

ORIGINAL

**IN THE SUPREME COURT OF OHIO**

On Appeal from the Lake County Court of Appeals, Eleventh Appellate District

Case No. 2009-0678

Court of Appeals Case No.: 2008 L 016

**THE STATE OF OHIO**

Plaintiff-Appellant

vs.

**JOSEPH PEPKA**

Defendant-Appellee

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**MEMORANDUM OF APPELLEE, JOSEPH PEPKA, OPPOSING APPELLANT STATE OF OHIO's, APPLICATION FOR STAY**

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## **MEMORANDUM OPPOSING STATE'S APPLICATION FOR STAY**

There are at least four (4) reasons why this application for a stay should be rejected. First, the prosecutor makes no attempt to address the four (4) traditional factors governing consideration of a stay of execution of a valid, final judgment. They are: likelihood of success on the merits, irreparable harm to the applicant if the stay is not granted, the potential harm to the applicant outweighs the harm to the opposing party if the stay is not granted, the granting of the stay would serve the public interest. [multiple citations omitted.]

(a) While he cites an opinion from this Court on a motion for reconsideration, not the merits of an argued case, he does not say it compels a different result, but disingenuously uses the term "indicates" it might lead to his hoped for result. At no point in his argument does he point to any claim, or law, leading inexorably to the "likelihood of success on the merits." His position in this Court, especially where it is only discretionary review that is available, would have to be he will certainly win here because the appellate court completely missed the governing principles in this case. His failure to address, and support, a position of ultimate success is fatal to the motion.

(b) Nor does the prosecutor address the question of irreparable harm to the State of Ohio if this stay is not granted. He does not even make an argument on this issue. If a stay is meant to prevent looming harm of an irreversible nature, it is not the least bit untoward to require the applicant to at least say why that is true. He did not. How could the prosecutor prevail on this application without presenting a claim regarding the harm he is asking this Court to prevent.<sup>1</sup>

(c) Without any reference to irreparable harm to the state, it is impossible for the prosecutor to have argued the balancing of the equities favors his application. And he doesn't. This failure to address at all the traditional factors governing the use of the extraordinary remedy of a stay almost treats this like an entitlement.

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<sup>1</sup> At an earlier incarnation of this very same issue in the very same case, Pepka filed an application for a stay here pending *his* appeal to the Eleventh District. In your case number 08-058, he alleged the irreparable harm to him would be his lawful prison sentence would be over before the appeal could be heard and decided. Pepka was right, as the Court of Appeals decision under review confirms, but the stays were denied all along the line. That irreparable loss of liberty was alleged, and was serious; the prosecutor has no such danger, and alleged nothing.

(d) The last, and most indefinite consideration, informing the stay exercise is the “public interest”. Like the others, this one is not mentioned at all. Failure of its mention is either evidence of nothing of substance to support the issue, or a misguided view that because of who the applicant is, it is not necessary.

Secondly, even if the prosecutor had attempted to offer reasons under the tests referred to, he would have failed because the law and the equities are completely against him.

(1) To prevail on the merits, the State would have to argue this Court is about ready to abandon controlling syllabus law, barely six (6) months old. *State v. Davis*, infra. This case is about an improper amendment to an indictment that by upping the degree, and penalty, had the effect of changing the identity of the offense, in violation of Criminal Rule 7.

The Court of Appeals relied on consistent and irrefutable precedent from this Court, e.g. *State v. Davis*, 121 Ohio St.3d 239, and *State v. Colon*, 118 Ohio St. 3d 26, to reverse on the strength of this Court’s recent trend re-affirming the singular importance, and significance, of the grand jury’s role.

Its allusion to an opinion on a motion, *State v. Smith*, 2009-Ohio-787, which is not a syllabus and was not considering this issue in the first instance anyway, is

insufficient to plausibly argue the state has a 'likelihood' of prevailing on the merits.

(2) On the question of 'irreparable harm', the state's position is compromised by the fact it is not totally clear what it is the state would like to "stay". In light of the fact its own memorandum confirms "On April 8<sup>th</sup>, 2009, pursuant to the state's request, the Lake County Court of Common Pleas released the Appellant (sic) {Pepka ?} on bond while awaiting is re-sentencing hearing....." {This was obviously spurred and joined by Pepka.}, it cannot be the prison term as he is presently out on bond. The state is not easily "irreparably harmed" and it would not be here. It pales in comparison to the harm Pepka already suffered without his stay and having to be in prison far longer than the maximum legal term for the charges he was lawfully indicted for, and convicted of, provided.

(3) Continuing the status quo, which was set in motion by the state's immediate joinder in an application for bond, seems to mean at this point the "potential harm" to, and for, each party, are in equipoise. That is but another of the facts not being resolved in the State's favor.

(4) Where we have an extant judgment of a duly authorized constitutional Court it is far from obvious the public interest is served by staying it, even if it were wrong. The public interest certainly must be fostered by consistent,

predictable judicial proceedings, and while the higher courts always have the last say, something specific and compelling must appear before deviation from our process is warranted. Again, the prosecutor does not even deign to address, or argue the point.

This is not particularly a mathematical exercise; it is not how many out of four you get to see what the out come will be. But such an application must be supported by something more than “should be stayed so this Court may review the issue.” Prosecutor’s Motion, page 2.

The state’s memorandum mischaracterizes, in tone as well as fact, the proceedings we are talking about. The Court of Appeals never found the indictment was “fatally flawed” as described by the prosecutor on page 1 of his submission. The Court found the indictment, and the trial that followed, were perfectly valid, but that it charged a misdemeanor of the first degree.

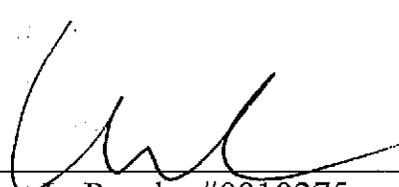
What was ‘fatally flawed’ in the appellate court’s view was the eleventh hour amendment to the indictment that elevated the charge to a third degree felony without any participation of the Grand Jury.

In the third place, the state’s position here is further compromised by the fact it never sought a stay from the Court of Appeals. It found time to file for reconsideration, (still pending as of 4/15/09), in that court but never bothered to ask that court to say its own judgment pending appeal or other proceedings.

Ordinarily that would be a condition precedent to a similar application here.

Fourthly, the state does not identify upcoming threatened event that it needs a stay to preserve.

For all the procedural, and more importantly, all of the substantive reasons urged here, the application for a stay should not be granted.

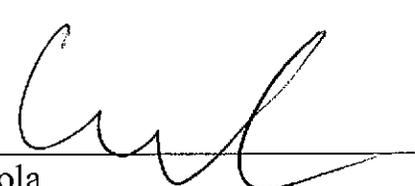


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CERTIFICATE OF SERVICE

A copy of the foregoing Appellee's Memorandum Opposing State's Application for Stay was sent by regular U. S. mail, postage prepaid, this 16 day of April, 2009, to Charles Coulson, Prosecuting Attorney, at P. O. Box 490, Painesville, Ohio 44077.



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Attorney for Defendant-Appellant