Not for Publication.

IN THE SUPREME COURT OF THE VIRGIN ISLANDS

IN RE: PETER R. NAJAWICZ, Petitioner.	))))))	**S. Ct. Civ. No. 2012-0112** Re: Super. Ct. Crim. No. 425/2008 (STT)

On Petition for Writ of Prohibition
Considered and Filed: October 10, 2012

BEFORE: **RHYS S. HODGE**, Chief Justice; **MARIA M. CABRET**, Associate Justice; and **IVE ARLINGTON SWAN**, Associate Justice.

ATTORNEYS:

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Attorney for Petitioner

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Attorney for Respondent People of the Virgin Islands

ORDER OF THE COURT

PER CURIAM.

This matter is before the Court on an October 8, 2012 petition for writ of prohibition filed by Peter R. Najawicz, which requests that this Court direct the Nominal Respondent—the Superior Court judge presiding over Super. Ct. Crim. No. 425/2008 (STT)—to stay all further proceedings, including the trial scheduled for October 11, 2012, during the pendency of

Najawicz v. People, S.Ct. Crim. No. 2012-0109, in which a notice of appeal was filed on October 4, 2012, from a September 7, 2012 Opinion denying Najawicz's motion to dismiss the information on double jeopardy grounds. Given the emergency nature of this matter, this Court, in an October 9, 2012 Order, authorized the Nominal Respondent and the People of the Virgin Islands to respond to the petition on or before October 10, 2012, and both the Nominal Respondent and the People responded to Najawicz's petition on that date. For the reasons that follow, we grant the petition.

I. JURISDICTION

In its response, the People contend that this Court lacks jurisdiction over this matter because Supreme Court Rule 8 sets forth a procedure for consideration of stays pending appeal. However, as Najawicz correctly states in his petition, Rule 8 is not implicated in either this matter or S.Ct. Crim. No. 2012-0109, since Rules 8(a)-(c)—by their own terms—govern motions for stays in *civil* cases, and Rule 8(d) addresses the release of incarcerated defendants pending appeal. Moreover, this Court's Rules of Procedure "shall not be considered to extend or limit the jurisdiction of the Supreme Court of the Virgin Islands as established by law," V.I.S.CT.R. 1(i), and this Court unquestionably possesses jurisdiction over original proceedings for extraordinary writs, such as a writ of prohibition. *See* 4 V.I.C. § 32(b) ("The Supreme Court's authority also includes jurisdiction of original proceedings for mandamus, *prohibition*, injunction, and similar remedies to protect its appellate jurisdiction.") (emphasis added). Therefore, this Court clearly possesses jurisdiction over this matter.

II. MERITS

A writ of prohibition is similar to a writ of mandamus, except that "[a] writ of mandamus may seem more appropriate if the form of the order is to mandate action, and a writ of

prohibition if the order is to prohibit action." *In re People of the V.I.*, 55 V.I. 851, 985 n.4 (V.I. 2011) (quoting *United States v. Santtini*, 963 F.2d 585, 593 (3d Cir. 1992)). Thus, to determine if issuance of a writ of prohibition is appropriate, this Court applies the same test it does to determine whether a party is entitled to a writ of mandamus. *United States v. Santtini*, 963 F.2d 585, 593 (3d Cir. 1992). Therefore, to obtain a writ of prohibition, "a petitioner must establish that it has no other adequate means to attain the desired relief and that its right to the writ is clear and indisputable." *In re People of the V.I.*, 51 V.I. 374, 382 (V.I. 2009) (citing *In re LeBlanc*, 49 V.I. 508, 516 (V.I. 2008)). Moreover, "even if the first two prerequisites have been met, the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances." *Cheney v. U.S. Dist. Court for the D.C.*, 542 U.S. 367, 380-81 (2004).

As to the first factor, the People contend that Najawicz could have sought a stay from the Nominal Respondent in lieu of filing the instant petition. The Superior Court's certified docket entries, however, reflect that Najawicz did file such a motion on October 9, 2012, and this Court takes judicial notice that the Nominal Respondent nevertheless continued to proceed with jury selection and other matters on October 9 and 10, 2012. Moreover, the fact that the Nominal Respondent opposes Najawicz's petition itself demonstrates that the Nominal Respondent has no intent to stay Najawicz's trial pending appeal.

We recognize, however, that Najawicz could seek similar—but not identical[1]—relief by filing a motion for a stay pending appeal in S.Ct. Crim. No. 2012-0109. However, criminal defendants who wish to stay trial court proceedings pending an appeal of a denial of a motion to

[1] Unlike an order entered in an appeal, an order issuing a writ of mandamus, prohibition, or other extraordinary writ personally binds the judge—who is a party to a prohibition proceeding, but not a party to an appeal—and is thus punishable by contempt if ultimately violated. *See In re Fleming*, S.Ct. Civ. No. 2011-0109, 2012 WL 917315, at *4 (V.I. Mar. 15, 2012).

dismiss on double jeopardy grounds possess the option to initiate an original proceeding for a writ of prohibition in lieu of filing a motion in the criminal appeal.[2] *See e.g., United States v. Dunbar*, 611 F.2d 985, 989 (5th Cir. 1980) ("This Court is, of course, empowered to protect the defendant's double jeopardy rights by staying proceedings below pending appeal . . . or by issuing a writ of mandamus or prohibition."); *United States v. Leppo*, 634 F.2d 101, 105 (3d Cir. 1980) (stating that either motion for stay pending appeal or petition for writ of prohibition may be used as vehicle to obtain stay pending appellate review of pre-trial double jeopardy claim); *Williams v. White*, 856 S.W.2d 847, 848 (Tex. App. 1993). Moreover, given that the Justices of this Court presiding over this original proceeding are the same Justices who will consider S.Ct. Crim. No. 2012-0109, denying a writ of prohibition on the grounds that Najawicz could file a motion for a stay pending appeal in S.Ct. Crim. No. 2012-0109 would needlessly elevate form over substance. Therefore, we find that Najawicz has satisfied the first prong.

As to the remaining two factors, both the People and the Nominal Respondent argue that this Court should deny the petition because the Nominal Respondent correctly ruled that the prohibition against double jeopardy does not preclude Najawicz's trial, and cite to case law dealing with extraordinary writs generally. However, neither the People nor the Nominal Respondent address the specific line of case law that has developed in the context of appeals raising pre-trial double jeopardy issues. Pursuant to these authorities, a defendant who wishes to appeal a pre-trial ruling denying a double jeopardy claim is not only permitted to prosecute an

[2] In fact, some courts have held that a criminal defendant may elect to adjudicate the merits of whether the prohibition precludes double jeopardy through a petition for writ of prohibition rather than proceed with an interlocutory appeal. *See, e.g., St. Clair v. Roark*, 10 S.W.3d 482, 484-85 (Ky. 1999). However, since Najawicz has manifested a clear intention to have the double jeopardy issue reviewed as part of the appeal docketed as S.Ct. Crim. No. 2012-0109, and has only requested that this Court issue a writ of prohibition restraining the Nominal Respondent from proceeding with trial while his appeal is pending, we decline to address the merits of Najawicz's double jeopardy claim as part of this original proceeding, except to the extent necessary to determine whether it is frivolous.

immediate appeal, but is entitled to a stay of all further proceedings in the trial court unless the double jeopardy claim is frivolous. *See Abney v. United States*, 431 U.S. 651, 662 (1977) ("[P]retrial orders rejecting claims of former jeopardy . . . constitute 'final decisions.'"); *Leppo*, 634 F.2d at 105 ("[I]n the absence of a finding that the [double jeopardy] motion is frivolous, the trial court must suspend its proceedings once a notice of appeal is filed."); *Williams*, 856 S.W.2d at 848 ("When a movant has appealed the trial court's denial of his double jeopardy claim, the movant is entitled to a stay of further proceedings unless his double jeopardy claim is frivolous.") (citing *Dunbar*, 611 F.2d at 989). In other words, these authorities establish that, if a defendant has timely appealed from the denial of a non-frivolous double jeopardy motion, a trial judge possesses no discretion to continue to proceed with trial, thus satisfying the last two factors to warrant issuance of a writ of prohibition. *Leppo*, 634 F.2d at 105.

As we have previously explained, a claim is "frivolous" only if it "is not only against the overwhelming weight of legal authority but also entirely without any basis in law or fact or without any logic supporting a change of law," *Murrell v. People*, 53 V.I. 534, 540 (V.I. 2010) (quotation marks and citation omitted). "Thus, while an issue may not be reversible because of controlling authority in the appellate court, an attorney might argue for a change in the law, or for the court to rely on a different line of authority. These issues are arguable on the merits, yet not likely to result in reversal." *Id.* (quoting *Shaw v. State*, 756 So.2d 1101, 1102 (Fla. Ct. App. 2000)). In other words, the fact that a particular argument is unlikely to succeed does not render it frivolous. *See also State v. Hyde*, 670 P.2d 1066, 1067-68 (Or. Ct. App. 1983) ("There is a distinction between 'non-meritorious' and frivolous. . . . By 'non-frivolous,' we mean an issue for which a reasonable argument can be made, including suggested changes in the law.").

Based on these authorities, we simply cannot conclude that Najawicz's motion was frivolous. In fact, while the People and the Nominal Respondent both believe the Nominal Respondent correctly denied Najawicz's motion, neither party has made any attempt to characterize the motion as frivolous. Perhaps most importantly, even though Third Circuit precedent—which the Nominal Respondent was required to follow, *see In re People of the V.I.*, 51 V.I. 374, 389 n.9 (V.I.2009)—mandates that trial courts who believe that a defendant has filed a frivolous pre-trial double jeopardy motion expressly state, in any written order denying a frivolous pre-trial motion to dismiss on double jeopardy grounds, that the motion is frivolous in order to assist an appellate court's consideration of a stay request, *see Leppo*, 634 F.2d at 105, the September 7, 2012 Opinion denying the motion did not include a finding of frivolity, indicating that the Nominal Respondent did not believe, at the time he rendered his decision, that Najawicz had filed a frivolous motion. Moreover, having independently reviewed Najawicz's July 12, 2011 motion, the September 7, 2012 Opinion, and the other portions of the record available to us, we cannot conclude that the issue he has raised is "entirely without any basis in law or fact or without any logic supporting a change of law." *Murrell*, 53 V.I. at 540. Therefore, we hold that Najawicz has satisfied all three of the prerequisites for issuance of a writ of prohibition, and consequently grant the petition.

We recognize, since the Nominal Respondent began jury selection on October 9, 2012 with the expectation that trial would begin on October 11, 2012, that our decision herein forces the Nominal Respondent to choose between (1) allowing the trial to proceed only with respect to Najawicz's co-defendants, with Najawicz to be tried at a later date if his appeal is unsuccessful, or (2) continuing the trial, notwithstanding the selection of the jury, with respect to all defendants so that all defendants may be tried together. While this clearly represents a considerable waste

of judicial resources, we note that the present situation is entirely of the Nominal Respondent's own making, given that he failed to rule on Najawicz's July 12, 2011 motion until September 7, 2012, despite the fact that (1) the Nominal Respondent informed the parties in a February 28, 2012 Order that jury selection would occur in October 2012; (2) this Court's rules permit an appeal in a criminal case to be filed within 30 days, *see* V.I.S.CT.R. 5(b)(1); and (3) extensive case law from the United States Supreme Court, Third Circuit, and other authorities authorizing immediate appeals of pre-trial orders denying motions to dismiss based on double jeopardy and requiring that the underlying proceedings be stayed pending appeal if the motion is not frivolous. Although such a waste of resources is highly unfortunate, this result could have been avoided by ruling on the July 12, 2011 motion at a much earlier stage in the litigation, and we hope that in future cases the judges of the Superior Court will resolve pre-trial motions raising double jeopardy issues well before the scheduled start of jury selection.

III. CONCLUSION

For the foregoing reasons, Najawicz has established that he is entitled to have all proceedings in the underlying criminal prosecution stayed pending the outcome of his appeal of the September 7, 2012 Opinion. Accordingly, the premises having been considered, it is hereby

ORDERED that the petition for writ of prohibition is **GRANTED**. It is further

ORDERED that the Nominal Respondent is hereby **ENJOINED** from conducting any further proceedings in *People v. Najawicz*, Super. Ct. Crim. No. 425/2008 (STT), until this Court issues its mandate in *Najawicz v. People*, S.Ct. Crim. No. 2012-0109. It is further

ORDERED that copies of this Order be served on the parties.

SO ORDERED this 10th day of October, 2012.

ATTEST:
VERONICA J. HANDY, ESQ.
Clerk of the Court