

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE  
IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE, )  
)  
Appellant, )  
) ID No. 0403006066  
v. )  
)  
RICHARD ROLLO, )  
)  
Appellee-Defendant. )

**MEMORANDUM OPINION**

*Upon Consideration of Appellee's Motion to Dismiss Appeal*  
**DENIED**

**Submitted: June 9, 2005**

**Decided: August 4, 2005**

Shawn Martyniak, Esquire, Department of Justice, Wilmington, Delaware,  
Attorney for Appellant

Louis B. Ferrara, Esquire, Ferrara, Haley & Bevis, Wilmington, Delaware,  
Attorney for Appellee-Defendant Below.

Johnston, J.

The State has appealed the Court of Common Pleas' dismissal of this case following the suppression of essential evidence. Defendant (Rollo) filed a Motion to Dismiss Appeal. This is the Court's decision on Defendant's motion to dismiss.

### **PROCEDURAL CONTEXT**

On February 21, 2004, Defendant Richard Rollo was detained and charged with driving under the influence of alcohol. Trial was scheduled in the Court of Common Pleas on November 22, 2004. Just before the start of trial, Defendant/Appellee successfully moved to exclude the results of chemical tests for lack of probable cause. Following the exclusion, the State certified on the record that the suppressed evidence was essential to the State's case in chief, and sought dismissal of the charge. The Court of Common Pleas granted the State's request for dismissal pursuant to 10 *Del. C.* § 9902(b), automatically ripening the State's absolute right of appeal conferred by 10 *Del. C.* § 9902(c).

On December 3, 2004, the State timely filed a Notice of Appeal indicating that the appeal is from the order suppressing all evidence. Defendant filed a Motion to Dismiss Appeal on May 17, 2005, alleging that under Superior Court Criminal Rule 39(f), the Court lacks jurisdiction as a result of the State's failure to comply with sections 9902(b)-(c). Defendant argues that the State's Notice of

Appeal is fatally flawed because the State erroneously appealed the *order to suppress* and not the *order to dismiss* as required by sections 9902(b)-(c).

### **ISSUE**

The issue presented is whether this Court may consider an appeal under 10 *Del. C.* § 9902(b)-(c) when the State incorrectly filed an application for appeal from the order suppressing evidence. The State successfully fulfilled all other requirements pursuant to section 9902.

### **STANDARD OF REVIEW**

The standard of review of legal issues in appeals from the Court of Common Pleas to the Superior Court is *de novo*.<sup>1</sup>

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<sup>1</sup>*State v. Karg*, 2001 WL 660014, at \*1 (Del. Super.)

## ANALYSIS

Section 9902<sup>2</sup> was designed to obtain the requisite measure of finality so that the State may pursue appeals of pretrial suppression orders.<sup>3</sup> The Delaware Supreme Court has outlined the three-step procedure required for the State to perfect an appeal. First, the trial court enters an order adverse to the State suppressing or excluding substantial and material evidence. Second, the Attorney General certifies that the evidence is essential to the prosecution of the case. Third, the court “shall” enter an order dismissing the complaint.<sup>4</sup> Before a court can rule on the merits of a section 9902 appeal, it must first determine if the

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<sup>2</sup>10 *Del. C.* § 9902 provides 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 to appeal to an appellate court from any 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.

<sup>3</sup>*State v. Cooley*, 473 A.2d 818, 822 (Del. Super. 1983).

<sup>4</sup>*State v. Cooley*, 430 A.2d 789, 791 (Del. Super. 1981).

procedural requirements have been met. If not, the reviewing court lacks jurisdiction to hear the appeal.<sup>5</sup>

In this case, the State has complied with all statutory requirements in section 9902. First, the trial court entered an order adverse to the State by suppressing the results of an intoxilyzer test that displayed the Defendant's blood alcohol was over the legal limit. This obviously is substantial and material evidence in a prosecution for driving under the influence pursuant to 21 *Del. C.* § 4177. Second, the State certified on the record at trial that the evidence was necessary to prosecute the case.<sup>6</sup> Third, following the State's concession, the Court dismissed the case. Defendant candidly conceded in his Motion to Dismiss that "the right of appeal was properly preserved at trial."

Despite satisfaction of the statutory requirements, Defendant contends that the language in the Notice of Appeal was fatally flawed in that the notice mentions the order to suppress, not the order of dismissal. It is undisputed that the State

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<sup>5</sup>*State v. Niffenegger*, 2003 WL 23163274 (Del. Super.).

<sup>6</sup> MR. MARTYNIAK: Under Title 10, 9902, Your Honor, the State submits that the evidence is necessary to the State's case in chief, and what ...

THE COURT: Seeks a dismissal on that basis?

MR. MARTYNIAK: Yes, Your Honor.

THE COURT: Motion is granted. The charge is dismissed under 9902.

Trial Transcript at 144-45.

incorrectly referenced the order suppressing evidence. The question is whether this technical error precludes the State from effectuating the absolute right of appeal conferred under section 9902.

The Defendant relies on language in *Cooley* declaring that an “order dismissing the action is the appealable order under Section 9902, not the order suppressing the evidence.”<sup>7</sup>

Section 9902 is intended to discourage appeals from interlocutory orders where *no* final judgments have been made. In this case, a final judgment was made ordering the dismissal of the charge. *Cooley* should not be interpreted to deny the State’s absolute right to appeal under section 9902(c) because of an obvious technical error in the language on the Notice of Appeal. In addition, the severity of the State’s error is mitigated by the fact that the order to suppress is directly linked to, and for all intended purposes inseparable from, the order to dismiss.

Further, the right of appeal provided to the State under section 9902 evolved from the federal act permitting appeals by the United States in criminal cases.<sup>8</sup> The nature of the remedy is an important remedial right which, like other appeals,

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<sup>7</sup>*Cooley*, 430 A.2d at 791.

<sup>8</sup>18 U.S.C.A. § 3731.

should not be denied except for good cause and in the clearest of cases if the appeal is within the terms of the statute.<sup>9</sup> Substance rather than form should govern the Superior Court's review of the decision-making process underlying an appeal filed under section 9902.<sup>10</sup> Technical flaws should not be grounds for dismissing an incorrectly filed appeal, unless the defendant will be prejudiced.<sup>11</sup> The importance of reaching and deciding the substantive merits of appeals whenever possible outweighs the technical procedural aspects of appeals.<sup>12</sup>

### CONCLUSION

The Defendant has failed to demonstrate that he will suffer substantial prejudice from the acceptance of the technically flawed Notice of Appeal. This minor procedural flaw does not constitute a ground for dismissal. Under the circumstances presented, the error clearly was not substantive. All of the statutory requirements established by 10 *Del. C.* §9902 have been met.

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<sup>9</sup>*State v. Dobies*, 290 A.2d 663, 665 (Del. Super. 1972).

<sup>10</sup>*State v. Reed*, 567 A.2d 414, 416 (Del. 1989).

<sup>11</sup>*Id.* at 417.

<sup>12</sup>*Weston v. State*, 554 A.2d 1119, 1122 (Del. 1989); *State Personnel Commission v. Howard*, 420 A.2d 135, 137 (Del. 1980).

**THEREFORE**, Appellee's Motion to Dismiss Appeal is hereby **DENIED**.

**IT IS SO ORDERED.**

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The Honorable Mary M. Johnson