IN THE SUPREME COURT OF OHIO

STATE OF OHIO	:	**Case No. 2020-338**
Appellee,	:	
vs.	:	On appeal from the Montgomery County Court of Appeals, Second Appellate District
SAMUEL GLENN	:	Case No. CA 28736
Appellant.	:	

MERIT BRIEF OF APPELLEE, THE STATE OF OHIO

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STATEMENT OF THE CASE AND FACTS

The question before this Court is whether a pre-trial order compelling a criminal defendant to provide reciprocal discovery under Crim.R. 16(H) constitutes a final, appealable order under R.C. 2505.02(B)(4), when that order does not compel disclosure of matters protected by attorney-client privilege. In its decision below, the Second District Court of Appeals answered that question in the negative and dismissed Appellant Samuel Glenn's interlocutory appeal of the trial court's order to compel discovery for lack of a final, appealable order, after finding that Glenn would be afforded meaningful and effective appellate review after judgment of any alleged errors in the trial court's discovery order. Glenn challenges the court of appeals' decision.

In January 2019, Glenn was indicted by the Montgomery County Grand Jury on one count of sexual battery under R.C. 2907.03(A)(7), based upon allegations that Glenn, a high school teacher, engaged in sexual conduct with a student. (Docket Entry 10 at Item 1) After the State provided Glenn complete discovery as required by Crim.R. 16, the prosecutor became aware (through an email from, and conversations with, Glenn's attorney) that Glenn intended to call in his case-in-chief several fact, character, and alibi witnesses of whom the prosecutor knew nothing about. (Docket Entry 10 at Items 30, 162, and 222) The prosecutor thereafter filed two motions to compel Glenn's attorney to provide reciprocal discovery under Crim.R. 16(H), in particular reports from the defense investigator regarding the investigator's interviews of prospective witnesses, including prospective alibi witnesses. (*Id*.) When Glenn's counsel continually refused to provide reciprocal discovery, the trial court granted the prosecutor's motion to compel, *in part*, with the condition that any information exempt from disclosure because it is privileged, would tend to incriminate Glenn, or is intended for use solely as impeachment evidence need not be disclosed and was not covered by the trial court's Order. (Docket Entry 10 at Item 227)

Glenn immediately filed a notice of appeal with the Second District Court of Appeals, seeking to challenge the trial court's discovery order. (Docket Entry 1) But on March 6, 2020, the court of appeals dismissed Glenn's appeal for lack of a final, appealable order. *State v. Glenn*, 2d Dist. Montgomery No. 28736, 3/6/20 *Decision and Final Judgment Entry*. (Docket Entry 8) The Second District found that "a trial court's order compelling discovery may be a final and appealable 'provisional remedy' under R.C. 2505.02(B)(4)," but only if the appellant can show, among other things, that they "would not be afforded a meaningful or effective remedy by appeal following final judgment as to all proceedings, issues, claims, and parties in the action." (*Id.* at p. 3, citing R.C. 2505.02(B)(4)(b)) The Second District found that Glenn failed to satisfy his burden of showing that the harm he alleged would be caused by the trial court's discovery order could not be remedied on appeal after trial. (*Id*. at pp. 6-7)

Glenn filed his notice of appeal with this Court on March 6, 2020. On July 7, 2020, this Court granted jurisdiction to hear his case. This appeal followed.

ARGUMENT

Appellee's First Proposition of Law:

I. A pretrial order compelling a criminal defendant to provide reciprocal discovery under Crim.R. 16(H) is not a final, appealable order when the order does not compel disclosure of material that by law is subject to privilege.

At the outset, the State would note that throughout his merit brief to this Court Samuel Glenn conflates two independent issues when setting out this arguments: first, did the trial court err in granting the State's motion to compel reciprocal discovery; and second, was the trial court's discovery order final and appealable. But in dismissing Glenn's appeal, the Second District considered only the second issue and found that because the trial court's order granting, in part,

the State's motion to compel Glenn to provide reciprocal discovery under Crim.R. 16(H) was not a final, appealable order, Glenn could not bring an interlocutory appeal from the trial court's discovery order. The Second District did not consider the merits of Glenn's claim that the trial court's discovery order exceeded the scope of what Crim.R. 16(H) compels a criminal defendant to provide. Consequently, to the extent that Glenn seeks to attack the validity of the trial court's discovery order, those attacks are misplaced and are not properly before this Court.

A. Final, appealable orders of provisional remedies

A final, appealable order must exist before an appeal can be filed, and where the order is not final a court of appeals has no jurisdiction to review, affirm, modify, or reverse it. *State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330, 893 N.E.2d 163, ¶ 6. Relevant here, an order is final and appealable under R.C. 2505.02(B) when it is:

> (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.

"A plain reading of [R.C. 2505.02(B)(4)] shows that an order must meet the requirements in *both* subsections of the provisional-remedy section of the definition of final, appealable order in order to maintain an appeal" like the one Glenn brought in the court of appeal below. (Emphasis sic.) *Smith v. Chen*, 142 Ohio St.3d 411, 2015-Ohio-1480, 31 N.E.3d 633, ¶ 5. When considering whether an order is a final order subject to interlocutory appellate review, the burden is on the appellate to "affirmatively establish that an immediate appeal is necessary in order to afford a meaningful and effective remedy." *Id*. at ¶ 8, citing R.C. 2505.02(B)(4)(b).

A trial court's order compelling discovery is an order granting or denying a "provisional remedy" within the meaning of R.C. 2505.02(A)(3).[1] And an "order compelling the production of privileged or protected materials certainly satisfies R.C. 2505.02(B)(4)(a) because it would be impossible to later obtain a judgment denying the motion to compel disclosure if the party has already disclosed the materials." *Burnham v. Cleveland Clinic*, 151 Ohio St.3d 356, 2016-Ohio-8000, 89 N.E.3d 536, ¶ 21. But what is lacking here (and the basis on which the Second District relied in finding that the trial court's discovery order was not final and appealable) is Glenn's ability to satisfy R.C. 2505.02(B)(4)(b), "which requires consideration of whether an appeal after judgment can rectify the damage of an erroneous trial-court ruling." *Burnham* at ¶ 21, citing *State v. Muncie*, 91 Ohio St.3d 440, 451, 746 N.E.2d 1092 (2001).

B. Attorney-client privilege vs. attorney work product

In the context of evaluating whether an order compelling discovery constitutes a final, appealable order, much ado has been made over the distinction between discovery orders requiring production of materials alleged to be protected by the attorney-client privilege, as compared to materials alleged to be protected by the work-product doctrine. That is because "[t]he attorney-client privilege and the attorney-work-product doctrine provide different levels of protection over distinct interests, meaning that orders forcing disclosure in these two types of discovery disputes do not necessarily have the same result that allows an immediate appeal." *Burnham* at ¶ 15.

To that end, this Court has held that discovery orders requiring disclosure of information protected by the attorney-client privilege satisfies R.C. 2505.02(B)(4)(b) and are final, appealable orders, because requiring the disclosure of privileged information "causes harm and prejudice that

[1] R.C. 2505.02(A)(3) defines "provisional remedy" to include "a proceeding ancillary to an action, including, but not limited to, a proceeding for * * * discovery of privileged matter * * *."

inherently cannot be meaningfully or effectively remedied by a later appeal." *Id*. at ¶ 2; *In re Grand Jury Proceeding of John Doe*, 150 Ohio St.3d 398, 2016-Ohio-8001, 82 N.E.3d 1115, ¶ 22 ("When a party is compelled to produce material protected by the attorney-client privilege, harm extends beyond the actual case being litigated and causes the loss of a right that cannot be rectified by a later appeal, and R.C. 2505.02(B)(4)(b) is accordingly satisfied."). But where, like here, the only protection asserted is the attorney-work-product doctrine,[2] "a showing under R.C. 2505.02(B)(4)(b) beyond the mere statement that the matter is privileged" should be required. *Burnham*, 151 Ohio St.3d 356, 2016-Ohio-8000, 89 N.E.3d 536 at ¶ 2.

In *Nelson v. Toledo Oxygen & Equip. Co.*, 63 Ohio St.3d 385, 588 N.E.2d 789 (1992), this Court determined that a discovery order compelling the production of materials allegedly protected by the work-product doctrine was not a final, appealable order because there was no need for immediate appellate review of such orders. *Id*. at syllabus. This Court explained,

> * * * We conceive of no circumstances, and appellant points to none, in which an appellate court could not fashion an appropriate remand order that would provide substantial relief from the erroneous disclosure of work-product materials. * * * Because the work-product exemption protects materials that are peculiarly related to litigation, any harm that might result from the disclosure of those materials will likewise be related to litigation. An appellate court review of such litigation will necessarily be able to provide relief from the erroneous disclosure of work-product materials.

Id. at 388-389. The same is true with the trial court's discovery order here.

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[2] Glenn's only contention below when opposing the State's motion to compel discovery was that the materials he was being ordered to disclose were protected as work product. (See Docket Entry 10 at Items 42 and 196) An argument relating to attorney-client privilege was never raised.

C. Glenn will be afforded a meaningful and effective review of the trial court's discovery order after final judgment.

In its discovery order, the trial court directed Glenn "to provide the State with written summaries of the statements made to defense counsel and the defense investigator by the witnesses defense intends to call regarding defendant's alibi." (Docket Entry 10 at Item 227 p. 6) Elsewhere in the order, the trial court recognized that the materials Glenn was compelled to disclose "only applied to statements made by the defense's own witnesses and does not apply to statements or information that would tend to incriminate the defendant or statements used solely as impeachment evidence." (*Id.* at p. 5) And the trial court recognized that under the plain language of Crim.R. 16(H)(5), "investigative reports and the statements of witnesses the defense intends to call [at trial] are subject to disclosure *to the extent they do not contain internal communications of impressions, conclusions, strategy, or opinions*." (Emphasis added.) (*Id*. at p. 5) In other words, the trial court acknowledged that any material traditionally recognized as attorney work product would be excluded from disclosure. See *Squire, Sanders & Dempsey, LLP v. Givaudan Flavors Corp.*, 127 Ohio St.3d 161, 2010-Ohio-4469, 937 N.E.2d 533, at paragraph two of the syllabus (recognizing "attorney work product" to include the attorney's "mental impressions, theories, and legal conclusions"); *Hickman v. Taylor*, 329 U.S. 495, 508, 67 S.Ct. 385, 91 L.Ed. 451 (1947) (attorney work product includes "writings which reflect an attorney's mental impressions, conclusions, opinions or legal theories").

Because the scope of the trial court's discovery order does not compel the disclosure of material protected by attorney-client privilege or any other guarantees of confidentiality, there is no legitimate reason why an immediate appeal is necessary to afford Glenn a meaningful and effective review of the order. For example, if Glenn's counsel refuses to comply with the discovery order, the trial court indicated that it would exclude the testimony of his witnesses. (Docket Entry

10 at Item 227 p. 6) If that happens and if Glenn is convicted at trial, Glenn may assign as error on direct appeal the exclusion of the witnesses. On the other hand, if Glenn's counsel complies with the trial court's order by providing written summaries of defense witness' anticipated testimony and he is convicted at trial, he can raise the discovery issues and related concerns on direct appeal. Both options would afford Glenn an adequate remedy for the errors he alleges, even if he is compelled to disclose material protected by the work-product doctrine. *Nelson*, 63 Ohio St.3d at 389, 588 N.E.2d 789 (an order compelling discovery of alleged work-product material is not a final, appealable order under R.C. 2505.02 because appellate court review of such litigation after judgment will provide adequate relief from any erroneous disclosure of work-product material).

Because the Second District did not err in dismissing Glenn's interlocutory appeal of the trial court's discovery order for lack of a final, appealable order, the decision below must be affirmed.

Appellee's Second Proposition of Law:

II. The nature of the litigation at issue, whether civil or criminal, is irrelevant when determining whether an order is a final, appealable order under R.C. 2505.02(B)(4).

Glenn seems to suggest that because the rights afforded a criminal defendant are significantly different from those afforded civil litigants, this fact alone somehow transforms discovery orders entered in criminal cases into a final, appealable order under R.C. 2505.02(B)(4), even if a similar discovery order entered in a civil case might not be. But he offers no valid basis for drawing this distinction.

The scope of the attorney-client privilege is no less expansive, nor are its protections any less important, in civil litigation than criminal litigation. If a discovery order compels a defendant

to disclose matters claimed to be protected by the attorney-client privilege, the State sees no reason why it should matter whether he is a criminal defendant or a civil defendant; in either instance the order would be immediately appealable under R.C. 2505.02(B)(4).

Likewise, in assessing whether an order is final and appealable under R.C. 2505.02(B)(4), if a discovery order compels a defendant to disclose matters claimed to be protected by the work-product doctrine, there is no reason why it should matter whether he is a defendant in a criminal or civil case. Although the United States Supreme Court has said that the role of the work-product doctrine "in assuring the proper functioning of the criminal justice system is even more vital" than in civil litigation, *United States v. Nobles*, 422 U.S. 225, 238, 95 S.Ct. 2160, 45 L.Ed.2d 141 (1975), the differing roles that the work-product doctrine might play in various forms of litigation should play no role in assessing whether an order qualifies as final and appealable under R.C. 2505.02(B)(4). If the aggrieved party will be afforded a meaningful and effective review of the trial court's discovery order following final judgment, it makes no difference whether the order involves discovery in a civil case or a criminal case; in either instance the order fails to meet the definition of a final order under R.C. 2505.02(B)(4). Glenn's attempt at drawing a distinction between civil and criminal discovery orders, therefore, necessarily fails.

CONCLUSION

Glenn failed in the court below, and fails again here, to meet his burden of affirmatively establishing that an immediate appeal of the trial court's pre-trial discovery order is necessary in order to afford him meaningful and effective appellate review of that order. The Second District Court of Appeals correctly concluded, therefore, that the trial court's discovery order was not a final, appealable order under R.C. 2505.02(B)(4). Samuel Glenn's interlocutory appeal of the trial court's discovery order was properly dismissed.

For these reasons and in view of the foregoing law and argument, the State of Ohio respectfully requests that this Court find no merit to Samuel Glenn's propositions of law, and that the court of appeals' decision below be affirmed.

Respectfully submitted,

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Certificate of Service

I hereby certify that on October 28, 2020, a copy of the foregoing *Brief of Appellee* was served by first class mail, postage-prepaid, to counsel for Appellant: Anthony Comunale, 130 West Second Street, Suite 1444, Dayton, OH 45402.

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