[Cite as *State v. Henderson*, 2024-Ohio-4795.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	No. 113622
v.	:	
JOHN HENDERSON,	:	
Defendant-Appellant.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: DISMISSED
RELEASED AND JOURNALIZED: October 3, 2024

Criminal Appeal from the Cuyahoga County Court of Common Pleas
Case No. CR-23-685289-A

Appearances:

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Sarah E. Hutnik, Assistant Prosecuting Attorney, *for appellee*.

Marein & Bradley, LLC, Steven L. Bradley, and Michael I. Marein, *for appellant*.

FRANK DANIEL CELEBREZZE, III, J.:

{¶ 1} John Henderson brings the following interlocutory appeal challenging the trial court's judgment dated January 29, 2024, which granted the State of Ohio's

motion to compel additional discovery. After a thorough review of the record and law, this court dismisses the matter for lack of a final, appealable order.

I. Factual and Procedural History

{¶ 2} Henderson's case was bound over from the Shaker Heights Municipal Court and a grand jury indicted Henderson on five counts, all for felonious assault. Counts 1 and 3 charged him with felonious assault in violation of R.C. 2903.11(A)(1) and Counts 2 and 4 charged him with felonious assault in violation of R.C. 2903.11(A)(2). Counts 1 through 4 all contained specifications for notice of prior conviction and repeat violent offender. Count 5 charged Henderson with felonious assault in violation of R.C. 2903.11(A)(2). The only facts on the record at this stage are that Henderson and the alleged victim were total strangers prior to the acts giving rise to the indictment.

{¶ 3} The parties engaged in productive discovery and then, on December 6, 2023, Henderson filed a notice pursuant to Crim.R. 12.2 and an accompanying motion to compel additional discovery from the State relating to self-defense. The notice disclosed that Henderson would present his theory of self-defense through cross-examination of the State's witnesses and when he takes the stand himself. The Crim.R. 12.2 motion specifically objected "to the requirement that this notice include specific information as to any 'prior incidents or circumstances upon which the defendant intends to offer evidence related to the conduct of the alleged victim.'" Henderson alleged that such disclosure would violate his privilege against self-incrimination, the confidentiality of his protected attorney-client communications,

his attorney-work-product privilege, and his constitutional right to prepare a defense.

{¶ 4} The State responded to these motions and asked the trial court to "prohibit presentation [at trial] of any evidence in support of a self-defense claim," alleging that Henderson did not fully comply with Crim.R. 12.2, which requires a defendant to provide, via written notice, "specific information about prior incidents and circumstances that the defendant intends to offer as evidence supporting this defense." The State also filed a motion to compel that requested that Henderson comply with providing specific information related to the "prior incidents or circumstances" required by Crim.R. 12.2.

{¶ 5} The trial court held a hearing on the self-defense issues on January 17, 2024, and the parties were afforded an opportunity to present arguments on the matter.

{¶ 6} On January 29, 2024, the trial court denied Henderson's motion to compel additional discovery but granted the State's motion to compel. Pertinently, the trial court reasoned that it denied Henderson's motion because Henderson "must identify the acts or circumstances that evoked his belief that he was in danger of death or great bodily harm that then provoked his use of force warranted under the circumstances and proportionate to that perceived threat." The trial court gave Henderson the opportunity to amend his Crim.R. 12.2 notice pursuant to the standard that the court elucidated above and also granted the State's motion to compel this specific information pursuant to Crim.R. 12.2.

{¶ 7} Henderson did not take the opportunity to amend and instead filed the instant notice of appeal to this court on February 5, 2024, alleging the following error for our review:

> The trial court erred when it ordered the defense to provide notice of "the acts or circumstances that evoked the defendant's belief" that he was in imminent danger and that then provoked the defendant's use of force in response.

{¶ 8} After Henderson filed his appellate brief, the State filed a motion to dismiss the appeal for lack of a final, appealable order. Henderson filed a brief in opposition, and this court rejected the State's motion to dismiss and found that the order compelling Henderson to comply with Crim.R. 12.2 was a final, appealable order:

> Motion by appellee to dismiss appeal is denied. Appellant presents a colorable claim that pre-trial disclosure of information regarding his possible pursuit of self-defense at trial would result in the disclosure of privileged information. To the extent the order requires disclosure of such matter, it determines the action with respect to a provisional remedy and prevents a judgment in appellant's favor with respect to the provision remedy. *State v. Glenn*, 165 Ohio St.3d 432, 2021-Ohio-3369. An appeal following a final judgment would not be an effective remedy for the disclosure of privileged and/or confidential information. Therefore, the court's order requiring the disclosure constitutes a final, appealable order under R.C. 2505.02(B)(4). Appellee's brief is due on or before May 23, 2024.

{¶ 9} Upon further consideration and a careful review of the record and the order appealed, we determine that Henderson's claims do not emanate from a final, appealable order, vacate motion No. 573420 (May 2, 2024), to the extent it found a final, appealable order, and dismiss.

{¶ 10} Article IV, Section 3(B)(2) of the Ohio Constitution confers jurisdiction to the appellate courts to review final orders of lower courts. The General Assembly has identified various "final orders" in R.C. 2505.02.

{¶ 11} A final order includes "[a]n order that grants or denies a provisional remedy" when (1) "[t]he order in effect determines the action with respect to the provisional remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy," and (2) "[t]he appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action." R.C. 2505.02(B)(4). The definition of "provisional remedy" pertinently includes "discovery of privileged matter." R.C. 2505.02(A)(3).

{¶ 12} Not all decisions granting or denying provisional remedies are final orders. Under R.C. 2505.02(B)(4), these orders are final orders if they satisfy each of the following:

> "(1) the order must either grant or deny relief sought in a certain type of proceeding — a proceeding that the General Assembly calls a 'provisional remedy,' (2) the order must both determine the action with respect to the provisional remedy and prevent a judgment in favor of the appealing party with respect to the provisional remedy, and (3) the reviewing court must decide that the party appealing from the order would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action."

State v. Chambliss, 2011-Ohio-1785, ¶ 15, quoting *State v. Muncie*, 91 Ohio St.3d 440, 446 (2001).

{¶ 13} In *State v. Glenn*, 2021-Ohio-3369, the Ohio Supreme Court was faced with a very similar issue. In *Glenn*, the trial court ordered Glenn's attorney "to provide the State with written summaries of the statements made to defense counsel and the defense investigator by the witnesses [the] defense intends to call regarding [Glenn's] alibi," which Glenn opposed on work-product grounds. *Id.* at ¶ 6. The trial court in *Glenn*, however, went even further than the court in the instant matter and made clear that disclosures mandated under the Ohio Rules of Criminal Procedure supersede the work-product protection and that the statements need not contain "internal communication of impressions, conclusions, strategies, or opinions." *Id.*

{¶ 14} In *Glenn,* the Supreme Court resolved the first prong of the *Chambliss* framework in the affirmative, referring to the scenario as presenting a "chicken/egg quandary." *Id.* at ¶ 13. The Court elaborated that the State disputed that the order required the disclosure of privileged material (as the State does in the instant matter), while resolution of that question required an appellate court to decide the merits of an appeal to determine whether it had the power to hear and decide the merits of an appeal. *Id.*, citing *Byrd v. U.S. Xpress, Inc.*, 2014-Ohio-5733, ¶ 12 (1st Dist.). The *Glenn* Court then suggested that it need only review "whether Glenn has made a colorable claim that the order directs him to disclose information that might be protected attorney work product." *Id.* As in *Glenn*, there does not seem to be a dispute that Henderson has properly asserted a colorable claim that compliance with the order will necessarily cause him to divulge privileged material.

{¶ 15} Turning to the second prong of the *Chambliss* analysis, the *Glenn* Court found that this was satisfied, i.e., that the judgment determined the action in regards to the provisional remedy and prevented a judgment in favor of the appealing party. In ordering Glenn's counsel to prepare written summaries of the statements made to defense counsel by the witnesses that the defense intended to call at trial regarding Glenn's alibi, coupled with the order that failure to do so would result in the exclusion of these witnesses, the *Glenn* Court concluded that it would be impossible to later obtain a judgment denying a motion to compel this disclosure if the materials have already been disclosed.

{¶ 16} Absent from the instant matter is the trial court's express order that failure to comply with the order would result in the exclusion of Henderson's self-defense claim altogether. Moreover, it does not expressly require written summaries or expressly require anything specific; it merely requests that Henderson "identify the acts or circumstances that evoked his belief that he was in danger of death or great bodily harm that then provoked his use of force warranted under the circumstances and proportionate to that perceived threat." At this juncture, the disclosures that comply with the trial court's order are speculative; we do not have a statement that was submitted for in camera review at the trial-court level. The State claims that compliance with this order could, in theory, be satisfied with evidence completely supplied by the State in discovery and, thus, would not be privileged or confidential, and even supplied the following as a statement that the State believes would comply with the trial court's order:

> This was a two against one situation that caused defendant to have a "bona fide belief that he or she was in imminent danger of death or great bodily harm and that his only means of escape from such danger was in the use of such force . . . ."

{¶ 17} Moreover, the trial court's order does not even make a determination as to the attorney-client privilege, the work-product issues, or the self-incrimination matters that Henderson raised. It offers an interpretation of the rule and compels compliance without necessarily compelling specific disclosure of privileged information. It is not even particularly clear from the record before us that Henderson is arguing that the *only* way he can comply with the order is via disclosure of privileged material. We therefore cannot find that the second prong of the *Chambliss* framework is satisfied.

{¶ 18} We next turn to the final requirement for an order granting a provisional remedy to be immediately appealable, that the "appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment." It is incumbent on Henderson to establish this appellate court's jurisdiction over an interlocutory appeal. "To meet this burden, [the appealing party] must establish not only that he has a colorable claim that the order compels the disclosure of attorney work product but also that any harm from its disclosure could not be remedied on appeal from a final judgment." *Glenn*, 2021-Ohio-3369, at ¶ 22, citing *Smith v. Chen*, 2015-Ohio-1480, ¶ 5-6; *Burnham v. Cleveland Clinic*, 2016-Ohio-8000, ¶ 20.

{¶ 19} In support of this third prong, Henderson argues that unlike *Glenn*, "pre-trial disclosure regarding self-defense will enable the State to prepare its witnesses to anticipate what the defendant will say — thus helping the prosecution at the first trial as well as avoiding inconsistencies at any re-trial following appeal." We are not persuaded by this argument. First, it is speculative at this juncture; we do not know how Henderson or his counsel will answer the court's order, nor can we address something that the State *might* do at trial with information that we do not yet have properly before us. Second, in *Glenn*, the Court was unpersuaded that nearly identical arguments would not be rectifiable on appeal:

> Although we acknowledge those concerns, there is no reason that such a situation could not be rectified in an appeal following final judgment. If that scenario comes to fruition and the appellate court determines that the trial court's discovery order was improper, then it may grant Glenn a new trial and order the exclusion of the improperly disclosed statements. In fact, when pressed on the effective-remedy question during oral argument, the only concrete reasons that counsel for Glenn set forth to explain why a postjudgment appeal would not be effective was that Glenn might have to face a second trial and possible additional pretrial incarceration. But the possibility of retrial does not render the appeal mechanism ineffective. Those concerns are present in virtually every criminal appeal; that doesn't mean they are sufficient to convert every interlocutory order into a final, appealable order.

Glenn at ¶ 24.

{¶ 20} We find that the same scenario exists in the instant appeal, and, because we find that both (2) and (3) of the *Chambliss* analysis are not conclusively established, we grant the State's motion to dismiss, vacate our previous order to the extent it found a final, appealable order, and dismiss the instant appeal for lack of a final, appealable order. *See, e.g.*, *A B C Accounting Servs., Inc. v. Pittman*, 1993

Ohio App. LEXIS 5181 (8th Dist. Oct. 28, 1993); *Menti v. Joy*, 1994 Ohio App. LEXIS 4718 (8th Dist. Oct. 20, 1994) (reconsidering interlocutory orders denying motions to dismiss).

{¶ 21} Appeal dismissed.

It is ordered that appellee recover from appellant costs herein taxed.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

FRANK DANIEL CELEBREZZE, III, JUDGE

EMANUELLA D. GROVES, P.J., and
SEAN C. GALLAGHER, J., CONCUR