

In the Supreme Court of Ohio

STATE OF OHIO,

Plaintiff-Appellant

vs.

CHRISTOPHER L. ANDERSON,

Defendant-Appellee

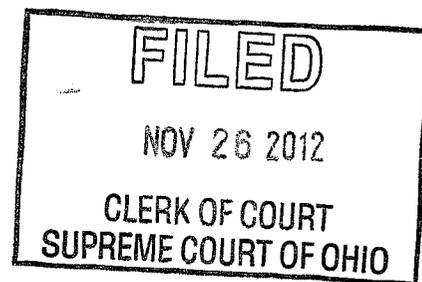
Case N° 12-1834

On Appeal from the Mahoning
County Court of Appeals,
Seventh Appellate District
Case No. 2011 MA 43

APPELLEE CHRISTOPHER L. ANDERSON'S
MEMORANDUM OPPOSING CLAIMED JURISDICTION

JOHN B. JUHASZ, Esq. N° 0023777
COUNSEL OF RECORD
E-mail: Jbjjurisdoc@yahoo.com
7081 West Boulevard, Suite N° 4
Youngstown, Ohio 44512-4362
Telephone: 330.758-7700
Facsimile: 330.758-7757
COUNSEL FOR APPELLANT

Mr. PAUL J. GAINS, Esq. N° 0020323
Mr. RALPH M. RIVERA, Esq. N° 0082063
21 West Boardman Street, 6th Floor
Youngstown, Ohio 44503
Telephone: 330.740.2330
Facsimile: 330.740.2008
COUNSEL FOR APPELLANT



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STATEMENT OF WHY THIS CASE AT THIS TIME IS NOT A CASE
OF GREAT GENERAL INTEREST AND PRESENTS A SUBSTANTIAL
CONSTITUTIONAL QUESTION

Appellant, the State of Ohio, (hereinafter “Appellant”) petitions this Court to grant it an interlocutory appeal from a ruling, not a final decision, in an interlocutory appeal. This Court should not—indeed, cannot—hear this case—or at least not yet. The State wishes to appeal a *ruling* by the Court of Appeals that simply permitted the appeal to continue; that is, the Court of Appeals refused the State’s motion to dismiss. But the Court of Appeals has not ruled on the merits of the matter, and in fact there is no final appealable order before this Court. Moreover, the law’s salutary reason for allowing interlocutory appeals in certain circumstances is present with regard to Appellant’s appeal before the Court of Appeals, but is utterly lacking with regard to the State’s appeal here. If Anderson is correct that an attempt to impanel a sixth trial jury would violate his constitutional rights, then the violation would have occurred at or before the commencement of the sixth trial and any appeal therefrom would be wholly illusory in terms of protecting the right at stake. The State, however, is in no such way similarly endangered. It has not argued that it is so exposed. The Court of Appeals has done nothing with the appeal below, except permit it to continue. To be sure, this Court may at a later point in time deem this case to be one of great general

public interest or one which involves a substantial constitutional question. Indeed, the case *does* involve a substantial constitutional question. It also, at least to some extent, questions the wisdom of this Court's prior holdings that appealing a double jeopardy claim *after* a trial is an effectual remedy because, if the claim is meritorious, it forces the defendant to undergo the very trial that the clause seeks to prohibit. The federal authorities recognize this point.

In the Seventh District Court of Appeals, the State maintained that there was no final appealable order. The State proceeds in this Court, spending fifteen pages belaboring the facts and the proceedings below, and offers not one word or syllable explaining why the *en banc* reconsideration of the State's motion to dismiss the appeal, which only allows the appeal to continue in the Court below and be heard on the merits, satisfies the definition of a final order which this Court is authorized to review. Complaining that Anderson and the appellate court are mis-applying the law concerning final and appealable orders, Appellant fails to address, let alone satisfactorily explain, why the statute, R.C. 2505.03, does not apply here. Appellant's Janus-faced argument is that Appellee's interlocutory appeal involving the denial of constitutional rights is *not* appealable, but the State's interlocutory appeal from the denial of a motion to dismiss the appeal *is* appealable. The State neither attaches to its Memorandum nor

addresses any “final” ruling by the Seventh District for the excellent reason that there is no such final order.

Appellee’s argument and the ruling by the Seventh District Court of Appeals, which simply permits the appeal to continue, emphasized that the case involves more than a double jeopardy claim. But the Seventh District has not yet issued a final decision ruled on the merits of Appellee’s appeal of the denial of his Motion to Dismiss. The State wants this Court to review—now, rather than later—whether or not an interlocutory appeal is the appropriate vehicle to address a motion to dismiss based upon a violation of the Due Process and Double Jeopardy Clauses. Should the State lose on the merits at the Seventh District, the State, of course, will be free to file a Memorandum in Support of Claimed Jurisdiction with this Court at that time. But the State is in no way prejudiced by the interlocutory appeal proceeding before the Seventh District. The State’s effort to persuade this Court to hear this matter now because the case includes an unrequited injustice involving an admittedly brutal murder is as insulting as it is artless. The State’s devotion of more than half of its memorandum to the facts of the alleged murder are proof enough of the duplicitous nature of the State’s legal claim—for the legal issues are the same whether Mr. Anderson was ordered to stand trial a sixth time for murder

or whether he was ordered to stand trial a sixth time for receiving stolen property.

It is difficult to be surprised at the tactic, however. Except when the State used illegal tactics (such as an assault of another woman that did not occur) at least some jurors have had doubts about the State's claim that Chris Anderson murdered this young woman. Each time that Chris Anderson prepared for and/or stood trial since that sham trial, the State's evidence has not changed and Anderson has not been convicted. That in fact is the heart of Appellee Anderson's Due Process claim: that bringing the force of the State against him again and again violates Due Process. The relevant point here, however, is not how the murder occurred, but the fact that the Due Process claim has not been fully briefed or argued and has not been decided by the Court of Appeals below.

Anderson and the State agree that the case is an important one. They agree it involves substantial constitutional questions. But the parties differ as to what the importance of the case is. Anderson asserts that it is the Due Process claim and whether this Court's Double Jeopardy analysis ought to be re-evaluated, while the State apparently believes it the important issue to be whether the denial of a motion to dismiss constitutes a final appealable order. It seems guaranteed that, once the Seventh District rules on the merits of this case, the losing party will seek review

from this Court. This Court may then properly address not only Anderson's due process claim and whether this Court's view of the appealability of double jeopardy claims ought to be re-examined; but also the State's argument on the final appealable nature of a denial of a motion to dismiss such as was filed here. Members of this Court recently called upon this Court to revisit these very issues. *See, State v. Gunnell*, 132 Ohio St.3d 442, 452, 457, 2012 Ohio 3236, 973 N.E.2d 243, ¶¶42, 55 (LANZINGER, J., concurring) and MCGEE BROWN, J., concurring). There is sound reason to reconsider this Court's position on the appealability of double jeopardy claims.

But the Seventh District also made clear that Double Jeopardy was not the only basis for its decision. Anderson also alleged a denial of due process in the trial court and in the Seventh District, and it is *that* claim which persuaded a majority of the original panel of the Seventh District that Anderson's appeal ought to be continue and be heard. But the immutable point here is that the Seventh District has not actually decided the case. It has simply said that the State's motion to dismiss the appeal for want of a final appealable order is not well taken. There is no final decision.

STATEMENT OF THE CASE AND OF THE FACTS

Chris Anderson was arrested in August of 2002. He was indicted by the grand jury of Mahoning County for the murder of Amber Zurcher. At his first trial, the trial judge granted a motion in limine concerning certain evidence of an incident with another woman—an incident, by the way, that Anderson says never occurred. A State's witness, however, blurted out the allegations, and the trial judge declared a mistrial. Incredibly, at the next trial, the judge permitted that same excluded evidence to be admitted, as well as other evidence not specifically related to the claim of murder. The Seventh District Court of Appeals reversed that conviction. *See, State v. Anderson*, 7th Dist. N^o 03 MA 252, 2006 Ohio 4618; 2006 Ohio App. LEXIS 4581, *appeal dismissed, State v. Anderson*, 112 Ohio St.3d 1443, 2007 Ohio 152, 860 N.E.2d 767.

One judge dissented from the reversal, finding that there was overwhelming evidence of Anderson's guilt despite any errors. But trial jurors have not agreed with that view. Since the reversal, there have been two mistrials as a result of deadlocked juries, and another mistrial because a juror said that one of Anderson's lawyers fell asleep during voir dire.

Anderson has remained incarcerated since his arrest in 2002. Preparing to defend himself for the *sixth* time in nearly ten years, Anderson filed a motion to dismiss the case before the trial judge. The trial judge overruled the motion, and Anderson appealed. The State asked the

appellate court to dismiss the appeal, but a majority of the panel refused. The State sought *en banc* review, but the appellate court split evenly, leaving intact the order that overruled the State's motion to dismiss, and permitting the appeal to continue. The merits of Anderson's appeal have yet to be ruled upon.

LAW AND ARGUMENT

Reply to Proposition of Law N^o 1: A Trial Court's Denial of a Pretrial Motion to Dismiss Based upon a Violation of His Right to Due Process and the Prohibition Against Double Jeopardy Following a Hung Jury Is Not a Final Appealable Order Pursuant to R.C. 2505.02.

The temptation is great indeed to respond to what the State *wants* this Court to decide. But the fact of the matter is that this Court can consider only one thing at this point. That one thing is not whether it *should* exercise discretionary jurisdiction, but whether the Court *can* lawfully hear this case at all at this time—irrespective of whether the Court believes that the case involves a substantial constitutional question or is one of great general or public interest. The short answer is that the Court cannot now hear the case. The State wants a ruling from this Court which the State would characterize as one re-affirming *State v. Crago*, 53 Ohio St.3d 243, 559 N.E.2d 1353 (1990). Claiming that the issue before the Court is a “simple” one, *State's Memorandum*, at 1, the State has not

explained the simple point of how the order here is a final one which this Court lawfully may review.

Courts have announced, again and again, that the Ohio and United States Constitutions do not expressly provide for a “right” to appeal. *See, e.g., McKane v. Durston*, 153 U.S. 684, 14 S.Ct. 913, 38 L.Ed. 867 (1894); *State v. Elswick*, 11th Dist. N^o 2006-L-075, 2006 Ohio 7011, 2006 Ohio App. LEXIS 6957, *discretionary appeal not allowed*, 113 Ohio St. 3d 1513; 2007 Ohio 2208, 866 N.E.2d 512. Ohio Constitution, Article IV, Sections 1-3 provide for the establishment of an appellate court system. R.C. 2505.03 further provides that every *final* order, judgment, or decree of a court may be reviewed unless otherwise provided by law. That the statute applies to review by this court as well as other appellate courts is, to borrow Justice John Paul Stevens’ phrase, pellucidly clear. R.C. 2505.03 provides in pertinent part:

(A) Every final order, judgment, or decree of a court * * * may be reviewed on appeal by * * * the supreme court * * *.

(B) * * * [S]uch an appeal is governed by this chapter and, to the extent this chapter does not contain a relevant provision, the Rules of Appellate Procedure. * * *

(C) An appeal of a final order, judgment, or decree of a court shall be governed by the Rules of Appellate Procedure or by the Rules of Practice of the Supreme Court, whichever are applicable, and, to the extent not in conflict with those rules, this chapter.

This Court presently has no jurisdiction to hear this appeal as there simply is no final order here. The Court of Appeals has not decided the

case. It has ruled simply that the appeal may continue. This is no more a final order than a juvenile court's decision ordering an amenability hearing under R.C. 2152.12(B) and Juv. R. 30 to determine whether two juvenile cases should be transferred to the general division for prosecution of defendant as an adult. An appeal by the State from that decision was properly dismissed for want of a final order. The juvenile court had neither granted nor denied the State's motions for bindover, just as the appellate court here has rendered no final decision. Thus, the appellate court lacked jurisdiction under §2505.03 and Ohio Const. art. I, § 3(B)(2) to hear the State's appeal, at least until the court granted the State relief (in the form of bindovers) or denied the relief. *See, In re S.C.M.*, 10th Dist. Nos. No. 09AP-462, No. 09AP-463, 2009 Ohio 6778, 2009 Ohio App. LEXIS 5680.

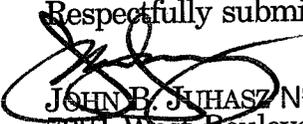
And so it is here. The appellate court has only said that the appeal may continue. It has neither ruled in favor of Anderson nor against him, nor has the appellate court ruled in favor of the State or against it as to the issues on appeal. There simply is no final decision that is ripe for review. Compare, *State v. Matthews*, 81 Ohio St.3d 375, 1998 Ohio 433, 691 N.E.2d 1041 (a trial court's order granting the defendant a new trial in a criminal case is a final appealable order pursuant to R.C. 2505.02 and 2505.03(A), which the state may appeal by leave of court); and, *Dudley v. Dudley*, 12th Dist. No. CA2010-05-114, 2012 Ohio 225, 2012 Ohio App.

LEXIS 180 (trial court's failure to issue a journal entry that expressly found an appellant failed to purge the contempt and imposed a jail sentence and accumulated fines required dismissal of appeal for want of a final order under Ohio Constitution, Article IV, Section 3(B)(2) and R.C. 2505.03(A).

CONCLUSION

The denial of a motion to dismiss, whether ruled upon by a panel or by the entire court *en banc*, is not a final order which may be reviewed on appeal. Hence, this court lacks jurisdiction to hear this matter, as the Seventh District Court of Appeals has not yet rendered a "final" decision. Accordingly, the Court should dismiss the appeal for want of jurisdiction.

Respectfully submitted,


JOHN B. JUHASZ N°0023777
7081 West Boulevard, Suite N° 4
Youngstown, Ohio 44512-4362
Telephone: 330.758-7700
Facsimile: 330.758.7757
E-mail: Jbjjurisdoc@yahoo.com
COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was: sent by regular United States Mail, postage prepaid; hand delivered to counsel or counsel's office; sent by telecopier to Messrs. Ralph M. Rivera, Esq., and Paul J. Gains, Esq., Counsel for Plaintiff, 21 West Boardman Street, Youngstown, Ohio 44503 on November 26, 2012.


JOHN B. JUHASZ

J:\JB\8GViol\Appeals\Anderson C 2740\MOJ dr7.wpd*Sunday 25 Nov 2012 5:53pm (1753hrs)