The Supreme Court of Ohio

CASE ANNOUNCEMENTS

June 29, 2022

[Cite as *06/29/2022 Case Announcements #2*, 2022-Ohio-2163.]

MOTION AND PROCEDURAL RULINGS

2022-0417. Davis v. McGuffey.
Hamilton App. No. C-220040. On appellant's motion for stay. Motion denied.
Kennedy, J., dissents, with an opinion.
Fischer, J., dissents.
DeWine, J., not participating.

KENNEDY, J., dissenting.

{¶ 1} Lawmaking by judicial fiat is violative of the separation of powers. A majority of this court has upset Ohio's bail system in a recent ill-considered opinion, *Mohamed v. Eckleberry*, 162 Ohio St.3d 583, 2020-Ohio-4585, 166 N.E.3d 1132. In *Mohamed*, a majority of this court declared that appellate courts should review de novo the decisions of trial courts in setting bail, "usurp[ing] * * * the trial court's power to set bail in the disguise of an extraordinary remedy, a writ of habeas corpus. *Id.* at ¶ 27 (Kennedy, J., dissenting). Once this case is ripe for a decision on the merits, the members of the *Mohamed* majority will have the ability to correct their improper exercise of judicial authority. For now, they can limit further damage and stay the application of *Mohamed* in this case.

{¶ 2} At this stage of this case, we address only whether to grant a motion to stay the judgment of the court of appeals reducing appellee Samantha Davis's bail through its granting of a writ of habeas corpus. Appellant, Hamilton County Sheriff Charmaine McGuffey, seeks a stay of the First District Court of Appeals' judgment granting a writ of habeas corpus and ordering the reduction of Davis's bail from $500,000 to $50,000, posted at ten percent.

{¶ 3} When deciding whether to grant a stay pending appeal, we ask whether the movant has demonstrated a likelihood of success on the merits and whether the movant will suffer irreparable harm absent a stay; we also consider the interests of the other parties to the litigation and the public.

{¶ 4} Applying these factors here, I would grant the motion for a stay. Because the majority does not, I dissent.

I. Facts and Procedural History

{¶ 5} According to the First District, the evidence at Davis's trial indicated that she lost control of her pickup truck while exiting from I-275 in Blue Ash. *State v. Davis*, 1st Dist. Hamilton No. C-190302, 2021-Ohio-1693, ¶ 11. The truck flipped over a cement barrier and fell from the overpass onto another vehicle traveling on I-71 South. *Id.* at ¶ 4, 8. Davis was ejected from the pickup before it fell from the overpass, and she suffered minor injuries. *Id.* at ¶ 11-12. However, her truck crushed the vehicle below, killing its two occupants instantly. *Id.* at ¶ 8-9.

{¶ 6} The state charged Davis with four counts of aggravated vehicular homicide and two counts of aggravated possession of drugs. *Id*. at ¶ 3. The trial court initially set bail at $250,000, but it reduced the bail amount seven months later to $1,000 with the condition of electronic monitoring. At trial, the jury acquitted Davis of two counts of aggravated vehicular homicide (the counts alleging that she caused the victims' deaths while operating a vehicle under the influence of drugs), but it convicted her of two counts of aggravated vehicular homicide (finding that she had recklessly caused the deaths of the two victims) and two counts of aggravated drug possession. *Id.* at ¶ 38, 55. The court of appeals rejected Davis's claims that her convictions were not supported by sufficient evidence or were against the manifest weight of the evidence, but it ordered a new trial because the state had not submitted an expert's report on all the subjects on which he provided expert testimony at trial. *Id.* at ¶ 62-64, 67-72, 80.

{¶ 7} On remand, the case was assigned to a new trial judge, who set Davis's bail at $500,000. Davis initially moved to reduce her bail, but she withdrew that motion and filed a petition for a writ of habeas corpus in the First District. The court of appeals granted the writ and set bail at $50,000. McGuffey has appealed to this court and moved to stay the court of appeals' judgment.

II. Law and Analysis

A. Factors for Determining whether to Grant a Stay

{¶ 8} The test applied in reviewing a motion for a stay has four factors: " '(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.' " *Nken v. Holder*, 556 U.S. 418, 434, 129 S.Ct. 1749, 173 L.Ed.2d 550 (2009), quoting *Hilton v. Braunskill*, 481 U.S. 770, 776, 107 S.Ct. 2113, 95 L.Ed.2d 724 (1987).

{¶ 9} In applying the first factor, a court must undertake a limited review of the merits. In this case, that requires a consideration of this court's recent—and erroneous—holding in *Mohamed*, 162 Ohio St.3d 583, 2020-Ohio-4585, 166 N.E.3d 1132.

B. The Trial Court Has Discretion to Set the Amount of Bail

{¶ 10} This court's wayward path toward effectively rewriting Ohio's law on bail began with *Mohamed*. In *Mohamed*, the majority opinion started from the position that "in an original action [for the reduction of bail], an appellate court may permit a habeas petitioner to introduce evidence to prove his claim." *Id.* at ¶ 5. From this premise, it leapt to the conclusion that the reviewing court may "exercise its own discretion in imposing an appropriate bail amount," *id.*, without according deference to the trial court's determination, *id.* at ¶ 4-5. In doing that, the majority opinion mistook the ability to present evidence in an original action with the ultimate issue to be decided by the court in a habeas case: whether the petitioner has shown that he or she is entitled to immediate release from confinement, *Smith v. Leis*, 106 Ohio St.3d 309, 2005-Ohio-5125, 835 N.E.2d 5, ¶ 13.

{¶ 11} This court and other courts of last resort have recognized that determining the amount of bail is within the discretion of the trial court. *See Jenkins v. Billy*, 43 Ohio St.3d 84, 85, 538 N.E.2d 1045 (1989); *Bland v. Holden*, 21 Ohio St.2d 238, 239, 257 N.E.2d 397 (1970); *State v. Visintin*, 143 Haw. 143, 162, 426 P.3d 367 (2018); *State v. Pratt*, 204 Vt. 282, 2017 VT 9, 166 A.3d 600, ¶ 20; *State v. Brown*, 2014-NMSC-038, 338 P.3d 1276, ¶ 43; *Myers v. St. Lawrence*, 289 Ga. 240, 241-242, 710 S.E.2d 557 (2011); *Querubin v. Commonwealth*, 440 Mass. 108, 120, 795 N.E.2d 534 (2003), fn. 10. Moreover, Crim.R. 46(B) expressly acknowledges that bail conditions are within the discretion of the court.

{¶ 12} A petitioner seeking a writ of habeas corpus ordering a reduction in bail therefore has the burden to show that that the trial court abused its discretion in setting bail. " 'The term "abuse of discretion" * * * implies that the court's attitude is unreasonable, arbitrary or unconscionable.' " (Ellipsis added in *White*.) *State v. White*, 118 Ohio St.3d 12, 2008-Ohio-1623, 885 N.E.2d 905, ¶ 46, quoting *State v. Adams*, 62 Ohio St.2d 151, 157, 404 N.E.2d 144 (1980). A trial court will also be found to have abused its discretion when its decision exhibits a "perversity of will, passion, prejudice, partiality, or moral delinquency." *Pons v. Ohio State Med. Bd.*, 66 Ohio St.3d 619, 621, 614 N.E.2d 748 (1993). Review for an abuse of discretion, therefore, does not permit a superior court to substitute its judgment for the trial court's.

{¶ 13} Contrary to the holding in *Mohamed*, 162 Ohio St.3d 583, 2020-Ohio-4585, 166 N.E.3d 1132, then, the abuse-of-discretion standard *is not applied any differently* simply because a habeas action is an original action. This is demonstrated by our jurisprudence involving other extraordinary writs. For example, we have said that "[t]o be entitled to an extraordinary remedy in mandamus, the relator must demonstrate that the administrative body abused its discretion by entering an order not supported by any evidence in the record." *State ex rel. WFAL Constr. v. Buehrer*, 144 Ohio St.3d 21, 2015-Ohio-2305, 40 N.E.3d 1079, ¶ 12. And "[w]hen an order is adequately explained and based on some evidence, even if other evidence of record may contradict it, there is no abuse of discretion, and a reviewing court must not disturb the order." *Id*. at ¶ 13. That is, a mandamus action does not give a relator an opportunity to make an end run around another tribunal's valid exercise of discretion. And even though a relator may present evidence in support of his or her claims, an abuse of discretion cannot be premised on evidence that was not presented to the lower tribunal. *See State ex rel. Quarto Mining Co. v. Foreman*, 79 Ohio St.3d 78, 81, 679 N.E.2d 706 (1997).

{¶ 14} These are settled principles that apply equally in habeas actions.

C. Applying the Law to this Case

{¶ 15} McGuffey has demonstrated that this court should grant a stay of the court of appeals' judgment. Applying the first factor stated above, she has shown a likelihood of success on the merits. The court of appeals applied the wrong standard of review when it considered the trial court's bail decision de novo rather than for an abuse of discretion. That provides grounds for reversal.

{¶ 16} Obviously, when considering likelihood of success on the merits, the precariousness of the *Mohamed* precedent must be considered. As the United States Supreme Court has stated, "when governing decisions are unworkable or are badly reasoned, 'this Court has never felt constrained to follow precedent.' " *Payne v. Tennessee*, 501 U.S. 808, 827, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991), quoting *Smith v. Allwright*, 321 U.S. 649, 665, 64 S.Ct. 757, 88 L.Ed. 987 (1944). And we should not feel constrained here. The main problem with *Mohamed*, 162 Ohio St.3d 583, 2020-Ohio-4585, 166 N.E.3d 1132 is not simply that it is poorly reasoned; nor is it that it contravenes our precedent concerning bail and the text of Crim.R. 46. The main problem is that it is plainly and dangerously wrong.

{¶ 17} The three remaining factors of the test—i.e., the possibility of irreparable harm to McGuffey, the potential harm to Davis if a stay is granted, and the community's interest in whether the stay is granted or denied—also weigh in McGuffey's favor. All factors in favor of a stay do not necessarily have to be of equal weight: "the factors are balanced, such that a stronger showing on some of these prongs can make up for a weaker showing on others." *Ohio Valley Environmental Coalition, Inc. v. United States Army Corps of Engineers*, 890 F.Supp.2d 688, 692 (S.D.W.Va.2012), citing 16A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure*, Section 3954 (4th Ed.2012). Therefore, likelihood of success on the merits can make up for a less weighty factor of irreparable harm. So, for example, in the context of preliminary injunctions, in circumstances in which "there is a strong likelihood of success on the merits, an injunction may be granted even though there is little evidence of irreparable harm [if an injunction is not granted] and vice versa." *Fischer Dev. Co. v. Union Twp.*, 12th Dist. Clermont No. CA99-10-100, 2000 WL 525815, *3 (May 1, 2000); *see also Southwestern Ohio Basketball, Inc. v. Himes*, 2021-Ohio-415, 167 N.E.3d 1001, ¶ 33 (12th Dist.).

{¶ 18} One of McGuffey's core, statutory duties as the sheriff of Hamilton County is to "preserve the public peace and cause all persons guilty of any breach of the peace, within the sheriff's knowledge or view, to enter into recognizance with sureties to keep the peace and to appear at the succeeding term of the court of common pleas." R.C. 311.07(A). McGuffey cannot undo the affront to the public peace that Davis's release on an insufficient bond has caused, nor can she rectify the negative effect on the community from its knowledge that Davis has been released.

{¶ 19} As to the third factor of the test, the potential harm to Davis if the stay is granted, Davis has not pointed to any concrete injury she will suffer if the stay is granted that goes beyond her being incarcerated now rather than later. There is little reason to believe that Davis will be able to avoid prison; she remains convicted of two counts of aggravated drug possession, and the reversal of her convictions for aggravated vehicular homicide does not prevent her being retried on those charges or the state's presenting the same evidence that originally resulted in a jury's finding her guilty. In fact, the same court of appeals that reduced her bail found that her conviction on two counts of aggravated vehicular homicide was not against the weight of the evidence. *Davis*, 2021-Ohio-1693, at ¶ 62-63.

{¶ 20} Finally, and in contrast, McGuffey and the public have an interest in community safety, which would be placed in jeopardy by allowing Davis to be released on insufficient sureties before this appeal is decided on the merits. The public interest lies in granting a stay and in the restoration of abuse-of-discretion review when a judge determines the amount of bail.

III. Conclusion

{¶ 21} The court of appeals plainly applied the wrong standard in reviewing the trial court's bail determination in this case. Applying the four factors stated above, I would grant the motion for a stay. Because the majority does not grant the motion, I dissent.
