IMPORTANT NOTICE
NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

RENDERED: NOVEMBER 26, 2008
NOT TO BE PUBLISHED

FINAL
DATE 12-17-08 Ella Graham, D.C.

Supreme Court of Kentucky

2008-SC-000457-OA

CECIL NEW APPELLANT

V. ORIGINAL ACTION IN SUPREME COURT

KENTUCKY COURT OF APPEALS, ET AL APPELLEE

MEMORANDUM OPINION OF THE COURT

DENYING

Appellant, Cecil New, moves this Court to enter an order prohibiting further proceedings in a Court of Appeals action and directing the Court of Appeals to dismiss that action without prejudice in order to permit re-filing the petition in this Court. Appellant argues the Court of Appeals lacks subject-matter jurisdiction to entertain an original action arising from a death-eligible criminal prosecution in circuit court. At issue is whether language in Skaggs v. Commonwealth, 803 S.W.2d 573, 577 (Ky. 1990), expanded this Court's interpretation of the scope of Ky. Const. § 110(2)(b) and CR 74.02(2) (both of which provide for appeals of judgments imposing the death sentence coming directly to this court) so as to divest the Court of Appeals of subject-matter jurisdiction over pre-judgment original actions in capital offense cases.

Facts

Appellant was charged with two (2) capital offenses and other lesser offenses by an indictment returned on December 5, 2007, for kidnapping and killing 4-year-old Cèsar Ivan Aguilar-Cano during the summer of 2007. On January 23, 2008, the Commonwealth filed a notice of aggravating circumstances pursuant to KRS 532.025, thus making the prosecution a death-eligible case. The Commonwealth also filed approximately 3,000 pages of written discovery concerning its investigation of the crimes.

On or about January 14, 2008, Appellant moved to seal all discovery filed with the circuit court, claiming that having discovery open to the public and news media would deprive him of his right to a fair trial. On January 21, 2008, the Louisville Courier-Journal newspaper (hereinafter Courier-Journal), intervened to oppose the motion to seal the discovery. On March 3, 2008, the Jefferson Circuit Court granted Appellant's motion and sealed all discovery in the court record.

Relying on Courier-Journal and Louisville Times Co. v. Peers, 747 S.W.2d 125, 130 (Ky. 1988), the Courier-Journal then instituted an original action in the Court of Appeals seeking a writ of prohibition or mandamus directing the Jefferson Circuit Court to unseal the court records. Citing to Skaggs, Appellant moved to dismiss the original action, arguing that the Court of Appeals lacked jurisdiction over the action in light of Skaggs' ruling that "the Court of Appeals is without authority to review any matter affecting the imposition of the death

sentence." Skaggs, 803 S.W.2d at 577. The Court of Appeals denied Appellant's motion in an order dated May 29, 2008, and on June 25, 2008, Appellant filed with this Court a petition in the nature of prohibition or mandamus, naming the Court of Appeals as Appellee. He also moved for an order prohibiting further proceedings in the Court of Appeals until such time as this Court rules on this petition, which this Court passed to the merits.

Court of Appeals Jurisdiction

We begin with Courier-Journal's intervention in this case. Pursuant to our holding in Peers, when a trial court forecloses public access to court proceedings or court records, media representatives have the right to intervene on behalf of the public and to request a hearing on the matter. Peers, 747 S.W.2d at 130. Further, once a media representative moves to intervene and requests a hearing, the representative may attack an adverse ruling by petitioning the Court of Appeals for a writ of prohibition or mandamus. Id. at 129; see also Roman Catholic Diocese of Lexington v. Noble, 92 S.W.3d 724, 728 (Ky. 2002). Here, following the trial court's decision to seal the discovery records in Appellant's criminal case, the Courier-Journal sought such a writ.

Arguing the Court of Appeals lacked subject-matter jurisdiction, Appellant moved for an order dismissing the Courier-Journal's petition. Although Appellant acknowledges that, generally, the Court of Appeals is the proper forum to hear such a petition, he argues that the last

paragraph in Skaggs and the example of St. Clair v. Roark, 10 S.W.3d 482 (Ky. 1999) establish a death penalty exception to the general rule. We disagree.

In Skaggs, we stated that "the Court of Appeals is without authority to review any matter affecting the imposition of the death sentence." Skaggs, 803 S.W.2d at 577. Appellant therefore argues that the Skaggs language expanded upon our interpretation of the scope of Ky. Const. § 110(2)(b) and CR 74.02(2) to divest the Court of Appeals of jurisdiction over pre-judgment original actions that affect the imposition of the death penalty. To support that proposition, Appellant cites St. Clair, where an original action against a circuit judge was brought directly to this Court.

We have subsequently explained, however, that our holding in Skaggs is limited to matters that actually *affect the imposition* of a death sentence. See, e.g., Cardine v. Commonwealth, 102 S.W.3d 927, 928-929 (Ky. 2003) (judgment or order denying post-conviction motion in a death penalty case is not a judgment imposing a sentence and, therefore, an appeal from it is addressable to the Court of Appeals); Foley v. Commonwealth, 55 S.W.3d 809, 810 (Ky. 2000) (accepting original jurisdiction in death row prisoner's appeal of denial of motion for new trial based on newly discovered evidence); McQueen v. Parker, 950 S.W.2d 226 (Ky. 1997) (accepting original jurisdiction over interlocutory proceeding concerning a stay of execution); Woodward v. Commonwealth, 949 S.W.2d 599, 601 (Ky. 1997) (accepting original jurisdiction over

death row prisoner's appeal of circuit court's denial of motion to vacate his sentence).

We further note that St. Clair is not implicated in the instant case as the Appellant in that case was seeking a writ of prohibition or mandamus to preclude the death penalty as a possible punishment in a capital case with Double Jeopardy implications. Here, Appellant is merely seeking to assert a lack of jurisdiction in a matter pertaining to media access to discovery materials. Thus, none of those factors are at play.

Accordingly, we reaffirm our ruling in Skaggs that "the Court of Appeals is without authority to review any matter *affecting the imposition of the death penalty.*" Skaggs, 803 S.W.2d at 577 (emphasis added). However, implicit in that ruling is that general procedural rules must be followed in every matter not involving imposition of the death penalty. Here, the Courier-Journal's petition to the Court of Appeals concerns access to sealed court records and its resolution will in no way affect the imposition of the death penalty. Therefore, Skaggs and its progeny do not divest the Court of Appeals of the jurisdiction that is conveyed in SCR 1.030(3) and recognized in Peers. The Court of Appeals therefore has original jurisdiction over the Courier-Journal's petition, pursuant to SCR 1.030(3), CR 76.36, and Peers.

Conclusion

For the foregoing reasons, Appellant's motion for stay of proceedings and petition for relief pursuant to Ky. Const. § 110(2)(a) are hereby denied.

All sitting. All concur.

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