

IN THE SUPREME COURT OF OHIO

07-2165

DOUG WIEDEMAN :
Plaintiff/Appellant : On Appeal from the Greene
County Court of Appeals
Second District
v. :
Sky Bank, Inc., et al. : Court of Appeals Case No. 2007CA0017
Defendant/Appellees :

MEMORANDUM OF APPELLEE, SKY BANK, INC.,
IN RESPONSE TO APPELLANT'S MEMORANDUM
IN SUPPORT OF JURISDICTION

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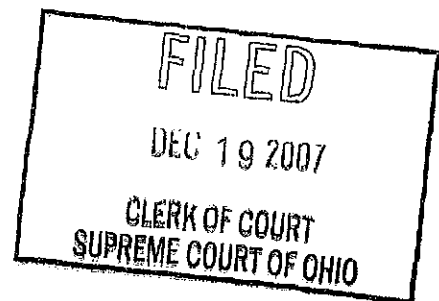


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**EXPLANATION OF WHY THIS CASE IS NOT A CASE OF PUBLIC OR GREAT
GENERAL INTEREST AND DOES NOT INVOLVE A SUBSTANTIAL
CONSTITUTIONAL QUESTION**

This case does not affect a substantial constitutional question, nor is it one of public or great interest. Instead, this case, and correspondingly Appellant's request to this Court for jurisdiction by way of discretionary appeal, is simply about his disagreement with the Second Appellate District's and the trial court's respective decisions. Whereas Appellant submits as his first proposition of law that a dismissal based on speedy trial grounds is a termination in favor of the accused, the Second Appellate District did not rule on that issue in affirming the trial court's decision. Indeed, both the trial court and the Second Appellate District held that Appellant could not satisfy the other elements of his malicious prosecution claim.

Under the first proposition of law, Appellant also requests this Court to identify a speedy trial dismissal as a termination of prosecution in favor of the accused for purposes of a malicious prosecution claim because, according to Appellant, a failure to accept this proposition would preclude individuals whose charges were dismissed based on a speedy trial violation from bringing any malicious prosecution claims against a prosecutor. Notwithstanding Appellant's failure to establish the other elements of his malicious prosecution claim, this argument fails for at least two reasons.

First, prosecutors who initiate prosecution of and present the state's case are entitled to absolute immunity. *Imbler v. Pachtman* (1976), 424 U.S. 409, 431. Absolute immunity is necessary to insure that judges, prosecutors, lawyers and witnesses can perform their respective functions in an adjudicatory proceeding without harassment or fear of consequences—i.e., without fear of malicious prosecution claims.

Second, because prosecutors are immune from civil lawsuits that arise from their prosecution or presentation of the state's claims, Appellant's equal protection argument is not relevant. Appellant's individual constitutional rights were protected in this case when the trial court, however reluctantly, dismissed on speedy trial grounds. Thus, irrespective of a prosecutor's absolute immunity, Appellant's constitutional rights remain the same regardless of whether a dismissal on speedy trial grounds is or is not a termination in favor of a criminal defendant for purposes of a malicious prosecution claim. Accordingly, Appellant's first proposition of law does not affect a substantial constitutional question, nor is it one of public or great interest.

Moreover, Appellant's second proposition of law, asserting that a clerk of a mayor's court does not have authority to issue a bench warrant, is both an incorrect statement of the law and likewise not an issue specifically considered by either court below. To be sure, Ohio statutory and case law establishes that a mayor's court clerk has authority to issue valid arrest warrants. The same law that Appellant asserts gives express authority to only municipal court clerks, unambiguously extends that same authority to county and mayor court clerks, as well. Accordingly, there is a presumption of probable cause in an arrest warrant issued by a mayor's court clerk. The issue in the courts below then was whether Appellant could rebut that presumption. He could not.

Appellant nevertheless asks this Court to accept jurisdiction and find that no presumption of probable cause exists for *his* arrest warrant because the mayor's court clerk somehow lacked probable cause. But in the courts below, Appellant failed to rebut the presumption of probable cause created by the bench warrant because, as both lower courts determined, he could not establish that the clerk was not a neutral or detached magistrate. Indeed, both the trial court and

the Second Appellate District correctly applied applicable law to this analysis. Appellant simply disagrees with the outcome.

Thus, Appellant's second proposition of law does not affect a constitutional protection against arrest warrants lacking probable cause, and likewise is not a matter of public or great general interest. It is of interest only to Appellant.

Accordingly, Appellant's Memorandum In Support of Jurisdiction is without merit. The Second Appellate District accurately considered and applied Ohio law in affirming the trial court's decision granting Appellees' respective motions for summary judgment. Appellant simply failed to establish any of the elements required for his malicious prosecution and Section 1983 claims as a matter of law. Although Appellant asks this Court to believe otherwise, this case is of interest solely to the parties herein. Consequently, this case is not of public or great general interest, nor does it affect a substantial constitutional question.

ARGUMENTS IN OPPOSITION TO PROPOSITIONS OF LAW

Appellant's Proposition of Law No. I: A dismissal of a criminal case based on statutory speedy trial grounds is a dismissal on the merits in favor of the accused.

I. A dismissal of a criminal case based on statutory speedy trial grounds is not a dismissal on the merits in favor of the accused for purposes of a malicious prosecution claim because it lacks any indication of innocence.

Jurisdiction over Appellant's first proposition of law must be denied because it (1) is irrelevant to the outcome of Appellant's malicious prosecution claim; and (2) would only confuse the standard of what a "termination in favor" of the claimant means for purposes of malicious prosecution claims, as well as other causes of action.

A speedy trial dismissal is not a termination of prosecution in favor of the accused because it is not a disposition on the merits and is not an indication of the innocence of the accused. The elements of a malicious criminal prosecution claim are (1) malice in instituting or continuing the prosecution, (2) lack of probable cause, and (3) termination of the prosecution in favor of the accused. *Trussell v. Gen. Motors Corp.* (1990), 53 Ohio St.3d 142. The Common Pleas Court of Greene County decided, and the Second District Court of Appeals affirmed, that Appellant failed to establish any of these elements, but in particular lack of probable cause.

Nevertheless, it is well-settled that the third element of a malicious prosecution claim, termination in favor of the accused, is established when the disposition includes some indication that the accused is innocent. *Ash v. Ash* (1995), 72 Ohio St.3d 520, 522. In *Ash*, this Court held that a settlement or agreement of compromise of a criminal case does not constitute favorable termination because the purpose of a settlement agreement is to avoid a determination *on the merits* of the criminal proceeding. *Id.* at 523. Thus, for an indication of innocence on the part of the accused to exist, there must have been a determination on the merits of the charge. *Broadnax*

v. Greene Credit Service (1997), 118 Ohio App.3d 881, 888, 694 N.E.2d 167. Further, it would be unfair to allow an accused to secure a dismissal of criminal charges against him by consenting to a compromise, and then take advantage of the termination by filing suit against the complaining witness. *Ash*, 72 Ohio St.3d at 523. Yet, that is essentially what Appellant is seeking in this case.

Here, the dismissal of the charge against Appellant was based upon violation of his speedy trial rights. A dismissal based on a speedy trial violation gives no indication that the accused is innocent. Rather, a speedy trial violation is procedural and constitutional in nature. Similar to a settlement or agreement of compromise in a criminal case, a speedy trial dismissal avoids a determination on the merits of the criminal proceeding. Thus, absent a determination on the merits, there can be no indication of the innocence of a party. *Broadnax*, 118 Ohio App.3d at 888.

To be sure, in its Entry of Decision dismissing the case, the trial court expressed its remorse at having to dismiss the case and noted that the dismissal was not on the merits, nor did it include any indicia of innocence:

Because of the time delays in bringing this case to trial the charges against the Defendant are hereby DISMISSED. It is with great reluctance that the Court must take this step. The alleged actions of Mr. Wiedeman clearly merit the intervention of the judicial system. The fact that he will not be held accountable for his behavior may seem to be an injustice. However, the Constitutional requirements and mandates of the Ohio Revised Code do not make an allowance for this situation. The charges are accordingly dismissed on this procedural technicality and **not** on the merits of this case.

Entry of Decision (emphasis original). Thus, in the same way it would be unfair to allow Appellant to secure a dismissal of his criminal charges through compromise, it would be unfair to

permit him to avoid prosecution on a technicality, and then subsequently take advantage of the procedural dismissal by claiming malicious prosecution. This is particularly true where, as here, Appellant could have waived his right to a speedy trial to determine the case on the merits. Consistent with established precedent then, this Court should reject this proposition of law. Absent any indication of innocence, a dismissal based on a speedy trial violation is not a dismissal on the merits, and cannot establish a termination of prosecution in favor of the accused for purposes of a malicious prosecution claim.

In his Memorandum in Support of Jurisdiction, Appellant also argues that a failure to accept his first proposition of law would create a "loophole" for prosecutors to evade malicious prosecution claims by permitting to lapse the time within which a defendant must be afforded a speedy trial, thus affecting the public or great general interest. Notwithstanding the lack of any logical basis for a prosecutor to purposefully do such a thing, prosecutors are immune from malicious prosecution claims when they initiate prosecution of and present the state's claims. *Imbler v. Pachtman* (1976), 424 U.S. 409, 431. There is no loophole then for prosecutors to avoid malicious prosecution claims because they are already immune from such claims under nearly all circumstances.

Appellant's first proposition of law does not affect a substantial constitutional right, nor does it present an issue of public or great general interest. Appellant simply disagrees with the lower courts' decisions, finding that he failed to establish each of the elements for his malicious prosecution claim. Appellant's first proposition of law must therefore be denied.

Appellant's Proposition of Law No. II: There can be no presumption of probable cause for an arrest which is based on an arrest warrant issued by a mayor's court clerk because no such authority is granted to a mayor's court clerk under Ohio law.

II. Under Ohio law, a mayor's court clerk has the authority to issue arrest warrants, thus creating a presumption of probable cause for arrest.

Appellant's second proposition of law is likewise without merit. A mayor's court clerk has the authority to issue warrants, thus creating a presumption of probable cause in the arrest of Appellant. Ohio Criminal Procedure Rule 4(A) provides that "a warrant for the arrest of the defendant * * * shall be issued by a Judge, clerk of court, or officer of the court designated by the judge * * *." Pursuant to R.C. 1905.02, the provisions of R.C. chapter 1907, which govern county courts, apply in proceedings in a mayor's court insofar as they are relevant. R.C. 1905.02; *State ex rel. Office of the Montgomery County Pub. Defender v. Siroki* (2006), 108 Ohio St. 3d 334, 336. Indeed, a county deputy clerk, "when so qualified, may perform the duties appertaining to the office of the clerk." R.C. 1907.20(E)(1).

The authority vested in the county court clerk is also vested in a mayor's court clerk, giving the mayor's court clerk authority to perform duties appertaining to the office of the clerk. This includes issuing arrest warrants. Thus, in the instant case, the mayor's clerk had the authority to issue the warrant to arrest Appellant thereby creating a presumption of probable cause.

The courts below correctly applied Ohio law. When an arrest warrant is issued by a clerk pursuant to Criminal Procedure Rule (4)(A), probable cause exists if in issuing the warrant, the clerk functioned as a neutral and detached magistrate. See *Shadwick v. City of Tampa* (1972), 407 U.S. 345, 92 S.Ct. 2119. Once the presumption of probable cause was established then, it became Appellant's burden to offer evidence proving the warrant was issued otherwise or that the clerk was neither neutral nor detached. *Dresher v. Burt*, 75 Ohio St.3d 280, 1996-Ohio-170.

Moreover, in the absence of a showing that the individual purporting to sign and issue an arrest warrant did not have authority, such authority is presumed. *Stuber*, 71 Ohio App.3d at 88. In holding that Appellant failed to present any evidence even suggesting that the issuing mayor's court clerk did not function as neutral and detached, the trial court and the Second Appellate District thus properly applied Ohio law.

Appellant nevertheless incorrectly asserts that because the mayor's court is not a "court of record", it only has the authority granted to it pursuant to R.C. 1905.01. *Siroki*, 108 Ohio St.3d at 336. Appellant points out that in *Siroki*, this Court held that a mayor's court was not a court of record for the underlying case, and thus the mayor's clerk did not have protection of R.C. 2701.20(A) in the refusal to accept a document for filing. *Id.* But in that same opinion, this Court states that pursuant to R.C. 1905.02, the provisions of R.C. Chapter 1907, which govern county courts, apply in proceedings in a mayor's court insofar as they are relevant. R.C. 1905.02. In other words, the authority given to county clerks is the same authority given to the mayor's court clerk; it is only when other R.C. sections refer to courts of record that the same authority does not apply to mayor's court clerks. *Id.*

In the present case, there is no issue concerning the mayor's court as a court of record. Appellant simply failed to demonstrate a lack of authority on the part of the mayor's court clerk in issuing his arrest warrant. Instead of addressing this proper application of Ohio law, Appellant asserts an unsubstantiated argument that mayor's court clerks generally do not have such authority, despite the statutory language stating otherwise. To be sure, the mayor's court clerk had authority to issue Appellant's arrest warrant.

A municipal clerk is given authority to issue arrest warrants pursuant to R.C. 1901.31(H) which states that a municipal clerk, when qualified as such, "may perform the duties appertaining

to the office of the clerk.” R.C. 1901.31(H). Similarly, a mayor’s clerk, when qualified as such, “may perform the duties appertaining to the office of the clerk” pursuant to 1905.02, which applies all provisions governing chapter 1907 county courts to apply to mayor’s courts. R.C. 1905.02; R.C. 1907.20(E)(1).

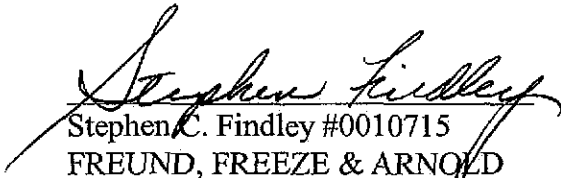
And because he could not establish a lack of probable cause, Appellant could not establish his malicious prosecution claim. That was the issue in the courts below, not whether anyone’s constitutional rights are violated when a mayor’s court clerk issues an arrest warrant. In this latter regard, Ohio law has adequate safeguards, which the courts below properly determined were followed in Appellant’s criminal case.

Thus, despite Appellant’s urging to the contrary, no substantial constitutional question exists, nor is this proposition of law a matter of public or great general interest. Plaintiff-Appellant’s second proposition of law is therefore without merit. This Court should refuse to accept the second proposition of law.

CONCLUSION

For the foregoing reasons, neither of Appellant’s propositions of law involve matters of public or great general interest, or raise substantial constitutional questions. Accordingly, this Court should deny jurisdiction of Appellant’s appeal.

Respectfully submitted,


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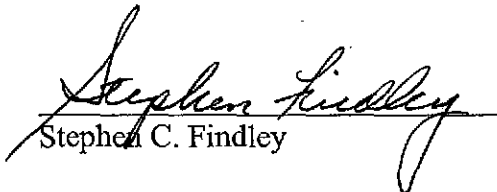
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing has been served upon the following, via ordinary mail on this 19 day of December, 2007:

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