

ORIGINAL

IN THE SUPREME COURT OF OHIO

THE STATE OF OHIO,

Plaintiff-Appellee,

vs.

SEAN SWAIN,

Defendant-Appellant.

11-1369

CASE NO.

On Appeal from the Sixth District Court of Appeals for Erie County, Ohio

C.O.A. Case Number E-95-011

APPELLANT SEAN SWAIN'S MEMORANDUM IN SUPPORT OF JURISDICTION

Sean Swain
Prison Reg. A243-205
MANCI
P.O. Box 788
Mansfield, Indian Territory
44901

SEAN SWAIN, APPELLANT, PRO SE

Erie County Prosecutor's Office
247 Columbus Avenue
Sandusky, OH 44870

FOR APPELLEE.

FILED
AUG 10 2011
CLERK OF COURT
SUPREME COURT OF OHIO

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EXPLANATION AS TO WHY THIS CASE IS OF GREAT GENERAL INTEREST WITH
A SUBSTANTIAL CONSTITUTIONAL QUESTION INVOLVED

The question before this Court is whether courts of appeals may selectively refuse criminal defendants whose appeals were decided prior to 2008 leave to request en banc reconsideration, and thereby deny those defendants the benefit of stare decisis. Both Due Process and Equal Protection are implicated, as defendants whose appeals were decided prior to 2008 have the same rights to en banc reconsideration as those defendants whose appeals were decided after this Court's ruling in McFadden v. Cleveland State University, 120 Ohio St. 3d 54, 896 N.E.2d 672 (2008).

STATEMENT OF THE CASE AND FACTS

In 1991, Swain lived in an apartment with Diane Chioy and her two young sons. Andrew Crouch was the father of her younger son. On April 20, 1991, Chioy and Crouch argued over visitation and Crouch made threats over the phone; Chioy informed him that neither she nor the children would be at the residence if he chose to come.

Swain was alone in the apartment when Crouch arrived, breaking open the front door and announcing he would find and kill Swain. When Crouch made a move as if to draw a gun while pushing Swain, Swain panicked and fatally stabbed Crouch. He then called 911.

Swain was indicted and tried for Aggravated Murder and Murder. Convicted, he appealed. His conviction was reversed and he was remanded for re-trial.

Prior to re-trial, Swain filed a motion to suppress non-recorded statements allegedly made to police officers. On November 16, 1994, that motion was denied by Magistrate George Howells, who issued no findings of fact nor conclusions of law for the court's review.

Swain was again convicted and he appealed. After his briefs were filed and arguments held, a different panel of the court of appeals rendered State v. Semaj

Smith, 112 Ohio App. 3d 413 (July 12, 1996), deciding sua sponte that Crim. R. 19 magistrates were without authority to rule on motions to suppress.

One week later, Swain's conviction was affirmed and the sua sponte holdings of Semaj Smith were not applied to Swain's case, though Swain was identically-situated to the appellant in that case. Swain's application for reconsideration, filed October 18, 1996, was denied. The remedy of en banc reconsideration was not available.

On February 24, 2011, Swain requested retrospective application of this Court's holdings in McFadden v. Cleveland State University, 120 Ohio St. 3d 54, 896 N.E.2d 672 (2008), asserting that the unavailability of the remedy at the time his appeal was decided constituted "extraordinary circumstances" pursuant to App. R. 14(B). After Swain filed a mandamus action (State ex rel. Swain v. Sixth Dist. Court of Appeals, Ohio Supreme Court Case Number 11-1185), the court of appeals denied leave on July 28, 2011.

Swain appeals, presenting the following Proposition of Law:

PROPOSITION OF LAW

I. DEFENDANTS WHOSE APPEALS WERE AFFIRMED PRIOR TO THIS COURT'S HOLDINGS IN MCFADDEN HAVE AN EQUAL RIGHT TO REQUEST EN BANC RECONSIDERATION AS DEFENDANTS WHOSE APPEALS WERE DECIDED AFTER MCFADDEN

This Court established en banc reconsideration in its decision in McFadden v. Cleveland State University, 120 Ohio St. 3d 54, 896 N.E.2d 672 (2008). Swain was denied the benefit of en banc reconsideration based solely upon the fact that his direct appeal was decided prior to McFadden. Thus, Swain is treated differently and denied the same protection of the laws as criminal defendants whose appeals were decided after McFadden.

As a consequence, the Sixth District Court of Appeals denies Swain the only remedy by which Swain could gain the benefit of stare decisis, the application of established precedent that would result in the reversal of his wrongful conviction. This conduct by the court of appeals violates Swain's rights to due

process and equal protection under state and federal constitutions.

CONCLUSION

WHEREFORE, based upon the foregoing, Defendant-Appellant Sean Swain requests this Honorable Court accept jurisdiction to consider his claimed appeal of right.

Respectfully Submitted,



Sean Swain, Appellant
Prison Reg. A243-205
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Mansfield, Indian Territory
44901

CERTIFICATE OF SERVICE

A true copy of the foregoing was sent to the Erie County Prosecutor's Office, 247 Columbus Avenue, Sandusky, Ohio 44870, this 5th day of August, 2011.



Sean Swain, Appellant

FILED
COURT OF APPEALS
ERIE COUNTY, OHIO
2011 JUL 28 AM 10:18
BARBARA J. JOHNSON
CLERK OF COURTS

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
ERIE COUNTY

State of Ohio

Court of Appeals No. E-95-011

Appellee

Trial Court No. 91-CR-253

v.

Sean Swain

DECISION AND JUDGMENT

Appellant

Decided:

JUL 28 2011

This matter is before the court on appellant, Sean Swain's, second "request for leave pursuant to App. R. 14(B) to seek en banc reconsideration after the expiration of the proscribed time upon a showing of extraordinary circumstances" filed on February 24, 2011. Appellant has failed to show extraordinary circumstances, therefore, appellant's motion is denied.

Peter M. Handwork, J.

Peter M. Handwork

JUDGE

Arlene Singer, J.

Arlene Singer

JUDGE

Thomas J. Osowik, P.J.
CONCUR.

Thomas J. Osowik

JUDGE

FAXED

J31/568
7-28-11
A.A.

FILED
COURT OF APPEALS
ERIE COUNTY, OHIO
2011 JUL 28 AM 10:13
BARBARA J. JOHNSON
CLERK OF COURTS

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
ERIE COUNTY

State of Ohio

Court of Appeals No. E-95-011

Appellee

Trial Court No. 91-CR-253

v.

Sean Swain

DECISION AND JUDGMENT

Appellant

Decided: JUL 28 2011

This matter is before the court on appellant, Sean Swain's, "request for En Banc reconsideration pursuant to App R. 26(A)(2)" filed on January 20, 2011. On February 15, 2011, we denied appellant's motion for leave to file en banc reconsideration out of time, as he failed to show extraordinary circumstances. Therefore, appellant's request is stricken from the record.

Peter M. Handwork, J.

Peter M. Handwork

JUDGE

Arlene Singer, J.

Arlene Singer

JUDGE

Thomas J. Osowik, P.J.
CONCUR.

Thomas J. Osowik

JUDGE

J31/567
7-28-11
C.A.

FILED