

[Cite as *State v. Bellman*, 2015-Ohio-2303.]

STATE OF OHIO)
)ss:
COUNTY OF LORAIN)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C.A. No. 15CA010525

Appellee

v.

RYAN D. BELLMAN

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF LORAIN, OHIO
CASE No. 13CR087131

Appellant

DECISION AND JOURNAL ENTRY

Dated: June 15, 2015

SCHAFFER, Judge.

{¶1} Defendant-Appellant, Ryan D. Bellman, appeals a judgment of the Lorain County Court of Common Pleas ordering him to pay \$15,296.00 as part of his intervention plan in lieu of conviction. This Court dismisses the appeal for lack of a final, appealable order.

I.

{¶2} On April 24, 2013, a grand jury indicted Defendant-Appellant, Ryan D. Bellman, with one count of receiving stolen property in violation of R.C. 2913.51(A). The charge stemmed from Mr. Bellman's actions where he took steel pipes from his employer, Dixie Pipe Sales, Inc., and sold them as scrap. Mr. Bellman pleaded not guilty to the sole count to the indictment.

{¶3} On June 11, 2013, Mr. Bellman filed a request for intervention in lieu of conviction under R.C. 2951.041. Mr. Bellman then changed his plea and pleaded guilty to the

sole count in the indictment. The trial court accepted Mr. Bellman's guilty plea and granted his motion for intervention in lieu of conviction.

{¶4} The trial court held a restitution hearing on November 18, 2013. Based upon the testimony, evidence, and arguments presented at the hearing, the trial court found that restitution in the matter amounted to \$15,296.00. The trial court ordered Mr. Bellman to pay that restitution amount as part of his intervention plan.

{¶5} Mr. Bellman now appeals the trial court's restitution order and raises four assignments of error for this Court's review.

II.

ASSIGNMENT OF ERROR I

THE TRIAL COURT ERRED BY ORDERING \$15,296 IN RESTITUTION, EVEN THOUGH DIXIE PIPE HAD MARKED THE PIPES AS SCRAP, AND THE PIPES' SCRAP VALUE WAS \$1,834.

ASSIGNMENT OF ERROR II

THE TRIAL COURT ERRED BY ORDERING \$15,296 IN RESTITUTION BASED ON DIXIE PIPE'S SPECULATIVE TESTIMONY.

ASSIGNMENT OF ERROR III

THE TRIAL COURT ERRED BY ORDERING \$15,296 IN RESTITUTION BECAUSE THE ORDER IS A WINDFALL BASED, IN PART, ON DIXIE WHITE'S [SIC] PROFIT MARGIN.

ASSIGNMENT OF ERROR IV

THE TRIAL COURT ERRED BY FAILING TO CONSIDER MR. BELLMAN'S ABILITY TO PAY RESTITUTION.

{¶6} Although the parties did not raise the issue of jurisdiction, this Court is obligated to raise it sua sponte. *State v. Harger*, 9th Dist. Summit No. 26208, 2012-Ohio-2604, ¶ 4. This Court has jurisdiction only to hear an appeal taken from a judgment or final, appealable order.

Ohio Constitution, Article IV, Section 3(B)(2); R.C. 2501.02. In the absence of a final, appealable order, this Court must dismiss the appeal for lack of subject matter jurisdiction. *Brown v. ManorCare Health Servs.*, 9th Dist. Summit No. 27412, 2015-Ohio-857, ¶ 7, citing *Lava Landscaping, Inc. v. Rayco Mfg., Inc.*, 9th Dist. Medina No. 2930-M, 2000 WL 109108 (Jan. 26, 2000).

{¶7} R.C. 2505.02(B) addresses final orders and states, in relevant part:

An order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is one of the following:

(1) An order that affects a substantial right in an action that in effect determines the action and prevents a judgment;

(2) An order that affects a substantial right made in a special proceeding or upon a summary application in an action after judgment;

* * *

(4) An order that grants or denies a provisional remedy and to which both of the following apply:

(a) The order in effect determines the action with respect to the provisional remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy.

(b) The appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action.

We determine that the trial court's ordered intervention plan in this case does not fall within any of the categories enumerated in R.C. 2505.02(B).

{¶8} To begin, we note that the trial court's order requiring Mr. Bellman to pay restitution as part of his intervention plan did not determine the action. Although Mr. Bellman pled guilty to receiving stolen property, the trial court elected not to enter a conviction. Instead, the trial court granted Mr. Bellman's request for intervention in lieu of conviction and stayed the

criminal proceeding. The trial court's ordered intervention plan contemplates further judicial action based on Mr. Bellman's compliance with his intervention conditions. Thus, we conclude that the trial court's ordered intervention plan is not a final, appealable order under R.C. 2505.02(B)(1).

{¶9} Moreover, R.C. 2505.02(A)(1) defines a substantial right as “a right that the United States Constitution, the Ohio Constitution, a statute, the common law, or a rule of procedure entitles a person to enforce or protect.” It is essentially “a legal right that is enforced and protected by law.” *State v. Coffman*, 91 Ohio St.3d 125, 127 (2001), citing *Cleveland v. Trzebuckowski*, 85 Ohio St.3d 524, 526 (1999).

{¶10} R.C. 2951.041 governs intervention in lieu of conviction and provides that a trial court “may accept, prior to the entry of a guilty plea, the [defendant's] request for intervention in lieu of conviction” if certain statutory conditions apply. (Emphasis added.) R.C. 2951.041(A)(1). Much like R.C. 2929.20, the statute authorizing judicial release, R.C. 2951.041 is permissive in nature and confers substantial discretion to the trial court to grant a defendant's request without providing for appellate review. *State v. Dempsey*, 8th Dist. Cuyahoga No. 82154, 2003-Ohio-2579, ¶ 9, citing *Coffman* at 127-128. Intervention in lieu of conviction is therefore not a right provided to defendants. *Id.* (noting that intervention in lieu of conviction is a special opportunity provided to select defendants). As such, we conclude that the trial court's imposition of a restitution order as part of Mr. Bellman's intervention plan does not affect a substantial right. *Id.*; accord *Rone v. State*, 11th Dist. Ashtabula No. 2005-A-0075, 2006-Ohio-

1268, ¶ 5, citing *Coffman* at 127-128.¹ The trial court’s ordered intervention plan is therefore not a final, appealable order under R.C. 2505.02(B)(2).

{¶11} Lastly, as used in R.C. 2505.02(B)(4), a provisional remedy is defined as:

a proceeding ancillary to an action, including, but not limited to, a proceeding for a preliminary injunction, attachment, discovery of privileged matter, suppression of evidence, a prima-facie showing pursuant to section 2307.85 or 2307.86 of the Revised Code, a prima-facie showing pursuant to section 2307.92 of the Revised Code, or a finding made pursuant to division (A)(3) of section 2307.93 of the Revised Code.

R.C. 2505.02(A)(3). Although ancillary is not defined by statute, the Supreme Court of Ohio has defined an ancillary proceeding as “one that is attendant upon or aids another proceeding.” (Internal quotations and citations omitted.) *Community First Bank & Trust v. Dafoe*, 108 Ohio St.3d 472, 2006–Ohio–1503, ¶ 24. Given this definition, we conclude that intervention in lieu of conviction is not an ancillary proceeding, as it does not aid or further the principal proceeding. *See id.* at ¶ 31. Unlike a proceeding for a preliminary injunction, which R.C. 2505.02(B)(4) explicitly lists as an ancillary proceeding, intervention in lieu of conviction is not “a separate matter from the trial on the merits” or “a proceeding with its own life.” *Id.* at ¶ 30. Therefore, we determine that the trial court’s ordered intervention plan is not a final, appealable order under R.C. 2505.02(B)(4).

III.

{¶12} In light of the foregoing, Mr. Bellman’s appeal is dismissed.

Appeal dismissed.

¹ While we reach the same result as the *Dempsey* court on this issue, our decision here does not necessarily adopt the Eighth District’s reasoning for doing so.

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.

JULIE A. SCHAFER
FOR THE COURT

WHITMORE, P. J.
CONCURS.

MOORE, J.
CONCURRING IN JUDGMENT ONLY.

{¶13} I agree that the appeal must be dismissed because of the lack of a final appealable order. I further concur in the majority’s analysis insofar as the majority has determined that the order appealed did not affect a substantial right. However, I disagree with the majority’s analysis as it pertains to whether intervention in lieu of conviction is a provisional remedy.

{¶14} I believe that intervention in lieu of conviction is a proceeding ancillary to, i.e. “attendant upon[,]” a criminal proceeding. *See Community First Bank & Trust v. Dafoe*, 108 Ohio St.3d 472, 2006-Ohio-1503, ¶ 24. Accordingly, although it is not specifically enumerated as a provisional remedy in R.C. 2505.02(A)(3), it meets the definition of a provisional remedy.

{¶15} Nonetheless, I do not believe that the order at issue here “prevent[ed] a judgment in the action in favor of the appealing party with respect to the provisional remedy.” R.C.

2505.02(B)(4)(a). First, Mr. Bellman is not challenging the judgment on the provisional remedy. The action on the remedy itself was *in favor* of Mr. Bellman, because the trial court *granted* Mr. Bellman's motion for intervention in lieu of conviction. Instead, he seeks to challenge only a term of the remedy. Although there could arise situations where the terms of an order granting a motion for treatment in lieu of conviction are so obtrusive as to essentially result in a denial of the motion, such is not this case here. Accordingly, because I believe that the attempted appeal here relates to a provisional remedy which was granted in the appellant's favor, instead of the judgment on a provisional remedy that was adverse to the appellant, the order is not final and appealable under R.C. 2505.02(B)(4)(a).

{¶16} I express no opinion on whether a defendant could appeal the *denial* of a motion for intervention in lieu of conviction, as we need not reach that issue under the facts of this case. *See* R.C. 2505.02(B)(4)(b), (provisional remedy not a final appealable order where a meaningful remedy could be afforded from an appeal from the final judgment on all the issues in the proceeding), *State v. Rice*, 180 Ohio App.3d 599, 602, 2009-Ohio-162, ¶ 11-12 (2d Dist.) (denial of intervention in lieu of conviction does not itself affect a substantial right but may be appealed from a conviction).

Based upon the foregoing reasons, I concur in the judgment.

APPEARANCES:

MATTHEW M. NEE, Attorney at Law, for Appellant.

DENNIS P. WILL, Prosecuting Attorney, and NATASHA RUIZ GUERRIERI, Assistant Prosecuting Attorney, for Appellee.