

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Kevin A. Tolliver, :
Plaintiff-Appellant, :
v. : No. 04AP-226
Liberty Mutual Group, : (C.P.C. No. 03CVH02-1759)
Defendant-Appellee. : (REGULAR CALENDAR)

D E C I S I O N

Rendered on November 30, 2004

Kevin A. Tolliver, pro se.

Robert S. Roby and Lynne K. Schoenling, for appellee.

APPEAL from the Franklin County Court of Common Pleas.

LAZARUS, P.J.

{¶1} Plaintiff-appellant, Kevin A. Tolliver, appeals from the January 30, 2004 decision and entry denying his January 20, 2004 motion for transportation to all pretrial conferences, hearing and trial. After reviewing the facts of this particular case, we affirm the judgment of the trial court.

{¶2} On January 20, 2003, Liberty Mutual Group ("Liberty Mutual") denied appellant's claim for theft loss at property located at 100 North High Street, Columbus, Ohio. Liberty Mutual concluded that appellant intentionally concealed or misrepresented

material facts and made false representations during his examination under oath. On February 13, 2003, appellant and his mother, Evelyn K. Pulphus, filed a complaint against Liberty Mutual seeking payment for the denied insurance claim.

{¶3} On March 20, 2003, Liberty Mutual filed its answer and counterclaim for declaratory judgment. After numerous attempts to depose Pulphus, Liberty Mutual filed a motion to dismiss Evelyn Pulphus' claims for lack of prosecution and for sanctions. On January 28, 2004, the trial court sustained Liberty Mutual's motion and dismissed Pulphus.

{¶4} On January 23, 2004, appellant filed a motion for transportation. Appellant is currently incarcerated at Ross Correctional Institution serving 15 years to life for murder and an additional three years incarceration on a firearm specification. See *State v. Tolliver*, Franklin App. No. 02AP-811, 2004-Ohio-1603. Upon finding that appellant failed to submit authority to support his motion for transportation, the trial court denied appellant's motion. It is from this entry that appellant appeals, assigning the following as error:

THE TRIAL COURT ERRED IN NOT GRANTING
PLAINTIFF'S MOTION FOR TRANSPORTATION WHEN
EXIGENT CIRCUMSTANCES WARRANTED PLAINTIFF'S
APPEARANCE

{¶5} "A ruling on the request of an incarcerated criminal to prosecute a *pro se* civil action by requiring penal authorities to transport him to a preliminary hearing or trial rests within the sound discretion of the trial court." *Mancino v. City of Lakewood* (1987), 36 Ohio App.3d 219, 221, citing *Holt v. Pitts* (C.A.6, 1980), 619 F.2d 558, 560-561; *Perdue v. Perdue* (June 19, 1979), Franklin App. No. 78AP-760; *Drescher v. Summers* (1986), 30 Ohio App.3d 271, 273 (It is well-established that a prisoner's *** presence

may be ordered in exceptional circumstances[;] [however], the decision is within the discretion of the trial court").

{¶6} Prisoners who bring civil actions have no constitutional right to be personally present at any stage of the judicial proceedings. *Holt*, supra; *In Re Davis* (Mar. 30, 1995), Franklin App. No. 94APF08-1205 ("while inmates are entitled to access to the court system, it has been established that such access does not require the inmate's physical availability").

{¶7} In *Price v. Johnston* (1948), 334 U.S. 266, 285-286, 68 S.Ct 1049, 1060, overruled on other grounds by *McCleskey v. Zant* (1991), 499 U.S. 467, 111 S.Ct. 1454, the United States Supreme Court stated that:

Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system. Among those so limited is the otherwise unqualified right given by § 272 of the Judicial Code, 28 U.S.C. § 394, 28 U.S.C.A. § 394, [now 28 U.S.C. § 1654], to parties in all the courts of the United States to "plead and manage their own causes personally."

{¶8} Whether permission should be given to a prisoner to be brought to trial to argue his case personally depends upon the particular and unique facts and circumstances of each case. *Marshall v. Marshall* (May 12, 1989), Lucas App. No. L-88-239. The court in *Mancino*, at 222, set forth the following criteria to be weighed in making this determination:

- (1) whether the prisoner's request to be present at trial reflects something more than a desire to be temporarily freed from prison; (2) whether he is capable of conducting an intelligent and responsive argument; (3) the cost and convenience of transporting the prisoner from his place of incarceration to the courthouse; (4) any potential danger or security risk the prisoner's presence might pose; (5) the substantiality of the matter at issue; (6) the need for an early resolution of the matter; (7) the possibility and wisdom of delaying the trial until

the prisoner is released; (8) the probability of success on the merits; and (9) the prisoner's interest in presenting his testimony in person rather than by deposition.

{¶9} The trial court has broad discretion in weighing the above factors, and absent an abuse of discretion, we will not disturb the trial court's findings. "The term 'abuse of discretion' connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶10} Under the facts of this particular case, we find that the trial court did not abuse its discretion in denying appellant's motion. The trial court determined that appellant failed to submit any authority to support his request for transportation. Appellant presented no compelling argument why the factors of the danger, expense of his transportation and safekeeping, and inconvenience of transporting a defendant, who was found guilty of killing his fiancé, were outweighed by his need to be transported to a civil trial when his testimony could have been presented by other less costly and less dangerous means. See *Doyle v. Magnotta* (Jan. 3, 1990), Summit App. No. 14200. Accordingly, under the facts presented, we cannot say that the trial court abused its discretion in denying appellant's motion to transport. As such, appellant's sole assignment of error lacks merit.

{¶11} For the foregoing reasons, appellant's sole assignment of error is overruled and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

PETREE and SADLER, JJ., concur.
