

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR SUSSEX COUNTY

STATE OF DELAWARE, : Def. ID# 0305012170
Appellant, :
v. :
JAMES A. JOHNSON, :
Appellee. :

ORDER DENYING LEAVE TO APPEAL

1) The State of Delaware (“the State”) seeks leave to appeal a decision of the Court of Common Pleas in and for Sussex County (“CCP”) pursuant to 10 Del. C. § 9903.¹

2) On May 12, 2003, James A. Johnson (“defendant”) was arrested on charges of violating 21 Del. C. §4122, driving on roadways laned for traffic, and 21 Del. C. §4177, driving under the influence. On November 10, 2003, a suppression hearing was held in CCP, and that court concluded there was no reasonable articulable suspicion to stop defendant’s vehicle. The following exchange then occurred:

¹In 10 Del. C. § 9903, it is provided as follows:

The State may apply to the appellate court to permit an appeal to determine a substantial question of law or procedure, and the appellate court may permit the appeal in its absolute discretion.

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

[THE STATE]: No, Your Honor.

[DEFENSE COUNSEL]: I make a motion to dismiss.

THE COURT: The case is dismissed.

Unlike the situation in the case of State v. Schleifer, Del. Super., Def. ID# 02030006830, Jurden, J. (May 27, 2003), the State did not, at the time of the hearing and before the dismissal, clearly state the suppressed evidence was essential to its case and note a dismissal was necessary on that ground. Instead, after the dismissal, the State sent a letter dated December 8, 2003, confirming the suppressed evidence was essential to its case and requesting the matter be dismissed so that the State could pursue an appeal. CCP did not dismiss the case based on this certification.

The State then filed an appeal to the Superior Court pursuant to 10 Del. C. § 9902(b).² The Superior Court dismissed the appeal because CCP had not entered an order dismissing the

²In 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.

action based upon the State's certification. State v. Johnson, Del. Super., Def. ID# 0305012170, Graves, J. (April 5, 2004).

On April 23, 2004, the State returned to CCP and requested that CCP dismiss the matter pursuant to 10 Del. C. 9902(b). CCP denied the request, ruling that since the case was dismissed pursuant to Court of Common Pleas Criminal Rule 48(b) before the State sought a dismissal pursuant to 10 Del. C. § 9902, the State's motion to dismiss was moot. State v. Johnson, CCP, Def. ID# 0305012170, Beauregard, J. (Sept. 14, 2004).

3) The State now asks that this Court, in its discretion, allow the appeal, arguing that the September 14, 2004 decision of CCP was contrary to the requirements of 10 Del. C. § 9902(b) and the decision in State v. Cooley, 430 A.2d 789, 791-92 (Del. 1981).

4) The State's legal position is incorrect. Nothing in either 10 Del. C. § 9902(b) or State v. Cooley, 430 A.2d at 791-92 allows for a case which has been dismissed for a reason other than pursuant to § 9902(b) to be appealed pursuant to that section after the dismissal for the other reason.³ If the State had specified orally that it would need to have the case dismissed because the evidence was necessary to its case, the fact the defense actually moved for the dismissal would have been irrelevant; CCP would have been compelled both to consider the certification to have been made and to have dismissed based on that certification. State v. Schleifer, supra. That was not the case here, and an appeal of the decision below would be fruitless.

³The Court in State v. Cooley, 430 A.2d, refers to certifying after the motion to suppress has been decided, not after the case has been dismissed. The State incorrectly assumes that the courts always dismiss a case immediately upon ruling on the motion to suppress. The Court acknowledges, however, that is usually the case. The State should know before the decision on the motion to suppress if it wishes to appeal an unfavorable decision and if so, meet the requisites of 10 Del. C. § 9902 at the time the decision on the suppression motion is rendered.

NOW, THEREFORE, THIS 16TH DAY OF NOVEMBER, 2004, this Court denies the State leave to appeal the decision below because the appeal is meritless on its face.

\S\ T. Henley Graves
JUDGE T. HENLEY GRAVES

cc: Prothonotary's Office
CCP Clerk's Office
Carole E.L. Davis, Esquire
George G. Strott, Jr., Esquire