

ORIGINAL

IN THE SUPREME COURT OF OHIO
2012

STATE OF OHIO,

Case Nos. 12-415
12-416

Plaintiff-Appellant,

-vs-

On Discretionary and
Certified-Conflict Appeal
from the Franklin County
Court of Appeals,
Tenth Appellate District

AL E. FORREST,

Court of Appeals
Case No. 11AP-291

Defendant-Appellee.

REPLY BRIEF OF PLAINTIFF-APPELLANT STATE OF OHIO

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STATEMENT OF FACTS

The State stands by its "Statement of Facts" but wishes to emphasize the following.

Defendant contends that, "[b]efore the officer stopped Mr. Forrest, the only actions the officer said arose suspicion were his facial expression and that Mr. Forrest turned his whole upper body toward the officer, instead of just turning his neck. The officer testified that he interpreted these movements as suspicious." Defendant's Brief, at 1.

While the purpose of the present briefing is to address the issue of en banc consideration rather than the legality of the stop, the State cannot let pass defendant's misstatements. As the State's memorandum supporting jurisdiction shows, there were numerous other factors that contributed to reasonable suspicion.

Most notably, defendant made a quick furtive movement with his right hand.

Officer Kevin George testified:

I walk up to the driver's door. Mr. Forrest * * * takes his right hand on his lap, he quickly moves it between himself and the center console, puts his hand on his lap, turns toward me, shifting his shoulders toward * * * the driver's window, so it is like he is * * * shielding my vision of what is inside the vehicle.

(Tr. 8-9) It was George's "first instinct" to think that defendant's "quick movements with his hand" involved trying to hide a weapon. (Tr. 9)

ARGUMENT

Proposition of Law. When a party files an application for en banc consideration pursuant to App.R. 26(A)(2), all full-time judges of that Court of Appeals who are not recused or disqualified from the case must participate in determining whether to grant or deny the application. (*McFadden v. Cleveland State Univ.*, 120 Ohio St.3d 54, 2008-Ohio-4914, 896 N.E.2d 672, and App.R. 26(A)(2), applied)

Certified-Conflict Question. Whether the entire en banc court as defined in App.R. 26(A)(2) must participate in the decision whether to grant or deny an application for en banc consideration.

The State stands by its merit brief and makes the following comments in reply to defendant's arguments.

A.

Defendant devotes much of his argument to policy arguments as to why the Tenth District panel's asserted gatekeeping approach makes sense in terms of judicial efficiency and in terms of judges "trusting" each other. The State will address those policy arguments below. The State will also address the panel's clear failure to follow a gatekeeping approach.

In terms of the actual language of App.R. 26(A)(2), defendant makes only one argument. He contends that the rule is discretionary because it uses the word "may." Given such "discretion," defendant argues that a court of appeals can decide by local rule or by custom to delegate a gatekeeping function to the three-judge panel. There are several problems with this argument.

The "may" provision actually *supports* the State's position. The provision shows that, if any discretion is involved, such discretion is exercised by the "en banc court," not the panel. The rule provides:

Upon a determination that two or more decisions of the court on which *they* sit are in conflict, a *majority of the en banc* court may order that an appeal or other proceeding be considered en banc. The en banc court shall consist of all full-time judges of the appellate district who have not recused themselves or otherwise been disqualified from the case. * * * (Emphasis added)

This provision specifically places the decision within the hands of the “en banc court,” which is specifically defined in mandatory terms (“shall”) as consisting of all full-time judges who are not otherwise disqualified or recused. The panel alone cannot exercise this “discretion”; only a majority of the en banc court can do so.

Defendant’s argument also fails because this Court has held there is no discretion. Although the rule states that, upon finding a conflict, the en banc court “may” order the case to be heard en banc, this Court has already held there is no discretion in that situation. “[I]f the judges of a court of appeals determine that two or more decisions of the court on which they sit are in conflict, they *must* convene en banc to resolve the conflict.” *McFadden v. Cleveland State Univ.*, 120 Ohio St.3d 54, 2008-Ohio-4914, 896 N.E.2d 672, paragraph two of the syllabus (emphasis added). As further stated in *In re J.J.*, 111 Ohio St.3d 205, 2006-Ohio-5484, 855 N.E.2d 851, paragraph two of the syllabus, “Appellate courts are duty-bound to resolve conflicts within their respective appellate districts through en banc proceedings.” Given these precedents, defendant errs in contending that the “may” language creates discretion on the court’s part to refuse to convene en banc after finding an intra-district conflict.

Defendant concedes this point, stating that “if a conflict exists, the full court must decide the case.” Defendant’s Brief, at 4. There is *no discretion* to decline en banc

review when an intra-district conflict is found.

The word “may” does not indicate discretion, since everyone agrees there is no discretion to decline en banc review when an intra-district conflict is found. Instead, the word “may” is merely acknowledging the en banc court’s already-existing authority, as found in *McFadden*, to act in this area. *McFadden*, ¶ 21. The word “may” reflects that the en banc court has the authority to carry out its mandatory duty to order en banc consideration.

To be sure, as *McFadden* makes clear, there is some discretion involved in the threshold question of whether a conflict exists. *McFadden*, paragraph two of the syllabus. An abuse-of-discretion standard applies to that threshold determination. *McFadden*, ¶ 19. But, even under *McFadden*, the decisionmaker on the issue of whether an intra-district conflict exists is still the en banc court. “[I]f the judges of a court of appeals determine that two or more decisions of the court on which *they* sit are in conflict, *they must convene en banc* to resolve the conflict.” *Id.* paragraph two of the syllabus (emphasis added). In other words, the en banc court (“they”) must decide whether a conflict exists so that “they” must convene en banc. Nothing in the rule countermands this need for the involvement of the en banc court, and, consistent with *McFadden*, the rule requires that the en banc court decide the issue of conflict, not just the panel alone.

In the final analysis, the rule plainly requires that the en banc court decide the question of whether an intra-district conflict exists. Although the en banc court has discretion in deciding whether a conflict exists, it is still the decision of the en banc court,

not the decision of the panel. The rule does not provide for the en banc court to delegate that decision to the panel. The rule does not provide for the panel to have any gatekeeping role. Under *McFadden* and the rule, the en banc court is the lone designated decisionmaker to decide whether an intra-district conflict exists.

B.

Defendant contends that the State engages in a “cramped” reading of the rule because “[t]he rule does not state that the entire court must make that initial determination * * *.” Defendant’s Brief, at 1. This argument repeats the panel’s contention that the rule does not “literally” state who will rule on the application for en banc consideration.

As the State pointed out in its merit brief, the rule *does* state that the majority of the en banc court can order en banc consideration upon finding an intra-district conflict. Because the rule specifically provides for the majority of the en banc court to grant the application, it necessarily follows that the en banc court must review the application. Otherwise, the rule is obstructed.

C.

Defendant focuses most of his arguments on policy rationales for allowing panel-only gatekeeping review. Defendant complains about the extra work that will be necessitated by review by the entire en banc court. He contends that the en banc court can decide that the panel alone can be entrusted with the conflict question.

Of course, arguments about policy cannot override the rule’s clear text. As this Court has stated in the context of statutory construction, “[i]n determining legislative

intent it is the duty of this court to give effect to the words used, not to delete words used or to insert words not used.” *Columbus-Suburban Coach Lines v. Pub. Util. Comm.*, 20 Ohio St.2d 125, 127, 254 N.E.2d 8 (1969). “It is a cardinal rule that a court must first look to the language of the statute itself to determine the legislative intent.” *Provident Bank v. Wood*, 36 Ohio St.2d 101, 105, 304 N.E.2d 378 (1973). “[T]he intent of the law-makers is to be sought first of all in the language employed * * *. The question is not what did the general assembly intend to enact, but what is the meaning of that which it did enact.” *Slingluff v. Weaver*, 66 Ohio St. 621, 64 N.E. 574 (1902), paragraph two of the syllabus. Arguments about policy do not overcome the plain language in the rule requiring that the “en banc court” decide whether there is a conflict.

In any event, the policy arguments ultimately weigh in favor of full-court review of the issue of intra-district conflict. “[C]onflicting rulings on the same legal issue create confusion for lawyers and litigants and do not promote public confidence in the judiciary.” *In re J.J.*, ¶ 18. En banc review is designed to allow the entire court to secure uniformity in its decisionmaking and to maintain its integrity as an institution. This institution-wide control cannot be exercised by as few as two panel members. In addition, full-court review allows non-panel members to have a say in such control. They are denied such a say if the panel alone decides no conflict exists. Only deliberations by the entire en banc court will serve the institution-wide interests meant to be addressed by en banc review.

D.

Defendant especially misses the mark in expressing concerns about judicial

efficiency and concerns about wasting the time of appellate judges. Of course, the en banc procedure creates more work for appellate judges. It is a new procedure adding another layer of review after the three-judge panel's review. In approving this additional layer of review, *McFadden* and the rule plainly intended to create more work for appellate judges.

En banc review takes work. Maintaining a court's integrity as an institution and securing uniformity is not easy. But *McFadden* and the rule indicate that the en banc court must perform this work on an institution-wide basis. The en banc court cannot abdicate that role to individual panels in the name of efficiency.

Panel-only review creates its own set of inefficiencies. As few as two judges might find that a conflict exists even though the entire court would say no conflict exists. An improvident denial by the panel could result in more work for the Ohio Supreme Court, requiring an additional appellate review here even though the non-panel members would have voted to find a conflict and would have resolved the conflict in a manner that would have obviated the need for plenary review here. Improvident denial by the panel will also hamper future panels by requiring them to spend time resolving the legal issue, even though en banc review in the earlier case could have resolved the issue in a way that saved the time of subsequent panels and saved the time of parties and lower courts needing to address the issue.

The State has also pointed out the inefficiency of not having the insight of other appellate judges in the initial decision of whether a conflict exists. The non-panel judges may have authored the potentially-conflicting earlier opinions and therefore may be able

to offer an especially-keen insight into the legal issue. It is hardly “efficient” to forego that expertise.

E.

Part of defendant’s efficiency argument is based on the claim that participation by the full en banc court would be particularly wasteful in appellate districts having fewer judges. Under defendant’s logic, in courts having four or five full-time members, a panel that would deny the application on a 2-1 to 3-0 vote would thereby prevent the entire court from mustering a majority to find a conflict in order to grant review. Defendant complains that the State’s argument is addressed only to larger courts like the Tenth District.

As the State pointed out, the issue *is* partly a numbers game in the Tenth District, as the panel of three on that eight-member court could never prevent the remaining judges from forming a majority to vote to hear the case. The same can be said for the 12-member Eighth District. Even if the issue involved only these two larger districts, the issue would still be significant enough to warrant review by this Court.

But, as the State argued in its merit brief, the issue is more than just numbers. Larger prerogatives are at stake. En banc review is designed to ensure institution-wide control by the en banc court *fully participating* in that process. The deliberations of the en banc court should include all members of the court so that all members can contribute to the decision whether to hear the case en banc.

Defendant contends that, if the panel would vote 2-1 or 3-0 to deny the application on a four-member court or five-member court, then it would be a “waste of time” and

“pointless” for the non-panel members to participate thereafter. But this argument is especially off-key in defendant’s brief extolling the good faith and fairness of appellate judges. Defendant’s argument here wrongly assumes that judges on the panel would be so close-minded as to *never* be influenced by deliberating with their non-panel colleagues who might hold opposing views. Defendant’s argument gives short shrift to the benefits of full-court deliberation. It also gives short shrift to the prerogatives of non-panel members to have a voice in maintaining the integrity of their court as an institution and in securing uniformity in the court’s decisionmaking. Shutting out the non-panel members is unwise, even if it would be more “efficient.”

F.

Defendant also argues that panel members can be trusted to do the right thing and that appellate courts can decide to entrust a gatekeeping role to the individual panels on the issue of whether there is a conflict. Defendant contends that the State’s argument is premised on panel members intentionally doing the wrong thing.

The State stands by its argument that panel-only review is unduly insular. The State’s insularity argument does not depend on any contention that appellate judges would intentionally err in refusing to find an intra-district conflict. It is sufficient to note that panel members would be less inclined to find their decision in conflict with earlier decisions. They may sincerely believe there is no conflict. They may have sincerely attempted to distinguish the earlier decision(s). They may have sincerely believed the earlier decision has been effectively overruled by subsequent higher case law. But non-panel members also could sincerely believe that the proposed distinction is

meritless, that there has been no overruling of the earlier decision(s), and that a conflict does exist. The author(s) of the earlier potentially-conflicting decisions would have a particularly significant role in this process. Regardless of whether the panel would “intentionally” err, the inclusion of the perspectives of non-panel members brings a fuller and fairer deliberation to that question.

Of course, the quality of judging can vary from case to case. It would be Pollyannaish to contend that every decision of every appellate court has the highest quality. This Supreme Court’s very existence attests to the fact that appellate courts make mistakes that often need correction. We know that appellate judging is at its best when the court’s opinion addresses all of the material facts and law asserted by the parties and when the court’s opinion explains why earlier decisions raised by the parties are or are not controlling. Many appellate decisions strive to reach this ideal. Some do not reach so high. Unfortunately, some fall far short of the ideal.

On this range of strong versus weak decisions, the weakest opinions would be the most likely to attract post-judgment motion practice. If the panel did not engage all of the factual and legal arguments, or if the panel left out material facts, and/or if the panel failed to address or distinguish an earlier decision that appears to be on-point, the weak decision will attract post-judgment appellate practice, which may include an application for en banc review. Weak decisions attract challenge.

In assessing the policy implications of having full-court participation, this Court should keep in mind that applications for en banc consideration sometimes will be filed in this context of a panel having issued a weak decision. Such decisions are the most in

need of review by the en banc court, thereby allowing the en banc court to secure uniformity in its decisions and to maintain its integrity as an institution. This is the very purpose of en banc review. This purpose is ill-served by panel-only review, particularly when the panel has issued a weak decision.

G.

Defendant errs in attempting to defend a panel-only gatekeeping approach anyway. The Tenth District panel never purported to engage in gatekeeping review for “arguable merit.” It did not mention any “arguable merit” standard when it denied en banc review. Instead, the panel only stated that “We do not find that two or more decisions of this appellate court are in conflict, so the requirements of App.R. 26(A)(2) are not met and en banc consideration is not permitted.” There was no gatekeeping involved; the panel simply denied the application because it asserted there was no conflict.

Other post-*McFadden* decisions by Tenth District panels are equally silent on any “arguable merit” standard. In *State v. Martin*, 192 Ohio App.3d 681, 2011-Ohio-951, 950 N.E.2d 221 (10th Dist.), the panel denied the application outright without reference to an “arguable merit” gatekeeping role. *Id.* ¶ 15 (“because there is no conflict, we deny the state’s application for en banc consideration”).

In *Stanley Miller Constr. Co. v. Ohio School Facilities Comm.*, 192 Ohio App.3d 676, 2011-Ohio-909, 950 N.E.2d 218 (10th Dist.), the panel decided for itself there was no conflict, stating, “we see no conflict” and “no conflict exists.” *Id.* ¶¶ 3-4. The panel ruling in *Stanley Miller* also presents the remarkable proposition that a decision of one

panel “overruling” another panel’s decision does not create a conflict. In fact, a second panel’s “overruling” of a previous panel’s decision represents the epitome of a “conflict” worthy of en banc consideration to settle the difference between the two decisions. The very existence of en banc review shows that one panel cannot “overrule” another panel. When panels conflict, the *en banc court* settles the conflict, not the second panel through “overruling.”

In *Fleisher v. Ford Motor Co.*, 10th Dist. No. 09AP-139, 2009-Ohio-4847, the Tenth District panel again failed to mention any “arguable merit” standard. Instead, the panel stated matter-of-factly that “appellants have failed to demonstrate that our decision is in conflict with any prior decisions by this court * * *.” This standard shows that the panel was engaging in a final review, not a mere gatekeeping review for “arguable merit.

The “arguable merit” gatekeeping standard was only mentioned in the Tenth District panel’s 3-8-12 decision certifying an inter-district conflict. No known prior decision mentioned that standard. No known local rule or court order mentioned that standard. And, in fact, the arguable-merit standard was not even addressed or applied when the panel denied en banc consideration in its 1-26-12 decision. The origins of the “arguable merit” standard are unknown.

Given these doubtful origins, the “arguable merit” standard should not be adopted under App.R. 26(A)(2). The rule makes no provision for such gatekeeping review. Super-imposing such a standard on the rule would amount to a rewriting of the rule, which this Court cannot engage in outside the process of rule amendment set forth in the Ohio Constitution. And, as the State has pointed out, the State’s application easily

satisfied an arguable-merit standard anyway.

Even if this Court concludes that such a standard should apply, a reversal should still occur, as the Tenth District panel did not apply such a standard, and the State satisfied the standard anyway.

H.

Finally, defendant argues that the State's discretionary and certified-conflict appeals should be dismissed as improvidently allowed or accepted. The State disagrees.

Insofar as discretionary review is concerned in No. 12-415, the bench and bar would greatly benefit from this Court addressing the question of whether full-court participation is required. If this Court accepts the State's argument, the Tenth District and other courts would begin complying with the rule's requirement for full participation by the en banc court. If this Court rejects the State's argument, then the Tenth District can proceed with its current panel-only practice, and other courts could choose between the competing approaches of panel-only review and full-court review. This Court's ruling would settle this important issue of judicial administration.

Even defendant concedes that there are issues of judicial administration of some import here, including the workloads of appellate judges and the potential efficiencies of having gatekeeping review. Also, the prerogatives of appellate judges are at stake. Under the Tenth District's logic, their prerogative to have a voice through en banc review is thwarted. Given these interests, it would be unwise for this Court dismiss the discretionary appeal as improvidently allowed.

Insofar as the certified-conflict appeal in No. 12-416 is concerned, the Tenth District's approach of having panel-only review conflicts with the approach of the Eight and Ninth Districts, both of which have the entire en banc court participate in the decision whether to grant or deny the application.

In *Kelley v. Ferraro*, 8th Dist. No. 92446, 2010-Ohio-4179, eight of the twelve full-time judges participated in the decision to deny the application. Four of the judges were recused, but this was consistent with full en banc participation under App.R. 26(A)(2)(a), which states that “[t]he en banc court shall consist of all full-time judges of the appellate district who have not recused themselves or otherwise been disqualified from the case.” *Id.*

Similarly, in *State v. Morris*, 9th Dist. No. 09CA0022-M, 2010-Ohio-5973, all five full-time judges participated in the decision whether to grant or deny the application. The vote was 3-2 to deny the application.

Article IV, Section 3(B)(4), of the Ohio Constitution provides that a court of appeals shall certify a conflict when its judgment “is in conflict with a judgment pronounced upon the same question by any other court of appeals of the state * * *.” “[T]here must be an actual conflict between appellate judicial districts on a rule of law before certification of a case to the Supreme Court for review and final determination is proper.” *Whitelock v. Gilbane Bldg. Co.*, 66 Ohio St.3d 594, 613 N.E.2d 1032 (1993), paragraph one of the syllabus.

A conflict exists here. The judgments in *Kelley* and *Morris* include the full participation of the en banc court in denying the application for en banc consideration. The

judgment of the Tenth District denying en banc consideration includes only the participation of the three-judge panel and includes the denial of the State's motion specifically seeking the participation of all full-time judges to rule on the application. The conflict was properly certified to this Court for determination.

To be sure, this conflict is unlike other conflicts that are certified. In most cases in which certification takes place, an appellate court opines on a rule of law in its decision, and then a second appellate court opines differently and then certifies the conflict. Here, the respective appellate courts, without any particular comment on the legal question, made the legal determination that full participation of the en banc court was required (*Kelley, Morris*) or that only the participation of the panel is required (the 1-26-12 decision in *Forrest* here). These respective decisions did not expressly address the legal question. Necessarily, though, these respective courts reached their respective conflicting legal conclusions on the "same question." Certification was warranted.

In addition, there should be no doubt that a "rule of law" is involved. The question of whether the full en banc court should participate involves an important point of judicial administration, and en banc proceedings are now a product of case law and App.R. 26(A)(2). The meaning of the case law, and the meaning of App.R. 26(A)(2), are brought into question. The State was invoking these things when it sought full participation of the en banc court in *Forrest*.

As the language of *McFadden* shows, a "rule of law" is at stake in the question of whether the full participation of the en banc court is required. The Tenth District panel reached a different answer than the Eighth and Ninth Districts on this "same question."

Certification was properly granted.

It should be noted that it makes no difference that the conflict arose during post-judgment stages of the present case. Post-judgment issues creating a conflict can justify certification, as shown by App.R. 25(A) and the 2010 Staff Note to the rule, both of which show that a motion to certify can be filed within ten days of any judgment or order that creates a conflict. “[T]he ten days begin to run with the entry of a judgment or order ruling on application for reconsideration or en banc consideration under App. R. 26(A) if the intra-district (sic) conflict first arises in the court’s ruling on that application.”

2010 Staff Note to App.R. 25.

The State respectfully requests that this Court sustain the proposition of law and answer “Yes” to the certified question.

CONCLUSION

The State respectfully requests that this Court reverse the Tenth District’s judgment denying en banc review and remand the case to the Tenth District so that the proper complement of all full-time judges of that Court can review and determine the State’s application for en banc consideration.

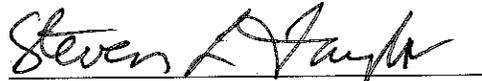
Respectfully submitted,



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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was sent by regular U.S. Mail on this 18th day of Sept., 2012, to Stephen P. Hardwick, Office of the Ohio Public Defender, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215, Counsel for Defendant-Appellee.


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