

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-002432-MR

COMMONWEALTH OF KENTUCKY

APPELLANT

APPEAL FROM CLAY CIRCUIT COURT
v. HONORABLE JERRY D. WINCHESTER, SPECIAL JUDGE
INDICTMENT NO. 04-CR-00089

JOHNNY C. BISHOP AND
CHRISTOPHER SESTER

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: BARBER, DYCHE, AND MINTON, JUDGES.

DYCHE, JUDGE: On March 15, 2004, two Manchester policemen and a Kentucky state trooper went to the home of appellee Johnny C. Bishop to effect an arrest. When the officers arrived at Bishop's residence, they were given permission by Bishop's roommate to search the premises; they discovered a methamphetamine laboratory and drug paraphernalia. Bishop was arrested by the city policemen as was co-appellee Christopher

Sester, who was on the scene and found in possession of methamphetamine and other drugs.

The two were indicted on multiple drug related offenses by the Clay County Grand jury on May 26, 2004. At arraignment, Bishop moved to dismiss the charges against him on the grounds that the city policemen made the arrests outside the Manchester city limits (thus outside their jurisdiction). Sester orally moved to join in this motion. A hearing was held on the motion, after which the special judge assigned to the case ordered briefing on the issues. The Clay County attorney moved and was granted permission to file an amicus curiae brief. Having considered the evidence at the hearing and the briefs filed, the trial court ordered the indictments dismissed. The Commonwealth appeals.

The Commonwealth first takes issue with the trial court's language that "[t]his indictment is dismissed for want of jurisdiction." It is unclear from the order whether the trial court was referring to its own or the city policemen's jurisdiction. However, review of the videotape of the hearing indicates that the trial court referred to the jurisdiction of the officers. Thus the trial court did not mistakenly determine that it had no jurisdiction. Whether the policemen had jurisdiction to make the arrest will be discussed further.

The Commonwealth secondly argues that the trial court erred in finding that the City of Manchester had the authority to limit its police officers' powers of arrest. Appellant cites KRS 95.019(1), which empowers members of the police force of cities of the first through fifth classes (and Manchester is a city of the fourth class) to make county wide arrests. See Commonwealth v. Monson, 860 S.W.2d 272 (Ky. 1993).

The trial court considered this before deciding that KRS 83A.130 and KRS 83A.060 nonetheless gave the City of Manchester the authority to specify the powers and duties of its police officers, including the right to curtail the officers' geographical boundaries. See also OAG 79-245. This the city purported to do via ordinances adopted in 1983 and 1987 and an order adopted in 1987.

"As a general rule, a city has broad powers to do whatever is necessary for the health, safety and welfare of its residents." Barber v. Commissioner of Revenue, 674 S.W.2d 18, 20 (Ky.App. 1984). However, the Commonwealth argues that the city's authority is not limitless: Pursuant to KRS 82.082, a city is able to "exercise any power and perform any function . . . that is in furtherance of a public purpose of the city *and not in conflict with a constitutional provision or statute.*" (Our emphasis); see also Kentucky Constitution § 156b. The Commonwealth urges that the ordinances in question are in

conflict with KRS 95.019, and the statute should thus take precedence.

The Manchester city ordinance adopted in 1983 was silent regarding the geographical jurisdiction of its police officers. The 1987 ordinance was followed by an order executed by the mayor on that same date; the former was again silent regarding jurisdiction, although it contained a section allowing change to occur by ordinance *or by municipal order*. The municipal order purported to restrict the city police and their vehicles from leaving the city limits. The precise language of §8.1(2) states: "No city policeman or police car is to leave the Manchester city limits while on duty, unless an emergency arises."

The Commonwealth argues that, because KRS 83A.130(11) vests legislative authority in the city council, and (3) vests the mayor with executive authority only, the 1987 municipal order effected a usurpation of the city council's authority and was thus invalid. Since the ordinances of 1983 and 1987 were silent regarding jurisdiction, the Manchester city policemen continued to operate under a county wide command pursuant to KRS 95.019(1) and Monson, supra. The arrest of appellees constituted a violation of the terms of the city policemen's employment but did not render the arrest itself illegal, says the Commonwealth.

Appellees counter that OAG 83-64 defines "municipal order" as "an official act of the legislative body and is binding upon the officers, employees and municipality and any governmental agency over which the municipality has jurisdiction." As such, they continue, the order was properly enacted and binding upon the city policemen. We agree. The city was within its rights to thus limit the patrol area of its police force, and the trial court was correct in its ruling in that regard.

The Commonwealth argues that nonetheless the arrest was legal because of (a) the presence of the state trooper or (b) as a citizen's arrest in response to a felonious act. See KRS 431.005(5). Unfortunately for the Commonwealth, neither of these arguments were ruled upon by the trial court. The latter argument was never raised in the trial court. The former argument was raised at the hearing, and the trial court indicated that it would be inclined to rule in the Commonwealth's favor if the issue could be developed further. However, neither the Commonwealth Attorney's nor County Attorney's brief included the state trooper or citizen's arrest arguments in favor of upholding the arrest.

"Having failed to raise the issue before the trial court, Appellant has not preserved it for appellate review. RCr 9.22." Hillard v. Commonwealth, 158 S.W.3d 758, 765 (Ky. 2005).

The same holds true for the last issue, viz., that the proper remedy would have been suppression of the evidence rather than dismissal of the indictment.

The order of the Clay Circuit Court is affirmed.

ALL CONCUR.

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