The Supreme Court of Ohio

CASE ANNOUNCEMENTS

May 7, 2023

[Cite as *05/07/2023 Case Announcements*, 2023-Ohio-1520.]

MOTION AND PROCEDURAL RULINGS

2023-0582. State ex rel. Panzeca v. Highland Cty. Court of Common Pleas, Gen. Div.

In Mandamus. On relators' emergency motion for stay of trial proceedings. Motion denied.

Brunner, J., dissents, with an opinion joined by Donnelly, J.

BRUNNER, J., dissenting.

{¶ 1} Whether this court should stay the proceedings of the trial court pending the resolution of the mandamus action in this court is the question before us, and I would answer that question in the affirmative. Because the majority does not, I respectfully dissent.

{¶ 2} Relators, Chelsea J. Panzeca and her client, Ronald W. Shepard, seek an immediate stay of all proceedings before respondents, the Highland County Court of Common Pleas, General Division, and Judge Rocky A. Coss in *State v. Shepard*, Highland C.P. No. 23CR0027 (the "criminal case"), pending a final decision in this mandamus action. The trial in the criminal case is scheduled to take place on Monday, May 8, 2023. Judge Coss denied a motion to stay proceedings in the criminal case on May 2, 2023. And on May 5, the same date relators filed their motion to stay in this court, the Fourth District Court of Appeals dismissed Shepard's interlocutory appeal in *State v. Shepard*, 4th Dist. Highland No. 23CA5. This dismissal also resolved Shepard's May 2 motion for stay pending appeal.

{¶ 3} As posited by relators, this court possesses the authority to stay any proceedings underlying an original action in mandamus that is pending before this court on an emergency

basis. *E.g.*, *State ex rel. Messina v. Steiner*, 87 Ohio St.3d 1466, 720 N.E.2d 920 (1999); *see State ex rel. Gaylor, Inc. v. Goodenow*, 125 Ohio St.3d 407, 2010-Ohio-1844, 928 N.E.2d 728, ¶ 8; *State ex rel. Aycock v. Mowrey*, 42 Ohio St.3d 716, 538 N.E.2d 1068 (1989). In short, this court has the authority to stay the trial-court proceedings in the criminal case.

{¶ 4} The majority may harbor doubts about whether we may consider the underlying claims via an action in mandamus, asking, should a defendant's constitutional rights be the subject of a mandamus action? For a mandamus claim to succeed, there must be proof by clear and convincing evidence of a clear legal duty to perform a governmental function and a clear legal right for it to be performed, there being no adequate remedy at law. *State ex rel. Culgan v. Collier*, 135 Ohio St.3d 436, 2013-Ohio-1762, 988 N.E.2d 564, ¶ 7; *State ex rel. White v. Aveni*, 168 Ohio St.3d 540, 2022-Ohio-1755, 200 N.E.3d 211, ¶ 11. Thus, in the context of a criminal trial, may a writ of mandamus be granted? The answer lies in the nature of the clear legal duty and the clear right to have it performed.

{¶ 5} The Sixth District Court of Appeals has addressed this point, safely relying on both the United States and the Ohio Constitutions, stating:

> The Sixth Amendment to the United States Constitution guarantees a criminal defendant the right to counsel for his defense. *Accord* Ohio Constitution, Article I, Section 10. "[One] element of [that] right is the right of a defendant who does not require appointed counsel to choose who will represent him." *United States v. Gonzalez-Lopez*, 548 U.S. 140, 144, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006). If a defendant has the ability to retain a qualified attorney, the Sixth Amendment generally protects his choice of counsel. *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 625, 109 S.Ct. 2646, 105 L.Ed.2d 528 (1989). A court commits structural error when it wrongfully denies a defendant his counsel of choice, thus a defendant need not demonstrate further prejudice. *Gonzalez-Lopez* at 150.

(Brackets sic.) *State ex rel. Boyd v. Tone*, 6th Dist. Erie No. E-23-001, 2023-Ohio-323, ¶ 8. The Sixth District also has addressed exceptions in this context:

> Though fundamental, the constitutional right to one's counsel of choice is not absolute. *Wheat v. United States*, 486 U.S. 153, 159, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988). Trial courts have an "independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them." *Id.* at 160. Hence, an actual conflict of interest and "a showing of a serious potential for conflict" justify a trial court's removal of a defendant's counsel of choice. *Id.* at 164. A trial court's pretrial ruling removing a criminal defendant's retained counsel of choice is subject to immediate appeal. *State v. Chambliss*, 128 Ohio St.3d 507, 2011-Ohio-1785, 947 N.E.2d 651, syllabus.

Id. at ¶ 9. Here, there is no conflict of interest that would justify the trial court's effective removal of Panzeca as Shepard's counsel. Instead, relators' request should have been granted by respondents as "reasonable under the circumstances or [as] otherwise in the interest of justice" (emphasis added), R.C. 2930.08(C). Moreover, the Fourth District should have considered Shepard's interlocutory appeal. *See Chambliss* at ¶ 22 (concluding that a defendant had a right to an immediate appeal upon the denial of his choice of counsel because postconviction reversal would not provide an effective remedy.) Regardless of whether a posttrial appeal without Panzeca's representation would be adequate or efficacious, her right to exercise the franchise of the practice of law at this trial is lost. Nor would a posttrial appeal by Shepard regain for Panzeca the right to represent him in the first instance. Moreover, it seems clear from the transcript of the pretrial hearing that Shepard will be prejudiced when he is forced to have his case tried with Adam Bleile, Panzeca's cocounsel, as lead and only counsel on account of respondents' removal of Panzeca from the case due to her imminent birth of twins this week.

{¶ 6} Panzeca has asserted that she has particular skills and expertise in cases involving alleged child sexual-assault victims. Moreover, the transcript of the April 19 pretrial hearing at which relators were denied a continuance indicates that Panzeca's assisting counsel, Bleile, is hard of hearing. The transcript further indicates that this may hinder effective representation of Shepard by Bleile's handling the trial as lead and only counsel for Shepard:

MR. BLEILE: Judge, I want to remind you I don't hear that well, and so that's why right now I'm leaning in to make sure I'm catching things. I have a couple of questions to make sure I understand.

THE COURT: Sure.

MR. BLEILE: I want to let you know when I come into your courtroom, it is—I'm going to try to have hearing aids in. The only thing is sometimes they're—they—what they give, they also take. Okay? So I will remind you of that.

THE COURT: We do have the devices that we can give you now. We just got some of those in for people that—participants, witnesses—that might need to have some assistance with that. So they're wireless, so we can provide you with one of those and see if that helps any.

MR. BLEILE: We'll figure it out. I just want to let you know when I ask questions, sometimes I can't hear.

THE COURT: Okay.

{¶ 7} In addition, Panzeca, who is lead counsel of Shepard's choosing, will be confined to bed rest during the trial and will have no ability to participate other than to passively watch Shepard's trial on YouTube. Any attempt by Panzeca to communicate with Bleile, by silent text or email messages for example, would only serve as a distraction.

{¶ 8} The pretrial transcript reveals that Panzeca's medical condition relating to her pregnancy, which was expected to result in her twins' birth on May 25, changed rather quickly following her earlier agreement to a May 8 trial date for Shepard, resulting in the motion for continuance that was denied on April 19:

THE COURT: All right.

All right. Ms. Panzeca, you wish to address the motion [for continuance]?

MS. PANZECA: Yes, Judge.

Obviously * * * attached to the motion I'm hoping you got the medical note.

THE COURT: I did.

MS. PANZECA: We filed. I have that via record—

THE COURT: Sure.

MS. PANZECA: —but had I known I was going to be placed on this type of bed rest with limited activity [sic] would not have scheduled for May 6th. I will say there have been new developments this week even with my medical status, that it's actually going to be sooner. So I'm actually going to be ending work, not able to return, starting next week. So we are asking for a continuance. I think I've put in here, Mr. Shepard, did hire both Mr. Bleile and myself. That's kind of how we work on other cases as well. I'm lead counsel for these trials. Mr. Bleile usually comes on for the trials.

Also, it looks like even if we went out in August, we are still within the statutory time frame to have a case tried, so I don't think Mr. Shepard's been (Inaudible) to time. However, if that were to make the Court more comfortable, he would waive time because he has indicated to me multiple times he wants both of his attorneys there at trial. Also, like I stated in the motion, I don't know how the State would necessarily be prejudiced or even the prosecuting witness when there was such a delay in indicting anybody. That had nothing to do with Mr. Shepard.

So we are asking for a continuance so that both of his attorneys could be present.

{¶ 9} Regarding Panzeca's access to the proceedings in order to participate in the trial, the record reveals that her access will be passive only:

MS. PANZECA: Do you still stream the trials, Judge?

THE COURT: Yes.

MS. PANZECA: And how—do I just access that by calling the clerk's office?

THE COURT: The—just go to YouTube and click on Highland County Common Pleas Court, and you should—it should pop right up.

Surely, this is not practicing law.

{¶ 10} What it means to practice law was eloquently addressed almost 100 years ago by the Cuyahoga County Common Pleas Court:

> The right to practice law is very valuable to the one possessing such right; it is a right acquired only after long study; and conferred by the state only after the closest investigation and rigid examination of the applicant as to his moral and intellectual fitness to be clothed with such right; it is a right in which the public is deeply interested as to the manner in which it is exercised; and after the right has been conferred, the state, through the public authorities, hold the possessor of the right to a strict accountability as to the manner in which he uses this right and sees to it that he does not abuse it, or impose upon the public or his clients, and if he does do so the state deprives him of such right. Is the holder of such a right so obtained, and one held to such strict accountability to be denied protection in the possession and use of such right? Surely the state ought not be permitted to demand so much and then refuse protection to the holder in the possession and use of a right to be conferred. If it may then the holder of such right is denied the equal protection of the laws guaranteed by federal and state constitutions. Such is not the law.

Dworken v. Cleveland Auto. Club, 29 Ohio N.P. 607, 617-618, 1931 WL 2254 (1931).[1]

{¶ 11} And while Judge Coss cited the rights of the alleged victim to have the trial proceed promptly, he is also bound to consider the reasonableness of relators' request for a continuance and to consider the "interests of justice," R.C. 2930.08(C). Under R.C. 2930.08(A), enacted as 2022 Sub.H.B. No. 343, and as legislation implementing provisions of the Ohio Constitution known as Marsy's Law, a victim "has the right to proceedings free from unreasonable delay and a prompt conclusion of the case":[2]

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1. It should be acknowledged that the common pleas court's description of the practice of law in this 1931 case also noted that protection of the franchise to practice law "and the remedy for its unlawful invasion [are] by way of injunction." *Id.* at 618. This statement was made in the context of protecting the public from the unauthorized practice of law. Such matters now are regulated by this court itself. Gov.Bar R. VII. For Panzeca, when seeking a remedy from this court to be treated equally in the exercise of the franchise, mandamus is appropriate.

2. This law took effect April 6, 2023. It has not yet been determined whether the specifics of this legislative amplification of Article I, Section 10a of the Ohio Constitution, known as Marsy's Law, will be held to apply to

> (1) The court and the prosecutor involved in the case shall take appropriate action to ensure a speedy disposition of the case.
>
> (2) A victim has the right to proceedings free from unreasonable delay and a prompt conclusion of the case. The court and all participants shall endeavor to complete the case within the time frame provided by the Rules of Superintendence.

Further:

> If the victim, victim's representative, or victim's attorney, if applicable, objects to a delay in the prosecution of the case, the court shall grant a motion, request, or agreement for a continuance of the case only if the party seeking the continuance demonstrates that the delay in the prosecution of the case is reasonable under the circumstances or is otherwise in the interest of justice. The court may grant a motion, request, or agreement for a continuance of the case only for the time necessary to serve the interests of justice. If a continuance is granted, the court shall state on the record or in a judgment entry the specific reason for the continuance.

(Emphasis added.) R.C. 2930.08(C).

{¶ 12} Finally, I wish to caution that for the offense of gross sexual imposition, any "victim" must first be proved to be one. Judge Coss has throughout the pretrial proceedings referred to the child who has made the allegations as "the victim," but he should not do so when conducting a jury trial. *See State v. Almedom*, 10th Dist. Franklin No. 15AP-852, 2016-Ohio-1553, ¶ 11. Almedom involved charges of sexual abuse of three girls under the age of 13. Almedom denied the charges, yet the trial-court judge consistently referred to the girls as "victims" in the presence of and when speaking to the jury. This was viewed by the appellate court as being tantamount to inferring that the girls were telling the truth by claiming that the

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crimes occurring after the effective date of the law or to cases pending and for which no conviction has been obtained and/or no sentence has been imposed when the new law took effect.

conduct occurred, "as opposed to telling the jury Almedom was truthful in his denial, or refusing to comment on the credibility of any potential witnesses." *Id.* at ¶ 2. On Almedom's appeal from his convictions, the Tenth District Court of Appeals explained:

> The average person is disgusted by the idea of anyone sexually abusing young children. Sefe Almedom was portrayed as such a disgusting person long before any evidence was presented. The trial court judge, who is viewed as the ultimate authority figure in the courtroom, in essence told the jury more than once that Almedom had victimized three young girls. Almedom's claims that the accusations flowed from the hatred of the girls' mother toward him following the end of his emotional relationship with her could not be fairly and impartially evaluated by the jury after the jury had been told repeatedly by the trial court judge that the girls were victims. All the while, Almedom's defense counsel, who was supposed to be advocating for Almedom's well-being, stood idly by and made no objection to the trial judge's accusation that his client was a child abuser. The case was essentially decided before the first words were uttered by the witnesses for the State of Ohio and long before Almedom had a chance to deny the accusations and to submit a theory as to why the accusations were being made.

Id. at ¶ 11.

{¶ 13} The case before us is troubling on many levels. We should not prejudge the outcome of the mandamus action in deciding whether the trial court's proceedings should be stayed. Accordingly, I respectfully dissent and would grant relators' motion for a stay.

DONNELLY, J., concurs in the foregoing opinion.