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No. P21-511

IN RE. THE 10 NOVEMBER 2021 ORDER IN HOKE COUNTY BOARD OF EDUCATION ET AL. VS. STATE OF NORTH CAROLINA AND W. DAVID LEE (WAKE COUNTY FILE 95 CVS 1158)

From Wake
(95CVS1158)

O R D E R

The following order was entered:

The petition for a writ of prohibition is decided as follows: we allow the petition and issue a writ of prohibition as described below.

This Court has the power to issue a writ of prohibition to restrain trial courts "from proceeding in a matter not within their jurisdiction, or from acting in a matter, whereof they have jurisdiction, by rules at variance with those which the law of the land prescribes." State v. Allen, 24 N.C. 183, 189 (1841); N.C. Gen. Stat. s. 7A-32.

Here, the trial court recognized this Court's holding in Richmond County Board of Education v. Cowell that "[a]ppropriating money from the State treasury is a power vested exclusively in the legislative branch" and that the judicial branch lacked the authority to "order State officials to draw money from the State treasury." 254 N.C. App. 422, 803 S.E.2d 27 (2017). Our Supreme Court quoted and relied on this language from our holding in Cooper v. Berger, 376 N.C. 22, 47, 852 S.E.2d 46, 64 (2020).

The trial court, however, held that those cases do not bar the court's chosen remedy, by reasoning that the Education Clause in "Article I, Section 15 of the North Carolina Constitution represents an ongoing constitutional appropriation of funds."

We conclude that the trial court erred for several reasons.

First, the trial court's interpretation of Article I would render another provision of our Constitution, where the Framers specifically provided for the appropriation of certain funds, meaningless. The Framers of our Constitution dedicated an entire Article--Article IX--to education. And that Article provides specific means of raising funds for public education and for the appropriation of certain monies for that purpose, including the proceeds of certain land sales, the clear proceeds of all penalties, forfeitures, and fines imposed by the State, and various grants, gifts, and devises to the State. N.C. Const. Art. IX, Sec 6, 7. Article IX also permits, but does not require, the General Assembly to supplement these sources of funding. Specifically, the Article provides that the monies expressly appropriated by our Constitution for education may be supplemented by "so much of the revenue of the State as may be set apart for that purpose." Id. Article IX then provides that all such funds "shall be faithfully appropriated and used exclusively for establishing and maintaining a uniform system of free public schools." Id. If, as the trial court reasoned, Article I, Section 15 is, itself, "an ongoing constitutional appropriation of funds"--and thus, there is no need for the General Assembly to faithfully appropriate the funds--it would render these provisions of Article IX unnecessary and meaningless.

Second, and more fundamental, the trial court's reasoning would result in a host of ongoing constitutional appropriations, enforceable through court order, that would devastate the clear separation of powers between the Legislative and Judicial branches and threaten to wreck the carefully crafted checks and balances that are the genius of our system of government. Indeed, in addition to the right to education, the Declaration of Rights in our Constitution contains many other, equally vital protections, such as the right to open courts. There is no principled reason to treat the Education Clause as "an ongoing constitutional appropriation of funds" but to deny that treatment to these other, vital protections in our Constitution's Declaration of Rights. Simply put, the trial court's conclusion that it may order petitioner to pay unappropriated funds from the State Treasury is constitutionally impermissible and beyond the power of the trial court.

We note that our Supreme Court has long held that, while our judicial branch has the authority to enter a money judgment against the State or another branch, it had no authority to order the appropriation of monies to satisfy any execution of that judgment. See State v. Smith, 289 N.C. 303, 321, 222 S.E.2d 412, 424 (1976) (stating that once the judiciary has established the validity of a claim against the State, "[t]he judiciary will have performed its function to the limit of its constitutional powers. Satisfaction will depend upon the manner in which the General Assembly discharges its constitutional duties."); Able Outdoor v. Harrelson, 341 N.C. 167, 172, 459 S.E.2d 626, 629 (1995) (holding that "the Judicial Branch of our State government [does not have] the power to enforce an execution [of a judgment] against the Executive Branch").

We therefore issue the writ of prohibition and restrain the trial court from enforcing the portion of its order requiring the petitioner to treat the $1.7 billion in unappropriated school funding identified by the court "as an appropriation from the General Fund as contemplated within N.C. Gen. Stat. s. 143C-6-4(b)(2)(a) and to carry out all actions necessary to effectuate those transfers." Under our Constitutional system, that trial court lacks the power to impose that judicial order.

Our issuance of this writ of prohibition does not impact the trial court's finding that these funds are necessary, and that portion of the judgment remains. As we explained in Richmond County, "[t]he State must honor that judgment. But it is now up to the legislative and executive branches, in the discharge of their constitutional duties, to do so. The Separation of Powers Clause prevents the courts from stepping into the shoes of the other branches of government and assuming their constitutional duties. We have pronounced our judgment. If the other branches of government still ignore it, the remedy lies not with the courts, but at the ballot box." 254 N.C. App. 422, 429, 803 S.E.2d 27, 32.

Panel consisting of Judge DILLON, Judge ARROWOOD, and Judge GRIFFIN.

ARROWOOD, Judge, dissenting.

I dissent from the majority's order granting a Writ of Prohibition. I vote to allow the Motion for Temporary Stay which is the only matter that I believe is properly before the panel at this time. This matter came to the panel for consideration of a non-emergency Motion for Temporary Stay that was ancillary to petitions for a Writ of Prohibition under Rule 22 of the Rules of Appellate Procedure and for Writ of Supersedeas under Rule 23 of the Rules of Appellate Procedure on 29 November 2021. The trial court had stayed the order at issue until 10 December 2021, the date when the time to appeal from the order would expire. Thus, there are no immediate consequences to the petitioner about to occur.

Under Rules 22 and 23 of the Rules of Appellate Procedure, a respondent has ten days (plus three for service by email) to respond to a petition. This time period runs by my calculation through 7 December 2021, before the trial court's stay of the order expires. However, the majority of this panel--ex meru motu--caused an order to be entered unreasonably shortening the time for respondents to file a response until only 9:00 a.m. today. While the rules allow the Court to shorten a response time for "good cause shown[,]" in my opinion such action in this case was arbitrary, capricious and lacked good cause and instead designed to allow this panel to rule on this petition during the month of November.

Rather, as the majority's order shows shortening the time for a response was a mechanism to permit the majority to hastily decide this matter on the merits, with only one day for a response, without a full briefing schedule, no public calendaring of the case, and no opportunity for arguments and on the last day this panel is constituted. This is a classic case of deciding a matter on the merits using a shadow docket of the courts.

I believe this action is incorrect for several reasons. The Rules of Appellate Procedure are in place to allow parties to fully and fairly present their arguments to the Court and for the Court to fully and fairly consider those arguments. In my opinion, in the absence of any real time pressure or immediate prejudice to the parties, giving a party in essence one day to respond, following a holiday weekend, and then deciding the matter on the merits the day the response is filed violates these principles. My concerns are exacerbated in this case by the fact that no adverse actions would occur to the petitioner during the regular response time

as the trial court had already stayed its own order until several days after responses were due. In addition, this Court also has the tools through the issuance of a temporary stay to keep any adverse actions from occurring until it rules on the matter on the merits.

Therefore, I dissent from the majority's shortening the time for a response and issuing an order that decides the the merits of the entire appeal without adequately allowing for briefing or argument. My vote is to issue a temporary stay of the trial court's order.

By order of the Court this the 30th of November 2021.

WITNESS my hand and the seal of the North Carolina Court of Appeals, this the 30th day of November 2021.

Eugene H. Soar
Clerk, North Carolina Court of Appeals

Copy to:
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