The Supreme Court of Ohio

CASE ANNOUNCEMENTS

November 23, 2021

[Cite as *11/23/2021 Case Announcements #3*, 2021-Ohio-4147.]

MOTION AND PROCEDURAL RULINGS

2021-1403. Dubose v. McGuffey.
Hamilton App. No. C-210489, 2021-Ohio-3815. On appellant's motion for stay. Motion denied. The clerk of the Hamilton County Court of Appeals has been ordered to certify the record and to transmit it to the clerk of the Supreme Court no later than 9:00 a.m. on Friday, December 3, 2021. Sua sponte, appellant ordered to file a merit brief no later than 9:00 a.m. on Wednesday, December 8, 2021; appellee shall file a merit brief no later than 9:00 a.m. on Friday, December 10, 2021; and appellant may file a reply brief no later than 9:00 a.m. on Monday, December 13, 2021. No requests or stipulations for extension of time shall be filed in this case, and the clerk shall refuse to file any requests or stipulations for extension of time.

DeWine, J., dissents, with an opinion joined by Kennedy and Fischer, JJ.

DEWINE, J., dissenting.

{¶ 1} I dissent from the majority's denial of the sheriff's motion for a stay. The motion seeks to stay the execution of the order of the court of appeals, which lowers Justin Dubose's bail from $1.5 million to $500,000. In addition to ordering expedited briefing, I would grant the stay to preserve the status quo, so that this court can review the highly relevant but not-yet-filed transcripts from the bond hearings before anything changes.

{¶ 2} Allegedly, Dubose entered Shawn Green's home to rob him and then murdered Green by shooting him in the head. Dubose fled. He was picked up in Las Vegas. According to the sheriff's motion, when Dubose was apprehended, he provided a fake identification card and was in possession of multiple credit cards that were not in his name, as well as $2,000 in cash.

{¶ 3} In determining the conditions of pretrial release, a trial court is required to impose the least restrictive conditions that "*in the discretion of the court*, will reasonably assure the defendant's appearance in court, the protection or safety of any person or the community, and that the defendant will not obstruct the criminal justice process." (Emphasis added.) Crim.R. 46(B).

{¶ 4} Here, the common pleas court held three different hearings. According to the court of appeals' opinion, the trial court heard testimony from the victim's grandmother that the victim's family has serious concerns that Dubose poses a threat to their safety and the court had before it evidence demonstrating that Dubose is a flight risk. Both were highly relevant: under Crim.R. 46(B), the court was required to consider both the risk that Dubose might flee and the dangers that Dubose might pose to the safety of the victim's family in establishing the bail amount.

{¶ 5} Crim.R. 46 explicitly entrusts the determination of an appropriate bail to the "discretion" of the trial court. Nonetheless, the court of appeals applied a de novo standard of review in choosing to lower bail. Admittedly, this court has been less than consistent with the standard of review. *Compare Mohamed v. Eckelberry*, 162 Ohio St.3d 583, 2020-Ohio-4585, 166 N.E.3d 1132, ¶ 5, *with 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). But, in my view, the de novo standard is plainly inappropriate. *See Mohamed* (Kennedy, J., dissenting). "To tell a trial judge that he has discretion in certain matters is to tell him that there is a range of choices available to him. It is to tell him that the responsibility is his, and that he will not be reversed except for straying outside the permissible range of choice, i.e., for abuse of discretion." *United States v. E. I. du Pont de Nemours & Co.*, 366 U.S. 316, 372, 81 S.Ct. 1243, 6 L.Ed.2d 318 (1961) (Frankfurter, J., dissenting). Indeed, to apply anything other than abuse-of-discretion review to the trial court's discretionary decision is almost nonsensical. How can one possibly review de novo a bail amount that is set based upon a judge's discretion?

{¶ 6} Moreover, trial courts are better equipped to make these kinds of decisions. The typical trial judge has extensive experience in setting the conditions of release, making such decisions on a regular, often daily, basis. Trial courts can take witness testimony and observe the demeanor of witnesses. And trial judges can easily modify the conditions of release based on changed circumstances. Fair to say, in the main I would much rather entrust these types of decisions to our trial courts than leave them to appellate courts that review only a paper record. Abuse-of-discretion review, then, not only comports with Crim.R. 46(B) but also makes good sense.

{¶ 7} Paradoxically, the majority orders expedited briefing in this case but denies the stay. Expedited briefing makes sense when the status quo is preserved, allowing this court to quickly decide if there should be a change in the status quo. But absent a stay, a speedy decision by this court will likely be of little import. If indeed the trial court is correct that the bond ordered by the court of appeals is insufficient to ensure the safety of the public and assure Dubose's appearance in court, then it's not likely to matter how quickly the appeal is decided.

{¶ 8} To make things worse, this court denies the motion for a stay without even the benefit of the transcripts of the bail hearings. In order to give this matter the consideration that it deserves before disrupting the status quo, I would grant the motion for a stay. Because the majority chooses to do otherwise, I respectfully dissent.

KENNEDY and FISCHER, JJ., concur in the foregoing opinion.
