

IN THE SUPREME COURT OF OHIO

ROMAN CHOJNACKI,

Petitioner-Appellant,

vs.

MARC DANN, Ohio Attorney General,
In his Official Capacity

Respondent-Appellee.

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08-0991

Case No. _____

On Appeal from the Warren
County Court of Appeals
Twelfth Appellate District

Case No. CA2008-03-040

NOTICE OF CERTIFIED CONFLICT

OFFICE OF THE OHIO PUBLIC DEFENDER

RACHEL HUTZEL # 0055757
Warren County Prosecutor

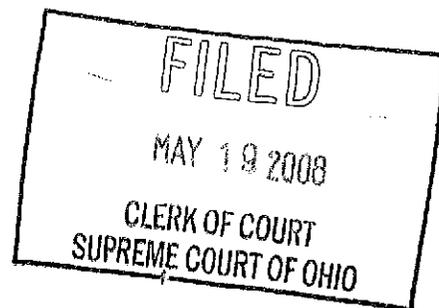
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COUNSEL FOR ROMAN CHOJNACKI



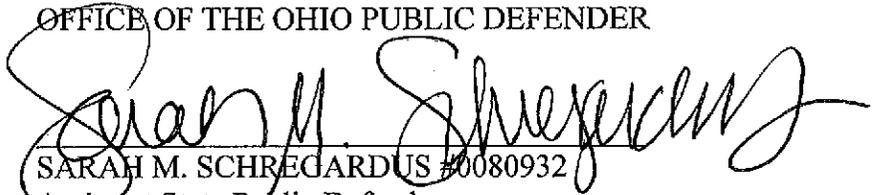
NOTICE OF CERTIFIED CONFLICT

Appellant Roman Chojnacki gives notice, pursuant to S.Ct.R. IV, Section 1, that the Twelfth District Court of Appeals certified its decision in *Chojnacki v. Dann* (April 3, 2008), Warren App. No. CA2008-03-040 in conflict with the Second District Court of Appeals decision in *King v. State of Ohio* (Mar. 19, 2008), Miami App. No 2008-CA-2 on May 5, 2008 pursuant to Article IV, Section 3(B)(4) of the Ohio Constitution.

The certified question is: whether a decision denying a request for appointment of counsel in a reclassification hearing held pursuant to Ohio's version of the Adam Walsh Act, Senate Bill 10, is a final appealable order.

Respectfully submitted,

OFFICE OF THE OHIO PUBLIC DEFENDER



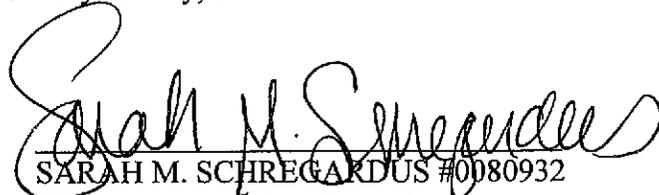
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COUNSEL FOR ROMAN CHOJNACKI

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing NOTICE OF CERTIFIED CONFLICT has been served upon Rachel Hutzal, Warren County Prosecutor, Warren County Courthouse, 500 Justice Drive, Lebanon, Ohio, 45036 this 19th day of May, 2008.


SARAH M. SCHREGARDUS #0080932
Assistant State Public Defender

COUNSEL FOR ROMAN CHOJNACKI

COURT OF APPEALS
 IN THE COURT OF APPEALS OF WARREN COUNTY, OHIO
 FILED

MAY 5 2008

ROMAN CHOJNACKI,

Petitioner/Appellant,

vs.

MARC DANN, Ohio Atty. General,
 in his Official Capacity,

Respondent/Appellee,

CASE NO. CA2008-03-040

James L. Spaeth, Clerk
 LEBANON OHIO

ENTRY DENYING APPLICATION
 FOR RECONSIDERATION AND
 GRANTING MOTION TO CERTIFY
 CONFLICT

The above cause is before the court pursuant to an application for reconsideration or, in the alternative, motion to certify conflict filed by counsel for appellant, Roman Chojnacki, on April 8, 2008. No response has been filed on behalf of appellee, Marc Dann, Ohio Attorney General.

On February 26, 2008, appellant filed a "petition to contest reclassification" which challenges the application of Ohio's version of the Adam Walsh Act reclassifying him as a Tier II offender. On the same date, petitioner filed a motion for appointment of the office of the Ohio Public Defender as counsel. The motion was denied, and appellant filed this appeal. In an entry of dismissal filed on April 3, 2008, this court dismissed the appeal for the reason that it is not taken from a final appealable order. Thereafter, appellant timely filed the above application for reconsideration, or in the alternative, motion to certify conflict.

The test generally used when ruling on an application for reconsideration is whether the application calls the court's attention to an obvious error in its decision, or raises an issue which was improperly or not fully considered, or was not considered at all by the court. *State v. Black* (1991), 78 Ohio App.3d 130. In his application for reconsideration, appellant disagrees with this court's decision finding the entry appealed from



Warren CA2008-03-040

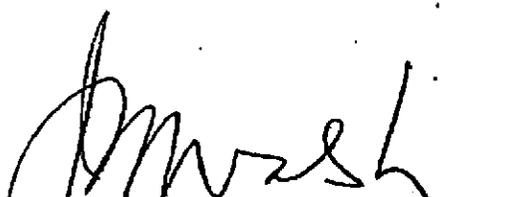
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not to be a final appealable, but raises no issues which were not fully considered by the court. The application for reconsideration is accordingly DENIED.

Under the Ohio Constitution, a court of appeals is required to certify the record of a case to the Supreme Court of Ohio if it finds that its decision is in conflict with the judgment of another court of appeals on the same question. O.Constitution Art. IV, Section 3(B)(4). Appellant contends that this court's decision is in conflict with a decision by the Second District Court of Appeals, *King v. State of Ohio* (Mar. 19, 2008), Miami App. No. 2008-CA-2.

Upon review, the court finds that its decision is in conflict with the *King* decision. Accordingly, the motion to certify is GRANTED. The issue for certification is whether a decision denying a request for appointment of counsel in a reclassification hearing held pursuant to Ohio's version of the Adam Walsh Act, Senate Bill 10, is a final appealable order.

IT IS SO ORDERED.


James E. Walsh, Presiding Judge
William W. Young, Judge
Stephen W. Powell, Judge

COURT OF APPEALS
IN THE COURT OF WARREN COUNTY
FILED OF WARREN COUNTY, OHIO

APR 3 2008

James L. Spaeth, Clerk
LEBANON OHIO

CASE NO. CA2008-03-040

ROMAN CHOJNACKI,

Petitioner/Appellant,

ENTRY OF DISMISSAL

vs.

MARC DANN, Ohio Attorney General,
in his Official Capacity,

Respondent/Appellee.

The above cause is before the court pursuant to a notice of appeal filed by petitioner/appellant, Roman Chojnacki, on March 13, 2008. The appeal is taken from an entry filed in the Warren County Court of Common Pleas on March 10, 2008 denying a motion for appointment of counsel.

Appellant is an inmate incarcerated at Lebanon Correctional Institution. He was found guilty of three counts of unlawful sexual conduct with a minor in 2006 and sentenced to 12 years in prison.

On February 26, 2008, petitioner filed a "petition to contest reclassification" which challenges the application of Ohio's version of the Adam Walsh Act re-classifying him as a Tier II offender. On the same date, petitioner filed a motion for appointment of the Office of the Ohio Public Defender as counsel. The motion was denied on March 10, 2008 and this appeal follows.

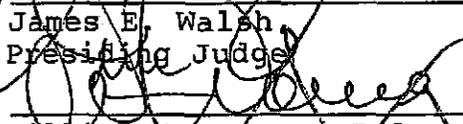
Upon consideration, the court finds that this appeal is not taken from a final appealable order. The entry denying petitioner's motion for appointment of counsel does not affect a substantial right in the action which in effect determines the action and prevents a judgment. R.C. 2505.02(B)(1). It is not an order made in a special proceeding (R.C. 2505.02(A)(2)), or a provisional remedy (R.C. 2505.02(A)(3)).

This appeal is accordingly hereby DISMISSED, costs to petitioner.

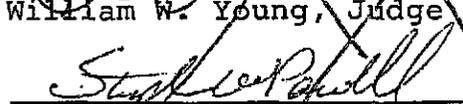
IT IS SO ORDERED.



James E. Walsh,
Presiding Judge



William W. Young, Judge



Stephen W. Powell, Judge

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MIAMI COUNTY

STEFANI M. KING

Plaintiff-Appellant

v.

STATE OF OHIO

Defendant-Appellee

Appellate Case No. 2008-CA-2.

T. Ct. Case No. 07-CV-1030

DECISION AND ENTRY

March 19th, 2008

This matter comes before us upon Stefani M. King's appeal from the trial court's December 26, 2007 order overruling her motion for appointment of counsel to assist her in challenging her reclassification as a "Tier II" sex offender.

The record reflects that King pleaded guilty to unlawful sexual conduct with a minor in 1997. She served five years of community control and completed ten years of registration as a sexually oriented offender. In December 2007, she received a letter from the Ohio Attorney General's office advising her of additional requirements being imposed on her under R.C. 2950.031, which was enacted in Senate Bill 10, effective January 1, 2008. Under SB 10, King automatically is reclassified as a "Tier II" offender based on the offense she committed. She also is required to register as a sex offender every six months for 25 years.

As permitted under R.C. 2950.031(E), King filed a petition in the trial court for

a hearing to challenge her reclassification as a Tier II offender and the accompanying registration requirements. She also filed an affidavit of indigence and a motion for the appointment of counsel to assist with her petition. The trial court summarily overruled the motion on December 26, 2007. This timely appeal followed.

After King filed her notice of appeal, the parties submitted written briefs addressing, *inter alia*, our jurisdiction over an interlocutory appeal from the trial court's denial of counsel. We also heard oral argument on the jurisdictional issue. Having considered the parties' respective arguments, we conclude that the trial court's order is immediately appealable under R.C. 2505.02(B)(2) and (B)(4).

Under R.C. 2505.02(B)(2), an order is final and appealable if it affects a substantial right and is made in a special proceeding. King contends the trial court's order declining to appoint counsel meets this standard. She asserts that the right to counsel is a "substantial right" recognized by the Constitution and by statute. She also claims her petition for a reclassification hearing qualifies as a "special proceeding" because she filed it under R.C. 2950.031(E), which specifically created such a procedure for a sex offender to challenge reclassification under SB 10.

In response, the State does not dispute that King's petition for a reclassification hearing is a "special proceeding" because it is "an action or proceeding that is specially created by statute and that prior to 1853 was not denoted as an action at law or a suit in equity." R.C. 2505.02(A)(2). The State argues, however, that the trial court's denial of counsel does not affect a substantial right because King has no right to counsel.

Upon review, we find the State's argument to be unpersuasive. Contrary to

the State's argument, we need not decide the merits—i.e., whether King actually has a right to counsel—in order to decide whether she can take an immediate appeal under R.C. 2505.02(B)(2). The State reasons that King has no right to appeal the denial of counsel because she has no right to counsel. If that logic held, this court would be compelled to resolve the merits of an appeal under R.C. 2505.02(B)(2) in order to decide the threshold issue of whether the appeal is properly before us.

Instead, we believe the proper inquiry is whether the right to counsel itself has been recognized as a "substantial right." The Ohio Supreme Court seemingly took this approach in *Gehm v. Timberline Post & Frame*, 112 Ohio St.3d 514, 2007-Ohio-607. There it characterized intervention as a "substantial right" under the appealable-order statute without first deciding whether the party seeking to intervene actually had a right to do so. *Id.* at 519.¹ The State does not dispute that the right to counsel is recognized by the Constitution and Crim.R. 44. Therefore, the trial court's ruling involves a substantial right.

Having determined that the proceeding in the trial court qualifies as a special proceeding, and that King has asserted a substantial right, the only remaining question is whether the trial court's ruling affects the substantial right. An order

¹The *Gehm* court reasoned:

"The only other possible basis for the denial of the motion to intervene to qualify as a final, appealable order under R.C. 2505.02 is that it affects a 'substantial right' as defined by R.C. 2505.02(A)(1) and that it 'in effect determines the action and prevents a judgment.' R.C. 2505.02(B)(1).

"R.C. 2505.02(A)(1) defines a 'substantial right' as 'a right that the United States Constitution, the Ohio Constitution, a statute, the common law, or a rule of procedure entitles a person to enforce or protect.' As a motion to intervene is a right recognized by Civ.R. 24, intervention constitutes a substantial right under R.C. 2505.02(A)(1)."

affecting a substantial right is one which, if not immediately appealable, would foreclose appropriate relief in the future. *Southside Comm. Dev. Corp. v. Levin*, 116 Ohio St.3d 1209, 1210-1211, 2007-Ohio-6665.

In *State ex rel. Keenan v. Calabrese* (1994), 69 Ohio St.3d 176, the Ohio Supreme Court recognized that granting a motion to disqualify counsel in a civil case is an appealable order under R.C. 2505.02 because it cannot be reviewed effectively after final judgment. *Id.* at 178, citing *Russell v. Mercy Hosp.* (1984), 15 Ohio St.3d 37; see also *State ex rel. Asberry v. Payne*, 82 Ohio St.3d 44, 49, 1998-Ohio-596 (holding that a pro se appeal would not necessarily be a "complete, beneficial, and speedy" remedy for a pro se litigant to challenge the trial court's refusal to appoint counsel in a civil child-custody proceeding); *State ex rel. Cody v. Toner* (1983), 8 Ohio St.3d 22, 23 ("In the instant case, if relator must wait for an appeal to establish his alleged right to have court-appointed counsel, he will be denied the opportunity to be legally represented throughout the course of the adjudication and disposition of his case. Accordingly, although relator may ultimately appeal an adverse decision rendered in the paternity action, that remedy cannot be said to be 'adequate under the circumstances.'").² The foregoing cases support the proposition that the denial of counsel in a civil proceeding is subject to immediate review because an appeal

²*Asberry* is distinguishable from the present case insofar as a statute specifically provided for the appointment of counsel there. We do not cite *Asberry*, however, for the proposition that King is entitled to counsel. Instead, we find *Asberry* instructive on a different issue, namely whether the denial of counsel in a civil case may be reviewed effectively after the entry of final judgment.

after final judgment is inadequate.³ We find that to be true in this case, which involves a civil action filed by King to contest her reclassification by the Ohio Attorney General. In an appeal after final judgment, King would be required to prove that the presence of counsel would have resulted in a more favorable outcome and that she was prejudiced by the absence of counsel—a showing which often is difficult to make.⁴ Accordingly, the trial court's order refusing to appoint counsel for King is immediately appealable under R.C. 2505.02(B)(2).

We reach the same conclusion concerning King's right to take an immediate appeal under R.C. 2505.02(B)(4), which involves provisional remedies. It provides that an order granting or denying a provisional remedy is immediately appealable if both of the following conditions are met:

“(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 * * *.”

³Although *Keenan* involved the disqualification of counsel of choice rather than the refusal to appoint counsel for a pro se litigant, the two situations nevertheless implicate some of the same concerns regarding the effectiveness of an appeal after final judgment. Moreover, we note that *Asberry* and *Cody*, like the present case, involved a trial court's complete refusal to appoint counsel for an indigent party in a civil action.

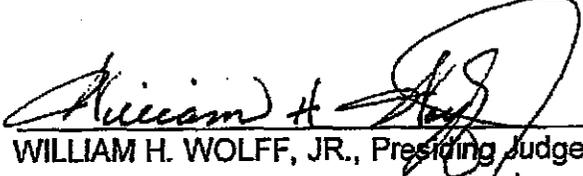
⁴Conversely, prejudice is presumed when a trial court erroneously disqualifies or denies counsel in a criminal case. See, e.g., *Russell*, 15 Ohio St.3d at 43; *Keenan*, 69 Ohio St.3d at 179. For that reason, an order disqualifying counsel in a criminal case is not immediately appealable. *Id.*

In opposition to King's reliance on R.C. 2505.02(B)(4), the State contends no provisional remedy is at issue. We disagree. A "provisional remedy" is "a proceeding ancillary to an action * * *." R.C. 2505.02(A)(3). King's motion for the appointment of counsel is ancillary to her petition for a reclassification hearing. Her request for counsel is attendant upon or aids her petition to challenge her reclassification as a Tier II offender. Cf. *State v. Williams*, Lucas App. Nos. L-03-1070, L-03-1071, 2003-Ohio-2533, ¶27 (recognizing that an order disqualifying counsel is ancillary to the main action and qualifies as a provisional remedy). Moreover, the trial court's denial of counsel determines the action with respect to the provisional remedy and prevents a judgment in the King's favor on the question of counsel.

The only remaining issue is whether King would be afforded a meaningful or effective remedy by an appeal following final judgment. We once again conclude, based on the reasoning set forth above, that an appeal following final judgment in this civil action would be inadequate. Therefore, the trial court's order refusing to appoint counsel is immediately appealable under R.C. 2505.02(B)(4).

In accordance with our January 14, 2008 scheduling order, the parties previously filed briefs addressing King's asserted right to counsel and the trial court's contrary ruling. Before we resolve the appeal, however, we will grant King fourteen days from the date of this decision and entry to file any supplemental brief that she deems necessary. If King submits such a brief, the State shall have fourteen days from the date of King's filing to submit its own supplemental brief. King then shall file any reply brief deemed necessary within seven days. No extensions of this briefing schedule will be granted.

IT IS SO ORDERED.


WILLIAM H. WOLFF, JR., Presiding Judge


JAMES A. BROGAN, Judge


MIKE FAIN, Judge

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