

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

State of Ohio

Court of Appeals Nos. L-11-1192
L-11-1198

Appellee

Trial Court No. CR0201002476

v.

Daniel Burns

DECISION AND JUDGMENT

Appellant

Decided: October 14, 2011

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Kevin A. Pituch, Assistant Prosecuting Attorney, for appellee.

Lisa E. Pizza and Anastasia K. Hanson, for Toledo City School
District.

Karin L. Coble, for appellant.

* * * * *

PER CURIAM.

{¶ 1} This matter is before the court on the second request of appellant, Daniel Burns, for suspension of execution of the trial court's restitution order in the judgment of sentence (January 24, 2011) and its later withholding order (July 28, 2011), pending our resolution of his delayed appeal.

{¶ 2} On September 14, 2011, Burns first requested that this court suspend execution of the trial court's July 28 withholding order directed to his Ohio School Employees Retirement System ("OSERS") monthly pension payment.¹ The withholding order was based on the court's earlier restitution order in the judgment entry of sentence. Burns was therein ordered to make restitution in specified amounts to several victims of the theft in office offense to which he had tendered an *Alford* guilty plea. One of the victims to whom restitution was ordered was the Toledo City School District ("District").²

{¶ 3} Following Burns' conviction and sentence, the District moved the court, pursuant to R.C. 2921.41(C)(2)(b)(i), for an order directing OSERS to withhold his monthly pension payments in order to satisfy the restitution order. This motion, after a hearing, resulted in the order of July 28, 2011. Burns' OSERS pension payments were thereafter withheld and deposited with the Lucas County Clerk of Courts.

{¶ 4} In his first request with this court, Burns indicated that he moved for suspension below, but claimed that the trial court's failure to rule on his motion

¹On September 2, 2011, we granted Burns' motion for a delayed appeal. On September 16, 2011, Burns' appeals in case Nos. L-11-1192 and L-11-1198 were ordered consolidated. Our disposition of his second request herein renders moot his first request to suspend execution of sentence.

²In the memoranda of counsel submitted in this matter, the specific amounts comprising the restitution component of Burns' sentence apparently are not disputed. The amount he was ordered to pay the District is specified as \$52,429. Separate amounts were ordered to be paid to the District's two insurance companies. The cumulative amount of the restitution ordered is specified as \$658,428.

constituted a denial. However, on September 16, 2011, while the first request was pending here, the trial court held a hearing on Burns' motions to suspend execution of the January 24 restitution order and the July 28 withholding order. Present at the hearing were counsel for Burns, the state and the District. The court heard argument from counsel on Burns' motions. The District separately asked the court to order the clerk to disburse to it, as restitution, the amount of OSERS payments thus far collected pursuant to the withholding order. When the hearing concluded, the court denied Burns' motions. As well, the court denied the District's request for a disbursement, stating: "[D]isbursement of any funds held in abeyance pending ruling from the Sixth District Court of Appeals."

{¶ 5} On September 20, 2011, Burns filed his second request for suspension with this court, along with a supporting memorandum that is compliant with 6th Dist.Loc.App.R. 17. Attached thereto is a copy of both the trial court's September 16 order and a partial transcript from the hearing. The state and the District filed memoranda opposing the second request.

{¶ 6} Burns' second request asks us to suspend execution of the January 24 and July 28 orders. Counsel for Burns complains that the trial court "failed to follow" App.R. 8 in ruling on his motions there, but does not explain in what manner that alleged failure occurred, given that the court held a hearing and entertained arguments on his requests for suspension. App.R. 8(B) requires that applications for suspension "be made in the

first instance in the trial court." That was done here. If denied, the rule then provides for a motion to be filed in this court, further stating:

{¶ 7} "The motion shall be determined promptly upon such papers, affidavits, and portions of the record as the parties shall present after reasonable notice to the appellee."

Id.

{¶ 8} In response to Burns' second request, the state and the District maintain that the trial court properly relied on various items in the record in deciding to deny his motions to suspend the withholding and restitution orders. The transcript of the September 16 hearing indicates that the court and the prosecutor referred to the transcripts from the earlier plea and sentencing hearings. During those hearings, Burns (and his trial counsel) had engaged in colloquies with the court on the issue of restitution and his alleged understanding of it. Also referenced were statements identifying Burns' OSERS pension as a source for that restitution. These references to such "portions of the record as the parties shall present" were no different than what App.R. 8 permits a reviewing court to consider in determining the merits of a defendant's request to suspend execution. Thus, we find the trial court properly entertained Burns' motions.

{¶ 9} Burns presently submits several "policy reasons" to suspend execution of the restitution and withholding orders, though what policy is implicated is unclear and the reasons offered are little more than conclusory assertions. Among them, he contends that suspension is necessary because his OSERS pension "would be dissipated to his disadvantage" should this court ultimately reverse the restitution and withholding orders.

This contention is unconvincing, for no OSERS money is being disbursed by the clerk to any of the entities named in the restitution order. That matter awaits resolution of Burns' consolidated appeal, which includes the disputed issue of restitution. In effect, the putative source funds from which the order would be satisfied are being escrowed by the clerk. The OSERS withholding payments to the clerk continue to accrue, and the trial court's September 16 order preserves the post-sentence status quo by preventing depletion of those funds either by Burns and his family or by premature disbursement to the District and its insurers.

{¶ 10} Burns, however, argues that it is the *pre*-sentence status quo - under which his family would be receiving the monthly pension payment - that should be preserved until this court decides the merits of his appeal. Yet, because the judgment of sentence is the final order from which we take jurisdiction, it is the status quo arising from that judgment that should be preserved, not the conditions which preceded it. The trial court's September 16 order accomplishes that, and it does so without prejudice to Burns or those seeking restitution. We thus find no merit in the claim that his pension is at risk of "being dissipated."³

{¶ 11} From the clear text of App.R. 8(A), the reviewing court has discretion to suspend the execution of a sentence while the appeal is pending, as did the court below.

³Burns further suggests, without support, that "OSERS accounting may be unduly complicated by a halt in the intervening time" between a reversal here and resentencing below; however, that point is as unconvincing now as it was at the September 16 hearing, where Burns' counsel conceded "this is speculation on my part."

Having reviewed counsels' memoranda and their arguments for and against suspension, along with such portions of the record as were presented, we find no persuasive reason to suspend execution of the trial court's orders of January 24 and July 28, 2011.

{¶ 12} Accordingly, Burns' second request for suspension of execution pending appeal is hereby denied.

{¶ 13} It is so ordered.

MOTION DENIED.

Arlene Singer, J.

Stephen A. Yarbrough, J.
CONCUR.

JUDGE

JUDGE

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