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Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001857-MR

ANGELA PETERS — APPELLANT

v.

APPEAL FROM SHELBY CIRCUIT COURT
HONORABLE CHARLES R. HICKMAN, JUDGE
ACTION NO. 08-CI-00518

COMMONWEALTH OF KENTUCKY
AND HON. DONNA G. DUTTON, JUDGE,
SHELBY DISTRICT COURT — APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; TAYLOR, JUDGE; HENRY,[1] SENIOR JUDGE.

COMBS, CHIEF JUDGE: This appeal concerns the propriety of a writ of prohibition issued by the Shelby Circuit Court against the Shelby District Court. After careful review and consideration, we reverse and remand for entry of an order setting aside the writ.

[1] Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

In February 2008, Angela Peters was charged with driving under the influence (DUI), first offense. At her arraignment in March, her attorney requested a pretrial conference and requested the presence of the officer who had arrested Peters. The Commonwealth objected to producing the arresting officer. After the parties briefed the issue, the district court ordered the Commonwealth to produce the officer. The Commonwealth then requested a writ of prohibition from the Shelby Circuit Court, which was granted. Peters now appeals.

A writ of prohibition is an extraordinary remedy that:

> *may* be granted upon a showing that (1) the lower court is proceeding or is about to proceed outside of its jurisdiction and there is no remedy through an application to an intermediate court; or (2) that the lower court is acting or is about to act erroneously, although within its jurisdiction, and there exists no adequate remedy by appeal or otherwise and great injustice and irreparable injury will result if the petition is not granted.

Hoskins v. Maricle, 150 S.W.3d 1, 10 (Ky. 2004). (Emphasis in original). *See also* Kentucky Rule[s] of Civil Procedure (CR) 81. The district court has exclusive jurisdiction over misdemeanors. Kentucky Revised Statute[s] (KRS) 24A.110(2). A person's first DUI offense is a misdemeanor. KRS 189A.010(5)(a). Therefore, the circuit court correctly observed that the writ of prohibition in this case belonged to the second category; *i.e.*, where the lower court was acting erroneously *within* its proper jurisdiction.

At the threshold, there are two prerequisites which must be considered: (1) whether the Commonwealth had an adequate remedy by appeal or

otherwise; and (2) whether the trial court's order resulted in great injustice and irreparable injury. *Bender v. Eaton*, 343 S.W.2d 799, 801 (Ky. 1961).

The Commonwealth correctly asserts that it did not have an adequate remedy by appeal. It may appeal to the circuit court "from any final action of the District Court." KRS 23A.080. A final action is one that disposes of all the issues in a case and generally includes the recitation that the judgment is final. CR 54.02(1).[2] This order did not dispose of the ultimate issue (*i.e.*, whether Peters is guilty of driving under the influence), nor does it include finality language.

This court was faced with a very similar situation in *Commonwealth v. Williams*, 995 S.W.2d 400, 402-03 (Ky. App. 1999), a DUI case in which the district court had suppressed evidence of a blood alcohol test. In *Williams*, this Court noted that KRS 23A.080(1) provides only for an appeal from final actions and that KRS 23A.080(2) authorizes circuit courts to issue writs to aid in its appellate authority. The *Williams* court held that the Commonwealth did not have the option of an interlocutory appeal, and that, therefore, its only remedy was to petition for a writ. We agree that in the case before us, the Commonwealth's only remedy was to seek a writ of prohibition.

We must next determine whether great injustice and irreparable harm resulted from the district court's order that the Commonwealth produce the arresting officer at a pretrial conference. As this inquiry is a matter of fact, our

[2] Kentucky Rule[s] of Criminal Procedure (RCr) 13.04 provides that the Rules of Civil Procedure shall apply to criminal proceedings where they have not been superseded by a criminal rule and where there is no inconsistency. Thus, CR 54.02(1) is incorporated by reference through RCr 13.04 and applies in this case.

standard of review is whether the court clearly erred in granting the writ. *Grange Mutual Ins. Co. v. Trude*, 151 S.W.3d 803, 810 (Ky. 2004). Clear error occurs only when there is no substantial evidence in the record to support the findings of the trial court. *M.P.S. v. Cabinet for Human Resources*, 979 S.W.2d 114, 116 (Ky. App. 1998).

Great and irreparable injury occurs when "the failure to succeed in the particular case should inevitably be followed by consequences of great and ruinous loss[.]" *Osborn v. Wolfford*, 39 S.W.2d 672, 673 (Ky. 1931). In its argument on appeal, the Commonwealth repeats the reasoning of the circuit court in its writ of prohibition that if the arresting police officer were to attend the pretrial conference, the result would be:

> the *potential* for impeachment of witnesses at trial with unsworn statements . . ., defense counsel who attended the pretrial hearings becoming fact witnesses, unrepresented witnesses incriminating themselves,
>
> encouragement of unfettered "fishing expeditions" by defense counsel.

(Emphasis added.)

We are not persuaded that the potential results enumerated by the circuit court and the Commonwealth qualify as great and irreparable harm – much less harm at all. They are highly speculative and generalized. Our highest court has made it clear that an injury meriting such an extraordinary remedy must be "shown by specific allegation of facts and acceptable proof of them" as a condition precedent to issuance of a writ. *Parsley v. Knuckles*, 346 S.W.2d 1, 3 (Ky. 1961).

In *Parsley*, the predecessor to our Supreme Court held that "[i]nterference with the trial procedure of another court should result only from certainty and assurance." *Id*. Similarly, the court in *Grange, supra*, held that merely describing documents which allegedly contained trade secrets was insufficient evidence; the insurer should have produced the documents themselves for the court's review. In the case before us, the writ simply surmises as to possible outcomes without providing specific facts or proof of misconduct either by the defense or by the district court.

As a failsafe to the potential mischief envisioned by the circuit court, the district court included preventive measures in its order. It cautioned the defense attorney against using the witness's statements later at trial, citing Supreme Court Rule 3.130(3.7), "Lawyer as Witness." The order set forth clear precautions for the defense attorney, such as including a third person in the pretrial conference who could testify later at trial or even the option to withdraw from the case if such a contingency were later to develop.

We acknowledge that the prerequisite of great and irreparable harm is excepted for "certain special cases," but this case does not belong in that category. *Grange*, 151 S.W.3d at 808. Those certain special cases involve instances where "a substantial miscarriage of justice will result if the lower court is proceeding erroneously, *and* correction of the error is necessary and appropriate in the interest of orderly judicial administration." *Bender*, 343 S.W.2d at 801. (Emphasis in original). In this case, the Commonwealth has not been the victim of a substantial miscarriage of justice and is not likely to be made so by the district court's order.

The district court issued its order in the interest of expediting the judicial process, stating that in Shelby County, it is customary for the arresting officer to attend pretrial conferences. Although we have not found caselaw directly on point, we note that a recent case from Jefferson County demonstrates the common or customary nature of requiring the presence of the arresting officer under similar circumstances. *Commonwealth v. Gonzalez*, 237 S.W.3d 575 (Ky. App. 2007).

Additionally, the district court properly acted within the scope of its discretion in issuing its order. Kentucky Rule[s] of Criminal Procedure (RCr) 7.24(5) gives the trial judge authority to "prescribe such terms and conditions" concerning discovery. The district court chose to expedite discovery by means of a pretrial conference. This Court has long held that a writ "is inappropriate to tell a lower court how to act or to interfere with its exercise of discretion." *Stallard v. McDonald*, 826 S.W.2d 840, 842 (Ky. App. 1992) (citing *Humana of Kentucky, Inc. v. NKC Hospitals, Inc*., 751 S.W.2d 369, 374 (Ky. 1988)). We are persuaded that such an unwarranted intrusion into the proper discretion of the district court occurred in this case.

Accordingly, because the threshold requirement of great and irreparable harm was not met and because the district court acted properly within its jurisdiction and discretion, we reverse the order granting the writ and remand for entry of an order setting it aside.

ALL CONCUR.

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NO BRIEF FILED FOR APPELLEE
JUDGE DONNA G. DUTTON