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March 13, 2004

Ms. Cynthia L. Turley
Deputy Clerk
Missouri Supreme Court
P.O. Box 150
Jefferson City, MO 65102

Re: State v. Carol Sue Smith
Case No. SC85595

Dear Ms. Turley:

On March 3, 2004, you advised me that the Court wanted a letter brief on or before March 18, 2004, on the issue of whether Section 547.200.5, RSMo conflicts with article V, Section 10 of the Missouri Constitution.

At the outset, it would be beneficial to set out the wording of the two provisions in question. Section 547.200.5, RSMo reads as follows:

5. The supreme court shall issue appropriate rules to facilitate the disposition of [interlocutory] appeals, balancing the right of the state to review the correctness of pretrial decisions of a trial court against the rights of the defendant to a speedy trial, including measures to facilitate these appeals by shortening of the time to file appellant's brief under supreme court rule 30.06(K) to ten days, and eliminations of motions for rehearing or transfer under supreme court rules 30.26 and 30.27.

The Missouri Constitution at article 5, Section 10 provides:

Cases pending in the court of appeals shall be transferred to the supreme court when any participating judge dissents from the majority opinion and certifies that he deems said opinion to be contrary to any previous decision of the supreme court or of the court of appeals, or any district of the court of appeals. Cases pending in the court of appeals may be transferred to the supreme court by order of the majority of the judges of the participating district of the court of appeals, after opinion, or by order of the supreme court before or after opinion because of the general interest or importance of a question involved in the case, or for the purpose of reexamining the existing law, or pursuant to supreme court rule. The supreme court may finally determine all causes coming to it from the courts of appeal, whether by certification, transfer or certiorari, the same as on original appeal.

It appears that the conflict between these two provisions has never been addressed. In the past, the Missouri Supreme Court has simply assumed it had jurisdiction to accept transfer of interlocutory appeals. For example, in *State v. Berry*, 801 S.W.2d 64 (Mo. banc 1990), a case I handled on appeal, neither side thought to raise this issue, and Judge Robertson merely made the conclusory statement: "We have jurisdiction. Mo. Const. art. V, Section 10." *Id.* at 65-66.

This issue should be resolved by the established law that "the right to appeal is purely statutory." *State v. Burns*, 994 S.W. 2d 941, 941 (Mo. banc 1999); *City of Springfield v. Stoviak*, 110 S.W.3d 418, 420-421 (Mo. App. S.D. 2003); *State v. Carter*, 78 S.W.3d 786, 787 (Mo. App. E.D. 2002); *State v. Burns*, 998 S.W.2d 848, 849 (Mo. App. W.D. 1999); *State v. Brown*, 722 S.W.2d 613, 616 (Mo. App. W.D. 1986). Courts and commentators have recognized that "Missouri's constitution distinguishes between appellate jurisdiction, which is subject to legislative regulation, and superintending control, which is not." *State ex rel. Hannah v. Seier*, 654 S.W.2d 894, 896 (Mo. banc 1983), citing Dennis J. Tuchler, "Discretionary Interlocutory Review in Missouri: Judicial Abuse of the Writ?" 40 *Mo. L. Rev.* 577, 577 (1975). Whether the Court can accept transfer in spite of the prohibition of Section 547.200.5 is a matter of appellate jurisdiction, not just superintending control, and thus the Court must be bound by the text of the statute. The superintending control of the supreme court, on the other hand, is set out in article 5, section 4 of the Missouri Constitution. See Tuchler, at 583.

The Missouri legislature had very understandable reasons for limiting the ability of either side to seek transfer of an interlocutory appeal to the Supreme Court after an unfavorable result from the Court of Appeals. Appellate courts have

already noted that “[t]he provisions of Section 547.200.5 indicate the legislative intention that such appeals be expedited . . .” *State v. Beaver*, 697 S.W.2d 573, 574 (Mo. App. E.D. 1985) (emphasis added). The reasons for the hurry are clear. Time is of the essence. The defendant in these interlocutory appeals has not yet gone to trial. All too often, the maxim “justice delayed is justice denied” is absolutely true. Witnesses’ memories become hazy. Witnesses move away or die. Recognizing the need to resolve these pretrial appeals quickly, the legislature set up a framework by which the Court of Appeals could review a pretrial ruling suppressing evidence without delaying the trial too long. Transfer defeats the whole concept of resolving the cases expeditiously.

As a practical matter, the taking away of the right to transfer to the Supreme Court will not usually prevent the Court in the long run from addressing important issues. In cases where the Court of Appeals ruled in the prosecution’s favor, the evidence would be admitted at trial and the defendant could file a normal post-trial appeal, raising the very same issue on appeal. Pursuant to the post-trial appeal, the issue could eventually end up at the Supreme Court level. As Professor Tuchler noted in the article cited in the *Beaver* case, pretrial appeals and writs result in the waste of “an inordinate amount of judicial time,” trials are delayed, “the expense of litigation is increased, and the majority of errors are curable by subsequent events at trial or by appeal.” 654 S.W.2d at 897.

The delay caused by appellate transfer is shown by the facts of the case at bar. This drunk driving offense occurred on August 12, 2002. The motion to suppress was sustained by the trial court on March 3, 2003. The Court of Appeals decision reversing the trial court and remanding for trial was issued on July 22, 2003. Yet, here we sit, over a year and a half since this routine DWI offense occurred, and the case has still not gone to trial.

The legislature’s act in taking away the right of transfer will not necessarily cripple the State when it has a case where the Court of Appeals has affirmed a suppression of evidence. This is true because of the interlocutory nature of these appeals. They are not final. The trial court can change its mind. A prosecutor who has lost an appeal of a suppression ruling actually has several options: (1) He or she can decide the Court of Appeals was correct and give up on the idea of using the evidence; (2) He or she can conduct a new suppression hearing in front of the same trial judge and ask the judge to reconsider, particularly if additional testimony or evidence or legal authority is available that might change the result, *State v. Davis*, 985 S.W.2d 876 (Mo. App. E.D. 1998); or (3) He or she can dismiss the case and refile it and take up the motion to suppress before a different trial court, *State v. Pippenger*, 741 S.W.2d 710 (Mo. App. W. D. 1987). Thus, an inability to transfer an unfavorable and incorrect ruling to the Supreme Court will not necessarily destroy a prosecution.

It is significant that article 5, Section 3 of the Missouri Constitution lists the “exclusive appellate jurisdiction” of the Supreme Court (which does not include interlocutory appeals) and goes on to provide that the Court of Appeals “shall have general appellate jurisdiction in all cases except those within the exclusive jurisdiction of the supreme court.” The exclusive jurisdiction over interlocutory appeals in all but first degree murder cases was made quite clear in Section 547.200.3, RSMo, which states in no uncertain terms:

3. The appeal provided in subsection 1 of this section shall be an interlocutory appeal, filed in the appropriate district of the Missouri court of appeals, unless the proceedings involve a charge of capital murder or murder in the first degree, pursuant to the provisions of section 565.001 or 565.003, RSMo, in which case notices of appeal shall be filed in the supreme court of Missouri.

Professor Tuchler correctly observed that “the constitutional role of the judiciary is not to provide appellate review where the legislature has provided none.” 40 *Mo. L. Rev.* at 626. The jurisdiction over the interlocutory appeals is set out by statute, is unambiguous, and provides that transfer should not be allowed in these interlocutory appeals. The established law holding that appellate jurisdiction is subject to legislative regulation requires this Court to reconsider its granting of transfer in this case.

For the reasons stated above, the Supreme Court should rescind its order granting transfer.

Kindest regards.

Very sincerely yours,



H. MORLEY SWINGLE
Prosecuting Attorney

cc: Mr. Stephen C. Wilson
Attorney for Respondent