

SUPERIOR COURT
OF THE
STATE OF DELAWARE

T. Henley Graves
Resident Judge

SUSSEX COUNTY COURTHOUSE
THE CIRCLE
P.O. BOX 746
GEORGETOWN, DE 19947
(302) 856-5257

April 22, 2004

Carole E.L. Davis, Esquire
Department of Justice
114 E. Market Street
Georgetown, DE 19947

George G. Strott, Jr., Esquire
P.O. Box 132
Salisbury, MD 21801

RE: State v. Johnson, Def. ID# 0305012170

DATE SUBMITTED: April 5, 2004

Dear Counsel:

Pending before the Court is an appeal which the State of Delaware (“the State”) has filed pursuant to 10 Del. C. § 9902(b). Since the record does not reflect that the State complied with the procedural requisites of pursuing such an appeal, I dismiss the appeal.

The State prosecuted James A. Johnson (“defendant”) on charges of violating 21 Del. C. §4122, driving on roadways laned for traffic, and 21 Del. C. §4177, driving under the influence. A suppression hearing was held before the Court of Common Pleas (“CCP”) on November 10, 2003. At the end of the hearing, CCP concluded that there was no reasonable articulable suspicion to stop defendant’s vehicle. The transcript reflects the following pertinent exchanges:

THE COURT: *** No probable cause to stop no reasonable articulable suspicion.

THE COURT: All right. With that said, can the State proceed any further with the prosecution of this case?

MS. SERGOVIC: No, Your Honor.

MR. STROTT: I make a motion to dismiss.

THE COURT: The case is dismissed. ***

CCP's docket contains an entry dated December 8, 2003 which provides as follows:

LETTER FROM DAG REQUESTING CASE BE DISMISSED IF NOT ALREADY
DONE AS THEY WISH TO FILE APPELLATE REVIEW

This letter is not in the record on appeal.

The State's notice of appeal recites as follows:

5. By letter dated December 8, 2003, the State confirmed that the evidence suppressed was essential to the prosecution and requested the matter be dismissed, so the State could pursue appellate review.

Nothing in the record on appeal or in the docket sheet indicates that CCP ordered a dismissal of the case pursuant to 10 Del. C. § 9902(b). The State filed the appeal on December 10, 2003, without the required order from CCP.

In 10 Del. C. § 9902, it is provided in pertinent part:

(b) 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.

(c) The State shall have an absolute right of appeal to an appellate court from an order entered pursuant to subsection (b) of this section and if the appellate court upon review of the order suppressing evidence shall reverse the dismissal, the defendant may be subjected to trial.

The Supreme Court explained the requisites of this statute in State v. Cooley, 430 A.2d 789, 791 (Del. 1981), as follows:

Subsection (b), § 9902(b), plainly provides for a three-step procedure to be followed when the State elects to perfect an appeal of right; thus:

- (1) The Trial Court enters an order adverse to the State "suppressing or excluding substantial and material evidence";
- (2) The Attorney General then certifies that the "evidence is essential to the prosecution of the case";
- (3) Whereupon, the Court "shall" enter an order dismissing the complaint.

The requisites were reemphasized in State v. Cooley, 473 A.2d 818, 821 (Del. Super. 1983), where the Superior Court stated:

[T]his statute sets out two requirements which must be satisfied before the State may appeal a pretrial suppression order under § 9902(c). They are:

- 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.

Until these two requirements are met, the State has no absolute right of appeal of a pretrial suppression order under § 9902(c).

In this case, an order from CCP dismissing the case based upon the State's certification is missing. That is fatal to the appeal. Although it might seem unfair to the State that its appeal should be dismissed because CCP did not act on the State's certification, the State is well aware of the procedural requisites of such an appeal, and the State should have specifically requested that CCP

enter such an order. Had the State done so, then CCP was required by statute to provide the requested order.

Since the jurisdictional requirements of the appeal statute are not met, I dismiss the appeal.

IT IS SO ORDERED.

Very truly yours,

T. Henley Graves

cc: Prothonotary's Office
CCP Clerk's Office
The Honorable Kenneth S. Clark, Jr.