

[Cite as *State v. Ruoff*, 2013-Ohio-4275.]

STATE OF OHIO)
)ss:
COUNTY OF LORAIN)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

Appellant

v.

NICOLE RUOFF

Appellee

C.A. No. 13CA010351

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF LORAIN, OHIO
CASE No. 09CR079564

DECISION AND JOURNAL ENTRY

Dated: September 30, 2013

BELFANCE, Presiding Judge.

{¶1} The State appeals the order of the Lorain County Court of Common Pleas that dismissed the criminal charges that were pending against Nicole Ruoff. For the reasons set forth below, we affirm.

I.

{¶2} On December 3, 2009, Ms. Ruoff was indicted for tampering with evidence, falsification, and two counts of patient abuse and neglect. On November 8, 2011, Ms. Ruoff moved the court to permit her to participate in its “diversion program[.]” According to the trial court’s journal entry, Ms. Ruoff subsequently pleaded guilty to “the indictment[.]” The trial court accepted her plea and entered the following into its January 31, 2012 journal entry: “Court does not find Defendant guilty because court grants Defendant’s request for placement in the Court’s diversion program. Case stayed. Bond modified to \$5,000.00 personal.” On January 18, 2013, the trial court entered the following order: “Upon recommendation of the Lorain

County Adult Probation Department and pursuant to R.C. 2951.041(E), the Court finds that the defendant has successfully completed the period of rehabilitation. Supervision is hereby terminated successfully and the above captioned case is hereby dismissed.”

{¶3} The State has appealed, raising two assignments of error for our review.

II.

ASSIGNMENT OF ERROR I

THE TRIAL COURT IMPROPERLY DISMISSED MS. RUOFF’S INDICTMENT UPON COMPLETION OF THE LORAIN COUNTY COURT OF COMMON PLEAS DIVERSION PROGRAM AS ONLY A PROSECUTING ATTORNEY HAS THE AUTHORITY TO ESTABLISH A PRE-TRIAL DIVERSION PROGRAM.

{¶4} In the State’s first assignment of error, it argues, pointing to R.C. 2935.36, that only a prosecuting attorney may establish a pretrial diversion program. This is the same issue the State raised in *State v. Wagner*, 9th Dist. Lorain No. 12CA010199, 2013-Ohio-2036, ¶ 4. As in *Wagner*, the trial court in this case dismissed the action pursuant to R.C. 2951.041(E), not R.C. 2935.36. *Id.* Also similar to *Wagner* is the State’s failure to even mention R.C. 2951.041 in its brief, “let alone demonstrate[] that the court improperly applied the statute.” *Id.*¹

{¶5} “[R.C.] 2951.041 lays out a process under which a defendant may seek intervention in lieu of conviction that, upon successful completion, culminates in the dismissal of the charges against him. R.C. 2951.041(A–E).” *Id.* Because the State has not challenged the trial court’s application of R.C. 2951.041(E), we overrule its first assignment of error. *See id.* at ¶ 4-5.

¹ While the State did argue in its reply brief that the trial court misapplied R.C. 2951.041, a party “may not raise new * * * issues for consideration in his reply brief; rather, the reply brief is merely an opportunity to reply to the brief of the appellee.” (Internal quotations and citations omitted.) *State v. Caldwell*, 9th Dist. Summit No. 26306, 2013-Ohio-1417, ¶ 9. *See also* Loc.R. 7(D).

ASSIGNMENT OF ERROR II

THE TRIAL COURT ERRED IN STRUCTURING THE LORAIN COUNTY COURT OF COMMON PLEAS DIVERSION PROGRAM TO REMOVE ONE OF THE ESSENTIAL PARTIES TO THE CASE AND TO VIOLATE THE CONSTITUTIONAL CONCEPT OF SEPARATION OF POWERS.

{¶6} The State argues in its second assignment of error that the trial court’s “diversion program” is contrary to law because the prosecutor was not involved with creating it. Again, this is the same assignment of error and argument raised in *Wagner*, see *Wagner*, 2013-Ohio-2036, at ¶ 6-7, and, just as in *Wagner*, the State did not challenge the constitutionality of R.C. 2951.041 in the trial court, has not argued that R.C. 2951.041 is unconstitutional in its brief, or included any details in the record about the court’s diversion program. See *id.* at ¶ 7. “This Court will not consider the constitutionality of a statute sua sponte.” *Id.*, citing *Smith v. Landfair*, 135 Ohio St.3d 89, 2012–Ohio–5692, ¶ 12 (“Declaring a statute unconstitutional, sua sponte, without notice to the parties would be unprecedented.”).

{¶7} Accordingly, the State’s second assignment of error is overruled.

III.

{¶8} The State’s assignments of error are overruled, and the judgment of the Lorain County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

EVE V. BELFANCE
FOR THE COURT

HENSAL, J.
CONCURS.

CARR, J.
DISSENTING.

{¶9} I respectfully dissent for the reasons I articulated in *State v. Davis*, 9th Dist. Lorain No. 12CA010272, 2013-Ohio-3966, ¶ 10-15 (Carr, J., dissenting).

APPEARANCES:

DENNIS P. WILL, Prosecuting Attorney, and NATASH RUIZ GUERRIERI, Assistant Prosecuting Attorney, for Appellant.

MARK B. MAREIN, Attorney at Law, for Appellee.