[Cite as *Guerriero v. Dept. of Rehab. & Corr.*, 2002-Ohio-5149.]

Please See Erratum to Opinion at Guerriero v. Dept. of Rehab. & Corr., 2002-Ohio-7486.

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

ASHTABULA COUNTY, OHIO

ANTHONY W. GUERRIERO, JR.,	:	**O P I N I O N**
Plaintiff-Appellant,	:	
		CASE NO. 2001-A-0062
- vs -	:	
DEPARTMENT OF REHABILITATION AND CORRECTION, et al.,	:	
	:	
Defendants-Appellees.	:	

Civil Appeal from the Court of Common Pleas, Case No. 2000 CV 862

Judgment: Affirmed.

Anthony W. Guerriero, Jr., pro Se, PID: R139-999, Grafton Correctional Institution, 2500 South Avon Belden Road, Grafton, OH 44044 (Plaintiff-Appellant).

Betty D. Montgomery, Attorney General, and *Kelley A. Sweeney,* Assistant Attorney General, Corrections Litigation Section, 615 West Superior Avenue, 11th Floor, Cleveland, OH 44113-1899 (For Defendants-Appellees Department of Rehabilitation and Correction, Ohio Adult Parole Authority, and Larry Mathews).

Thomas L. Sartini, pro se, Ashtabula County Prosecutor, 25 West Jefferson Street, Jefferson, OH 44047 (Defendant-Appellee).

DIANE V. GRENDELL, J.

{¶1} Anthony Guerriero, Jr. ("appellant") appeals the July 27, 2001 judgment entry of the Ashtabula County Court of Common Pleas, staying the proceedings in the

case now before us for review. The trial court's decision to stay the proceedings in the instant case was made upon review of a Motion to Change Venue, filed on July 10, 2001, by the Ohio Department of Rehabilitation and Correction ("appellees"). For the following reasons, we affirm the decision of the trial court in this matter.

{¶2} On February 10, 1987, appellant entered into a plea bargain with the Ashtabula County Prosecutor's office. In that plea bargain, appellant pled guilty to the crimes of attempted murder and abduction in exchange for the prosecution's dismissal of the kidnapping, aggravated robbery, gross sexual imposition, and attempted "aggravated" murder charges that were pending against appellant. As a result of that plea, appellant is serving an indefinite term of incarceration spanning twelve to thirty-five years.

{¶3} On January 12, 2000, appellant appeared before the Ohio Adult Parole Authority ("OAPA"). Pursuant to OAPA guidelines, appellant was denied parole. On September 20, 2000, appellant was again denied parole pursuant to the OAPA guidelines.[1] On December 21, 2000, appellant filed the underlying complaint for declaratory judgment and injunctive relief. In his complaint, appellant alleged that the OAPA guidelines required the parole board to improperly consider the crimes noted on appellant's indictment, as opposed to the crimes actually contained in appellant's plea agreement, in determining appellant's eligibility for parole. As a result, appellant claimed that the contractual rights arising from his plea agreement with the prosecutor had been breached.

[1] As indicated by the record, appellant's next parole hearing is scheduled for February 2005.

{¶4} On January 18, 2001, appellees filed a motion to dismiss the instant case. A public defender was appointed to represent appellant on June 26, 2001. Appellees' motion to dismiss was denied on June 28, 2001. Subsequently, appellees filed a Motion to Change Venue on July 10, 2001. In their Motion to Change Venue, appellees argued that since the alleged breach of contract took place in either Lorain or Franklin County, Civ.R. 3(B) required the instant case be moved to either of those counties. As additional support for the change of venue, appellees made mention in their motion to the trial court of the fact that there is a class action pending on an identical matter in the Franklin County Court of Common Pleas. See, *Ankrom v. Hageman*, Franklin C.C.P. Case No. 01 CVH 02-1563. Appellees also noted in their motion that the class action in *Ankrom* was certified pursuant to Civ.R. 23(B)(2).[2] On July 19, 2001, the Ohio Public Defender filed a Motion for Leave to Withdraw as counsel for appellant due to a conflict of interest.

{¶5} On July 27, 2001, based upon the information contained in appellees' Motion to Change Venue, the trial court ordered that all proceedings in the instant case be stayed, "pending the determination of the Plaintiff's status as a member of the class in *Ankrom*, *** and/or the disposition of that case." In ordering the stay, the trial court stated, "the ultimate disposition of the class action would seem to be dispositive of the Plaintiff's case before this court." Appellant subsequently filed a timely appeal and asserts four assignments of error for our review.

[2] A class action suit certified under Civ.R. 23(B) does not require notice to all class members, does not allow opting out, and a decision issued under this rule would bind all members of the class. We also note that the issue of whether or not appellant is a member of the *Ankrom* class remains unresolved.

{¶6} "[1.] The trial court errer (sic) to stay proceedings: while motion of appellant's counsel for leave to withdraw filed by the Ohio Public Defender is pending.

{¶7} "[2.] The trial court erred to stay all proceedings: Denying appellant's right to justice without delay.

{¶8} "[3.] The trial court erred to stay all proceedings, determined on outcome of the Ankrom v. Hageman class action, case no. 01CVH-02-1563 Franklin Co.; where class action cannot adequately represent the individual claims put forth by appellant in case no. 2000-CV-862.

{¶9} "[4.] The trial court abused its discretion, granting request for stay, ex parte."[3]

{¶10} As all four assignments of error are based on the trial court's decision to stay the proceedings, we proceed to address them collectively.

{¶11} A trial court's decision to stay proceedings shall not be overturned absent an abuse of discretion. *Glenmoore Builders, Inc. v. Kennedy* (December 7, 2001), 11th Dist. No. 2001-P-0007, 2001 Ohio App. LEXIS 5449. An abuse of discretion is more than an error of law or judgment; it implies that the action of the trial court was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶12} In his first and third assignments of error, appellant asks this court to address arguments pertaining to the unresolved issue of whether he is a member of the *Ankrom* class action suit under Civ.R. 23(B)(2). Appellant's class action status was not resolved by the trial court in this case and is therefore not an appealable issue. See,

[3] Appellant's fourth assignment of error was set forth in a supplemental brief, filed with this court on November 28, 2001.

Chef Italiano Corp. v. Kent State Univ. (1989), 44 Ohio St.3d 86. As a result, we decline to consider arguments pertaining to said issue as part of this appeal.

{¶13} At this point, we emphasize that the only issue of relevance before this court is whether or not the trial court abused its discretion in ordering a stay of the proceedings in the instant case.

{¶14} Appellant argues in his second assignment of error that, by waiting for the outcome of *Ankrom,* the trial court is denying appellant his right to have "justice administered according to law without denial or delay." *Armstrong v. Duffy* (1951), 90 Ohio App. 233. *Armstrong* is inapplicable to the instant case. The passage "*** without denial or delay", as used in *Armstrong*, refers to the rights of employees to bring suit against their employers in a court of law despite their employer's attempts to keep them from doing so. Thus, *Armstrong* is easily distinguished from the instant case as appellant has already initiated an action in a court of law, and the action is one that appellant will be able to litigate to its conclusion.

{¶15} In his fourth and final assignment of error, appellant argues that the trial court abused its discretion by ordering the stay based on ex parte communications with appellees. The record indicates that appellees specifically directed the trial court's attention to *Ankrom* in their motion to change venue. Appellant was then served with said motion, containing the reference to *Ankrom*, and filed a response to said motion on July 17, 2001. As a result, appellant had sufficient opportunity to reply to appellees' reference to *Ankrom* in his July 17, 2001, response, but failed to do so. Based on the information contained in appellees' motion to change venue, the trial court subsequently exercised its discretion by issuing a stay order. There is nothing in the record that

supports appellant's claim that the trial court's decision to stay the proceedings was based on ex parte communication with appellees.

{¶16} Courts have the power to stay proceedings pending resolution of potentially dispositive developments. *State v. Hochhausler* (1996), 76 Ohio St.3d 455, 464; *State ex rel. Smith v. Friedman* (1970), 22 Ohio St.2d 25. Said authority flows from the inherent power of the courts to control their dockets. Id. Among the factors that courts have held warrant a stay are "the efficiency and judicial economy that results from staying matters pending resolution of potentially dispositive developments." *Zellner v. Bd. of Ed, of Cincinnati* (1973), 34 Ohio St.2d 199, 202.

{¶17} The record indicates that the class action filed in *Ankrom* pertains specifically to breach of contract claims arising from the OAPA's interpretation of parole guidelines with respect to plea bargain agreements. The claims raised in *Ankrom* appear identical to the claims raised in the instant case. It is undisputed fact that the class in *Ankrom* was certified under Civ.R. 23(B). While we do not rule on the issue, we agree with appellees that appellant may be a member of the *Ankrom* class. Based on the potentially binding effects of the *Ankrom* court's decision on the instant case, we hold that it was not unreasonable or arbitrary for the trial court in this case to stay the proceedings pending a decision as to appellant's status as a member of the *Ankrom* class, or an actual decision in the *Ankrom* case itself.

{¶18} Based on the holdings of *Hochhausler, Friedman,* and *Zellner*, we find that the trial court did not abuse its discretion in staying the proceedings pending the outcome of the potentially dispositive developments in *Ankrom.* Furthermore, subsequent to the trial court's stay order on July 27, 2001, the Supreme Court of Ohio

has since certified that a conflict exists between decisions issued by the Ohio Court of Appeals' Second and Third Districts on exactly the same issue contained in *Ankrom* and the instant case.[4]

{¶19} For the foregoing reasons, we hold that appellant's first, second, third, and fourth assignments of error are without merit.

{¶20} The trial court's order to stay the proceedings in this matter is hereby affirmed.

JUDITH A. CHRISTLEY, J., concurs,

DONALD R. FORD, J., dissents with dissenting opinion.

DONALD R. FORD, J., dissenting.

{¶21} While this writer agrees with the substance of the majority's merit analysis of the issues raised in this appeal, I respectfully dissent from the majority opinion based upon my conclusion that this court does not have jurisdiction to decide this case on its merits due to lack of a final appealable order.

{¶22} After having been denied parole twice by the OAPA, appellant sought relief through the underlying declaratory judgment action. Subsequently, it came to the attention of the trial court that a class action was pending on the identical issue raised

[4] See *Randolph v. Ohio Adult Parole Authority* (Jan. 21, 2000), 2nd Dist. No. 99CA17, 2000 Ohio App. LEXIS 121; *Layne v. Ohio Adult Parole Authority* (May 29, 2001) 3rd Dist. No. 9-2001-06, 2001 Ohio App. LEXIS 2371; *Houston v. Wilkinson* (June 29, 2001) 3rd Dist. No. 1-01-52, 2001 Ohio App. LEXIS 2915. (All three cases based upon an alleged breach of contract arising from the OAPA's use of indictment records, as opposed to the plea agreement, in determining parole eligibility.) The Ohio Supreme Court certified this conflict fit for review on October 10, 2001.

by appellant in the Franklin County Court of Common Pleas. See *Ankrom v. Hageman*, Franklin C.P. No. 01 CVH 02-1563, complaint filed March 26, 2001. Based on this information, the trial court issued a stay since "[t]he ultimate disposition of the class action would seem to be dispositive of [appellant's] case ***." Hence, the stay was issued pending the disposition of that class action. Appellant has appealed that decision.

{¶23} Pursuant to R.C. 2505.02(B), there are five types of orders which qualify as final appealable orders:

{¶24} "(1) An order that affects a substantial right in an action that in effect determines the action and prevents a judgment;

{¶25} "(2) An order that affects a substantial right made in a special proceeding or upon a summary application in an action after judgment;

{¶26} "(3) An order that vacates or sets aside a judgment or grants a new trial;

{¶27} "(4) An order that grants or denies a provisional remedy and to which both of the following apply:

{¶28} "(a) The order in effect determines the action with respect to the provisional remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy;

{¶29} "(b) The appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action.

{¶30} "(5) An order that determines that an action may or may not be maintained as a class action."

{¶31} In the case sub judice, it is clear that the motion for stay is not one that: (1) determines the entire action; (2) was made in a special proceeding; (3) vacates or sets aside a judgment or grants a new trial; or (4) determines a class action status. Hence, the only other possible type of final appealable order pertains to provisional remedies under R.C. 2505.02(B)(4). For the present case to fall within the ambit of that statutory provision, both subsections (a) and (b) must apply. There is no doubt but that subsection (a) applies as the trial court's order, in effect, determines that action with respect to the provisional remedy and prevents a judgment in the action in favor of appellant with respect to the provisional remedy.

{¶32} The more difficult question is whether subsection (b) applies; namely, whether appellant would be denied a meaningful or effective remedy by delaying his appeal until after final judgment had been issued as to all issues and claims in the action. Under the facts of this case, this question must be answered in the negative.

{¶33} To begin with, we can take judicial notice of the fact that the substantive issue raised by appellant in his declaratory judgment action has been taken in by the Supreme Court of Ohio subsequent to the filing of the instant appeal. See *Layne v. Ohio Adult Parole Auth*. (2001), 93 Ohio St.3d 1448. Therefore, while the trial court would not have been aware of this fact at the time it issued the stay, it still has an effect on whether appellant would be denied a meaningful or effective remedy by having to delay his appeal.

{¶34} The possibility of delayed justice must be balanced against the principles of judicial economy. It is well established that courts have the inherent power to control their own dockets so as to promote efficiency and judicial economy. As the majority

admits, this includes the power to stay proceedings pending resolution of potentially dispositive developments. *State v. Hochhausler* (1996), 76 Ohio St.3d 455, 464; *State ex rel. Zellner v. Bd. of Ed. of Cincinnati* (1973), 34 Ohio St.2d 199, 202.

{¶35} In the instant cause, appellant is in the same position as the other plaintiffs who now sit and wait for a decision from the Supreme Court of Ohio. Even if this court had jurisdiction to consider this appeal, based upon the opinion of the majority, it is clear that appellant's position would not change as the stay would remain. Moreover, were the trial court to decide the case on its merits in favor of appellant, common sense dictates that the Ohio Adult Parole Authority would be hesitant to act knowing that a definitive decision from the Supreme Court would be issued shortly.

{¶36} Alternatively, even without the Supreme Court's decision to accept the conflict appeal in *Ankrom*, this writer reaches the same dispositive conclusion regarding the finality of the trial court's order in this case.

{¶37} Here appellant filed his action in the trial court prior to Judge Cain's issuance of an injunction pursuant to Civ.R. 23(B)(2) in the class action in *Ankrom*, and, thus, appellant's efforts are not subject to any restraint as a result of Judge Cain's decree. Nevertheless, this does not eviscerate the underlying logic applicable to the issue of finality.

{¶38} Thus, keeping the principles of judicial economy in mind and the unique circumstances before us which are fact specific to this case, this writer is compelled to conclude that appellant would not be denied a meaningful or effective remedy by having to delay the trial until a definitive ruling in the class action suit involving the identical issues raised here is made, regardless of whether the Supreme Court of Ohio has

reached its decision on the merits of appellant's substantive claim. There has been no legal showing that "the cow would be out of the barn." *Amato v. General Motors Corp*. (1981), 67 Ohio St.2d 253, overruled on other grounds by *Polikoff v. Adam* (1993), 67 Ohio St.3d 100, 107. Hence, R.C. 2505.02(B)(4)(b) has not been satisfied. Accordingly, the judgment appealed from is not a final appealable order. Without a final appealable order, this court is without jurisdiction to consider this appeal and, therefore, it should be dismissed.

{¶39} Based upon the foregoing analysis, I respectfully dissent.