

RENDERED: AUGUST 3, 2012; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000890-MR

COMMONWEALTH OF KENTUCKY

APPELLANT

v. APPEAL FROM NICHOLAS CIRCUIT COURT
HONORABLE JAY DELANEY, JUDGE
ACTION NO. 11-CR-00022

SAMUEL TERRELL

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS AND THOMPSON, JUDGES; LAMBERT,¹ SENIOR JUDGE.

COMBS, JUDGE: The Nicholas Circuit Court entered an order halting police questioning of the appellee, Samuel Terrell, until he could consult with counsel. The Commonwealth has appealed the order. After our review, we affirm.

¹ Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

A very sparse record is before us, but it shows that on May 13, 2011, the Carlisle Police Department obtained a search warrant for the apartment shared by Samuel Terrell and his mother. Terrell's mother was found dead from a gunshot wound, and he was taken into custody. On the same day, the Nicholas Circuit Court entered an order which directed police officers to cease questioning of Terrell until he was granted access to an attorney. The record then indicates that Terrell was arraigned on May 16, 2011, represented by the late Gatewood Galbraith.

The Commonwealth claims that the order to cease questioning was obtained in an *ex parte* meeting between the court and Terrell's father. The Commonwealth contends that it was not given an opportunity to argue against entry of the order. However, nothing in the record supports these claims. On appeal, the Commonwealth urges us to hold that it was improper for the court to enter the order.

The order of the circuit court relied on Kentucky Rule[s] of Criminal Procedure (RCr) 2.14(2), which provides that “[a]ny attorney at law entitled to practice in the courts of this Commonwealth shall be permitted, at the request of the person in custody or of some one² acting in that person's behalf, to visit the person in custody.”

Our Supreme Court has already addressed a highly similar factual scenario in *West v. Commonwealth*, 887 S.W.2d 338 (Ky. 1994). The facts of *West* are virtually congruent. West was taken into custody, and he signed a waiver of his

² The rule uses *some one*, not *someone*.

right to an attorney. However, West's family contacted the office of the public defender. When the police did not allow him to visit West, the public defender tendered an order to the court that all questioning cease and that West be given access to counsel. The trial court granted the order. On appeal, the Supreme Court held that the order was appropriate. The language of the trial court's order in *West* is identical to the order that is at issue in this case.

The Commonwealth suggests either that we overrule *West* or that we distinguish it from the case before us. *West* is a Supreme Court case; therefore, we are not permitted to overrule it. Kentucky Supreme Court Rule[s] (SCR) 1.030(8)(a); *Special Fund v. Francis*, 708 S.W.2d 641, 642 (Ky. 1986). The Commonwealth seeks to distinguish the cases by pointing out that West was adjudicated to be indigent while Terrell was represented by private counsel.

We cannot agree that this distinction is relevant. In its opinion, the Supreme Court pointed out that RCr 2.14 pertains to *any* lawyer. *West v. Commonwealth*, 887 S.W.2d at 341. It further elaborated that if a public defender were erroneously provided for a defendant who was not indigent, there is a statutory mechanism for the state agency to recoup funds that were spent. *Id.* (citing Kentucky Revised Statute[s] (KRS) 31.150). We also note that while Terrell was represented by private counsel at his arraignment, he is currently being represented by the Department of Public Advocacy. The record does not reflect whether his private representation continued at the trial level. However, we believe that it is immaterial whether private counsel or a public defender is involved.

Therefore, in light of precedent set by our Supreme Court, we affirm the order of the Nicholas Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Jack Conway
Attorney General

Heather M. Fryman
Assistant Attorney General
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Thomas M. Ransdell
Assistant Public Advocate
Frankfort, Kentucky