

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
WOOD COUNTY

David O'Neill

Court of Appeals No. WD-10-019

Petitioner

v.

Hon. Alan R. Mayberry

DECISION AND JUDGMENT

Respondent

Decided: April 15, 2010

* * * * *

Jack W. Bradley and Brian J. Darling, for petitioner.

Paul A. Dobson, Wood County Prosecuting Attorney, and
Mary Loeffler Mack and Jacqueline M. Kirian, Assistant Prosecuting
Attorneys, for respondent.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Petitioner, David O'Neill, has filed a petition for a writ of prohibition against respondent, the Honorable Alan R. Mayberry of the Wood County Court of Common Pleas. In the petition, O'Neill asks this court to issue a writ of prohibition preventing respondent from exercising judicial power in Wood County Common Pleas

Court case No. 2006-CR-0047, which case is scheduled to proceed to trial on April 19, 2010. The state had filed a motion to dismiss the petition.

{¶ 2} A writ of prohibition " * * * is an extraordinary writ, the purpose of which is to challenge the jurisdiction of a court to act." *State ex rel. News Herald v. Ottawa Cty. Court of Common Pleas, Juv. Div.* (1996), 76 Ohio St.3d 1203, 1203. The writ will be issued only if a petitioner can prove: "(1) that the court or officer against whom it is sought is about to exercise judicial or quasi-judicial power, (2) that the exercise of such power is unauthorized by law, and (3) that the refusal of the writ will result in injury for which no other adequate remedy exists." *State ex rel. Starner v. DeHoff* (1985), 18 Ohio St.3d 163, 164.

{¶ 3} We previously set forth the history of this case in *O'Neill v. Mayberry*, 6th Dist. No. WD-08-077, 2009-Ohio-1123. A repeat of the relevant portion of that history is appropriate here. In February 2006, O'Neill was indicted on five counts in connection with an incident in which two bicyclists were struck by a silver Jeep allegedly driven by petitioner. The counts, listed in numerical order, were: (1) aggravated vehicular assault in violation of R.C. 2903.08(A)(1)(a), a third degree felony; (2) failure to stop after an accident in violation of R.C. 4549.02(A) and (B), a third degree felony; (3) aggravated vehicular homicide in violation of R.C. 2903.06(A)(1)(a), a second degree felony; (4) operating a vehicle under the influence of alcohol in violation of R.C. 4511.19(A)(1)(a), a first degree misdemeanor; and (5) operating a vehicle under the influence of alcohol in violation of R.C. 4511.19(A)(1)(f), a first degree misdemeanor.

{¶ 4} Count 5, which alleged a violation of R.C. 4511.19(A)(1)(f), required proof that O'Neill operated a motor vehicle with "a concentration of seventeen-hundredths of one per cent or more by weight per unit volume of alcohol in the person's whole blood." In contrast, Count 4, which alleged a violation of R.C. 4511.19(A)(1)(a), only required proof that O'Neill operated a motor vehicle "under the influence of alcohol, a drug of abuse, or a combination of them."

{¶ 5} The trial court denied O'Neill's motion to suppress the results of his blood alcohol tests performed after his arrest. Pursuant to a negotiated plea agreement, O'Neill entered pleas of no contest to Counts 1, 2, 3, and 5. In exchange, the state dismissed Count 4 and O'Neill was sentenced on his no contest pleas.

{¶ 6} O'Neill appealed his convictions and sentences, asserting that the trial court erred in failing to suppress his blood-alcohol test results. In *State v. O'Neill*, 175 Ohio App.3d 402, 2008-Ohio-818 ("*O'Neill I*"), we found that the state failed to demonstrate substantial compliance with applicable regulations governing blood-alcohol testing. Due to that error, we vacated O'Neill's conviction for operating a vehicle under the influence of alcohol in violation of R.C. 4511.19(A)(1)(f). Because O'Neill's convictions for aggravated vehicular homicide and aggravated vehicular assault depended upon a violation of R.C. 4511.19, those convictions were also vacated. The conviction and sentence for failure to stop after an accident was affirmed. In disposing of the matter, the decision did not specifically state that the case was remanded to the trial court for further proceedings. *State v. O'Neill*, supra, at ¶ 41.

{¶ 7} Subsequently, the state proceeded to prosecute O'Neill under the original indictment. In an order denying O'Neill's motion in opposition to jurisdiction, respondent concluded that our decision on appeal placed O'Neill in the position he was in after indictment but prior to trial. O'Neill then filed his first petition for a writ of prohibition against respondent, seeking a writ from us prohibiting respondent from exercising jurisdiction by conducting a jury trial on the remaining counts.

{¶ 8} In a decision dated March 9, 2009, we granted respondent's motion for summary judgment and dismissed O'Neill's first petition for a writ of prohibition. *O'Neill v. Mayberry*, supra ("*O'Neill II*"). In that case, O'Neill had argued that respondent lacked jurisdiction to proceed to trial because this court in *O'Neill I* had not remanded the case back to the trial court after appeal. Addressing the remand issue, we concluded that "the absence of language specifically remanding the case to the trial court was a technical mistake and indicated nothing with respect to the trial court's jurisdiction." *O'Neill II*, supra, at ¶ 18. We therefore issued an order of errata correcting *O'Neill I*, by adding the sentence "This matter is remanded to the trial court for further proceedings consistent with this decision and judgment entry."

{¶ 9} We then determined that O'Neill was unable to demonstrate that respondent patently and unambiguously lacked jurisdiction to try him on the remaining counts. In so holding, we relied heavily on the Ohio Supreme Court's decision in *State ex rel. Douglas v. Burlew*, 106 Ohio St.3d 180, 2005-Ohio-4382, in which the court determined that "[u]pon remand from an appellate court, the lower court is required to proceed from the

point at which the error occurred.'" Id. at ¶ 11, quoting *State ex rel. Stevenson v. Murray* (1982), 69 Ohio St.2d 112, 113. In denying O'Neill's motion in opposition to jurisdiction, respondent had determined that our decision in *O'Neill I*, placed O'Neill back in the position he was in when the error occurred – namely, after respondent's ruling on the suppression motion but before the plea agreement wherein the state dismissed the general DUI charge. In *O'Neill II*, we determined that respondent's judgment in this regard was correct. Therefore, because O'Neill was unable to demonstrate that respondent patently and unambiguously lacked jurisdiction to try him on the charges that remained, he was not entitled to the extraordinary relief in prohibition.

{¶ 10} O'Neill has now filed a second petition for a writ of prohibition. O'Neill contends that respondent has scheduled a trial for Monday, April 19, 2010, on the originally indicted charges of aggravated vehicular assault, aggravated vehicular homicide, and operating a motor vehicle under the influence of alcohol in violation of R.C. 4511.19(A)(1)(a). O'Neill is not disputing respondent's jurisdiction to try him on the general DUI charge under R.C. 4511.19(A)(1)(a). Rather, O'Neill contends that respondent has no jurisdiction to try him again for the aggravated vehicular homicide and aggravated vehicular assault charges because this court in *O'Neill I*, dismissed those charges and they were predicated on the similarly dismissed charge of operating a vehicle under the influence of alcohol in violation of R.C. 4511.19(A)(1)(f).

{¶ 11} It is well-settled that "[i]n the absence of a patent and unambiguous lack of jurisdiction, a court having general subject-matter jurisdiction can determine its own

jurisdiction, and a party challenging that jurisdiction has an adequate remedy by appeal." *State ex rel. Shimko v. McMonagle* (2001), 92 Ohio St.3d 426, 428-429. As we noted above, the Supreme Court of Ohio has held: "Upon remand from an appellate court, the lower court is required to proceed from the point at which the error occurred." *Douglas*, supra, at ¶ 11. Despite O'Neill's arguments to the contrary, this is the law in Ohio. Accordingly, when we remanded the case to the trial court following our determination that the trial court should have granted the motion to suppress, respondent was required to proceed from the point at which the error occurred, that is, after he denied the motion to suppress but before the plea agreement in which the state dismissed the general DUI charge. In our view, we made this clear in *O'Neill II*. Moreover, any claim that O'Neill may have in regard to double jeopardy is "remediable by appeal rather than by extraordinary writ" *Id.* at ¶ 15.

{¶ 12} Because O'Neill has failed to establish that respondent patently and unambiguously lacks jurisdiction to proceed to trial on the charges of aggravated vehicular assault, aggravated vehicular homicide and operating a motor vehicle under the influence of alcohol in violation of R.C. 4511.19(A)(1)(a), he is not entitled to the extraordinary writ of prohibition and respondent's motion to dismiss is found well-taken and granted. Costs to petitioner. The clerk is directed to serve upon all parties, within three days, a copy of this decision in a manner prescribed by Civ.R. 5(B).

{¶ 13} It is so ordered.

MOTION GRANTED.

O'Neill v. Honorable
Alan R. Mayberry
WD-10-019

Peter M. Handwork, J.

JUDGE

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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