, but rather on the unopposed 48(b) motion of the Defendant.¹ In oral argument, the State conceded that fact. Without an order of dismissal based upon the State's certification, no statutory right for the State to appeal is created. In the words of Judge Graves, "[t]hat is fatal to the appeal." *State v. Johnson*, Del. Super., Cr.A. No. 0305012170, Graves, J. (April 22, 2004).

The language of 9902(b) presupposes that an information or indictment is pending when the State's certification and request for dismissal is made. This matter was dismissed by final order on November 10, 2003 pursuant to an unopposed defense motion for failure to prosecute. The State

¹ At the suppression hearing, the State neither certified the evidence as essential, nor did it request a dismissal in order to preserve its appellate rights. Had it done so, prior to the Court's ruling the defense 48(b) motion to dismiss, the Court would have been obligated to grant the State's request under the mandatory language of 10 *Del. C.* § 9902(b).

cannot later certify and request a dismissal after the entry of that final order, as there was no longer a viable case for the court to act upon. In short, the request of the State to dismiss was moot.

B. Time Limitations on Certification

The State also argues that Delaware law provides a 30-day period within which the State may be allowed to certify that the suppressed evidence is essential. The Court disagrees. The State has 30 days from the entry of the pre-trial suppression order to *appeal* according to 10 *Del.*

C. § 9904. The right to appeal and the right to certify are not synonymous. 10 *Del. C.* § 9904 states:

The appeal or application for appeal shall be filed with the appellate court within 30 days from entry of the order appealed from, or, in any case in which the State elects to prosecute a cross appeal, notice of the cross appeal shall be filed within 30 days from the filing of a notice of appeal by the defendant.

This section governs the time limit for a state appeal. It does not give the State 30 days to certify that the evidence is essential nor to request a dismissal. Neither 10 *Del. C.* §§ 9902 or 9904 explicitly give the State 30 days to certify. The Court of Common Pleas is a statutorily created court and is bound by the laws promulgated by the legislature. If the Court were to follow the logic of the State and interpret sections 9902 and 9904 so

liberally, it would be acting outside its statutorily created authority. The Court declines to do so.

In this case, the State failed to either certify the evidence as essential or request a dismissal at the close of the suppression hearing. Twenty-eight days later, the State sent the Court a letter requesting a dismissal and certifying the evidence as essential. The State argues that since the certification letter was sent within the 30-day time limit imposed by section 9904 for the filing of an appeal, the Court is obligated to accept the certification and dismissal request as timely. The State has provided no precedent for its argument and fails to concede that the prior November 10, 2003 final order of dismissal under Rule 48(b) had any effect on their appeal rights under §9902(b). In effect, the State's position is for this Court to ignore its prior 48(b) Dismissal Order and order the dismissal of the case under 9902(b) for the State's benefit. The Court cannot ignore the procedural legal facts of this case.

As stated above, section 9904 applies to the time period for requesting appeals, not for certifying evidence as essential. Therefore, the State's reliance on section 9904 is unfounded. If there are no intervening dispositive motions presented to and granted by the Court prior to State certification and request for dismissal, the State may very well have the luxury of the 30-day

time period to decide whether to certify and appeal. However, when the defense pursues an appropriate case dispositive motion, the State may find that its time to certify is limited due to other motions or matters being considered by the court.

The State would have had a stronger argument had it opposed the 48(b) motion, or made a motion to reopen the 48(b) order, rather than request the Court to dismiss a case that had already been dismissed. If the 48(b) dismissal had been reopened, the State may have had the opportunity to certify that the suppressed evidence was essential and requested a dismissal pursuant to subsection 9902(b).

Under the present circumstances, however, the Court finds that the State failed to timely certify that the evidence was essential and to request a dismissal under 10 *Del. C.* § 9902(b).

THEREFORE, the Court finds that the matter has already been dismissed. Consequently, the State's Motion to Dismiss is moot and must be denied.

IT IS SO ORDERED.

Judge Rosemary Betts Beauregard