

ORIGINAL

IN THE SUPREME COURT OF OHIO

**Michelle D. Schussheim n.k.a.
Henneman**

Petitioner - Appellee,

v.

Alan C. Schussheim

Respondent – Appellant

12-1235

|
|
| **On appeal from the Warren County**
| **Court of Appeals, Twelfth Appellate**
| **District**

|
|
| **Court of Appeals Case No.**
| **CA2011 07 078**
|

**MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT ALAN C. SCHUSSHEIM**

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

This case presents a matter of great public interest and a substantial constitutional question. This case presents two critical issues: One, does a trial court have authority pursuant to both the Ohio Constitution, the United States Constitution and this Honorable Court's Decision in Pepper Pike v. Doe 66 Ohio St. 2d 374 (1981) to grant judicial expungement of a Domestic Relations Court Ex-Parte Civil Protection Order? Two, if such authority exists, must the applicant prove actual "negative consequences" have or will occur do to the record of the charge for the court to act and expunge and/or seal a Civil Protection Order proceeding?

Although extremely unfortunate, it is common knowledge that almost one half of all married couples will divorce. Not all, not many, but all too frequently divorce actions begin with one spouse filing a Petition for a Civil Protection Order against the other spouse. As a relatively new legal tool, the Civil Protection Order has become a double edged sword. As a civil action, the ex-parte CPO allows a suspension of due process rights to provide immediate protection to the alleged victim, which is a benefit to the individual and society. But without a corresponding method to correct for mistakes caused by the haste and suspension of due process rights, there is a clear detriment to the individual and society. No one is safe from irreparable harm of a stained record and the corresponding stigma of being a person who has committed domestic violence.



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The issue is of increasing public concern, in proportion to the increasing availability of public records online and the public's increasing knowledge of the availability of these records. For many employers, it is standard practice to obtain detailed background checks of prospective employees. The trend of suing corporations or public entities who fail to discover such readily available information about their employees when the employee commits a crime or tort. Individuals run background checks of potential their romantic interests, their friends or family members romantic interests, co-workers-etc. There is little question that this is and will continue to be a matter of great public interest.

This very court has recognized the importance of an individual's privacy in Pepper Pike v. Doe 66 Ohio St. 2d 374 (1981), finding when there exists no compelling interest or reason to retain judicial or police records, "such as when they arise from a domestic quarrel and constitute a vindictive use of our courts, the accused is entitled to this remedy." *Pepper Pike* found the arrest record of a school teacher with a previously unblemished reputation in her community should be sealed, even absent statutory authority.

The 2nd District Court of Appeals extended the *Pepper Pike* doctrine of judicial expungement to a motion to seal a Civil Protection Order record in a motion to seal a Civil Protection Order record in Reiger v. Reiger 165 Ohio App. 3d 454.

In the instant matter, the 12th District Court of appeals majority indicated this matter was of great public and constitutional concern stating they were "sympathetic to Appellant's plight" and going so far as to acknowledge that;

The courts must strive to set aside what the law should be or what they would like it to be, and give deference to the legislature. If a remedy is needed (and we believe it is needed in this case), the legislature, not the



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courts, should address it.

“The majority opinion offers no logic as to why the accused in a criminal proceeding may be heard on the issue and have a matter weighted, but yet an accused in a unilateral ex parte civil protection proceeding that is subsequently dismissed has no such remedy.” Courts have inherent power and may use this inherent power and authority in unusual and exceptional situations.” State v. Stadler 14 Ohio App. 3d 10, 11 (9th Dist. 1983) superseded by statute on other grounds.

The record of a Civil Protection Order being levied against an individual can cost that individual their employment, stifle promotions, and affect a person’s daily work and personal life. Yet such devastation can be levied against a person based on the ex-parte statements of a spouse who may be highly motivated to gain the benefits of the CPO for reasons other than fear for their safety. Appellant is not the only individual who has found himself in this untenable position and the number of men and women who will suffer these undeserved consequences will continue to rise, until corrective action is taken.

In addition to being a matter of great public concern, the case presents substantial questions of Constitutional concern. Appellant’s procedural and substantive due process rights are abrogated by the decision of the 12th District as well as his right to Equal Protection of the laws. Pursuant to the Ohio Supreme Court’s decision in *Pepper Pike*, Appellant has a Constitutional right to privacy, a Constitutional right to due process and a Constitutional right to be free from unwarranted punishment.

As quoted above, the 12th District insinuated that even if Pepper v. Pike were applicable to the present case, “[that case] would not withstand our current Supreme Court’s scrutiny concerning judicial restraint.” The 12th District is essentially presuming that Pepper Pike, has been overruled by the current tenor of the Court. Certainly the 12th District is not



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arguing this Honorable Court has elected to defer to state legislatures as having supremacy over the Constitution itself? More likely, the 12th District is arguing that certain rights found to exist in our Constitution by previous courts, may not be found to exist or extended by this Court. Perhaps, if the only constitutional interest involved were the “privacy rights” of Appellant, a presumption could be made that a restraint minded court would not be inclined to extend the scope of the contentious “right to privacy,” as this right is not among those specifically enumerated in the Constitution. Arguably it was, at least in part, such a concern for privacy that led to the expungment statutes in the first place, but we cannot now treat this issue in a vacuum as if the expungment statutes were never enacted. The Pepper Pike decision itself acknowledged three separate Constitutional issues (privacy, due process, freedom from unwarranted punishment).

As 12th District dissent stated,

The majority opinion offers no logic as to why the accused in a criminal proceeding may be heard on the issue and have a matter weighted, but yet an accused in a unilateral ex parte civil protection proceeding that is subsequently dismissed has no such remedy.

Privacy merely describes a portion of the reason Appellant would like to have his record sealed, but it does not end the Constitutional problem with refusing to do so, which now includes equal protection of the law. The Equal Protection Clause does not forbid classifications. It simply keeps governmental decision makers from treating differently persons who are in all relevant respects alike. *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 [40 S. Ct. 560, 561, 64 L. Ed. 989, 990-991] (1920). The relevant reasons one seeks expungment of a criminal arrest or conviction, are the same reasons one seeks expungment of



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CPO. The 12th District Court of Appeals majority erroneously refused to apply the doctrine of judicial expungement as established by *Pepper Pike*, because *Pepper Pike* involved a criminal matter and the instant Appellant was not charged with a crime. This is a distinction largely without a constitutionally significant difference.

Furthermore, procedural due process is also implicated. The Ex-Parte CPO itself survives the Constitutional challenge to its suspension of procedural due process protections only because of its “civil” moniker and the relatively short duration that such protections are suspended in favor of protecting a potential victim of violent crime. From this acknowledgment it must follow that erroneous CPO’s will issue. Yet the position of the trial Court, and the 12th District is that the dismissal of the CPO is all the correction needed when vindictive use of the courts occurs.

The inherent power of the courts to take action to seal a criminal, civil or quasi criminal matter is found within the Constitution not the legislature. And it is no effort of judicial restraint to ignore its’ duty to apply the Constitution. As cited by the Honorable Judge Piper in his dissent from the 12th district majority:

“Judicial expungement is a constitutional remedy and it is elementary that although the legislature has freedom to provide greater protections, it has no authority to place limits on rights guaranteed under the Constitution. The legislature does not control the meaning and scope of constitutional guarantees and it may not limit the ability of the judiciary to perform its essential functions. “ In Re: Application to Seal Records of No. Bill 131 Ohio App. 399, 403 (3rd District 1999)

The Court further opined that even if it had authority to grant a judicial expungement, there was insufficient evidence to establish Appellant’s right to be free from unwarranted punishment, pursuant to the *Pepper Pike* balancing test.



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The Civil Protection Order between Appellant and Appellee was dismissed. Appellee, the Appellant's ex-wife testified before the trial court that she wished the matter expunged and sealed. The nature of the CPO is highly relevant when addressing the Constitutional concerns for due process and privacy described by the Supreme Court in *Pepper Pike*. "The basis for such expugement in our view is a constitutional right to privacy." *Pepper Pike* 66 Ohio St. 2d at 377 citing *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705 (1973), *Wisconsin v. Constantineau*, 400 U.S. 433 91 S. Ct. 507 (1971) and *Griswold v. Connecticut*, 381 U.S. 479, 85 S. Ct. 1678 (1965).

Due process rights are sacrificed initially to protect potential victims, making it is even more unjust that there should be no countervailing due process right to ameliorate the very harm caused by their initial sacrifice. The point likewise is at the heart of the balancing test that the Appellate Court failed to engage in. That is the government's interest in preserving the records of an ex-parte CPO, which was later dismissed. That interest should be reduced in the same proportion that the accused's rights normally applying in a criminal action have been reduced in the case of a CPO. We all sacrifice, or temporarily suspend our Constitutional rights so that individuals can be protected from eminent threats of harm. If an ex-parte CPO proves warrantless by dismissal or judgment, it is even more compelling that the accused be permitted to have his record clean than it would be in the case of a criminal charge or criminal conviction – because that very record was granted so expeditiously and without the protections normally afforded to the criminally accused.

As set forth herein, this case involves both a great public interest and a substantial Constitutional question.



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STATEMENT OF THE CASE AND FACTS

Appellee filed for a Civil Protection Order shortly before filing for divorce, regarding an incident with no injury that had occurred some weeks prior, for which law enforcement was not contacted. The CPO Petition was filed on July 13th and the Complaint for Divorce was filed on July 21, 2009. The Civil Protection Petition was granted Ex-Parte on July 13, 2009 and was dismissed on August 14, 2009 by agreement of the parties which resulted in favorable temporary Orders for Appellee in the divorce. A series of events indicative of a "divorce CPO," wherein one party seeks a CPO more to gain advantage in a contemporaneous divorce filing, than due to actual harm being caused or fear of harm. The parties ultimately resolved the divorce by agreement, including a shared parenting plan.

Appellant is employed by Procter & Gamble as a section manager. This position requires him to have the trust of and work with not only the senior management within Procter & Gamble of Cincinnati, but with international divisions of P&G, and international third party clients and vendors. Appellant testified that disclosure of a CPO could prevent him from working with those constituencies and that his position could require additional background and security checks at any time. If Appellant is excluded from performing his job duties for third party overseas vendors as the result of the Civil Protection Order it could result in the loss of his position, and/ promotion opportunities. Appellant could also have his present job or promotion opportunities thwarted if future internal background checks are conducted by P&G. He further testified that as a large multinational corporation, P&G performs background checks on its employees. Appellant also testified that his privacy interest is affected simply by knowing that this record exists and could cause him unwarranted harm at



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any time. This blemish on an otherwise exemplary record is a constant source of stress for him.

Appellee executed an Affidavit stating she believed it to be in the best interest of herself, the parties' children and Appellant that the Civil Protection Order proceedings be expunged and sealed. Appellant was never charged with criminal domestic violence in connection with this matter nor any other matter, and has a spotless prior criminal record. Appellee also appeared at the hearing to expunge this matter and testified that it was in her and the parties' children's the best interest for this matter to be expunged and the record sealed. Appellee also concurred that the allegations that gave rise to the Civil Protection Order were in the nature of yelling and that no physical harm was alleged.

In an attempt to be proactive, Appellant applied to the Warren County Common Pleas Court to have the record of the Civil Protection Order sealed. The issue came on for hearing before a Magistrate who promptly denied Appellant's application, even after Appellee testified to her desire to seal this record. Appellant timely file his objection to the Magistrate's Decision. In record breaking time, the trial court judge overruled Appellant's objections. Appellant timely filed his Notice of Appeal to the 12th District Court of Appeals. The 12 District Court of Appeals, absent Judge Piper, again denied the Court holds any authority outside of statutory to grant Appellant a judicial expungement. Judge Piper's dissent is the only portion of the Decision that makes sense.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. I: A Civil Protection Order or an Ex Parte Civil Protection Order is Subject to Judicial Expungement Because of the Constitutional Due Process and Equal Protection Rights of the Alleged Perpetrator, and Pursuant to Pepper Pike v.



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Doe 66 Ohio St. 2d 374 (1981).

The trial court and Appellate court had authority under the Constitution and the Ohio Supreme Court Decision to grant the Appellant Judicial Expungement. The Court's authority to grant a judicial expungment is rooted in the Constitution and is not only statutory in nature.

This Honorable Court in Pepper Pike v. Doe 66 Ohio St. 2d 374 (1981) sets forth a court's authority in the context of judicial expungments in BOTH criminal and civil matters:

“In holding a right to expungement and sealing of all records in this case, we follow other jurisdictions which recognize the power to grant this judicial remedy. When exercising these powers, the trial court should use a balancing test, which weighs the interest of the accused in his good name and right to be free from unwarranted punishment against the legitimate need of government to maintain records. Where there is no compelling state interest or reason to retain the judicial and police records, such as where they arise from a domestic quarrel and constitute vindictive use of our courts, the accused is entitled to this remedy. There can be no compelling state interest or reason to maintain the records of the criminal proceedings against defendants like appellant here, a school teacher with a previously unblemished reputation in her community.”

Pepper Pike involved a criminal case where here was no conviction, in fact there was a dismissal with prejudice and facts indicating that the charge was wholly fabricated by the accusers. The Court reasoned that a criminal charge can be nearly as damaging as a criminal conviction. It was also highly inequitable for the person actually convicted of a crime to get their second chance at a clean record, but a person who was the victim of false allegations could never get that second chance, because they were not convicted. The guilty could have a clean record, but the innocent could not? The legislature's adoption of the Court's reasoning and correcting the inequity by statute does not affect or overrule the Court's Constitutional authority and duty to grant this judicial remedy outside of the statutory framework. Yet the Magistrate, Trial Judge and the 12th District Court of Appeals have all failed to address the



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Constitutional rights of the Appellant at all.

This very court has acknowledged not all records must be retained and even records not retained by law enforcement can be harmful and contain implications of criminal actions.

State v. S.R. 63 Ohio St. 3d 590, 596 (1992).

The U.S. Supreme Court addressed the issue of due process in Little v. Steater, 452 U.S. 1, 5 101 S.1 Ct. 2202 (1981) stating:

“due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.” Rather it is “flexible and calls for such procedural protections as a particular situation demands.” Due process requires at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty to the judicial process must be given a meaningful opportunity to be heard” (Internal citations omitted)

There exists no countervailing interest of the State to maintain this record as a public record. Further, even expunged / sealed records are available to law enforcement. Appellant was entitled to seal the record of the Civil Protection Order.

Proposition of Law No. II: In matters subject to judicial expungement, when determining whether or not to grant a judicial expungement, the trial court must conduct the balancing test described in Pepper Pike v. Doe 66 Ohio St. 2d 374 (1981)

The Ohio Supreme Court in Pepper Pike set forth a balancing test for court’s to consider when expunging or sealing a Civil Protection Order. The Appellate Court failed to accurately conduct the required test. The *Pepper Pike* court held:

“When exercising these powers, the trial court should use a balancing test, which weighs the interest of the accused in his good name and right to be free from unwarranted punishment against the legitimate need of government to maintain records. **Where there is no compelling state interest or reason to retain the judicial and police records, such as where they arise from a**



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An individual charged with domestic violence is subjected to great ridicule from everyone. Great ridicule and scrutiny of any person convicted or charged with domestic violence is certainly warranted. Our society cannot and should not tolerate violence against anyone, especially when it occurs in a home. However, by that same token, the accused, by the nature of the allegation or charge alone, when the charge is dismissed or an accused found not guilty, should NOT be subjected to that same continuing ridicule and scrutiny. Any scintilla of a public record accusing someone of an act of domestic violence is harmful and detrimental to that person's privacy and their reputation. As the Dissent pointed out, the charge of Domestic Violence is criminal; and is viewed as such by the public whether it be a Domestic Violence CPO, or a Domestic violence criminal conviction.

The Appellate Court in the instant matter failed to properly apply *Pepper Pike v. Doe*. The Appellate Court believed there is a requirement that actual harm or negative consequences must be shown. The 12th District Court of Appeals wrongfully found the "evidence presented in the record, the calamities suggested by the appellant are simply speculative and conjectural."

Pepper Pike specifically allowed judicial expungement to protect the "right to be free from unwarranted punishment." It is wholly nonsensical to require the "unwarranted punishment" to occur BEFORE one could be afforded the protection against "unwarranted punishment". It likewise defies reason that a court could not readily be aware of the "unwarranted punishment" of an individual accused of committing an act of domestic violence.

The Ohio Supreme Court acknowledged that records retained by Children Services



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should not always be retained in the event the records implicate the accused in criminal conduct. State v. S.R. 63 Ohio St. 3d 590, 596 (1992). There can be absolutely no difference found in Children Services maintaining records that implicate an accused in criminal conduct and the record of a Civil Protection Order accusing the Appellant of committing an act of domestic violence. Children Services records **are not available to the public** yet the records of a Civil Protection Order are a matter of public record. (Emphasis added)

The 2nd District Court of Appeals in *Reiger v. Reiger* 165 Ohio App. 3d 454 (2nd Dist. 2006) found specifically that the trial court erred by failing to engage in a weighing process of the Appellant's request to seal a Civil Protection Order which had expired. The Reiger court noted an allegation of domestic violence is a pre-requisite to obtain a civil protection order.

The mere allegation of domestic violence brings with it severe ridicule and scrutiny. There is no requirement by case law or statute that requires that "negative consequences" be proven to secure an expungement or sealing of the record.

CONCLUSION For the reasons discussed above, this case involved matters of public or great general interest and a substantial constitutional question. Appellants request that this Court accept jurisdiction in this case so that the important issues presented will be reviewed on the merits.



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Certificate of Service

I certify that a copy of this Notice of Appeal was sent by ordinary U.S. mail to Michelle Schussheim n.k.a. Michelle Henneman at 4354 Marival Drive, Mason, Ohio 45040 on this the 23rd day of July, 2012.

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