

IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN THE MATTER OF THE                   §  
PETITION OF BRUCE R.                   §       No. 432, 2006  
BANTHER, JR., FOR A WRIT OF       §  
PROHIBITION.                           §       Cr. ID No. 9705000270

Submitted: October 25, 2006

Decided: November 6, 2006

Before **STEELE**, Chief Justice, **HOLLAND** and **JACOBS**, Justices.

**ORDER**

This 3<sup>rd</sup> day of November 2006, upon consideration of the petition for a writ of prohibition as cured<sup>1</sup> and the answer and motion to dismiss, it appears to the Court that:

(1) In 1997, the petitioner, Bruce R. Banther, Jr., and his co-defendant John E. Schmitz, were indicted for Murder in the First Degree and related offenses, including first degree conspiracy. Schmitz pleaded guilty to Murder in the Second Degree.<sup>2</sup> Banther elected to be tried before a jury in the Superior Court.

(2) The jury convicted Banther of Murder in the First Degree, Possession of a Deadly Weapon During the Commission of a Felony, Theft,

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<sup>1</sup>The petition for a writ of prohibition was filed without the intended attachments. The attachments were filed on October 25, 2006, when the Clerk notified Banther's counsel of the oversight.

<sup>2</sup>*Schmitz v. State*, 2000 WL 383789 (Del. Supr.).

and Forgery in the Second Degree. The jury acquitted Banther of Conspiracy in the First Degree.

(3) On appeal, this Court reversed Banther's conviction on the basis that he was denied the right to a fair trial by an impartial jury.<sup>3</sup> The Court remanded the case to the Superior Court for a new trial before a different jury.<sup>4</sup>

(4) At the conclusion of Banther's second trial, the jury convicted him of Murder in the First Degree and Possession of a Deadly Weapon During the Commission of a Felony.<sup>5</sup> On appeal, this Court reversed the conviction on the basis that the Superior Court failed to account for Banther's conspiracy acquittal when it allowed the State to argue that he could be convicted as an accomplice for having "agreed to aid" Schmitz in planning the murder ("the Court's 2005 decision").<sup>6</sup>

(5) Upon return of the case to the Superior Court and the scheduling of a third trial, Banther filed a "Motion to Dismiss Indictment, or in the Alternative to Limit Evidence and Argument." Banther argued that dismissal

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<sup>3</sup>*Banther v. State*, 823 A.2d 467, 484 (Del. 2003).

<sup>4</sup>*Id.*

<sup>5</sup>It appears from the Superior Court docket that Banther pleaded guilty to Forgery in the Second Degree and Theft.

<sup>6</sup>*Banther v. State*, 884 A.2d 487, 489 (Del. 2005).

of the indictment was warranted because (i) there is insufficient evidence to prove that he carried out the murder by himself and (ii) any attempt by the State to prove that he carried out the murder by himself would violate the Court's 2005 decision as well as principles of due process and fundamental fairness.

(6) By order dated July 18, 2006, the Superior Court denied the motion to dismiss indictment, concluding that there was nothing in the Court's 2005 decision or otherwise that bars a retrial of Banther on an accomplice theory, "if supported by the evidence."<sup>7</sup> Nonetheless, the Superior Court granted Banther's alternative request to limit evidence and arguments, stating that:

the State is precluded from arguing at trial that [Banther] and Schmitz conspired or planned together in advance to murder the victim or that [Banther] agreed to aid Schmitz in planning or committing the murder. To the extent that this ruling grants less than [Banther's] full alternative request, it is without prejudice to [Banther] to raise at trial any and all objections concerning, argument, admission of evidence, or instructions which he believes would constitute error under [the Court's 2005 decision], as well as all other objections on any ground.<sup>8</sup>

(7) Banther filed a *pro se* notice of appeal from the Superior Court's July 18, 2006 decision. The appeal was dismissed by the Court on the basis

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<sup>7</sup>*State v. Banther*, 2006 WL 2337355 (Del. Super. Ct.).

<sup>8</sup>*Id.*

that the Delaware Constitution limits the Court's appellate jurisdiction in criminal matters to final judgments.<sup>9</sup>

(8) Thereafter, Banther, through his counsel, filed the pending petition for a writ of prohibition. The State filed an answer and motion to dismiss the petition.<sup>10</sup>

(9) This Court may issue a writ of prohibition to prevent the Superior Court from proceeding in a matter where it has no -- or has exceeded -- jurisdiction and the traditional appeal route is unavailable or will not provide an adequate remedy at law.<sup>11</sup> The decision to issue a writ of prohibition rests within the sound discretion of the Court and in view of the particular circumstances of the case.<sup>12</sup>

(10) "The right to appeal a criminal conviction is generally considered a complete and adequate remedy to review all of the questions presented in a criminal proceeding."<sup>13</sup> The Court has held, however, that the right of appeal

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<sup>9</sup>*Banther v. State*, 2006 WL 2707425 (Del. Supr.).

<sup>10</sup>It appears from the docket that the Superior Court stayed Banther's trial pending resolution of the petition.

<sup>11</sup>*In re Hovey*, 545 A.2d 626, 628 (Del. 1988).

<sup>12</sup>*Id.* at 629.

<sup>13</sup>*Id.* at 628.

is not an adequate remedy when it is “clear and unmistakable” that a trial would be “a futile procedure if it would inevitably be determined on appeal that the trial court lacked the jurisdiction to hear the case.”<sup>14</sup> Also, the Court has held that the right of appeal after a conviction does not adequately redress a double jeopardy claim when the trial and appeal are likely to be prolonged.<sup>15</sup>

(11) In his petition in this Court, Banther argues that, under the doctrine of collateral estoppel and the double jeopardy clauses of the United States and Delaware constitutions, he is entitled to a writ of prohibition barring his third trial in the Superior Court. Banther argues that a writ of prohibition is warranted because any conviction arising from a third trial in the Superior Court would undoubtedly be reversed on appeal under the Court’s 2005 decision.

(12) The Court has carefully considered the parties’ positions and has concluded that Banther’s petition for a writ of prohibition should be denied. Contrary to Banther’s position, it is not clear and unmistakable that a third trial is futile due to insufficient evidence, or that any conviction would be reversed on appeal under the doctrines of collateral estoppel and/or the prohibition

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<sup>14</sup>*Id.* at 629.

<sup>15</sup>*Id.*

against double jeopardy. Moreover, Banther has not demonstrated (nor do the circumstances of his case or the law suggest) that if he is convicted, the appellate remedy will be insufficient to address his claims,<sup>16</sup> including any claims touched upon in this Order.<sup>17</sup>

NOW, THEREFORE, IT IS ORDERED that the State's motion to dismiss is GRANTED. Banther's petition for a writ of prohibition is DISMISSED.

BY THE COURT:

/s/ Myron T. Steele  
Chief Justice

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<sup>16</sup>*Compare In re State of Del.*, 433 A.2d 325, 326 (Del. 1981) (denying writs of mandamus and prohibition, but noting that trial judges "should be alert . . . to the need to make a record which permits appellate review"), and *In re State of Del.*, 1986 WL 18255 (Del. Supr.) (denying writs of mandamus and prohibition, and noting the lack of precedent for extraordinary relief to review evidentiary ruling or content of jury instruction), and *In re State of Del.*, 597 A.2d 1 (Del. 1991) (granting mandamus relief prior to penalty hearing (citing *In re State of Del.*, 433 A.2d 325 (1981))).

<sup>17</sup>*See In re State of Del.*, 1986 WL 18255 (Del. Supr.) (denying writs of prohibition and mandamus, but reserving right to determine underlying issues on appeal, if necessary).