

**THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
TRUMBULL COUNTY, OHIO**

IN THE MATTER OF: : **MEMORANDUM OPINION**
MATTHEW WHALEY, :
ALLEGED DELINQUENT CHILD : **CASE NO. 2005-T-0137**

Criminal Appeal from the Court of Common Pleas, Juvenile Division, Case No. 2005 JD 336.

Judgment: Appeal dismissed.

Dennis Watkins, Trumbull County Prosecutor, Administration Building, Fourth Floor, 160 High Street, N.W., Warren, OH 44481-1092 (For Plaintiff-Appellee).

Matthew Whaley, pro se, 739 Belmont, Niles, OH 44446 (Defendant-Appellant).

CYNTHIA WESTCOTT RICE, J.

{¶1} On November 14, 2005, appellant, Matthew Whaley, filed a notice of appeal with this court from an October 19, 2005 judgment of the Trumbull County Court of Common Pleas, Juvenile Division.

{¶2} In the October 19, 2005 judgment entry, the trial court concluded that a conflict existed between appellant's counsel and appellant. Therefore, the trial court disqualified appellant's counsel and appointed a public defender. It was from that entry that appellant filed his notice of appeal on November 14, 2005.

{¶3} The Supreme Court has held that a trial court order that grants the state's motion to disqualify a defendant's counsel in a criminal case is not a final appealable order. *State ex rel. Keenan v. Calabrese* (1994), 69 Ohio St.3d 176, 178. Specifically, the Court stated that "[p]ursuant to *Polikoff v. Adam* (1993), 67 Ohio St.3d 100], it is apparent that the pretrial order granting a disqualification [of counsel] motion in a criminal case is not a final appealable order." *Id.* Moreover, the Court stated that an appeal following conviction "would be neither impractical nor ineffective." *Id.* at 179. As the instant matter is a juvenile delinquency case, it qualifies as a "criminal proceeding."

{¶4} The amended version of R.C. 2505.02, the final appealable order statute, which applies to all cases pending as of July 22, 1998, reads in pertinent part:

{¶5} "(A) As used in this section:

{¶6} "(1) 'Substantial right' means a right that the United States Constitution, the Ohio Constitution, a statute, the common law, or a rule of procedure entitles a person to enforce or protect.

{¶7} "(2) 'Special proceeding' means an action or proceeding that is specially created by statute and that prior to 1853 was not denoted as an action at law or a suit in equity.

{¶8} "(3) 'Provisional remedy' means a proceeding ancillary to an action, including, but not limited to, a proceeding for a preliminary injunction, attachment, discovery of privileged matter, suppression of evidence, ***.

{¶9} "(B) An order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is one of the following:

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

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

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

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

{¶14} “(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.

{¶15} “(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.

{¶16} “(5) An order that determines that an action may or may not be maintained as a class action;

{¶17} “(6) An order determining the constitutionality of any changes to the Revised Code made by Am. Sub. S.B. 281 of the 124th general assembly, ***.”

{¶18} Applying the foregoing statute to the instant matter, the trial court’s judgment entry disqualifying defense counsel is clearly not an order that determines the entire action, sets aside a judgment, grants a new trial or determines class action status. Hence, R.C. 2505.02(B)(1), (3) and (5) are inapplicable.

{¶19} Turning to R.C. 2505.02(B)(2), an order affecting a substantial right made in a special proceeding, the legislature adopted the definition of special proceeding set

forth in *Polikoff*, which instructed courts to address the special proceeding prong and then, only if that prong is met, to proceed to the question of whether substantial rights are affected. A criminal action does not fit the definition of a special proceeding as set forth in R.C. 2505.02(B)(2) because it was not specially created by statute and was in existence prior to 1853. *State v. Saadey* (June 30, 2000), 7th App. No. 99 CO 49, 2000 WL 1114519, at 2.

{¶20} Therefore, we shift to R.C. 2505.02(B)(4), which specifies situations when an order granting or denying a provisional remedy is final and appealable. We must decide if appellant would be precluded from a meaningful or effective remedy on appeal following a final judgment as to the entire action. R.C. 2505.02(B)(4)(b). If appellant will not be denied a meaningful or effective remedy by waiting to appeal the pretrial order granting disqualification, then the order may not be appealed now.

{¶21} Here, based on the Supreme Court precedent in *Keenan*, it is our position that appellant will not be denied meaningful and effective review by waiting to appeal the disqualification of counsel until the case is concluded.

{¶22} Since the trial court's judgment entry is not a final appealable order and is interlocutory, we are compelled to dismiss appellant's appeal.

{¶23} Appeal dismissed.

DONALD R. FORD, P.J.,

COLLEEN MARY O'TOOLE, J.,

concur.