

STATE OF MARYLAND,

Petitioner,

v.

EDWARD NERO,

Respondent

IN THE

COURT OF APPEALS

OF MARYLAND

September Term, 2015

Petition Docket No. _____

MOTION TO STAY CIRCUIT COURT PROCEEDINGS

Now comes the State of Maryland, by and through Brian E. Frosh, Attorney General; Carrie Williams, Assistant Attorney General; and Michael Schatzow, Special Assistant Attorney General; and pursuant to Rule 8-303(e) and the Court's inherent power, requests that this Court issue a stay of the circuit court proceedings in this case pending resolution of the appeal filed by the State on February 4, 2016, from the final judgment of the circuit court entered on January 20, 2016, denying the State's Motion to Compel a Witness to Testify Pursuant to Section 9-123 of the Courts and Judicial Proceedings Article. The trial in which the State sought to compel the witness to testify is set to begin on February 22, 2016.

I. SUMMARY OF ARGUMENT

Without a stay of these proceedings, there will be no review of the circuit court's unprecedented decision to arrogate unto itself the immunity power granted to the Executive Branch of our government. The court's denial of the State's Motion to Compel Officer William Porter's testimony ran contrary to the plain language of § 9-123

and to the Legislature's intent in enacting the immunity statute, and the State is now appealing these errors given their ramifications on the State's ability to prosecute this and other cases here and throughout the State. As outlined in the State's petition for writ of certiorari filed contemporaneously with this Motion (which the State requests to incorporate herein along with the Attachments thereto), the lower court had no authority to engage in judicial review of the State's Attorney's exercise of lawful, vested discretion in determining that Officer Porter's testimony may be necessary to the public interest in the State's prosecution of the defendant for his role in the fatal arrest and custodial transportation of Freddie Gray. Instead, the circuit court had only the power to decide whether that the State's motion to compel complied with the procedural and pleading requirements of § 9-123. Upon finding such compliance, the court was required to follow the mandate of the Legislature and issue the immunity order.

Though the circuit court disagreed with the State's assessment of the statute's mechanics, the State's arguments about § 9-123's power distribution are strong. Moreover, the circuit court acted without any express authority or guidance on this issue from either this Court or the intermediate appellate court—and in the face of overwhelming precedent from other jurisdictions. If, as the State firmly maintains, the circuit court was, in fact, wrong in its denial of the State's motion to compel, to deny the State any meaningful opportunity for appellate review of that decision would potentially result in a miscarriage of justice in the defendant's trial. The People of this State deserve that opportunity. As such, this Court should exercise its discretionary power to stay the proceedings pending the State's appeal.

II. FACTS AND PROCEDURAL HISTORY

On January 14, 2016, the State filed a Motion to Compel a Witness to Testify Pursuant to Section 9-123 of the Courts and Judicial Proceedings Article in the matter of *State of Maryland v. Edward Nero*. That case is set to begin trial on February 22, 2016, in the Circuit Court for Baltimore City (the Honorable Barry G. Williams, presiding) and is docketed under case number 115141033. The witness in question was Officer William Porter, and the underlying criminal case involves a police officer indicted on May 21, 2015, in connection with the death of Freddie Gray. The State's motion, signed by the State's Attorney herself, set forth her determinations that Officer Porter's testimony may be necessary to the public interest and that he is likely to refuse to testify on the basis of his privilege against self-incrimination.

On January 15, 2016, Edward Nero, the defendant, filed an Opposition to the State's motion to compel, attacking it for failing to explain "why Officer Porter is either necessary or material to the trial of defendant Nero or how it is necessary to serve the public interest" and arguing instead that his testimony is in fact not necessary to the public interest. Def. Opp. at 1-3. On January 19, 2016, Officer Porter filed an Opposition to the State's motion in which he too requested that the court deny the motion on grounds that compelling his testimony would not be necessary to the public interest. Def. William Porter's Opp. at 8. The State filed a Response to Nero's opposition on January 20, 2016, arguing that § 9-123 granted neither the underlying defendant nor the witness standing to make such objections and that under the plain terms of that statute,

the circuit court lacked the discretion to deny a prosecutor's request to compel immunized testimony when presented as here with a motion that complied with the statute's procedural requirements.

Later that same day, the circuit court conducted a hearing on the State's motion to compel, at which the court not only considered objections from both Officer Porter and Nero but also required the Chief Deputy State's Attorney to explain in open court the reasons that the State's Attorney believed that Officer Porter's testimony may be necessary to the public interest. The Chief Deputy explained that the State sought to elicit from Officer Porter testimony regarding two important aspects of the charges against the defendant.

The circuit court then made its own determination that granting Officer Porter immunity would *not* be in the public interest, irrespective of the State's Attorney's contrary determination. Accordingly, the circuit court denied the State's motion to compel Officer Porter. From this judgment docketed January 20, 2016, the State filed a notice of appeal on February 4, 2016. That appeal is still undecided and is pending before the Court of Special Appeals, No. _____, Sept. Term, 2015.

The State filed a petition for writ of certiorari in this Court on February 10, 2016. Prior to then on February 5, 2016, the State moved in the circuit court to stay Nero's trial. The circuit court has not ruled on the State's motion, and the trial remains set to begin on February 22.

III. This Court should stay the proceedings pending review of the circuit court's erroneous denial of the State's motion to compel to avoid a miscarriage of justice

A. Denying the State's request for a stay would render the State's appeal moot

Pending appellate review of the circuit court's denial of the State's motion to compel Officer Porter, the State requests that this Court issue a stay of the proceedings below. As this Court has described, when such an appeal is taken, "the trial court retains its 'fundamental jurisdiction' over the cause, but its right to exercise such power may be interrupted by . . . a stay granted by an appellate court . . . in those cases where a permitted appeal is taken from an interlocutory or final judgment." *Pulley v. State*, 287 Md. 406, 417 (1980); *accord Thompson v. M'Kim*, 6 H. & J. 302, 332 (Md. 1825) ("[P]ending the appeal, proceedings may be stayed . . . by a special order of this court, on such terms as the peculiar circumstances of each particular case may be found to require.").

Though the circuit court retains "fundamental jurisdiction" over the underlying proceeding, this Court has also held that "the propriety of the exercise of that jurisdiction" is a separate matter. *In re Emileigh F.*, 355 Md. 198, 202 (1999). In that regard, "[a]fter an appeal is filed, a trial court may not act to frustrate the actions of an appellate court," and "[p]ost-appeal orders which affect the subject matter of the appeal are prohibited." *Id.* at 202-03; *see also State v. Peterson*, 315 Md. 73, 82, n.3 (1989) ("We think that a trial court ordinarily should not proceed with a hearing [when a writ of certiorari has been issued], thereby mooting an issue before an appellate court."); *accord Jackson v. State*, 358 Md. 612, 620 (2000) (While "a circuit court is not divested of

fundamental jurisdiction to take post-judgment action in a case merely because an appeal is pending from the judgment,” “[w]hat the court may *not* do is to *exercise* that jurisdiction in a manner that affects either the subject matter of the appeal or the appellate proceeding itself—that, in effect, precludes or hampers the appellate court from acting on the matter before it.”) (emphasis in original). Despite these strong admonitions, the circuit court has to date declined to stay the proceedings. This failure to act will soon force the State to proceed to trial and allow jeopardy to attach without the testimony of Officer Porter, a silent order that would unquestionably frustrate the ability of this Court to review the lower court’s actions and that would moot the State’s appeal.

B. Denying the State’s request for a stay would needlessly cause irreparable harm

If this Court declines to stay the proceedings, the result would be irreparable harm to the State’s ability to prosecute this case at no commensurate gain to Officer Porter or the underlying defendant. Indeed, Officer Porter, the appellee in this appeal, will not be affected by a stay because his trial is not set to begin until June 13, 2016. Regarding Nero, he will not be a party to this appeal. As such, granting the stay would cause Nero to lose only a legally insignificant short amount of time awaiting resolution of the appeal before starting his trial.¹ On the other hand, denying the stay would cost the State a

¹ Even assuming that granting a stay would result in a trial delay of several months, Nero was indicted less than nine months ago and so would still come to trial on a date that would barely be sufficient to trigger a legitimate speedy trial challenge, much less actually deprive the defendant of that right given the complexity of the issues in this case. *See Glover v. State*, 386 Md. 211, 223 (2002) (“While no specific duration of delay constitutes a *per se* delay of constitutional dimension, we have employed the proposition that a pre-trial delay greater than one year and fourteen days was ‘presumptively prejudicial’ on several occasions.”) (internal citations omitted).

valuable witness in its case. Officer Porter would provide key evidence regarding the defendant's alleged misconduct and his alleged recklessness. Once the jury has been sworn in the defendant's trial, however, the State will be foreclosed from seeking any meaningful remedy to the circuit court's denial of the motion to compel. If the defendant were acquitted after a trial without Officer Porter's testimony, the damage would be done and could not be undone.


A stay would obviate the risk of such a potentially unfair result, a risk made all the more compelling given the public interest that abounds in this matter. At stake here is not only the outcome of one of the most high-profile criminal trials in Maryland history but also the very fiber of our State's constitutional separation of powers. The circuit court's denial of the motion to compel has deprived prosecutors of both a valuable witness in this case and also an indispensable prosecutorial tool that the Legislature provided to them nearly thirty years ago. Whether the lower court's ruling is correct or whether the State's view is proper is a question which this Court should be permitted to answer without the lower court rendering the appeal moot before briefs are even filed. The public interest deserves no less, particularly in light of the strong merits of the State's case on appeal as outlined in the petition for writ of certiorari filed in this case.

IV. CONCLUSION

For the foregoing reasons, the State respectfully requests that its Motion to Stay Circuit Court Proceedings be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 10, 2016, a copy of the State's Motion to Stay Circuit Court Proceedings was delivered via electronic mail and first-class mail, postage pre-paid to Gary E. Proctor, 8 East Mulberry Street, Baltimore, Maryland 21202; Marc L. Zayon, 201 N. Charles St., Suite 1700, Baltimore, Maryland 21201; and delivered via electronic mail to Joseph Murtha, 1301 York Road, Suite 200, Lutherville, Maryland 21093.

CARRIE J. WILLIAMS

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ORDER

Pending before the Court is the State of Maryland's motion to stay proceedings in in the circuit court pending resolution of this appeal. Having considered the motion and any response, the Court hereby grants the motion to stay.

So ORDERED this _____ day of _____, 2016.

Judge