

Filed
FEB 16 2016
Bessie M. Decker, Clerk
Court of Appeals
of Maryland

STATE OF MARYLAND

Petitioner,

v.

EDWARD NERO

Respondent.

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IN THE
COURT OF APPEALS
OF MARYLAND
September Term, 2015
Petition Docket No. 660

**RESPONDENT’S RESPONSE IN OPPOSITION TO STATE’S MOTION TO
STAY TRIAL COURT PROCEEDINGS**

NOW COMES Respondent, Edward Nero, by undersigned counsel¹ and files this Response to the State’s Motion to Stay Proceedings Pending Appeal and for reasons states:

Summary of Argument

The State has taken an appeal not permitted by law. Therefore, a stay of proceedings to let the meritless appeal run its course would not be in the interests of justice and would offend the Officers' rights to speedy trials. In a veiled attempt to vest this Court with jurisdiction *allegedly* pursuant to Courts & Judicial Proceedings ("CJP") 12-301, the State alleges that the appeal is from a final judgment with respect to Officer Porter alone.² The

¹ Officer Porter, through his attorney Gary E. Proctor, joins in and adopts by reference pursuant to Md. Rule 8-503(f), the arguments made in this Opposition in his arguments before the Court. Gary E. Proctor has authorized undersigned to make this representation to Court.

² The State has not copied undersigned counsel on any pleadings in this Honorable Court as evidenced by the Certificates of Service. This is purely an attempt to portray the appeal as a final judgment where only Officer Porter is a party. The Sixth Amendment clearly gives Officers Nero, Miller and Lieutenant Rice standing to make the arguments contained herein.

State also seeks to avoid the inevitable result of dismissal of the charges if the State were to lose an appeal on the merits pursuant to CJP 12-302.

The Circuit Court found that the State's efforts which form the basis of its appeal and request for a stay in the trials of Officers Miller, Nero and Lieutenant Rice were simply subterfuge to manipulate the court's trial schedule of the officers charged in the death of Freddie Gray. Officers Miller, Nero and Lieutenant Rice are asking this Honorable Court to DENY the State's request for a stay pending its frivolous appeal.

Factual and Procedural History

On April 12, 2015, Freddie Gray was taken into custody by Baltimore City Police Officers at North and Mount Streets in Baltimore City, Maryland. He was arrested and placed in a transport van to be transported to the Baltimore City Western District Police Station. As a result of a serious medical condition, Mr. Gray was transported to the hospital where he remained in a coma from April 15 through April 19, 2015. Mr. Gray died on April 19, 2015.

On May 1, 2015, the State's Attorney for Baltimore City publicly announced charges against Officers Porter, Goodson, Miller, Nero, Lieutenant Rice and Sergeant White. The charges ranged from assault to murder in the second degree.³ The State's theory of

³ Officer Nero and Officer Miller, two of the bicycle officers who were present in the vicinity or participated in the arrest, were charged with assault in the second degree and related charges. Lieutenant Rice, who participated in the arrest, was charged with manslaughter, assault and related charges. Officer Goodson, the transport van driver, was charged with murder in the second degree and related charges. Sergeant White, who was present at one stop of the van, was charged with manslaughter, assault and related charges. Officer Porter, an officer that responded to multiple stops during the van's transport of Mr. Gray, was charged with manslaughter, assault and related charges.

prosecution in Officers Miller, Nero, and Lieutenant Rice differs from its theory of prosecution of the other three officers. The State's prosecution theory in Miller, Nero and Rice is based, at least in part, on the argument that the officers lacked probable cause to effectuate the arrest of Mr. Gray. The State announced publicly that the knife for which Freddie Gray was arrested was legal under Maryland law, when it, in fact, was illegal under the Baltimore City Criminal Code. These charges are the most factually and legally tenuous because they are based on the State's unprecedented argument that an officer's reasonable determination that probable cause exists and that a crime has occurred can lead to criminal culpability on the part of the officer.

Judge Barry G. Williams, Circuit Court for Baltimore City, was specially assigned to the trial of the six officers. "On September 15, 2015, the State notified the Circuit Court that it intended to try the above-captioned case and the related cases in a certain order." (Order of J. Barry G. Williams denying State's Request to Stay Proceedings during Pendency of Appeal 2/10/2016 at 1) (hereinafter "J. Williams Order") (*see* attached). At that time the State only identified Officer Porter as a material witness in the trials of Officer Goodson and Sergeant White. (J. Williams Order at 1). Officer Porter's trial ended in a mistrial and was reset for June of 2016. (J. Williams Order at 1).

On or about January 7, 2016, the Circuit Court "granted the State's Motion to Compel Officer Porter to testify in the *Goodson* and *White* trials." (J. Williams Order at 1) (emphasis in original). The Circuit Court notified all parties to the action that it intended to proceed with the trials of Officer Miller, Nero and Lieutenant Rice. (J. Williams Order at 1).

Officer Edward Nero is pending second degree assault and related charges. Officer Nero's trial is currently scheduled to begin on February 22, 2016. On January 13, 2016, the State filed a Motion to Compel Testimony of Officer William Porter in the Miller, Nero and Rice trials. On about January 15, 2016, the State sent a letter to the Court expressing its intent to request a postponement of the trial date and, for the first time, notifying the Circuit Court that "Officer Porter may be a material witness in the *Nero, Miller, and Rice* cases." (J. Williams Order at 1) (emphasis in original). This was *FOUR MONTHS* after the State originally identified Officer Porter as a material witness only in the Goodson and White trials. The State also requested the Circuit Court postpone all five cases until after Officer Porter's trial so the State could try the cases in the State's preferred order. (J. Williams Order at 1).

On January 20, 2016, the Circuit Court conducted a hearing on the State's dual requests. The Court denied both requests. The Circuit Court specifically found that "the State was using Md. Code, Cts. & Jud. Proc. § 9-123 in an attempt to control the schedule and order of the trials and to circumvent [the Circuit Court's] ruling that postponement in these cases was not appropriate." (J. Williams Order at 2). The Circuit Court also found that "the State's motion was simply an attempt at subterfuge because they did not agree with the Court's order to continue with the other trials." (J. Williams Order at 2).

The State, in the spirit of Dolos⁴, has embarked on a pattern of deception, pretext and subterfuge in an attempt to end-run the Circuit Court's Order and try the cases in the

⁴ The Greek god of deception, trickery, and guile.

order in which it desires. On February 4, 2016, the State improperly filed a Notice of Appeal for an appeal not permitted by law. On February 5, 2016, the State filed a Motion to Stay Proceedings in the Circuit Court pending the improper appeal. In an attempt to avoid another adverse ruling in the Circuit Court, on or about February 10, 2016, the State has filed two additional motions to stay the trials of Miller, Nero and Rice. The Court of Special Appeals Motion for Stay asks for the Court of Special Appeals proceedings to be stayed but the Court of Appeals motion for stay asks that the Circuit Court proceedings be stayed pending the resolution of the meritless appeal. These Motions to Stay are yet another transparent subterfuge on the part of the State to obtain postponements, in order to avoid trying the most legally and factually tenuous cases first. Judge Williams has seen through the subterfuge and deception, the State's attempt to manipulate the dockets, and the State's burdening three levels of the judiciary in a frivolous appeal. On February 10, 2016, Judge Williams denied the State's motion to stay the trials of Miller, Nero and Rice citing purposeful delay on the part of the State as the reason for the denial.⁵

Further, the State is attempting to "bootstrap" its improperly taken appeals in Miller, Nero, and Rice with Officer Porter's proper appeals taken in White and Goodson by filing all five Petitions for Certiorari together. The State attempts to "mask" the jurisdictional divide between its displeasure with Circuit Court's ruling and the right to take an appeal in the first instance through its rhetoric, alleging a "separation of powers crisis" is occurring.

⁵ The State has not appealed Judge Williams' Order denying the State's Motion to Stay but, instead, seeks appellate jurisdiction again where it does not exist and asks the appellate courts to issue the stay.

The officers are asking this Honorable Court to follow the proper course set by Judge Williams and DENY the State's requested stay in the trials of Officers Miller, Nero, and Lieutenant Rice.

Argument

Normally, the Court of Appeals has the power to grant a Motion to Stay Proceedings Pending Appeal. *See* Md. Rule §8-303(e) (“Upon the filing of a petition for a writ of certiorari, or upon issuing a writ on its own motion, the Court of Appeals may stay the issuance, enforcement, or execution of a mandate of the Court of Special Appeals or the enforcement or execution of a judgment of a circuit court.”). The State, however, cannot rely upon this power to obtain an unwarranted postponement, especially when the pending appeal is not permitted by law. “It is undisputed that the State is statutorily obligated to act in good faith when taking an appeal;” this obligation is in place to “ensure that the State would not pursue an appeal . . . simply to take advantage of the delay occasioned by an appeal.” *McNeil v. State*, 112 Md. App. 434, 461-62 (1996). Furthermore, the obligation to act in good faith “encompasses not just the decision to take the appeal, but the entire process thereafter,” including the filing of a Motion to Stay Proceedings Pending Appeal. *Id.* at 462.

The State argues that a denial of its motion would cause irreparable harm, presumably referring to one of the four factors relevant to the granting of injunctive relief. Md. Rule 8-425. This argument, however, presupposes the validity of the State’s pending appeal. Because the underlying appeal is invalid, as it is not an appeal from a final judgment, nor is it a member of the narrow class of allowable interlocutory appeals, any

subsequent motion based on that appeal is also invalid. The State's pending appeal and this Motion are nothing more than thinly veiled efforts to obtain a postponement and tailor the order of the trials to its wishes; efforts that certainly do not comport with the State's obligation to act in good faith. *McNeil*, 112 Md. App. at 461.

In noting the appeal, the State relies on CJP §12-301 which allows an appeal only from a *final judgment*. The statute does not include any direction regarding a stay as this would be unnecessary after a final judgment has been rendered. In addition, the filing of an improper Notice of Appeal does not divest the trial court of jurisdiction to continue the proceedings. See e.g. *Pulley v. State*, 287 Md. 406 (1980). In that the Circuit Court does retain jurisdiction, “[w]hether to grant or deny a stay of proceedings in a matter is within the discretion of the trial court, and only will be disturbed if the discretion is abused.” *Vaughn v. Vaughn*, 146 Md. App. 264, 279 (2002). The trial court is best equipped to decide if the trial should be stayed pending the State's efforts to appeal. The trial court is quite familiar with the facts of this case and all of the issues arising from the litigation. The trial court is uniquely situated to assess the legitimacy of the State's allegations.

Even though the baselessness of the State's pending appeal renders consideration of the merits of the argument presented in its Motion to Stay unnecessary, Appellee would still contend that those arguments are ineffective. This Court “shall consider the same factors that are relevant to the granting of injunctive relief by a circuit court.” Md. Rule 8-425. The four factors relevant to the issuance of an injunction are “(1) the likelihood that the plaintiff will succeed on the merits; (2) the ‘balance of convenience’ determined by whether greater injury would be done to the defendant by granting the injunction than

would result by its refusal; (3) whether the plaintiff will suffer irreparable injury unless the injunction is granted; and (4) the public interest.” *Schade v. Maryland State Board of Elections*, 401 Md. 1, 36 (2007).

It is the moving party’s burden to establish these four factors and “failure to prove the existence of even one of the four factors will preclude the grant of preliminary injunction relief.” *Id.* With regard to the first factor, the State cannot win on the merits because the issue they seek to be reviewed is not a final judgment. The Circuit Court’s ruling is just one of many pre-trial rulings that have occurred in this case. The defense has filed a Motion to Dismiss the Notice of the Appeal with the Court of Special Appeals.

"The right of appeal is entirely statutory in Maryland." *Seward v. State*, -- Md. --, at *3 (Slip. Op. No. 12, Sept. Term, 2015) (Decided Jan. 27, 2016) (*citing Pack Shack, Inc. v. Howard County*, 371 Md. 243, 247 (2002)). "It is an often stated principle of Maryland law that appellate jurisdiction, except as constitutionally authorized, is determined entirely by statute, and that, therefore, a right of appeal must be legislatively granted." *Seward*, at *4 (*quoting Gisriel v. Ocean City Bd. of Supervisors of Elections*, 345 Md. 477, 485 (1997)). Courts article section 12-301 provides:

Except as provided in § 12-302 of this subtitle, a party may appeal from a ***final judgment*** entered in a civil or criminal case by a circuit court. The right of appeal exists from a final judgment entered by a court in the exercise of original, special, limited, statutory jurisdiction, unless in a particular case the right of appeal is expressly denied by law. In a criminal case, the defendant may appeal even though imposition or execution of sentence has been suspended. In a civil case, a plaintiff who has accepted a remittitur may cross-appeal from the final judgment.

Md. Code, Courts & Judicial Proceedings, §12-301 (emphasis supplied). According to §12-301, and as interpreted by this Court, an appeal is premature until after final judgment. *Id.*; *see also Langworthy v. State*, 284 Md. 588, 596 (1979). Accordingly, “[w]here appellate jurisdiction is lacking, the appellate court will dismiss the appeal *sua sponte*.” *See, e.g., Eastgate Associates v. Apper*, 276 Md. 698, 701 (1976). The purpose of CJP § 12-301 is “to prevent piecemeal appeals and . . . the interruption of ongoing judicial proceedings.” *Seward*, at *5 (quoting *Douglas v State*, 423 Md. 156, 172 (2011)). This purpose “takes on added weight in criminal cases, where the defendant is entitled to a speedy resolution of the charges against him.” *Will v. U.S.*, 389 U.S. 90, 96 (1967).

The prematurity of an appeal hinges on the existence, or absence, of a final judgment. “Final judgment” has been defined by this Honorable Court as:

one that either determines and concludes the rights of the parties involved or denies a party the means to prosecute or defend his or her rights and interests in the subject matter of the proceeding. Important is whether any further order is to be issued or whether any further action is to be taken in the case.

Seward, at *4 (quoting *Douglas*, 423 Md. at 171). In a criminal case, a final judgment has not been rendered until the court has entered a verdict and a sentence. *Jones v. State*, 298 Md. 634, 638 (1984).

The State’s right to appeal is further “limited . . . to narrow categories of orders terminating the prosecution.” *Will*, 389 U.S at 96. CJP §12-302 provides specific guidance regarding the State’s right to appeal in criminal cases. Md. Code, Courts & Judicial Proceedings, §12-302(c). The pertinent section provides:

(c)(1) In a criminal case, the State may appeal as provided in this subsection.

(2) The State may appeal from a final judgment granting a motion to dismiss or quashing or dismissing any indictment, information, presentment, or inquisition.

(3) The State may appeal from a final judgment if the State alleges that the trial judge:

(i) Failed to impose the sentence specifically mandated by the Code; or

(ii) Imposed or modified a sentence in violation of the Maryland Rules.

(4)(i) In a case involving a crime of violence . . . the State may appeal from a decision of a trial court that excludes evidence offered by the State or requires the return of property alleged to have been seized in violation of the Constitution of the United States, the Maryland Constitution, or the Maryland Declaration of Rights.

Id. The State’s appeal in the present case does not fall under one of the “narrow categories” presented in §12-302, and is therefore not valid.

In addition to the fact that this appeal has been filed without any legal authority, the trial court has already made a factual determination that the State's Motion to Compel was without merit and should be denied. It is the Appellee’s position that the Circuit Court’s denial of the State’s Motion to Compel is not a final judgment and therefore the State has no chance to succeed on the merits of its appeal. The inquiry need go no further.

However, with regard to the second and third factor, the State cannot show that it will suffer greater and irreparable injury if the stay is denied than the defendant will suffer if it is granted. The State claims that Officer Porter is a “valuable witness” in its case and that his absence “would cause irreparable harm to the State’s ability to prosecute this case.” The State has identified no less than 75 witnesses that it intends on calling in its prosecution of Officer Nero. The first time that the State indicated that it intended on calling Officer Porter was on January 13, 2016. Certainly, the State’s late recognition of Officer Porter’s “value” undercuts its contention that the State would be irreparably harmed in its ability to

prosecute Officer Nero for the pending misdemeanor charges. Additionally, the Circuit Court found the value of Officer Porter's testimony questionable at best after hearing the State's proffer of his "needed" testimony at the hearing on the Motion to Compel. On the other hand, granting a stay in this case would delay the trials of Officers Nero, Miller, and Rice well beyond acceptable speedy trial dimensions.

The State has consistently argued that any delay in the Officers' trials would be a "legally insignificant short amount of time awaiting resolution of the appeal." The State is asking that the trials of Officers Nero, Miller, and Rice be put back in the original line-up of cases which would arguably result in the cases being scheduled in September, 2016, at the earliest. The State suggests that the fact that this is "one of the most high-profile criminal trials in Maryland history" should figure into the public interest factor. The public interest is best served by the process continuing in the ordinary course of criminal litigation.

The State has taken an extraordinary action in seeking to appeal in the midst of litigation; this action is not supported by the law. The public should be able to trust that each case prosecuted by this State's Attorney will be tried in a speedy and predictable manner, in accordance with the rules and the law.

WHEREFORE, the Respondent respectfully requests that this Honorable Court deny the State's Motion for Stay Pending the Appeal.

Respectfully submitted,



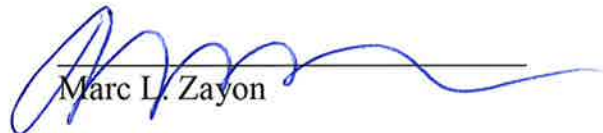
Marc L. Zayon

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CERTIFICATION OF SERVICE

I HEREBY CERTIFY that on the **16th day of February 2016**, a copy of the foregoing Opposition to Stay was mailed first-class, postage pre-paid, United States Mail to Michael Shatzow, Deputy State's Attorney for Baltimore City, 120 E. Baltimore Street, 9th Floor, Baltimore, Maryland 21202; Carrie Williams, Assistant Attorney General, 200 St. Paul Place, Baltimore, Maryland 21202.



Marc L. Zayon

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CRIMINAL DIVISION

STATE OF MARYLAND

* IN THE

* CIRCUIT COURT FOR

v.

* BALTIMORE CITY

EDWARD NERO

* Case No. 115141033

* * * * *

ORDER

On September 15, 2015, the State notified this Court that it intended to try the above-captioned case and related cases in a certain order. The State indicated that the order was preferable because Officer William Porter was a material witness in the cases against Sergeant Alicia White and Officer Caesar Goodson. On December 16, 2015, Officer Porter's trial ended in a mistrial. His retrial is currently scheduled for June 13, 2016.

On January 7, 2016, this Court granted the State's Motion to Compel Officer Porter to testify in the *Goodson* and *White* trials. Officer Porter appealed this Court's decision and the *Goodson* and *White* trials are stayed pending a decision by the Court of Special Appeals.

Shortly after the *Goodson* and *White* trials were stayed, this Court notified all parties that it planned to proceed with the *Nero*, *Miller*, and *Rice* trials, with Nero's scheduled to begin on February 22, 2016. It was only then, four months after the State identified Officer Porter as a material witness in two other trials, and one month after Officer Porter's mistrial, that the State notified this Court, in a January 16, 2016 letter, that Officer Porter may be a material witness in the *Nero*, *Miller*, and *Rice* cases and that it wished to postpone all five cases until after Officer Porter's retrial. One of the reasons

the State requested the Court grant the postponement was so that the State could avoid a *Kastigar* hearing and the need to put together a “clean team.”

On January 20, 2016, this Court heard arguments on the State’s Motion to Compel the testimony of Officer Porter in the *Nero*, *Miller*, and *Rice* trials and denied the State’s motion. This Court found that the State was using Md. Code, Cts. & Jud. Proc. § 9-123 in an attempt to control the schedule and order of the trials and to circumvent this Court’s ruling that postponement in these cases was not appropriate.

This Court agrees that its role is not to impose its opinion upon the State’s determination that a witness’ testimony is in the public interest. This Court believes, however, that rather than become a rubber-stamp for the State’s Attorney, there should be a two-step process in granting immunity under § 9-123 when, and only when, the motives of the requesting party are called into question. The denial of the State’s motion to compel was not based upon an imposition of the Court’s opinion on the State’s determination that a witness’ testimony was in the public interest under § 9-123, but rather based upon the Court finding that the State’s motion was simply an attempt at subterfuge because they did not agree with the Court’s order to continue with the other trials. It is this action of the State that this Court found was not in the public interest.

For these reasons, this Court finds that its denial of the State's motion to compel was appropriate. Therefore, it is this 10th day of February, hereby

ORDERED that the State's Motion to Stay Proceedings Pending trial in the above-captioned case is **DENIED**.

Judge Barry G. Williams

Judge's Signature appears on the original document

BARRY G. WILLIAMS
JUDGE, CIRCUIT COURT FOR
BALTIMORE CITY

Clerk, please mail copies to the following:

Marc Zayon, Attorney for Edward Nero

Janice Bledsoe, Deputy State's Attorney, Office of the State's Attorney for Baltimore City