

IN THE SUPREME COURT OF OHIO

STATE OF OHIO

CASE NO.

07-2434

Plaintiff-Appellee

ON APPEAL FROM THE
COURT OF APPEALS OF OHIO,
SECOND APPELLATE DISTRICT,
MONTGOMERY COUNTY

VS.

JOHN W. SLAGLE

COURT OF APPEALS
CASE NO: 22364

Defendant-Appellant.

MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT JOHN W. SLAGLE

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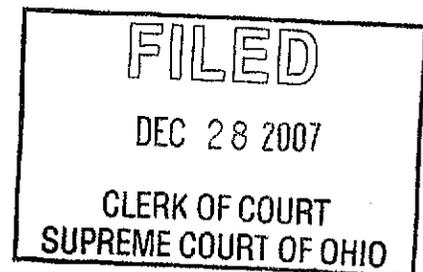


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EXPLANATION OF WHY THIS IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTION QUESTION

This case presents the Court with the opportunity to determine whether, in a criminal case, an order overruling a Motion to Dismiss on the basis of Double Jeopardy is a final appealable order, in light of amendments to O.R.C. §2505.02 that became effective on July 22, 1998. Specifically, Appellant asserts that such an order falls within the “provisional remedy” type of final order set forth in O.R.C. §2505.02(B)(4).

Appellant is, of course, aware of the fact that in State v. Crago (1990), 53 Ohio St. 3d 243, this Court held that the overruling of a Motion to Dismiss based upon a violation of Double Jeopardy is not a final appealable order. However, Crago was decided before the foregoing amendments, and was based upon O.R.C. §2505.02 as it then existed. Thus, this Court has not yet addressed the specific issue presented herein.

As is set forth more fully below, Appellant had a bench trial on felony theft charges in the Montgomery County Common Pleas Court. After all of the evidence and arguments were presented, the Court took the case under advisement. Unfortunately, the trial Judge died before rendering any verdict. At the State’s insistence, and with no opportunity for Defendant to respond, a substitute Judge declared a mistrial, and the case was scheduled for a complete retrial.

Appellant then filed a Motion to Dismiss the charges, arguing that such retrial would violate his Federal and State rights to be free from Double Jeopardy. The trial court overruled the Motion.

Appellant then filed a Notice of Appeal to the Second District Court of Appeals. The State, citing Crago, supra, moved to dismiss the appeal for lack of a final order. Appellant filed a response, arguing that such order was final and appealable pursuant to the present version of O.R.C. §2505.02(B)(4).

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On November 14, 2007, the Court of Appeals filed a Decision and Judgment Entry dismissing the appeal. In doing so, the Court did not set forth any independent reasoning. Instead, it merely recited that “[u]pon careful consideration, this court approves of and follows the holding set forth in Mentor v. Babul (July 15, 1999), Eleventh Dist. No. 98-L-244.”

Babul is one of the only three cases (other than the instant case) found by the undersigned that have dealt with this precise issue since the 1998 amendments to O.R.C. §2505.02. In Babul the Eleventh District Court of Appeals based its decision solely upon the definition of “provisional remedy” contained in O.R.C. §2505.02(A)(3), *i.e.*, a “proceeding ancillary to an action.”

Finding that the order at issue was not a provisional remedy, the Babul Court stated that:

Unlike a motion to suppress, a motion to dismiss is not simply directed to a limited evidentiary issue during the pendency of the overall action. Indeed, a motion to dismiss is not “provisional” in nature because the *status quo* may not be preserved depending on how the trial court rules on the motion. For instance, if the trial court grants the motion to dismiss, then the adjudication of the motion may be dispositive of the entire proceeding.

For this reason, we distinguish between a motion to suppress and a motion to dismiss in a criminal proceeding. While the former is expressly mentioned as a provisional remedy in R.C. §2505.02(A)(3), the latter does not constitute such a remedy.

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Nevertheless, the Court went on to recite that “[d]espite this holding, this court is mindful of the very persuasive argument that can be made in support of the immediate exercise of appellate jurisdiction over the trial court’s denial of a motion to dismiss on double jeopardy grounds. ... The bar against multiple prosecutions is seriously undermined by requiring a defendant to appeal following a second prosecution.”

In State v. Hubbard (1999), 135 Ohio App. 3d 518, the Seventh District Court of Appeals appears to have reached just the opposite conclusions. For example, the Hubbard court recognized that the amendment adding “orders denying provisional remedies” was “a legislative expansion of the types of orders subject to immediate review.” Id. At 521. However, the Court then proceeded to focus its attention on O.R.C. §2505.02(B)(4)(b), stating that:

Appellant in this case would not be denied a meaningful or effective appeal on the issue of double jeopardy, along with any other trial issue which may develop, should he be required to wait until conviction and sentence before an appeal is taken. Moreover, appellant may still be acquitted at trial, rendering such issue moot.
Id.

Finally, the Fourth District Court of Appeals confronted this issue in State v. Prokos, 2000 Ohio App. LEXIS 2387. Therein, the Court acknowledged that the appellant had made “a compelling argument” that “Crago and its progeny were legislatively superseded by Sub. H.B. No. 394 and that such precedent is no longer binding on this Court.”

However, the Court went on to find that “[h]ad the legislature intended to supersede the extensive body of caselaw on this issue then, surely, more explicit language to that effect would have been used in the legislation.”

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As can be seen from the foregoing, more and more Courts of Appeals have had to deal with this issue. Although three Appellate Districts have now concluded that an order denying a double jeopardy motion is not immediately appealable, they appear to have disparate views regarding the different elements of the analysis.

This Court recently remarked upon “the morass of the final-and-appealable-order statute.” See Gehm v. Timberline Post & Frame (2007), 112 Ohio St. 3d 514, 516, 1007 Ohio 607, ¶ 7.

Nevertheless, the Court also noted that it “accepted at least six other cases in 2006 that require interpretation of the statute.” Id. Obviously, there is a growing need for this Court to settle all aspects of the change in O.R.C. §2505.02. The instant case presents the Court with the opportunity to resolve one more aspect of the final order statute that the lower Courts are struggling with. This is all the more important, given the underlying Constitutional Rights which are involved herein. Accordingly, this Court should accept jurisdiction over this case.

STATEMENT OF THE CASE AND FACTS

On August 20, 2004, Appellant, John W. Slagle, was indicted on two counts of theft. Eventually, on September 21, 2006, Mr. Slagle waived his right to a jury trial, and consented to “be tried by Judge G. Jack Davis,” of the Montgomery County Common Pleas Court.

The bench trial began on September 25, 2006, and concluded four days later. The entire trial was videotaped. As a result, a complete audio/visual record of the trial exists.

On November 13, 2006, Mr. Slagle filed “Defendant’s Closing Argument”, pointing out the deficiencies in the State’s evidence and arguing that Mr. Slagle should be acquitted. The State’s Response was filed on December 1, 2006. At that point, with the evidence and arguments complete, Judge Davis took the case under advisement for the purpose of rendering a verdict.

Unfortunately, Judge Davis died on March 4, 2007. He had not yet rendered a verdict.

On March 20, 2007, the State filed a “Motion for Declaration of a Mistrial”. An “Entry Declaring a Mistrial” was signed by Judge John W. Kessler, and was filed simultaneously with the State’s Motion, before Defendant had any opportunity to respond.

On April 17, 2007, an Entry was filed transferring the case from Judge Davis to Judge Kessler. (Signed by Judge Hall). At that time, the parties were discussing a procedure whereby Judge Kessler would review the audio/visual record and the written arguments of the parties, and render a verdict without conducting a full blown retrial. On May 9, 2007, Judge Kessler filed a handwritten Request for Disqualification, noting that the State had unilaterally vetoed the foregoing procedure. As a result, Judge Hall filed a “Transfer of Assignment to Another Judge,” sending this case back to Judge Davis’ docket.

On June 11, 2007, Defendant filed a Motion to Dismiss the Indictment against him, arguing that a retrial following the mistrial declared by the trial court would violate Defendant's right to be free from Double Jeopardy, as guaranteed by the Fifth Amendment of the United States Constitution and Art. I § 10 of the Ohio Constitution. On August 3, 2007, the trial court filed its Entry and Order overruling Defendant's Motion to Dismiss the Indictment. On August 10, 2007, the trial court scheduled a retrial for December 10, 2007, which has since been vacated.

On August 29, 2007, Defendant filed his Notice of Appeal from the decision overruling his Motion to Dismiss. On September 6, 2007, the State filed its Motion to Dismiss such appeal for lack of a final appealable order.

Appellant filed a Memorandum Opposing Appellee's Motion to Dismiss on September 24, 2007. On November 14, 2007, the Court of Appeals granted the Motion to Dismiss, finding that there was no final appealable order. It is from that November 14 Decision and Final Judgment Entry that Mr. Slagle now appeals to this Court.

ARGUMENT

Proposition of Law:

A trial Court's Order overruling a criminal defendant's motion to dismiss based upon a double jeopardy violation is a final appealable order.

The State's Motion to Dismiss contained no analysis. Instead it merely asserted that an order denying a motion to dismiss is not a final appealable order, and cited State v. Crago (1990), 53 Ohio St.3d 243, and State v. Hubbard (1999), 135 Ohio App.3d 518.

Counsel for Appellant recognizes, of course, that in Crago, supra, this Court held that "[t]he overruling of a motion to dismiss on the grounds of double jeopardy is not a final appealable order." However, Crago was decided under a former version of O.R.C. §2505.02. At that time, the relevant portion of O.R.C. §2505.02 stated that:

An order that affects a substantial right in an action which in effect determines the action and prevents a judgment, an order that affects a substantial right made in a special proceeding or upon a summary application in an action after judgment, or an order that vacates or sets aside a judgment or grants a new trial is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial. Crago, supra at 244, n. 2.

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Finding that a denial of a Motion to dismiss a charge on the basis of double jeopardy did not fall within any of the three prongs of that statute, the Court held that such order is not a final appealable order. *Id.* P. 244.

In 1998, however, the General Assembly amended O.R.C. §2505.02 and, in doing so, greatly expanded the scope of what will constitute a final appealable order in Ohio. For the purposes of the instant Memorandum, the relevant provision of the current version of O.R.C. §2505.02 states that:

(B) An order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is one of the following:

(4) An order that grants or denies a provisional remedy and to which both of the following apply:

(a) The order in effect determines the action with respect to the provisional remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy.

(b) The appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action.

“Provisional remedy” is defined in O.R.C. §2505.02 (A)(3) as “a proceeding ancillary to an action,” followed by several non-exclusive examples.

In 2001, this Court had its first occasion to interpret and apply the foregoing provision in State v. Muncie (2001), 91 Ohio St.3d 440. While Muncie involved the issue of whether an order to forcibly medicate an incompetent defendant is a final appealable order, the Court’s discussion of O.R.C. §2505.02 (B)(4) is relevant to the issue at hand.

First, this Court held that a “provisional remedy” is actually a type of proceeding. Muncie, Supra, p. 447. The Court then construed “ancillary proceeding” to mean “one that is attendant upon or aids another proceeding.” *Id.*, p. 449 (*quoting Bishop v. Dresser Industries* (1999), 134 Ohio App.3d 321, 324).

In the present case, Appellant submits that the determination of whether or not a retrial is barred by double jeopardy is an ancillary proceeding (i.e., “provisional remedy”). A motion raising such issue is separate from, and completely collateral to, the substantive issues at trial. The constitutional right not to be tried does not involve issues of guilt or innocence. Thus, any proceeding regarding the double jeopardy issue is as independent of the trial itself as was the decision to forcibly medicate the defendant in Muncie, supra.

The second prong of O.R.C. §2505.02 (B)(4) – that “the order in effect determines the action with respect to the provisional remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy” – is easily and obviously satisfied here. The trial court’s August 3, 2007, Entry and Order definitively overruled Appellant’s Motion to Dismiss. It provided for no other alternative but to proceed to Trial (which has already been scheduled) and be subjected to that which, in Appellant’s opinion, is constitutionally prohibited. *See e.g., Muncie, supra*, at 450, 451.

Finally, Appellant will unquestionably be denied “a meaningful or effective remedy by an appeal following a final judgment as to all proceedings, issues, claims and parties in the action.” *See* O.R.C. §2505.02 (B)(4)(b). It must be remembered that the constitutional right at issue herein is the right not to be tried. As the United States Supreme Court recognized in Abney v. United States (1977), 431 U.S. 651, 660-61, “the Double Jeopardy Clause protects an individual against more

than being subjected to double punishments. It is guaranteed against being twice put to trial for the same offense.” (Emphasis added). Thus, “if a criminal defendant is to avoid exposure to double jeopardy and thereby enjoy the full protections of the Clause, his double jeopardy challenge to the indictment must be reviewable before that subsequent exposure occurs.” *Id.* at 662.

In Muncie, Supra, the Ohio Supreme Court (at p. 451) explained O.R.C. §2505.02 (B)(4)(b) in the following manner:

This division of the final order statute recognizes that, in spite of courts’ interest in avoiding piecemeal litigation, occasions may arise in which a party seeking to appeal from interlocutory order would have no adequate remedy from the effects of that order, on appeal from final judgment.

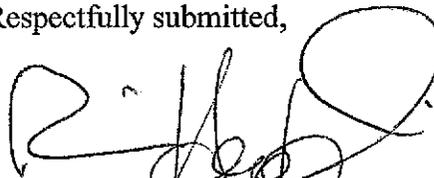
Obviously, if the right sought to be vindicated is the right to be free from a second trial, no subsequent appeal would or could be sufficient, adequate, or effective to relieve one from “the effects of [an] order” requiring that person to undergo the second trial. In other words, “the proverbial bell cannot be un-rung and an appeal after final judgment on the merits will not rectify the damage suffered by the appealing party.” Muncie, Supra, at 451; see also State v. Upshaw (2006), 110 Ohio St.3d 189, 2006-Ohio-4253, ¶ 18. Simply put, the right not to be tried is completely eviscerated by subjecting a person to trial. Logic dictates that a defendant’s right not to be tried can’t ever be restored after he has been made to endure the cost and trouble of defending himself in court, regardless of the outcome of the retrial.

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CONCLUSION

For the foregoing reasons, the Court should accept jurisdiction over this case.

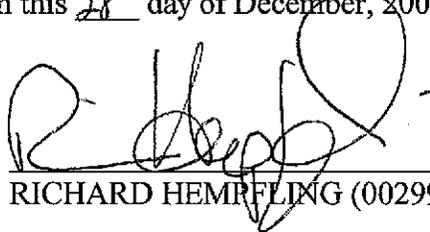
Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify, by signing below, that a copy of the foregoing MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT JOHN W. SLAGLE has been served upon Assistant Prosecuting Attorney, Appellate Division, Carley Ingram, 301 W. Third St., 5th Fl., Dayton, OH 45422, via ordinary U.S. Mail on this 28 day of December, 2007.



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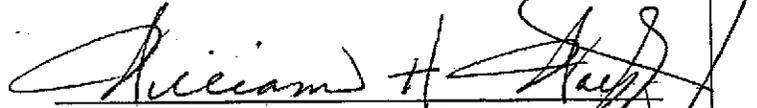
APPENDIX TO

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SO ORDERED.


WILLIAM H. WOLFF, JR., Presiding Judge


JAMES A. BROGAN, Judge


MIKE FAIN, Judge

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