EFiled: Mar 09 2016 01:02PM EST
Filing ID 58693354
Case Number 530,2015

IN THE SUPREME COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE	)	
	)	
Plaintiff-Below,	)	
Appellant,	)	**No. 530, 2015**
	)	
v.	)	**On Appeal from the Superior**
	)	**Court of the State of Delaware**
ISAIAH W. McCOY,	)	**in and for Kent County**
	)	**Cr. ID. No. 1005008059A**
Defendant-Below	)	
Appellee.	)	

REPLY BRIEF OF APPELLANT
DELAWARE DEPARTMENT OF CORRECTION

STATE OF DELAWARE
DEPARTMENT OF JUSTICE

/s/ Jason W. Staib
Jason W. Staib (DE Bar No. 3779)
Deputy Attorney General
Delaware Department of Justice
820 North French Street
Wilmington, DE 19801
Phone: (302) 577-8304

Counsel for Appellant

Date: March 9, 2016

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Constitutional Provisions

Statutes and Rules

Other Authorities

I. THIS COURT HAS JURISDICTION OVER THIS APPEAL UNDER THE COLLATERAL ORDER EXCEPTION TO THE FINAL ORDER RULE.

The Department[1] filed this appeal as a matter of right under this Court's decision in *Gannett Co. v. State*.[2] In *Gannett*, this Court addressed the jurisdictional limitations on the Court's ability to hear interlocutory appeals in criminal cases.[3] That case involved an appeal by a local newspaper publisher that sought to vacate a Superior Court order requiring that jurors' names be kept confidential during the highly publicized capital murder trial of Steven Pennell.[4] The Court determined that it had jurisdiction because, as to the newspaper publisher, the Superior Court order was "final" under the "collateral order" exception first announced by the U.S. Supreme Court in *Cohen v. Beneficial Indus. Loan Corp*.[5]

Under collateral order doctrine, an order entered in criminal proceedings is considered final and appealable if it: (1) determines a civil matter independent of

---

[1] Capitalized terms used but not defined herein have the meanings ascribed to such terms in the Department's corrected opening brief ("Open. Br.").
[2] 565 A.2d 895 (Del. 1989).
[3] The Court cited Del. Const. art. IV, § 11(1)(b) and *State v. Cooley*, 430 A.2d 789, 791 n.2 (1981), for the general proposition that the Court does not have jurisdiction to hear interlocutory appeals in criminal cases. *Gannett*, 565 A.2d at 899. The Court did not address in *Gannett* the statutory exceptions to this general rule cited in 10 *Del. C.* § 9902, which provides the "State" with an absolute right of appeal from certain orders entered in criminal cases. None of those statutory exceptions applies here because, among other reasons, the DOC is not a party to criminal cases and is not "the State" within the meaning of § 9902.
[4] *Gannett*, 565 A.2d at 896-897.
[5] 337 U.S. 541, 546-547 (1949) (holding that federal appeals courts have jurisdiction under 28 U.S.C. § 1291 over appeals from orders that finally determine "a claimed right which is not an ingredient of the [underlying] cause of action and does not require consideration with it").

the issues to be resolved in the underlying criminal proceeding, (2) binds persons who are not parties to the criminal proceedings and (3) had a substantial, continuing effect on important rights.[6] All three requirements are clearly met.

A. The Orders Determined Civil Matters Independent of the Issues to be Resolved in the Criminal Case.

The Transfer Order and the Superior Court's order denying the Department's timely request for reconsideration (the "**Reconsideration Order**," and together with the Transfer Order, the "**Orders**") did not address in any way the charges or defenses at issue in the underlying capital murder case. The Orders did not determine McCoy's guilt or innocence or any factual or legal matter relevant to the merits of the case against McCoy.

The Transfer Order finally determined the merits of McCoy's request to be transferred out of SHU and into general population based on alleged interference with his *civil* rights - namely, his Sixth Amendment right to assistance of counsel. The Reconsideration Order rejected and finally determined the Department's arguments that McCoy is a serious threat to safety and security, that the Transfer Motion was procedurally defective and granted on an incomplete and incorrect factual record, and that the Transfer Motion presented legal issues concerning the Superior Court's authority that had not been briefed or otherwise adequately

[6] *Gannett*, 565 A.2d at 900.

addressed. The issues determined by the Orders are separable from and collateral to the rights and issues to be resolved in the underlying criminal case.

B. The Orders Bind Persons Who Are Not Parties to the Criminal Proceedings.

Both of the Orders directly affected and bound the Department, its officials, including Commissioner Coupe and Warden Pierce, and its employees, including correctional officers and classification personnel. The Department and its officials and employees are not named parties in the criminal case and play no role, direct or indirect, in the State's prosecution of McCoy.

McCoy's assertion that the State of Delaware is a party in both the underlying criminal proceedings and this appeal is overly simplistic and ignores the critical legal and operational distinctions between the agencies and departments of State government and the divided nature of its executive branch.

The Delaware Department of Justice ("**DDOJ**") and the DOC are separate legal entities with distinct functions. The DDOJ is a state agency headed by the Attorney General.[7] The Attorney General is an elected, statewide official and the holder of a distinct and critical constitutional office in the divided executive branch of this State's system of government.[8] The Attorney General serves as the chief

[7] *See* 29 *Del. C.* § 2502.

[8] Delaware's constitutional scheme provides for an independently elected Governor, Attorney General and other executive branch officers. *See* Del. Const. art. III, §§ 2, 21. This "non-unified" system of state government provides internal checks and balances within the executive

law officer of the State[9] and has exclusive control of "all criminal proceedings" in this State.[10] The Attorney General, operating by and through the DDOJ, serves as "the State" in criminal prosecutions.

The DOC is a state agency headed by a Commissioner appointed by the Governor.[11] The Commissioner serves at the pleasure of the Governor.[12] The DOC was "established to provide for the treatment, rehabilitation and restoration of offenders as useful, law-abiding citizens within the community."[13] The DOC has a duty to accept custody of all persons committed to it by courts of competent jurisdiction.[14] The DOC, the Commissioner and the officials and employees of the DOC are not parties to and have no role in criminal prosecutions.

McCoy's assertion that "the State," in the context of a criminal prosecution, encompasses every governmental agency of the State of Delaware, as well as every officer and employee of State government, ignores these critical distinctions and is extreme and unprecedented. Not surprisingly, McCoy has failed to cite a single decision or any other authority in support of his position.

---

department akin, by analogy, to the familiar "three branch" separation of powers structure of federal and state governments.

[9] *Darling Apartment Co. v. Springer*, 22 A.2d 397, 404 (1941).

[10] 29 *Del. C.* § 2504(6).

[11] 29 *Del. C.* § 8902(a).

[12] *Id*.

[13] 29 *Del. C.* § 6502(a).

[14] 29 *Del. C.* § 6502(b).

C. The Orders Have a Substantial, Continuing Effect on Important Rights.

The Department's officials and employees, despite their grave safety and security concerns, and notwithstanding their exclusive statutory authority over housing and classification, have been precluded by the Orders from housing McCoy, a high-risk, maximum-security detainee, in an appropriate security setting. Their hands are tied. Unless the Orders are overturned, or an order entered releasing McCoy from the Department's custody, McCoy will remain a risk to the safety of DOC employees, nursing staff, inmates and others and will continue to pose an ongoing threat to security.

McCoy is a violent felon with prior escape attempt and an extensive disciplinary record - one that includes a history of sexual misconduct involving repeated, intentional and disturbing acts perpetrated exclusively against female correctional officers and nursing staff.[15] The Department, through its classification boards and wardens, was granted and has exclusive statutory power and authority to classify and house inmates and to address the unique safety and security concerns presented by individual inmates.[16] The Department and its officers and employees have been precluded by the Order from exercising these powers vis-à-vis McCoy, with little or no regard for the safety and security of others.

[15] App'x at A78.
[16] *See generally* 11 *Del. C.* §§ 6527, 6529.

The Orders have a substantial, continuing effect on important rights of non-parties and are final and appealable now under the collateral order exception.[17] Given the stakes, the Department should not be forced to wait a year or more for the entry of a sentence or other final order disposing of the criminal case against McCoy.

II. QUESTIONS CONCERNING THE SUPERIOR COURT'S JURISDICTION AND POWER WERE NOT WAIVED AND SHOULD BE ADDRESSED BY THIS COURT.

In a further attempt to persuade this Court to ignore the important questions raised by the Department, McCoy attempts to invoke Supreme Court Rule 8. Specifically, McCoy asserts that the Department waived its right to challenge the Superior Court's exercise of jurisdiction and power over the classification and housing of inmates. McCoy's argument is rich with irony and short on substance.

Rule 8 provides that "[o]nly questions fairly presented to the trial court may be presented for review; provided, however, that when the interests of justice so require, [this] Court may consider and determine any question not so presented."[18] Rule 8 should not be invoked by parties who fail to give proper notice and otherwise fail to follow the rules and does not prevent review of fundamental questions concerning the jurisdiction and power of trial courts. The interests of

[17] McCoy's assertion that he would have had no right of appeal if the Transfer Motion had been denied is correct but ignores the well settled proposition that "appeals by nonparties warrant a different calculus of finality." *Finality-Orders Prior to Trial-Nonparty Orders*, 15B Fed. Prac. & Proc. Juris. § 3914.31 (2d ed.).

[18] *See* Del. Supr. Ct. R. 8.

justice require that the Department's challenges to the jurisdiction and power of the Superior Court be heard.

McCoy improperly sought to enforce his *civil* rights through motion practice in the context of a criminal prosecution. McCoy's "Motion to Transfer" is nowhere provided for or even contemplated in the Delaware Code or any rules of the courts of this state. McCoy could and should have instituted a separate civil action, whether sounding in mandamus or otherwise, to protect or enforce his Sixth Amendment right to counsel. Even assuming, for present purposes, that it was appropriate for McCoy to seek relief, civil in nature, from the Superior Court via motion in the context of a criminal case, the Department, *at the very least*, was entitled to notice of the Motion to Transfer and an adequate opportunity to respond. That did not happen.

McCoy, having sought affirmative relief against the Department, had a duty to serve the Department and should not be permitted to invoke Rule 8 to bar review of arguments that would have been raised in and decided by the trial court but for McCoy's own acts and omissions.

Further, Rule 8 should not prevent review of fundamental questions concerning the jurisdiction and power of trial courts.[19] This case involves

[19] *A. L. W. v. J. H. W.*, 416 A.2d 708, 712, n.6 (Del. 1980) (holding that interests of justice require that Court consider whether master had jurisdiction and power to enter a final decree of divorce).

important issues concerning the interplay between and boundaries of the Superior Court's duty to ensure a criminal defendant receives a fair trial and the Department's duty to maintain order and safety in its prison facilities. The core question here - *i.e.*, whether the Superior Court has jurisdiction and authority to reclassify and house detainees and inmates as it sees fit - implicates critical safety and security issues and should be decided to bring clarity and certainty to this important area of the law.

III. THE SUPERIOR COURT DOES NOT HAVE STATUTORY OR INHERENT AUTHORITY TO RECLASSIFY AND HOUSE INDIVIDUALS COMMITTED TO THE CUSTODY OF THE DEPARTMENT.

McCoy has cited no authority directly supporting the proposition that the Superior Court has authority over the classification and housing of detainees and inmates committed to the custody of the Department.[20] Instead, McCoy suggests that such authority derives from 10 *Del. C.* § 542(a), which, according to McCoy, bestows upon the Superior Court general supervisory power over the administration of prisons, including authority to dictate classification and housing.[21] In support, McCoy cites *Vick v. Dep't of Correction*.[22] McCoy also

[20] McCoy did not cite 11 *Del. C.* § 3902, which permits a sentencing court to require certain offenders to serve a period of "solitary confinement" lasting up to 3 months. This limited statutory authority does not purport to authorize a sentencing court to determine or reduce the security classification of an inmate, as the Superior Court did in this case.

[21] McCoy also suggests that 11 *Del. C.* § 6551 may be relevant here. That statute states only that the DOC "shall cooperate with the courts and with public and private agencies and offices to assist it in attaining its purposes." *Id.* Section 6551 is not a grant of jurisdiction or authority and

appears to argue that the Superior Court has inherent authority to dictate classification and housing under this Court's decision in *Bailey v. State*.[23] McCoy is mistaken.

A. Section 542(a) Does Not Grant Supervisory and Contempt Powers over Executive Branch Officials.

As previously explained, Section 542(a) is a limited grant of jurisdiction and supervisory power over inferior courts and other *judicial branch officers*.[24] The powers granted in Section 542(a) are limited to "examin[ing], correct[ing] and punish[ing] the contempts, omissions, neglects" of inferior judicial officers.[25] Section 542(a) was not intended to be, and, under separation of powers doctrine, cannot be construed as a grant of general supervisory jurisdiction and power over prison administrators or any other executive branch officials.[26] The *Vick* decision does not and cannot alter this analysis and does not support the extreme

---

does not purport to limit in any way the DOC's discretion and powers over the classification and housing of detainees and inmates.

[22] 1986 WL 8003 (Del. Super.). McCoy also references *State ex rel. Tate v. Cubbage*, 210 A.2d 555 (Del. Super. 1965), a mandamus action that did not involve or address Section 542(a). The Superior Court in that case was exercising and had "jurisdiction to issue, *upon application*, the writ of mandamus to lower tribunals, boards and agencies, inter alia, to compel performance of their official duties." *Schagrin Gas Co. v. Evans*, 418 A.2d 997, 998 (Del. 1980) (emphasis added). McCoy did not file an application for mandamus relief and did not proceed in the manner prescribed in 10 *Del. C.* § 564. *Cubbage* is inapposite.

[23] 521 A.2d 1069 (Del. 1987).

[24] S*ee* discussion in DOC's Open. Br., pp. 20-22.

[25] 10 *Del. C.* § 542(a).

[26] *See Superior Court v. State, Pub. Employment Relations Bd.*, 988 A.2d 429, 433 (Del. 2010) ("Under [the doctrine of separation of powers] each branch of the government must respect the power given to the other two branches. . . . [T]he Legislature is without power to limit the constitutional power of the [Executive] as a separate branch of government to run its own house.").

proposition urged by McCoy - namely, that the Superior Court has authority to reclassify and house detainees and inmates.

Vick involved a motion for appointment of counsel filed by an inmate who, unlike McCoy, filed a civil suit against the Department and several of its employees for alleged violations of his constitutional rights. The sole question presented was whether the Superior Court had authority to appoint counsel for an indigent prisoner in a civil suit.[27] The *Vick* court determined that it had inherent power to make the appointment if it could be demonstrated that the inmate lacked meaningful access to the courts by other alternatives.[28]

While the ultimate decision in *Vick* is unremarkable, the analysis leading to that decision is demonstrably incorrect. The *Vick* court's decision was premised, in large part, on its belief that Section 542(a) is "a plenary grant of power [over prison administration], which in order to be effective, could encompass the appointment of counsel for prisoners in civil matters."[29] The *Vick* court misconstrued the scope of its supervisory and contempt powers under Section 542(a). McCoy's reliance on *Vick* is misplaced.

---

[27] 1986 WL 8003, at *1.
[28] *Id*. at *2.
[29] *Id*. at *1. The *Vick* court, presumably mindful of glaring separation of powers issues, went on to state its view that the Superior Court's prison-related powers under Section 542(a) can only be exercised when there is "an arbitrary and capricious abuse of discretion by the prison authorities or where it is clearly shown that there has been a deprivation of constitutional rights of inmates." *Id*.

B. The Superior Court Does Not Have Inherent Authority to Reclassify and House of Detainees and Inmates.

This Court, in *Bailey*,[30] previously addressed the manner in which a trial court in a criminal case handled complaints about a detainee's access to counsel. The trial court in that case denied the defendant's motion to transfer out of SHU but did enter an order permitting the defendant unlimited access to his attorney and liberal telephone privileges.[31] This Court found that the manner in which the trial court handled the defendant's claim of interference, including subsequent warnings about possible contempt citations, "was exemplary and a model for the consideration of similar claims in the future."[32]

The *Bailey* decision does imply that the Superior Court, exercising criminal jurisdiction, has a certain degree of inherent authority to protect a detainee's Sixth Amendment right to effective assistance of counsel. The authority recognized in *Bailey*, however, was limited to the entry of orders ensuring or compelling an acceptable level of access.[33] The authority urged by McCoy is much broader and deeply troubling. Nothing in *Bailey*, or any other decision of this Court, suggests that the Superior Court has inherent authority in a criminal case to second-guess

---

[30] For a more detailed discussion of the *Bailey* decision, s*ee* DOC's Open. Br., pp. 31-32.
[31] *Id*. at 1084.
[32] *Id*. at 1085-1086.
[33] The remedy for interference with counsel must be tailored to the injury suffered and should not infringe society's competing interest in safe and secure prison facilities. *See Cooke v. State*, 97 A.3d 513, 527 (Del. 2014) (citing *Bailey*). The Superior Court in this case went far beyond what was necessary to address the alleged (and unproved) interference.

and countermand the Department's classification and housing decisions and thereby jeopardize the safety of others and the security of the Department's prison facilities.

IV. THE SUPERIOR COURT'S SIXTH AMENDMENT HOLDING IS UNPRECEDENTED AND INVALID AS A MATTER OF LAW.

The Superior Court determined that McCoy's Sixth Amendment rights were violated, not because of a lack of access to his court-appointed counsel, but rather, because of the Superior Court's belief that McCoy's time in SHU had such a negative effect on his mental and physical health that it impermissibly impaired his ability to meet or otherwise confer with defense counsel.[34] The Superior Court's decision is unprecedented and invalid as a matter of law.

The Sixth Amendment requires only that a detainee be provided an adequate opportunity to confer meaningfully with counsel. In this State, improper interference with this right has been found where prison officials interrupted telephone calls between the defendant and his counsel and destroyed or confiscated trial preparation materials.[35] Interference also has been found where *prior* policies and rules pertaining to attorney-client visits within SHU made it difficult to

[34] Trans. Or. at 4, Ex. A to Open. Br.
[35] *Bailey*, 521 A.2d at 1083.

schedule attorney-client visits, and where *prior* accommodations for attorney-client visits in SHU prevented an attorney from reviewing documents with his client.[36]

McCoy has cited no authority, from this State or otherwise, supporting the extreme proposition adopted by the Superior Court in this case – *i.e.*, the Sixth Amendment is violated whenever a defendant's mental or physical health is or may be negatively affected by restrictive housing conditions. The untenable rule announced by the Superior Court creates new rights and avenues of appeal, encourages malingering and sets a dangerous precedent. The Superior Court's holding, if affirmed, will seriously impair the Department's ability to safely house McCoy and other dangerous pretrial detainees.

[36] *State v. Sells*, 2013 WL 1143614, *3 (Del. Super.); *State v. Gibbs*, 2012 WL 6845687, at *3-4 (Del. Super.). McCoy apparently concedes, as he must, that the attorney-access issues identified in *Sells* and *Gibbs* were addressed appropriately by the DOC and JTVCC officials.

CONCLUSION

The Orders of the Superior Court should be reversed. At a minimum, the matter should be remanded to the Superior Court for a full and fair hearing on the Transfer Motion.

STATE OF DELAWARE,
DEPARTMENT OF JUSTICE

/s/ *Jason W. Staib*
Jason W. Staib (Del. Bar No. 3779)
Deputy Attorney General
820 North French Street, 6th Floor
Wilmington, DE 19801
(302) 577-8304

Counsel for Appellant

Dated: March 9, 2016