The Supreme Court of Ohio

CASE ANNOUNCEMENTS

August 31, 2021

[Cite as *08/31/2021 Case Announcements #5*, 2021-Ohio-3015.]

MOTION AND PROCEDURAL RULINGS

2021-1062. State ex rel. Bowling v. DeWine.
Franklin App. No. 21AP-380, 2021-Ohio-2902. On appellees' emergency motion for relief from stay. Motion denied.

Brunner, J., concurs in part and dissents in part, with an opinion.
Stewart, J., dissents.
DeWine, J., not participating.

BRUNNER, J., concurring in part and dissenting in part.

{¶ 1} From the standpoint that there is legal support for the trial court to carry out the mandate of the Tenth District Court of Appeals ordering that the trial court determine any remaining issues pertaining to potential injunctive relief, I concur with the majority's decision to deny appellees Candy Bowling, David Willis, and Shawnee Huff's emergency motion for relief from the stay. But I respectfully dissent for the fact that we could provide true guidance to the trial court by granting appellees' motion and clarifying to the trial court that it may proceed to execute the mandate of the Tenth District.

{¶ 2} This court has held, and other courts have followed us and applied in a variety of circumstances—including situations in which a trial court has already issued a judgment—that " 'the general rule is that when an appeal is taken from the district court the latter court is divested of jurisdiction, *except to take action in aid of the appeal*, until the case is remanded to it by the appellate court.' " (Emphasis added.) *State ex rel. Special Prosecutors v. Judges, Court of Common Pleas*, 55 Ohio St.2d 94, 97, 378 N.E.2d 162 (1978), quoting 7 *Moore's Federal Practice*

419, Paragraph 60.30(2) (2d Ed.). Here, the Tenth District reversed the trial court's judgment, which denied appellees a preliminary injunction. The Tenth District found as a matter of law that the trial court abused its discretion when it found that appellees had no likelihood of success on the merits of their claim and the appellate court remanded the case back to the trial court. The Tenth District ordered the trial court to determine the ultimate issue—i.e., whether an injunction should issue, as the trial court had not addressed two of the four prongs of the preliminary-injunction analysis because it essentially treated those two prongs as moot. That is, the trial court had declined to determine whether issuing an injunction would cause harm to any third parties and whether public interest would be served by an injunction, having already determined that there existed irreparable harm and that appellees did not have a substantial likelihood of success on the merits of their case. When the Tenth District reversed the trial court's judgment that there was an unlikelihood of success of the merits as a matter of law, it instructed the trial court that its irreparable-harm determination was the law of the case. The Tenth District also determined as a matter of law that " 'the likelihood of success and irreparable harm factors predominate.' " 2021-Ohio-2902, ¶ 59, quoting *Youngstown City School Dist. Bd. of Edn. v. State*, 10th Dist. Franklin No. 15AP-941, 2017-Ohio-555, ¶ 68 (Brunner, J., dissenting); *see also Cummings v. Husted*, 795 F.Supp.2d 677, 686 (S.D.Ohio 2011).

{¶ 3} It is clear that the Tenth District expects that its mandate, as carried out by the trial court, will result in the trial court's granting an injunction. It is also clear that appellant Governor Mike DeWine has sought refuge from that apparent eventuality by appealing to this court to delay this matter past September 6, 2021, the date on which the federal benefits that appellees seek will expire. Inexplicably, the governor has not asked this court to stay the Tenth District's decision. Essentially, it appears that the governor seeks to accomplish what could not be accomplished before the Tenth District by the simple act of filing a notice of appeal and a memorandum in support of jurisdiction.

{¶ 4} However, under *Special Prosecutors*, the Tenth District's decision and mandate clearly appears to be enough support for the trial court to " 'take action in aid of the appeal,' " *id.* at 97, quoting 7 *Moore's Federal Practice* at 60.30(2), hear evidence on the other two factors of the analysis for granting an injunction and determine whether to grant it, whether or not we grant appellees' motion for relief from stay. In support of this are the facts that the other two prongs of the injunction analysis are not the subject of the governor's appeal, and the governor does not seek

to stay the Tenth District's mandate to the trial court on matters that are not the subject of his appeal.

{¶ 5} Procedurally, the trial court was prepared to determine these two issues at a hearing on August 27, 2021. Had this hearing gone forward, it may have alleviated the need for the governor's appeal to this court (which he could just as easily dismiss after the clock has run out on September 6 if there is no action from the trial court because of this appeal). This is because, if the trial court denies appellees the ultimate relief they seek—an injunction—there is no immediate need or basis for this court to grant jurisdiction in this appeal. But if the trial court grants the injunction, then, as appellees suggest, the record will have been fully developed and we may proceed. Thus, based on *Special Prosecutors*, 55 Ohio St.2d 94, 378 N.E.2d 162, no matter whether this court grants appellees' motion, the trial court should timely exercise its discretion before September 6, 2021.

{¶ 6} To assist the trial court with guidance from this court, I would grant appellees' motion for relief on the authority of S.Ct.Prac.R. 4.01(A)(1), which states that "[u]nless otherwise addressed by these rules, an application for an order or other relief shall be made by filing a motion for the order or relief. The motion shall state with particularity the grounds on which it is based."

{¶ 7} There are specific rules of practice before this court that permit us to stay our consideration of jurisdictional memoranda, but these specific rules are limited to conflicts of law between or among Ohio's appellate districts or substantive, similar matters already jurisdictionally perfected before this court. That is why the more general S.Ct.Prac.R. 4.01(A)(1) appears to be applicable, and I would find that the parties seeking the relief have stated with particularity the grounds for the motion. Thus, I dissent in that I would grant the motion for relief from stay to permit the trial court to, without question, carry out the Tenth District's mandate. However, I concur with the decision in that the trial court may proceed in aid of the appeal without our granting appellees' motion.

{¶ 8} For these reasons, I respectfully concur in part and dissent in part.