

STATE OF MARYLAND * IN THE
v. * COURT OF SPECIAL APPEALS
ADNAN SYED, * OF MARYLAND
Appellee * September Term 2022
* No. 1291
* Circuit Court Case Nos. 199103042-46

* * * * *
**APPELLEE’S RESPONSE TO VICTIM REPRESENTATIVE’S
MOTION TO STAY CIRCUIT COURT PROCEEDINGS**

Adnan Syed, Appellee, through counsel, Assistant Public Defender Erica J. Suter, Director, UB Innocence Project Clinic, files this Response to the Victim Representative’s Motion to Stay the Circuit Court Proceedings Pending Resolution of Appeal [Motion] and states as follows:

I. Preliminary Statement

This Court should not rule on the Motion because an identical motion is pending before the circuit court and Appellant has not alleged that pursuing the Motion in circuit court is impracticable or that the circuit court has not ruled on the Motion within a reasonable amount of time. If this Court rules on the Motion, this Court should deny the Motion because the victim’s representative may not seek a stay pending the resolution of an appeal from a final order in a criminal case. If this Court reaches the merits of the Motion, this Court should deny the Motion because the Appellant has not met its burden of pleading.

II. Procedural History and Relevant Facts

The State's Motion to Vacate was filed on September 14, 2022. A hearing was held on the Motion (J. Phinn, presiding) on September 19, 2022. Through an attorney, on the afternoon of the hearing, Appellant filed a motion to continue the hearing. After hearing argument, Judge Phinn denied the motion. Judge Phinn then recessed the proceedings for the Appellant's attorney to consult with Appellant to ascertain if he wished to attend via Zoom, as the victim's representative had previously expressed to the State, and address the court. Appellant then did attend via Zoom when proceedings resumed and testified before the court. Appellant's testimony was simultaneously broadcast on speakers in the courtroom so that all attendees heard Appellant's testimony in real time. The court did not limit the length or content of Appellant's testimony. Appellant noted an appeal on September 28, 2022, and then moved for a stay in circuit court on September 29, 2022. Five days after that Motion was filed in circuit court and before Mr. Syed received a service copy, Appellant then moved for relief in this Court.

III. Argument

1. **This Court should not rule on the Motion because an identical motion is pending before the circuit court and Appellant has not alleged that pursuing the Motion in circuit court is impracticable or that the circuit court has not ruled on the Motion within a reasonable amount of time.**

Appellant's Motion before this Court is premature. A party seeking a stay during the pendency of an appeal **shall** file a motion in circuit court before seeking relief in the appellate court unless it is impracticable to do so. (Rule 8-245(b)) (emphasis

supplied). Appellant filed an identical Motion to Stay the Circuit Court Proceedings in circuit court at 1:48 p.m. on September 29, 2022 and asked the circuit court to rule “by close of business” that same day. (Appellant’s Motion, Exhibit 1). Five days after filing the circuit court motion, prior to Appellee receiving a service copy of the circuit court motion, and ten days before Appellee’s time for response in the circuit court had run under Rule 4-252(f), Appellant sought relief in this Court.

Rule 8-245(c) provides three, alternate, predicate events that must occur for Appellant to move for a stay in this Court, 1.) seeking relief in the circuit court is not practicable; 2.) the motion was denied by the circuit court; or, 3.) the motion was not ruled on within a reasonable time. Appellant does not allege that it was impracticable to seek relief in the circuit court. Appellant does not allege that the circuit court denied its motion; indeed, it is still pending. Appellant does not allege that the motion was not ruled on within a reasonable amount of time because it cannot. Asking the circuit court to issue a stay within three hours of filing and without notifying the Appellee, was the equivalent of asking the court to issue an emergency, ex-parte stay without providing any cognizable basis for such an extraordinary request. Appellant has not alleged any basis for why the normal period for response contemplated under the rules should not apply here. The circuit court cannot be faulted for observing and applying the proper rules of procedure, when Appellant has neither moved to shorten the time period for Appellee to respond nor provided any argument in the circuit court motion in support thereof.

This Court should decline to hear Appellant's Motion at this time because the matter is not yet ripe for this Court's review.

2. If this Court rules on the Motion, this Court should deny the Motion because the Victim may not seek a stay pending the resolution of an appeal from a final order in a criminal case.

The relief that the Appellant now seeks is not available to him under the law. The Maryland Declaration of Rights enshrines the rights of victims in criminal proceedings, but also notes “[n]othing in this Article . . . authorizes a victim of crime to take any action to stay a criminal justice proceeding.” Md. Decl. of Rts. Art. 47(c). Consistent with this policy, the statute which codifies the victim's right to seek redress if it believes its rights were denied, Criminal Procedural Article § 11-103, contemplates the only scenario in which a stay might be granted, where the victim has filed an Application for Leave to Appeal from an interlocutory order **and** all parties consent. Appellant has filed a direct appeal from a final order and Appellee opposes Appellant's Motion. Appellant has not cited to any statute, rule, or case that provides support or precedent for the relief he now seeks.

3. If this Court reaches the merits of the Motion, this Court should deny the Motion because the Appellant has not met its burden of pleading.¹

Four factors are considered when determining whether to grant or deny a motion for injunctive relief: (a) the likelihood that the movant will succeed on the merits; (b) an analysis of who will suffer the greater harm, the defendant if the

¹ The Attorney General's response to the motion to stay, in which the Attorney General joins the Appellant's motion, is likewise silent on the four requisite factors.

injunction is granted or the movant if the injunction is denied; (c) whether the movant will suffer irreparable injury unless the injunction is granted; and (d) the public interest. *Eastside Vend Distributors, Inc. v. Pepsi Bottling Group, Inc.*, 396 Md. 219, 240 (2005). The movant must prove all four factors in order to prevail:

[A]n interlocutory injunction should not be granted unless the party seeking it demonstrates a likelihood of success on the merits. The party seeking an injunction must prove the existence of all four of the factors ... in order to be entitled to preliminary relief. The failure to prove the existence of even one of the four factors will preclude the grant of preliminary relief.” *Id.* (quoting *Fogle v. H&G Restaurant, Inc.*, 337 Md. 441, 456 (1995)). With respect “to the ‘likelihood of success factor,’ a party seeking the interlocutory injunction ‘must establish that it has a real probability of prevailing on the merits, not merely a remote possibility of doing so.’” *Id.* (quoting *Fogle, supra*, 337 Md. at 456).

Id. at 241.

a. Appellant fails to address the likelihood of success of the underlying appeal in its Motion, but even a cursory analysis reveals that there is little likelihood of success.

This Court should deny Appellant’s Motion because it has failed to meet its burden of pleading. Having failed to make a prima facie showing of any of the four factors necessary to prevail, this Court’s inquiry should end here. This Court need not consider the merits of the underlying appeal. Nonetheless, even a cursory assessment reveals that the underlying appeal is unlikely to succeed on the merits for four reasons; (1) there is no evidence in the record that the victim’s representative submitted a notification request form; (2) the victim’s right to be notified was not violated; (3) the victim’s representative has the right to be notified

and attend, but does not have a right to participate in collateral review proceedings involving legal arguments such as post conviction proceedings, petitions for writ of actual innocence, and vacatur under Criminal Procedure Article § 8-301.1; (4) the victim's representative did attend and participate in the vacatur proceeding via Zoom.

First, there is no evidence in the record that the victim's representative submitted a notification request form. Md. Crim. Pro. §11-102 provides that a "victim's representative who has filed a notification request form under §11-104 of this subtitle has the right to attend any proceeding in which the right to appear has been granted to a defendant." The procedures for filing the notification form, also referred to as the Crime Victim Notification Form (CVNF), are detailed in §11-104. The State's duty to notify the victim's representative of court proceedings is triggered by the CVNF. Md. Crim. Pro. §11-104(f)(1)(ii). Neither counsel for the victim's representative, the Office of the State's Attorney for Baltimore City, nor the Office of the Attorney General has referenced or moved into the record any evidence that the CVNF was completed and on file.

Second, although not mandated by statute, the prosecuting attorney may give information about the status of the case to the victim's representative if requested. Md. Crim. Pro. §11-104(f)(4). According to the State's proffer at the hearing on the State's Motion to Vacate, the State notified the victim's representative the same day, shortly after a hearing was scheduled. Appellant does not contend that he was not notified, but rather that notification was not "reasonable." (Motion at 3). The statute

provides that the prosecuting attorney shall send a victim or victim's representative prior notice of each court proceeding if prior notice is practicable and if the victim has filed a notification request form. Md. Crim. Pro. §11-104(f)(1)(i), (ii). The State complied with victim notification requirements.

Third, the victim has the right to be notified and attend a hearing, but does not have a right to participate in collateral review proceedings involving legal arguments such as post conviction proceedings, petitions for writ of actual innocence, and vacatur under Criminal Procedure Article § 8-301.1. Victims have the right to give victim impact statements for Pre-Sentence Investigations (Crim. Pro. §11-402); and at a sentencing or disposition hearings (Crim. Pro. §11-403). [S]entencing or disposition hearing” is defined as a “hearing at which the imposition of a sentence, disposition in a juvenile court proceeding, or alteration of a sentence or disposition in a juvenile court proceeding is considered.” *Id.* Notably, the victim notice and right to attend provisions contained in the Uniform Post Conviction Procedure Act and the Petition for Writ of Actual Innocence Statute delineate the victim's right to be notified and attend. They do not provide a right to address the court. Crim. Pro. §§ 7-105, 8-301(d)(1), 8-301.1(d)(1). In contrast, a victim's right to testify in a sentencing hearing or in a hearing on a motion for modification of sentence is explicitly delineated in the rules. (Rules 4-342(d)(2) and 4-345(e)(2)). This distinction is a rational and appropriate one because victims and their representatives may not participate in every aspect of a criminal proceeding. For example, a trial court could not consider victim impact testimony in a motion to

suppress tangible evidence. Likewise, this Court could not consider victim impact in its analysis of a defendant's direct appeal following trial.

Fourth, the victim's representative attended the hearing on the State's Motion to Vacate via Zoom and testified before the court. The court below found that attendance at hearings via Zoom is commonplace since the COVID pandemic and that appearing via Zoom was, in fact, attendance. The victim's representative testified during the proceedings and his remarks were broadcast over the speakers in the court room. Although the victim's representative did not attend in person, the victim's representative received more than he was entitled to by law in that he received notice of the hearing, attended the hearing, *and* participated in the hearing.

b. Mr. Syed will suffer the greater harm if the stay is granted.

As discussed below, Appellant maintains that he will be prejudiced if a stay is not granted but does not say how this is so. Appellant also fails to reckon with or even acknowledge the other side of the scale, the potential injury to Mr. Syed if a stay is granted. In particular, Mr. Syed has two significant interests that would be impacted by the granting of a stay, Mr. Syed's right to a speedy trial and his liberty interest. Per the circuit court's order, Mr. Syed is currently on home detention pending a potential retrial. Mr. Syed must remain at home with extremely limited exceptions such as meeting with his attorney. Mr. Syed must notify the monitoring company in advance of any meeting and provide the date, start and end time, and location of such meetings. Mr. Syed also has the right to a speedy trial. The Sixth

Amendment to the United States Constitution guarantees the accused in all criminal prosecutions the right to a speedy trial. *Clark v. State*, 97 Md. App. 381, 385 (1993). This right applies to all states through the Fourteenth Amendment's Due Process Clause. *Id.* at 385. If a stay were granted and thus the State's Attorney's office was precluded from either entering a nolle prosequi or retrying Mr. Syed, Mr. Syed's rights would be significantly, detrimentally impacted.

c. Appellant has failed to allege that it will suffer irreparable harm if the stay is not granted.

In its Motion, Appellant does not allege that he will be irreparably harmed if a stay is denied. Instead, Appellant alleges that a stay is necessary to preserve this Court's appellate jurisdiction and to avoid irreparable prejudice to the Appellant's right to appeal. Appellant fails to articulate a scenario in which the denial of the stay causes this Court to lose jurisdiction, nor does he explain how a stay preserves this Court's jurisdiction. Having failed to address an essential element of the movant's burden of pleading, Appellant's request for stay must fail.

d. Public interest weighs in favor of denying a stay

The burden of pleading with this element, as with the others, remains with the movant. As with the previous 3 prerequisites, the Appellant fails to address the Public Interest. Having failed to satisfy his burden of pleading, Appellant's request for a stay must fail.

Respectfully submitted,

_____/s/_____
Erica J. Suter, CPF 0712110231
Director, Innocence Project Clinic
University of Baltimore School of Law
& the Office of the Public Defender
1401 N. Charles Street
Baltimore, MD 21201
410-837-5388 (phone)
410-837-47766 (fax)
esuter@ubalt.edu
Counsel for Appellee

Certification of Word Count and Compliance with MD Rule 8-112

This pleading complies with the font, line spacing, and margin requirements of Maryland Rule 8-112 and contains 2,407 words, excluding the parts exempted from the word count by Rule 8-503.

_____/s/_____
Erica J. Suter

Certificate of Service

I hereby certify that on October 11, 2022, I emailed a copy of the foregoing Response to Victim Representative's Motion to Stay Circuit Court Proceedings to Steven J. Kelly at skelly@sanfordheisler.com, Assistant State's Attorney Becky K. Feldman at bfeldman@stattorney.org, and Assistant Attorney General Carrie Williams at cwilliams@oag.state.md.us.

_____/s/_____
Erica J. Suter