IN THE

Indiana Supreme Court

Supreme Court Case No. 23S-CR-26

Richard A. Means, II,
Appellant (Defendant below),

–v–

State of Indiana,
Appellee (Plaintiff below).

Decided: February 1, 2023

Appeal from the Hendricks Superior Court
No. 32D02-2002-F5-17
The Honorable Rhett M. Stuard, Judge

On Petition to Transfer from the Indiana Court of Appeals
No. 21A-CR-2570

Opinion by Justice Molter
Chief Justice Rush and Justices Massa, Slaughter, and Goff concur.

Molter, Justice.

After a juvenile court entered an order in a child in need of services ("CHINS") proceeding which concluded Richard A. Means, II was likely not responsible for the abuse of his girlfriend's son—E.H.—the State of Indiana investigated further and charged Means with Level 5 felony battery resulting in bodily injury to E.H., a child under fourteen years old, Ind. Code § 35-42-2-1(c)(1) and -1(g)(5)(B). The criminal court entered an order in limine excluding from evidence the juvenile court's CHINS order and then certified the order in limine for a discretionary interlocutory appeal under Appellate Rule 14(B). A Court of Appeals motions panel accepted jurisdiction over the appeal, but then a different Court of Appeals panel assigned to consider the merits dismissed the appeal sua sponte, reasoning that orders in limine are only tentative rulings, so the appealed order was not ripe for appellate review.

Means requests we grant transfer and reverse the trial court's order in limine. Amicus Indianapolis Bar Association Appellate Practice Section takes no position on the admissibility of the CHINS order, but it requests we grant transfer to provide guidance for procedural issues the Court of Appeals' opinion presents in discretionary interlocutory appeals. We grant transfer to provide that guidance, concluding: (1) after the Court of Appeals accepts a discretionary interlocutory appeal, it may later dismiss the appeal on non-jurisdictional grounds, although its general reluctance to do so is appropriate; and (2) orders in limine are eligible for discretionary interlocutory review. As for the merits of Means' appeal, we conclude the trial court did not abuse its discretion by excluding the CHINS order because the dangers of unfair prejudice and misleading the jury substantially outweigh the order's probative value.

Facts and Procedural History

A daycare worker changing E.H.'s diaper discovered severe bruising on his body, which led the daycare to report E.H.'s injuries to the Department of Child Services ("DCS"). DCS then filed a petition in the juvenile court alleging E.H. was a CHINS, but after a fact-finding hearing,

the juvenile court denied the petition. The court's written order explained that while the agency proved E.H. was battered, it failed to investigate whether daycare staff caused the injuries, which the court believed was most likely what happened based on the evidence presented.

A month later, after further investigation, the prosecutor reached a different conclusion, and the State charged Means—the boyfriend of E.H.'s mother—with Level 5 felony battery resulting in bodily injury to E.H., who was less than fourteen years old, I.C. § 35-42-2-1(c)(1) and -1(g)(5)(B). After defense counsel conveyed at a pretrial hearing that Means would introduce the CHINS order as evidence that someone else likely injured E.H., the State moved to exclude that evidence in limine. The trial court granted the State's motion, concluding the CHINS order's "finding that someone at the daycare likely battered [E.H. was] a legal conclusion that invade[d] the jury's duty to determine the outcome of this case on the facts presented to them at a trial held in their presence." App. Vol. 2 at 83.

After the trial court certified its order for discretionary interlocutory review, the Court of Appeals motions panel accepted jurisdiction over the appeal. Consistent with the Court of Appeals' established internal procedures, a different three-judge panel was then assigned to consider the merits of the appeal, and that panel issued a published opinion dismissing the appeal as insufficiently ripe because orders in limine are only tentative rulings subject to reconsideration. *Means v. State*, 193 N.E.3d 432 (Ind. Ct. App. 2022), *reh'g denied* (Aug. 29, 2022). Means then sought transfer, which we now grant, vacating the Court of Appeals' opinion. Ind. Appellate Rule 58(A).

Standard of Review

Whether our Indiana Rules of Appellate Procedure (1) allow a Court of Appeals panel to dismiss an interlocutory appeal on non-jurisdictional grounds after a different panel already accepted jurisdiction over the case and (2) categorically exclude orders in limine from discretionary interlocutory review are purely legal questions, which we review de novo.

See Horton v. State, 51 N.E.3d 1154, 1157 (Ind. 2016) (recognizing that we review legal questions de novo). We review the trial court's decision to exclude the CHINS order for an abuse of discretion. *Escamilla v. Shiel Sexton Co., Inc.*, 73 N.E.3d 663, 666 (Ind. 2017) ("We review the trial court's evidentiary rulings for an abuse of discretion."). And we may affirm the trial court's decision on any basis supported by the record. *Ramirez v. State*, 174 N.E.3d 181, 190 n.2 (Ind. 2021).

Discussion and Decision

To resolve this appeal, we begin by considering whether a Court of Appeals panel may dismiss on non-jurisdictional grounds a discretionary interlocutory appeal which an earlier panel properly accepted. Concluding that it may, we turn next to whether orders in limine are categorically excluded from discretionary interlocutory appeals, explaining that they are not. Finally, we consider Means' evidentiary argument, affirming the trial court because it did not abuse its discretion by excluding the CHINS order and remanding to the trial court for further proceedings.

I. The Court of Appeals may dismiss a discretionary interlocutory appeal on non-jurisdictional grounds.

Before we reach Means' evidentiary argument, the Appellate Practice Section argues there is a threshold procedural problem, contending that once the Court of Appeals exercises its discretion to accept a discretionary interlocutory appeal, it may not later dismiss the appeal on non-jurisdictional grounds. We disagree. For as long as it has jurisdiction, the Court of Appeals retains the inherent authority to reconsider its decision to accept a discretionary interlocutory appeal, and it makes no difference whether it is the court's motions panel or writing panel exercising that authority.

Understanding the procedure for interlocutory appeals begins with understanding Indiana's final judgment rule. Under that rule, our appellate courts generally have jurisdiction only over appeals from judgments either disposing of all claims as to all parties, or which the trial court certifies as lacking any just reason to delay entering judgment as to fewer than all the issues, claims, or parties under Trial Rule 54(B) or Trial Rule 56(C). *Ramsey v. Moore*, 959 N.E.2d 246, 251 (Ind. 2012). Efficiency inspires the final judgment rule. *Thompson v. Thompson*, 286 N.E.2d 657, 659 (Ind. 1972). Without it, there would be needless delays and increased expense from limitless interlocutory appeals of garden variety rulings, and those rulings may not even make a difference because the complaining party may win the case despite them.

But the final judgment rule does not always chart the most efficient or sensible path, so there are exceptions, including discretionary interlocutory appeals under Appellate Rule 14(B). Under that exception, a party may obtain appellate review before a final judgment if a trial court first certifies its order for an interlocutory appeal and the Court of Appeals then exercises its discretion to accept the appeal. Common grounds for discretionary interlocutory appeals are that the appellant will suffer substantial expense, damage, or injury from having to wait until after a final judgment to correct an error; an early determination of a substantial question of law will lead to a more orderly disposition of the case; or an appeal from a final judgment is otherwise inadequate. App. R. 14(B)(1)(c).

Our Court of Appeals has long used a "motions panel" to decide whether it will exercise its discretion to accept a discretionary interlocutory appeal that a trial court has certified for early appellate review. *See, e.g.*, *In re A.Q.*, 104 N.E.3d 628, 629 (Ind. Ct. App. 2018), *trans. denied*. Comprised of three judges from among the court's fifteen active judges and additional senior judges, the panel meets regularly to rule on motions, and its composition rotates at regular intervals so that the work is spread evenly. *Frequently Asked Questions*, Court of Appeals of Indiana, https://www.in.gov/courts/appeals/about/faqs [https://perma.cc/P2EV-93KH].

If the motions panel declines to accept a discretionary interlocutory appeal, then appellate review must await a final judgment, and an order declining to accept a discretionary interlocutory appeal is not reviewable in our Court through a transfer petition. App. R. 57(B). But if the motions panel accepts an interlocutory appeal, the appeal is then assigned to another three-judge panel to decide the case. In Indiana, the second panel is sometimes called the "writing panel," and in other jurisdictions it is called the "merits panel." *See, e.g.*, *In re Adoption of O.R.*, 16 N.E.3d 965, 968 (Ind. 2014) ("writing panel"); *Rezzonico v. H & R Block, Inc.*, 182 F.3d 144, 149 (2d Cir. 1999) ("merits panel"). This is a common way for intermediate appellate courts to screen interlocutory appeals. *See, e.g.*, *Johnson v. Burken*, 930 F.2d 1202, 1205 (7th Cir. 1991) (explaining the court's use of a motions panel for screening federal discretionary interlocutory appeals); *Rodriguez-Tocker v. Est. of Tocker*, 129 P.3d 586, 594 (Kan. Ct. App. 2006) (noting that the court's motions panel declined to accept an interlocutory appeal).

Here, after the motions panel accepted Means' appeal, the writing panel reconsidered that decision and dismissed the appeal as not ripe. *Means*, 193 N.E.3d at 435–36. The Appellate Practice Section contends the writing panel exceeded its authority, arguing that while the writing panel may dismiss an appeal on *jurisdictional* grounds, it may not revisit the motions panel's exercise of discretion and dismiss the appeal on *non*-jurisdictional grounds, such as concluding that the motion to accept jurisdiction was improvidently granted. This view is mistaken.

The writing panel's authority to revisit the decision to accept an interlocutory appeal and then dismiss the appeal as improvidently granted is simply a specific application of the court's more general power to reconsider its rulings. Like any other court, the Court of Appeals retains the inherent authority to reconsider its decisions up until the point when it loses jurisdiction over the appeal, subject to law of the case considerations. *See Bridgestone Americas Holding, Inc. v. Mayberry*, 878 N.E.2d 189, 191 n.2 (Ind. 2007) (summarily affirming the Court of Appeals' decision that a second motions panel could reconsider the decision of a first motions panel to deny a motion to accept jurisdiction over an interlocutory appeal); *see generally* 5 C.J.S. *Appeal and Error* § 1133

(recognizing the common law rule that appellate courts have inherent power to reconsider their decisions until they lose jurisdiction). The law of the case doctrine "mandates that an appellate court's determination of a legal issue binds the trial court and ordinarily restricts the court on appeal in any subsequent appeal involving the same case and relevantly similar facts." *Hopkins v. State*, 782 N.E.2d 988, 990 (Ind. 2003). But that doctrine does not apply here because an appellate court's exercise of discretion in determining whether to accept an appeal is not the determination of a legal issue.

The fact that the Court of Appeals has divided the labor between a motions panel and a writing panel does not restrict the court's authority to reconsider its decision. That is why intermediate appellate courts using a motions panel to screen interlocutory appeals routinely recognize a writing panel's or a merits panel's authority to reconsider the motions panel's decision. *See generally* 16 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 3929 (3d ed.) ("Court of appeals discretion extends beyond the initial decision to permit appeal. Discretion also is exercised by vacating an initial grant of permission when further consideration of the case shows that the grant was improvident."); 4 Am. Jur. 2d *Appellate Review* § 127 (2d ed.) ("If, after receiving the briefs, reviewing the record, or hearing oral argument, the court of appeals comes to the conclusion that a proper question has not been presented, it may vacate its order to grant leave to appeal as having been improvidently granted. The appellate panel of the court can also vacate an order of the motions panel which granted leave to appeal.").

Indeed, the often cursory nature of motions practice before the motions panel makes it all the more important that the writing panel have the authority to revisit the motions panel's decisions. As the United States Court of Appeals for the Seventh Circuit has explained in the context of federal discretionary interlocutory appeals:

> Decisions by motions panels are summary in character, made often on a scanty record, and not entitled to the weight of a decision made after plenary submission. Certainly when the panel is merely deciding whether an appeal should be heard,

> rather than disposing of the appeal, its decision should be regarded as tentative, and therefore revisable by the merits panel.

Johnson, 930 F.2d at 1205 (citation omitted).

Even so, while a writing panel may reconsider a motions panel's decision to accept a discretionary interlocutory appeal, the practice is appropriately disfavored. *City of Indianapolis v. Tichy*, 122 N.E.3d 841, 844 n.3 (Ind. Ct. App. 2019) ("Although a writing panel of this Court has inherent authority to reconsider any decision while an appeal remains in fieri, we are reluctant to overrule orders decided by the motions panel." (quotations omitted)). The same efficiency concerns motivating the final judgment rule and the exception for certain interlocutory appeals have restrained the Court of Appeals to rescind its acceptance of interlocutory appeals on only rare occasions. Trial courts and parties can therefore continue to expect that, generally, when the trial court certifies an interlocutory appeal and the Court of Appeals accepts it, the Court of Appeals will ultimately decide the appeal.

All that said, we agree with Means and the Appellate Practice Section that transfer is necessary because the explanation in the Court of Appeals' published opinion for dismissing this appeal sweeps too broadly. While the Court of Appeals *may* dismiss a discretionary interlocutory appeal as improvidently accepted, the published opinion seems to suggest mistakenly that the court *must* do so when the appeal is from an order in limine. We grant transfer to make clear that while the Court of Appeals does not have to exercise its discretion to accept jurisdiction over discretionary interlocutory appeals of orders in limine, those orders are not categorically excluded from review under Appellate Rule 14(B).

II. Orders in limine are eligible for discretionary interlocutory appeals.

When explaining its decision to dismiss this appeal, the Court of Appeals began by noting that in limine rulings are tentative rulings,

subject to revision at trial when a party seeks to introduce the evidence at issue. *Means*, 193 N.E.3d at 435. That is correct, and that is why, for example, the denial of a motion in limine is insufficient to preserve an issue for later appellate review. *Raess v. Doescher*, 883 N.E.2d 790, 796–97 (Ind. 2008) ("Only trial objections, not motions in limine, are effective to preserve claims of error for appellate review. Failure to object at trial to the admission of the evidence results in waiver of the error, notwithstanding a prior motion in limine.").

From the premise that in limine rulings are only tentative, the Court of Appeals reasoned that this appeal "is not ripe for review." *Means*, 193 N.E.3d at 436. But it is not clear what the court meant by "ripe" in this context. If it simply meant that after a deeper dive it discovered that an evidentiary ruling would be premature in this particular case on this particular record, then transfer would not be warranted.

For example, a motions panel might accept jurisdiction over the appeal of an order in limine concluding that a particular document is admissible under the business records exception to the hearsay rule. Ind. Evid. Rule 803(6). Evaluating that issue may require determining whether the relevant entity relied on the document for the performance of its functions. *See In re Termination of Parent-Child Relationship of E.T.*, 808 N.E.2d 639, 643 (Ind. 2004) ("Thus where a company does not rely upon certain records for the performance of its functions those records are not business records within the meaning of the exception to the hearsay rule."). If, after digging deeper into the briefing and record, the writing panel concluded the pretrial record was not developed enough to determine whether the entity relied on the document, then there would be nothing improper about dismissing the appeal as improvidently accepted.

But that does not appear to be the sort of analysis which led the Court of Appeals to dismiss this appeal. Rather than identifying a case-specific or record-related reason for dismissal, the court engaged in a general discussion of orders in limine and ripeness, suggesting all orders in limine are ineligible for interlocutory review through Appellate Rule 14. That view conflicts with our Appellate Rules.

Appellate Rule 14(B) allows for early appellate review of "other interlocutory orders" beyond those for which there is an early appeal as of right through Appellate Rule 14(A), and Appellate Rule 14(B) does not limit the orders subject to discretionary review. App. R. 14(B). Orders in limine are eligible for appellate review under Appellate Rule 14(B) to the same extent, and with the same prerequisites—trial court certification and Court of Appeals acceptance—as any other interlocutory order. The tentative nature of orders in limine does not result in the categorical exclusion of those orders from discretionary interlocutory review, which is why our appellate courts have long reviewed orders in limine through interlocutory appeals. *See, e.g.*, *McClain v. State*, 678 N.E.2d 104, 106 (Ind. 1997) (interlocutory appeal reviewing a trial court's order granting the State's motion in limine to exclude certain expert testimony). Indeed, aside from law of the case limitations, all trial court rulings are subject to revision until there is a final judgment, *Mitchell v. 10th & The Bypass, LLC*, 3 N.E.3d 967, 971 (Ind. 2014), so the tentative nature of a trial court ruling cannot mean interlocutory review is unavailable.

Having determined that orders in limine are eligible for interlocutory review, we review the trial court's order.

III. The trial court did not abuse its discretion by excluding the CHINS order.

Turning to the merits of the appeal, we conclude the trial court did not abuse its discretion by excluding the CHINS order.

Means seeks to introduce the CHINS order so he can point the jury to the juvenile court's conclusion that it was probably someone at the daycare who injured E.H. He argues the juvenile court's conclusion that someone else committed the crime makes it less probable that he is the perpetrator. But the trial court determined the CHINS order is inadmissible because the juvenile court's "finding that someone at the daycare likely battered the victim[ ] is a legal conclusion that invades the jury's duty to determine the outcome of this case on the facts presented to them at a trial held in their presence." App. Vol. 2 at 88. It grounded its

analysis in our decision in *Pelley v. State*, 901 N.E.2d 494, 506 (Ind. 2009), which held that Indiana Rule of Evidence 704(b)—prohibiting a witness in a criminal case from testifying to "opinions concerning intent, guilt, or innocence" or "legal conclusions"—barred a deputy prosecutor's testimony in a murder case that he had expressed the opinion that there was not enough evidence to charge the defendant.

Means argues that *Pelley* and Rule of Evidence 704(b) do not apply because they concern testimony, and a CHINS order is not testimony. But we need not decide that question because even if Rule 704(b) is inapplicable, the trial court's appropriate concern would still make the evidence inadmissible under Rule 403, which excludes evidence when its probative value is substantially outweighed by the dangers of unfair prejudice or misleading the jury. Evid. R. 403.

To begin with, the CHINS order presents a great risk that the jury will be too deferential to a judge's assessment of the facts. *See Clary v. Lite Machines Corp.*, 850 N.E.2d 423, 435 (Ind. Ct. App. 2006) (recognizing that the opinion of a trial judge who made findings in a previous case related to the same underlying issues "would likely carry tremendous weight with the jury, risking unfair prejudice"). If the juvenile court judge had concluded Means was in fact the perpetrator, Means would rightly argue it would be unfairly prejudicial to his defense for the State to introduce into evidence that conclusion. It is no less unduly prejudicial to the State's case to allow Means to introduce evidence that another judge exonerated him. *See Sigo v. Prudential Prop. & Cas. Ins. Co.*, 946 N.E.2d 1248, 1252 (Ind. Ct. App. 2011) (concluding that "in an action to recover on a fire insurance policy, evidence of the insured's acquittal of related arson charges is at best marginally relevant and raises the concern of unfair prejudice"), *trans. denied*.

Moreover, introducing the CHINS order is misleading in the criminal proceeding. The juvenile court judge reached her conclusion in the CHINS order based on DCS's evidentiary presentation in a civil proceeding following its own investigation, not the prosecutor's evidence in this criminal proceeding based on additional police investigation. That is especially problematic because the juvenile court reached its conclusion

in the CHINS case before the State completed its investigation in the criminal case.

To be clear, the trial court's ruling is limited to the admissibility of the CHINS order; it does not extend to the underlying evidence that led the juvenile court to conclude it was likely someone at the daycare who abused E.H. Nothing in the trial court's order or this opinion precludes Means from introducing that evidence in his defense.

Finally, because we affirm the trial court's order based on Rule of Evidence 403, we need not address the parties' remaining evidentiary arguments, and we agree with the State that Means waived his argument that the CHINS order collaterally estops the State from prosecuting him because he did not first make that argument in the trial court. *See Harris v. State*, 165 N.E.3d 91, 98 (Ind. 2021) ("By not raising the issue before the trial court, he has waived this argument on appeal.").

Conclusion

For these reasons, we grant transfer, affirm the trial court's order in limine, and remand to the trial court for further proceedings.

Rush, C.J., and Massa, Slaughter, and Goff, JJ., concur.

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