

ORIGINAL

IN THE SUPREME COURT OF OHIO

Case No. 2010-1203

CITY OF CLEVELAND HEIGHTS)

Plaintiff/Appellant,)

-vs-)

WARREN LEWIS)

Defendant/Appellee.)

On Appeal from the
Cuyahoga County Court
of Appeals
Eighth Appellate District

Court of Appeals
Case No. CA09-92917

MERIT BRIEF OF APPELLEE
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STATEMENT OF THE CASE AND FACTS

On June 23, 2008, appellee/defendant Warren Lewis was charged with two misdemeanor counts based on an incident that occurred on June 21, 2008 in Cleveland Heights, Ohio.

Mr. Lewis was charged with one count of obstruction of official business, in violation of Ohio Revised Code Section 2921.31(A), and one count of resisting arrest, in violation of O.R.C. 2921.33(A).

On February 5, 2009, a bench trial was held.

At the end of the prosecution's case, the defendant moved for dismissal pursuant to Crim.R. 29. That motion was overruled.

At the conclusion of evidence, defendant again moved for dismissal pursuant to Rule 29. That motion was also overruled.

After deliberating, the trial court found defendant not guilty of resisting arrest, and guilty of obstructing official business. The trial court sentenced defendant to three days in jail, a \$100 fine and costs, and six months non-reporting probation. The Court suspended the three-day jail sentence.

Defendant moved for a stay of execution of the sentence with the trial court and that motion was overruled.

On May 19, 2010, the Eighth District Court of Appeals issued an en banc decision reversing and vacating Mr. Lewis's conviction on the obstruction charge. Ten of the Court's judges signed on to the opinion reversing the trial court's opinion, and Judge Christine T. McMonagle wrote a separate concurring opinion

specifically on the issue currently before this Court, i.e., whether the appeal was moot because the defendant did not request a stay from the appeals court; six judges signed onto Judge McMonagle's concurring opinion. One judge dissented, saying the appeal should have been deemed moot.

On June 1, 2010, the City of Cleveland Heights appealed upon a certified conflict and this Court ultimately accepted the case on that basis.

On June 20, 2010, Mr. Lewis filed a federal civil rights lawsuit against the City of Cleveland Heights and the officer who had arrested him, alleging violations of Mr. Lewis's Fourth Amendment rights in that the officer did not have probable cause to arrest him and used excessive force in effectuating the arrest. Lewis v. City of Cleveland Heights, U.S. District Court, Northern District of Ohio, Case No. 1:10 CV 1371. The "lack of probable cause" count of Mr. Lewis's federal lawsuit would be affected by his conviction on obstruction of official business being reinstated.

It should be noted that while appellant City of Cleveland Heights states in its brief that Mr. Lewis "did not address in his merit brief whether his appeal was rendered moot as a consequence of serving all aspects of his sentence" and that Mr. Lewis "did not allege any collateral disability as a result of this appeal being moot," Appellant's brief at 3, neither did the City of Cleveland Heights raise either of these issues. The issue of the possible mootness of the appeal came up for the first time in oral argument

at the Court of Appeals, raised sua sponte by one of the judges on the panel. Neither side briefed the issue and it was not a part of the appeal from the litigants' perspective. Mr. Lewis did not address either the mootness issue or the collateral disability issue because the City did not raise it and the Court of Appeals did not notify the parties that it was basing its decision, at least in part, on mootness and collateral disability.

Thus, Mr. Lewis cannot be faulted for failing to raise the mootness and/or collateral disability issue and the mootness issue is arguably waived by the City of Cleveland Heights because it was not raised at the trial court or the appellate court.

LAW AND ARGUMENT

PROPOSITION OF LAW: An appeal is not moot when a misdemeanor defendant serves all aspects of his or her sentence without filing a motion for a stay of execution of the sentence in the court of appeals even if the appellant fails to allege or argue a collateral disability.

The City of Cleveland Heights ("the City") asks this Court to find, retrospectively, that Mr. Lewis's appeal--which was found to be well-taken on its merits--is moot because he failed to take an action--requesting a stay from the Court of Appeals--that was not raised by either party during the appeal, nor briefed by either party, was not legally required in his appellate district at the time of his appeal, has no basis in statutory law or procedure, makes no sense and would provide unnecessary paperwork and waste of

judicial resources should it become required.

For a variety of reasons, outlined below, this Court should not require misdemeanor appellants to file a motion for a stay at the appellate level, nor should appellants be required to prove a collateral disability as a prerequisite to having their appeal heard. While appellants should continue to have the option of filing for a stay, requiring an appellant to do so would be to glorify form over substance and would deprive litigants and trial courts of the benefit of legal rulings on their merits.

In the event this Court finds that a motion for stay at the appellate level is required, any such ruling should be prospective, as it would be unfair to appellant to penalize him--by reinstating his conviction--for failing to file a procedural motion that was, according to case law that existed in his appellate district at the time, not required to be filed as a prerequisite to having his appeal heard on the merits. It would be the most cruel form of irony if Mr. Lewis, whose conviction on a misdemeanor obstruction charge was reversed and vacated on its merits, was labeled a criminal for failing to do something that he was not required to do at the time he was not required to do it.

1. There has never been a requirement in the Eighth District for two motions for stay.

The first reason the Court of Appeals should be affirmed is because there has never been a requirement in the Eighth District Court of Appeals that a misdemeanor appellant, even one whose sentence might be completed by the time the court of appeals issues

a ruling, file a motion for a stay at the appellate level.

As the Court of Appeals stated in its majority opinion:

"[u]nless one convicted of a misdemeanor seeks to stay the sentence imposed pending appeal or otherwise involuntarily serves or satisfied it, the case will be dismissed as moot unless the defendant can demonstrate a particular civil disability or loss of civil rights specific to him arising from the conviction." Oakwood v. Pfanner, Cuyahoga App. No. 90664, 2009-Ohio-464, citing Cleveland v. Martin, Cuyahoga App No. 79896, 2002-Ohio-1652. See, also, Cleveland v. Pavlick, Cuyahoga App. No. 91232, 2008-Ohio-6164.

City of Cleveland Hts. v. Lewis, Cuyahoga App. No. 92917, En Banc Court, May 19, 2010 at 2, emphasis added.

In this case, Mr. Lewis did seek to stay the sentence imposed pending appeal. The Court of Appeals ruling, summarizing other cases on the issue decided by the Eighth District, did not say the appellant had to seek a stay twice or that the appellant had to seek a stay in the Court of Appeals. The Court of Appeals merely said that appellant must seek a stay, and that is exactly what Mr. Lewis did.

The Court of Appeals cited several of its previous rulings in which the appellant was permitted to go forward with his or her appeal because the involuntariness requirement was fulfilled when the appellant filed a motion for a stay with the trial court. Cleveland v. Burge, Cuyahoga App. No. 83713, 2004-Ohio-5210; Cleveland v. Townsend, Cuyahoga App. No. 87006, 2006-Ohio-6265; Broadview Hts. v. Krueger, Cuyahoga App. No. 88998, 2007-Ohio-5337.

Neither the Court of Appeals nor the City of Cleveland Heights

have cited any cases emanating from the Eighth District which require an appellant to file a motion for a stay at the appellate level as a prerequisite to having an appeal heard on its merits.

In fact, the only cases cited by anyone are cases from other appellate districts that indicate that the appellant is deemed to have "voluntarily" served his or her sentence if the appellant fails to file a motion for a stay at the appellate level.

2. Serving a criminal sentence is not "voluntary," regardless of how many motions for stay are filed.

The requirement of filing for a stay in both the trial court and the appellate court is not grounded in any practical legal concerns, but additionally it is completely counterintuitive. As Judge McMonagle so aptly pointed out in the Court of Appeals' concurring opinion, the fact that a person chooses to take the case to trial belies any notion that serving the sentence imposed is "voluntary." The person only pays a fine or serves a jail sentence or visits a probation officer because he or she is ordered to.

This case can easily be resolved by following the logic of Judge McMonagle in her concurrence: One must simply look at the definition of "voluntary" to determine whether Mr. Lewis's actions in paying his fine and serving his non-reporting probation were voluntary. "I note with some amusement that the Black's Law Dictionary definition of 'voluntary' reads as follows: 'Unconstrained by interference; unimpelled by another's influence; spontaneous, acting of one's self...proceeding from the free and

unrestrained will of the person.' What jail sentence and/or monetary fine could accordingly, ever be termed 'voluntarily served?'" McMonagle Concurrence, Appellant's Apx. at 23.

One need also merely look at what would have happened to Mr. Lewis had he not "voluntarily" paid his fine after being denied a stay in the trial court to see that he did not "voluntarily" complete his sentence; he would have been held in contempt of court. If a defendant who is sentenced to actual jail time does not show up to serve his sentence after being denied a stay, an arrest warrant is issued. Thus, serving a sentence imposed by a court cannot be said to be voluntary.

The City's own statements within its brief are inconsistent with its overall argument that Mr. Lewis's appeal should be deemed moot. Using tortured logic, the City claims that even though Mr. Lewis took his case to trial, appealed the verdict and moved for a stay pending appeal, these actions do not necessarily lead to the conclusion that Mr. Lewis involuntarily served his sentence. Appellant's brief at 7. It's as if the City attributes the following thought process to Mr. Lewis: "At the time I was sentenced, I did not want to serve the sentence, so I filed for a stay with the trial court. When that was rejected, I decided that I did want to serve the sentence, so I decided not to file for a stay in the Court of Appeals because not filing for a stay a second time would indicate to the Court of Appeals that I voluntarily served my sentence so that the Court of Appeals would dismiss my appeal and leave my conviction standing."

Obviously, this purported thought process is fanciful. If Mr. Lewis "voluntarily" served his sentence, it stands to reason that he voluntarily accepted his conviction. It is obvious he did not voluntarily serve his sentence just as it is obvious he did not accept his conviction; that is why he appealed. Just as obviously, the Court of Appeals agreed with his assertion and vacated his conviction. Again, it would be the height of irony if this Court were to rule that Mr. Lewis voluntarily served his sentence for a conviction that he aggressively fought. Why would he voluntarily serve a sentence for a conviction he did not voluntarily agree with? Such an outcome would stand the definition of "voluntary" on its head. How could he voluntarily serve a sentence by failing to file for a stay that he did not know he was required to file?

3. There is no practical or logical reason for imposing a "two-motion" requirement and such a requirement is a waste of time and resources.

In addition to the logical inconsistencies inherent in forcing a defendant to file for a stay in the court of appeals as a prerequisite to having his or her appeal heard, there are practical and financial problems. In terms of the practicality, such a requirement would result in appeals courts being inundated with stay requests, most of which would be routinely denied by the court of appeals. In the present case, it is difficult to imagine the Eighth District Court of Appeals granting a stay of a \$100 fine and non-reporting probation pending the appeal, nor should the Court of

Appeals waste its time reading additional briefs from both sides on the issue.

Thus, the requirement of filing for a stay in the Court of Appeals would be merely a procedural "hoop" for a defendant to jump through to gain access to the Court of Appeals, the failure of which--if this Court adopts the City's position--would prevent many meritorious appeals, such as the instant case, from being adjudicated on their merits.

From a financial standpoint, adding the requirement of a request for a stay and/or proffering of evidence on the collateral disability issue at the appellate level would add to the cost of a criminal prosecution and a criminal defense because of the additional attorney time it would take to draft and file these motions and responses. As it stands now, an appellant who faces jail time or a large fine is certainly free to file a motion for a stay with the appellate court, but making it a requirement would not only drive up costs and create additional unnecessary paperwork for attorneys and courts, but would potentially create a situation where appeals courts treated all such motions as procedural requirements to be greeted with a rubber-stamp denial, which might make it even harder for legitimate motions to stay to be heard in a timely manner.

Further, if the "stay" requirement is played out to its logical conclusion, why would the motion for stay requirement end at the court of appeals? A person would be required to file a motion with the court of appeals, and if that was denied, a further

motion to the Ohio Supreme Court would be required and then to the United States Supreme Court. Why not also require that, in order to show that complying with the sentences is not voluntary, the appellant must file a petition for a writ of habeas corpus in either state or federal court, and then follow that up with appeals to the highest level?

There is a difference between accepting a sentence and volunteering to serve it. In terms of showing "involuntariness," what is the logical difference between filing for a stay at the trial court level and filing at the appellate court level? And if a litigant is required to file for a stay twice in order for an appeal to be heard, must that litigant have also filed for a stay with the Ohio Supreme Court in order to have the appeal heard by the Ohio Supreme Court? There is no logical, practical or legal reason to add the extra layer of requirement in order for a defendant to even have his or her appeal heard.

The City further undermines its argument by stating: "...Mr. Lewis had the option of seeking a stay of execution in the court of appeals...." Appellant's brief at 7. How could he be forced to do something (file a motion for stay in the Court of Appeals) that the City acknowledges he had the option of doing? If he is required to do it, then it stands to reason he did not have the option to do it.

4. The only rule cited by the City actually supports Mr. Lewis's position.

Even Ohio Appellate Rule 8(B), the only rule cited by the City

in support of its argument, seems to undermine the City's position; The rule says that application for release on bail and for suspension of execution of sentence after a judgment or conviction shall be made in the first instance to the trial court, but thereafter such a motion may be made to the court of appeals. Appellant's brief at 7.

The rule seems very clear; an appellant shall apply to the trial court but may appeal to the court of appeals. In order for the City to prevail, the rule would have to say that the appellant shall apply to the trial court and shall apply to the court of appeals. It would be patently unfair to Mr. Lewis to hold him to a standard that did not exist by rule or case precedent at the time of his appeal. The City is correct when it says that Mr. Lewis had a right to seek a stay in the court of appeals, but it is incorrect to infer from that that Mr. Lewis had an obligation to file for a stay in the court of appeals as a condition to having his appeal heard.

5. The City's argument regarding collateral disability is not well-taken and is disingenuous.

The City states in its brief that Mr. Lewis "did not present any evidence to the Eighth District Court of Appeals to support a finding that he would suffer a collateral disability or loss of his civil rights if his appeal were deemed moot." Appellant's brief at 5. While this is technically true, it is because, as stated earlier, neither party raised the mootness issue during briefing

and no rule, policy or case law in the Eighth District ever made it a requirement.

Mr. Lewis once again defers to the well-written and well-argued concurrence of Judge McMonagle on this issue.

As Judge McMonagle points out after citing a number of instances in which a misdemeanor conviction automatically creates a collateral disability, "there is a palpable collateral disability to any misdemeanor conviction." McMonagle Concurrence, Appellant's Apx. at 22.

Although the record on this issues was not fully developed at the trial court or appellate level (again, because neither party raised it and it was not an issue for the appellate court until oral argument), it is a matter of record that Mr. Lewis is employed by the U.S. Postal Service. There is nothing in this record indicating that Mr. Lewis would automatically be terminated from his employment if this conviction stands, but it is certainly true that any of the collateral disabilities mentioned by Judge McMonagle that would apply to other misdemeanants could apply to Mr. Lewis. For example, any misdemeanor conviction prevents a subsequent request for expungement. Chillicothe v. Herron (1982), 3 Ohio App.3d 468, 445 N.E.2d 1171, cited in McMonagle Concurrence, Appellant's Apx. at 21. If Mr. Lewis's conviction were to be reinstated because his appeal is deemed moot, the conviction could have an effect on his employment, but more tangibly, if he applied for an expungement and it was granted, he could be arrested and convicted again on misdemeanor charges and that subsequent

conviction could not be expunged. Given that Mr. Lewis was acquitted of one charge and the other charge, of which he was convicted, was overturned on appeal, it is not beyond the realm of comprehension for a similar event to happen again, which would put Mr. Lewis in a decidedly difficult position.

The table of collateral consequences contained in the Amicus Curiae brief is also instructive and Mr. Lewis adopts the table and incorporates it into his argument. It is obvious that any conviction--especially one in which Mr. Lewis prevailed on the merits--could have collateral consequences.

In addition to the potential collateral consequences, there is one very real collateral consequence that would attach should this Court reinstate this conviction.

Mr. Lewis currently has a civil rights lawsuit pending against the City of Cleveland Heights and the officer who arrested him. When Mr. Lewis was arrested for obstructing official business, it was because he failed to give the investigating officer information. The Court of Appeals reversed and vacated the conviction, noting that an affirmative act is usually required to sustain a charge of obstructing. City of Cleveland Heights v. Lewis, Cuyahoga App. No. 92917, citing Cleveland v. Weems, Cuyahoga App. No. 82752, at Appellant's Apx. at 18.

Based on the fact that his conviction on obstructing was overturned and on the fact that he was acquitted on the charge of resisting arrest, Mr. Lewis filed a federal civil rights lawsuit against the City of Cleveland Heights and the arresting officer,

alleging excessive force (for physical force that was used against Mr. Lewis by the arresting officer after Mr. Lewis was arrested and handcuffed) and arrest without probable cause, in violation of Mr. Lewis's Fourth Amendment rights. The federal lawsuit alleges that the officer never had probable cause to arrest Mr. Lewis in the first place, since his actions in refusing to give the officer information did not amount to obstruction of official business.

Should Mr. Lewis's conviction on obstruction be reinstated, even if it is based on the technicality that he failed to apply for a second stay, the "no probable cause to arrest" count of his federal civil lawsuit will undoubtedly become untenable. This is undoubtedly why the City is pressing this matter before this Court; a ruling that results in Mr. Lewis's conviction being reinstated may result in the dismissal of at least one major component of Mr. Lewis's federal civil rights lawsuit.

CONCLUSION

The decision of the Court of Appeals should be affirmed. A criminal misdemeanor defendant should not have to file a motion for a stay in order to have access to the Court of Appeals because compliance with the terms of a sentence is not really voluntary and because there are so many types of collateral disability that it is not fair or practical to force a defendant to prove a collateral effect of conviction before granting him or her access to the appellate court. But if it is necessary for a motion for a stay to be filed, then only one should be necessary, i.e., to the trial

court, because adding an extra layer to the appellate process is illogical, costly, a waste of judicial and lawyer resources and will not have any practical effect, since most of the motions would be routinely denied anyway.

And whatever rule this Court determines is proper--especially if this Court holds that a defendant must file for a stay at the trial level and the appellate level--should be applied prospectively and should not be applied to reinstate Mr. Lewis's conviction because the Court of Appeals ruled in his favor on the merits, the issue was never raised by the City at the appellate level, and because both by rule and by existing case law in the Eighth District Court of Appeals, Mr. Lewis never had any reason to believe that he was required to file a motion for a stay at the appellate level in order to have his appeal heard. While Mr. Lewis understands the necessity for a uniform rule statewide, he should not be penalized because his case was chosen as a vehicle to pronounce the statewide rule. All of the cases in the Eighth District until now, including the majority and concurring opinions in this case, point to a defendant fulfilling his commitment by filing for one stay, not two. To reinstate Mr. Lewis's conviction on the technical procedural ground that he did not file for a stay that the prior cases of the Eighth District said he did not have to file, especially when he won on the merits and his conviction was vacated, would be a truly unfair result.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The foregoing has been sent, via regular U.S. mail, postage pre-paid, to Kim Sagebarth, Esq., Cleveland Hts. Prosecutor, 40 Severance Circle, Cleveland Hts., OH 44118; and Cullen Sweeney, Esq., Assistant Cuyahoga County Public Defender, Counsel for Amici Curiae, 310 Lakeside Avenue, Suite 200, Cleveland, OH 44113, this 17th day of January, 2010.



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