
From: <JonFlan>
To:
Sent: Tuesday, April 04, 2006 10:11 PM
Subject: Ohio Court grants Dr. Nucklos bail pending appeal in pain prosecution

The Court of Appeals for the 2nd District of Ohio has granted our motion to release Dr. Nucklos on bail pending appeal in this most recent state-side pain prosecution.

We objected in our papers and at oral argument that the trial court had failed to act on our bail application, that jury selection was racially discriminatory, that the evidence was insufficient, that the prosecutor had offered prejudicial and inflammatory evidence that should have been excluded, that the instructions were in error, as they criminalized Dr. Nucklos's treatment of chronic non malignant pain because the state prosecutor has a policy of intolerance for any opioid medicine.

We also insisted that Dr. Nucklos did not present a risk of flight, and that the government was playing fast and loose with the facts as to what risk he posed, given that he had appeared on every occasion he was required to do so.

The Court's order is reproduced below, as well as an excerpt from our argument on appeal.

Warmest regards,

John

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IN THE COURT OF APPEALS OF CLARK COUNTY

STATE OF OHIO

:

Plaintiff-Appellee

:

C.A. CASE NO. 06CA0023

T.C. CASE NO. 04CR790

vs.

:

WILLIAM NUCKLOS

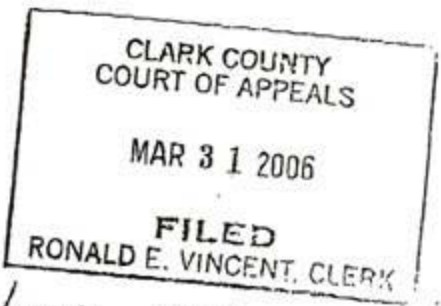
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Defendant-Appellant

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DECISION AND ENTRY

Rendered on the 31st day of MARCH, 2006.
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PER CURIAM:

On March 8, 2006, Appellant, William Nucklos filed an "Application for Bail Pending Appeal" with this court. Appellee, State of Ohio, filed a memorandum contra to Appellant's motion on March 14, 2006. Appellant, now represented by new counsel on appeal, filed a "Reply to state's Opposition to Bail Pending Appeal" on March 20, 2006. On March 28, 2006, this court conducted a hearing by telephone on the application for an appeal bond and heard from both parties to this appeal.

Pursuant to App. R. 8(B) an application for release on bail pending appeal "shall be made in the first instance in the trial court." On February 23, 2006, Appellant filed a "Motion For Release Pending Appeal and Stay of Execution" in the common pleas court. To date that court has not ruled on the motion. Accordingly, we deem the motion to have been denied by the trial court.

Upon his motion, and for good cause shown, Appellant's "Application for Bail

Pending Appeal" is GRANTED, and further execution of the sentences the common pleas court imposed upon Appellant's convictions is STAYED, pending determination of this appeal or other order of this court, subject to the following terms and conditions:

Appellant shall post a bond in the amount of Fifty Thousand Dollars (\$50,000.00), cash or surety, with the clerk of the court of common pleas;

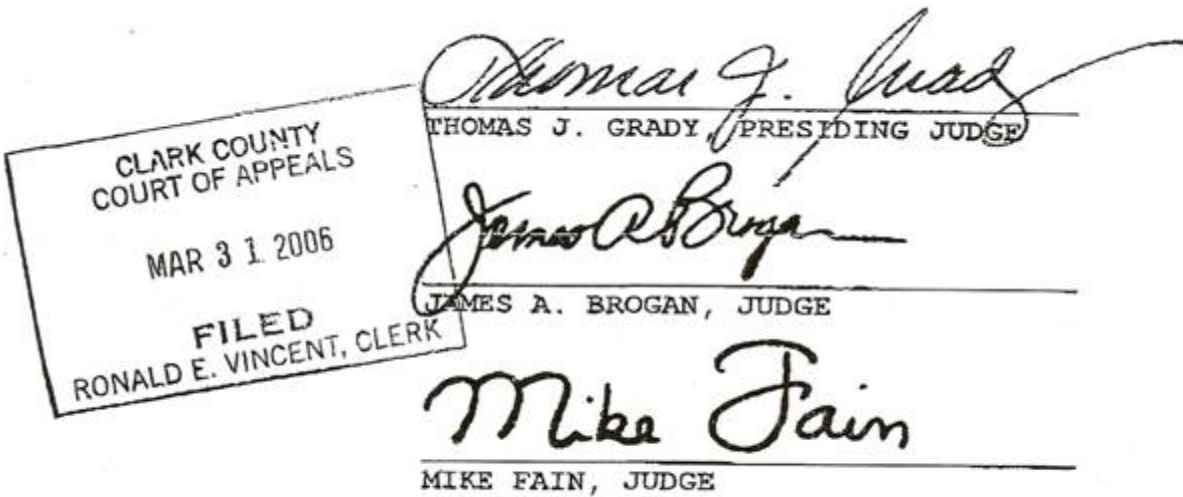
Within twenty-four (24) hours following his release, Appellant shall report, in person, to the Probation Department of the court of common pleas at 101 North Limestone Street, Springfield, Ohio, where he shall be informed of and be made subject to the general conditions of his release;

Appellant shall report weekly, in person, to the Probation Department. Appellant may, with the prior approval of the Probation Department, make his personal report instead to another probation department of a common pleas court of another county in Ohio. The Clark County Probation Department is directed to advise the Administrator of this court of any such change; and,

Appellant shall remain in the State of Ohio must surrender any passport he has to the Probation Department, and shall not obtain a passport.

This stay of execution of sentence and bond pending appeal is subject and subservient to any other hold order, orders of detainment, or other orders that require Appellant's incarceration, and Appellant shall not be released to the extent that any such orders exist.

So Ordered.



EXCERPT OF ARGUMENT ON BAIL APPEAL:

III. THE STATE HAS MISCHARACTERIZED THE RECORD AND THE MATERIAL FACTS AS TO THIS BAIL APPLICATION

A. MISLEADING ASSERTIONS BY THE STATE AS TO DEFENDANT-APPELLANT'S RISK OF FLIGHT.

In the State's self-styled "Memoranda *Contra* Defendant's Application for Appellate Bond," offered to contradict the application originally filed by Mr. Willis, the State presumes that its conclusory claims and misleading representations as to the process and facts of this case will go unexamined by this Court.

In fact and truth, Dr. Nucklos presents no flight risk, and this appeal raises substantial and serious questions.

We therefore seek to inform this Court's discretion that it would be an abridgment of Dr. Nucklos' right to bail pending appeal.

1. DR. NUCKLOS RESPONDED TO EVERY COURT APPEARANCE IN APPROPRIATE AND TIMELY FASHION; HE'S NO FLIGHT RISK.

In its desperation, the State argues that because an arrest warrant issued on or about October 29, 2004 for Dr. Nucklos, following the Indictment herein, that Dr. Nucklos is a flight risk.

Nothing could be further from the truth.

In the first case, there is no indication that Dr. Nucklos knew that he had been indicted until the warrant

was served.

Indeed, the certified copy of the indictment that had been forwarded to an address for Dr. Nucklos was returned unopened and unsigned.

More importantly, at no time since Dr. Nucklos was first arrested and formally made aware of these charges, has he failed to make any appearance he was required to make in this case, over a period of about a year and a half.

2. DR. NUCKLOS HAS GOOD AND SUFFICIENT CONTACTS BOTH IN THE COMMUNITY AND IN OHIO AS HE'S BEEN HERE SINCE 1956.

In order to make an argument that Dr. Nucklos has no ties to the community, the State asserts that Dr. Nucklos has "no ties to the Clark County Community." This is quite misleading. Dr. Nucklos maintained his medical office in Clark County but it is now closed. Dr. Nucklos had an office In Columbus. And his home is in Powell. Dr. Nucklos has been in Ohio for 56 years. He's an American citizen and, unlike many Americans, he has never shown an interest to stray far from home, as he does not even own a passport.

3. WHILE THERE ARE TAX LIENS, THEY ARE NOT AS EXTENSIVE AND THEY ARE CONTESTED.

It is true that there is a pending IRS claim that Dr. Nucklos owes back taxes, and the charges are related to the facts of this case. Dr. Nucklos is presently disputing those charges. It may be instructive to consider that IRS had a lien on an earlier occasion and it was removed. While it took an extended period of time, as it often does with the IRS, to persuade the agency that its zeal was misplaced, they withdrew the claim – finally. That's what Dr. Nucklos expects here.

4. THE ADMINISTRATIVE ASSESMENT IS ABOUT 1/10TH WHAT THE STATE CLAIMS, AND, IF THERE'S FAULT, WE EXPECT IT WILL BE THE BILLING COMPANY.

The State charges that there is an administrative assessment levied by the Ohio Bureau of Worker's Compensation for over-billing the agency, AND in the amount of \$623,000.

In fact and truth, on information and belief, the claim is about \$70,000, and any errors that may be found, we expect, shall be assigned to the billing company and not to Dr. Nucklos.

In any case, to the extent that these claims persist, Dr. Nucklos intends to dispute their accuracy, in other words, to stand and fight, not flee - insofar as he believes these claims are wrongly instituted.

5. THE SUSPENSION BY THE MEDICAL BOARD IS ALSO DEPENDENT ON THIS CONVICTION

AND WILL BE LIFTED WHEN THESE CHARGES RESULT IN AN ACQUITTAL

Dr. Nucklos' suspension stems from the conviction and, if Dr. Nucklos succeeds, as he hopes to do, that suspension will be set aside.

6. DR. NUCKLOS HAS NEVER HAD LARGE SUMS OF MONEY; HE HAS HAD A SUCCESSFUL MEDICAL PRACTICE AND THAT'S THE PRINCIPAL BASIS OF HIS INCOME

There is this presumption that physicians garner large fees and husband vast financial resources, particularly Dr. Nucklos.

But Dr. Nucklos' practice in Springfield, at the heart of this prosecution, was about attending to less financially fortunate patients, and most patients were charged a fee of about \$75.00, usually on follow-up visits, and Dr. Nucklos, when he had the office in Springfield was not there exclusively or for that long.

B. THE CONVICTION IS FATALLY FLAWED AND THIS APPEAL RAISES SUBSTANTIAL QUESTIONS

1. THE EVIDENCE WAS INSUFFICIENT

The evidence that the state relied on for these convictions was predicated upon questionable characters as illustrated by the discussion that follows regarding Ms. Swyers (see below). If it were not for prosecutorial misconduct and expert testimony that was not properly challenged, it is doubtful there would have been any conviction.

2. THE EXPERT WAS A HIRED GUN WHO KNEW LITTLE OR NOTHING ABOUT PAIN MEDICATION, YET HE WASN'T CHALLENGED

Theodore Parran, the State's expert teaches mostly, and practices little – if at all. He is a hired gun for the government and only testifies for the federal or state authorities. His self-described expertise as an internist does not in the slightest justify any opinion he might render on pain medication. In fact, his claim to fame or expertise is that he is an addiction expert. That's his specialty. In this role, as an addictionologist, he searches for reasons not to prescribe, rather than to ease pain. He looks for what he believes to be signs of addiction in the form of “aberrant” behaviors and red flags. These are not scientifically validated. This approach is flawed in the sense that it ignores the accepted definition of addiction, which relies on the concept of continued use in spite of harm. His approach assumes harm. His diagnoses are wild speculation based on entirely ambiguous criteria, when better exist within his own field. Accordingly, he should never have been allowed to testify. He reviewed patient files, and prescriptions,

but never the patients involved. Any opinion he gave was therefore skewed by the incompleteness of the file that might itself be legitimately incomplete. It appears that Dr. Parran did not want to interview the patient, as the patient might tell him that the pain was controlled.

3. THE GIGLIO VIOLATION.

Raymona Swyers, a critical witness for the State, testified that she was getting prescriptions from four to five doctors at the trial, and implicitly from Dr. Nucklos, and that this was with the knowledge that each doctor knew others were simultaneously prescribing to Ms. Swyers.

But what the State did not disclose to court, to counsel or to the jury was that Detective Keri Frasco had arrested her for visiting four to five doctors “without their knowledge that she was seeing another doctor.” See Law Enforcement Arrest Report, Detective Keri Frasco.

Indeed, as to each doctor, the officer noted, after reviewing the details of Ms. Swyers’ multiple deceptions, that her misconduct was “without the knowledge” of each of the five doctors. *Id.*

Whereas the State had knowledge of this error when and as it occurred, and knew or should have known the testimony was false and material, indeed perjurious, it failed to correct or uncover this false and misleading testimony by a critical State witness.

If the State knew this fact during the testimony, it violated *Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173 (1959). In *Napue*, a critical prosecution witness stated, in response to a defense question, that he had not received any promise of lenient treatment from the prosecutor in return for his testimony. Although the prosecutor had, in fact, made such a promise, he did not correct the witness’ testimony. In holding that due process had been violated, the Court noted that “the principle that a State may not knowingly use false evidence ... does not cease to apply merely because the false testimony goes only to the credibility of the witness.” The “jury’s estimate of the truthfulness and reliability of a given witness,” it noted, “may well be determinative of guilt or innocence.”

But, even if the prosecutor sitting there at trial, didn’t know, it has the same effect. *See Giglio v. United States*, 405 U.S. 150, 153, 92 S.Ct. 763 (1972). In *Giglio*, the government’s trial attorney was unaware that the witness was lying, but the Supreme Court nevertheless found *Napue* controlling, treating the prosecutor as a spokesman for the government, and binding each by the acts of every other agent of the government.

4. ANOTHER GIGLIO VIOLATION.

At trial, the State summoned as a witness, a Dr. Romano, as an expert witness, who provided some quite adverse testimony harmful to Dr. Nucklos. In other words, his testimony was critical.

By reference to the aforementioned affidavit filed in support of the warrant for Ms. Swyers, a Dr. Romano did supply Ms. Swyers with prescription drugs and, like Dr. Nucklos, he was deceived by Ms. Swyers.

If this Dr. Romano who appeared at trial as an expert witness is the same Dr. Romano who was deceived by Ms. Swyers, this is a fact that would tend to impeach Dr. Romano's testimony, and yet it was withheld from the defense below and the reasoning is similar to the Swyers' question.

This is hardly a novel principle of criminal due process. In *Mooney v. Holohan*, 294 U.S. 103, 55 S.Ct. 340 (1935), the Supreme Court first held that a prosecutor's use of false testimony could constitute a violation of due process. The Supreme Court explained that the State may not deprive "a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured." The self-evident rationale for this policy "is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused."

5. HIGHLY PREJUDICIAL CHARACTER EVIDENCE

The State, on its own, in violation of Rule 404(a), Ohio Rules of Evidence, put Dr. Nucklos' character at issue. Just as the State has for the purpose of this appeal. Dr. Nucklos never put his own character at issue. To make matters worse, the Court told the jury' that in "determining whether the defendant's character and reputation *witnesses* were accurate in forming *their opinions* or in describing the defendant's reputation and character" they could take into consideration the fact that he *owed* monies on his taxes and to the Bureau of Worker's Compensation. That evidence had no probative value and was highly prejudicial.

6. THE JURY INSTRUCTION.

The instruction to the jury was as if this was a standard of care case in a civil proceeding, that is, had the physician done it correctly, rather than whether, as a matter of criminal law, Dr. Nucklos had conducted himself as a drug dealer might.

8. INEFFECTIVE ASSISTANCE OF COUNSEL

In reliance on *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984), we most reluctantly must

assert that trial counsel's performance was "deficient in that it fell below an objective standard of reasonableness and outside the range of professionally competent assistance" and that the deficient performance prejudiced the defense in that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Hunt v. Lee*, 291 F.3d 284, 289 (4th Cir. 2002).

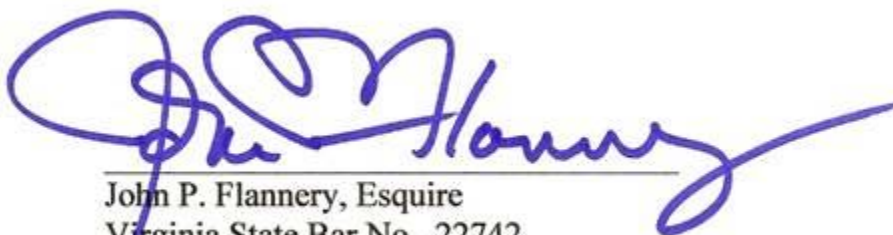
The record of the trial record shall reveal that trial counsel repeatedly failed to object to wide-ranging hearsay testimony that went on for pages, and references to absent documents referenced without any evidentiary foundation. But defense trial counsel was particularly unprofessional and unprepared in his handling of the expert testimony of the government's witness and of the accused's expert. Indeed, he never questioned how the government's expert could render any valid opinion in the absence of medical records, that were concededly incomplete, and without examining any of the patients themselves. Almost from the outset of his cross of the Government's expert, defense trial counsel was out of his depth.

Defense trial counsel did not even confer with his expert until the last moment, and, according to the expert, did not appreciate the concepts that he had to learn on the fly, while the trial was underway. There was abundant evidence that much of what the defense trial counsel adduced, he was hearing for the first time with the jury.

While trial counsel did preserve many objections, he failed to appreciate the significance of many other errors at trial.

WHEREFORE, for the reasons stated herein, and based on the pleadings, Dr. Nucklos, by undersigned counsel, respectfully requests that this Court grant bail pending appeal.

WILLIAM NUCKLOS
By Counsel



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