

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-000490-OA

CONNIE L. RUNNER

PETITIONER

ORIGINAL ACTION

V. REGARDING THE JEFFERSON CIRCUIT COURT

HON. STEPHEN P. RYAN, JUDGE
JEFFERSON CIRCUIT COURT

RESPONDENT

AND

COMMONWEALTH OF KENTUCKY

REAL PARTY IN INTEREST

*** ** ***

OPINION AND ORDER

BEFORE: KNOPF, MILLER, AND SCHRODER, JUDGES.

KNOPF, JUDGE: Petitioner seeks relief from this Court pursuant to CR 76.36 for issuance of a writ of prohibition to prevent her trial on the charge of tampering with physical evidence. This Court previously denied petitioner's motion for emergency relief in this matter, and this panel now considers this original action on the merits.

The petitioner is charged with tampering with physical evidence based on the Commonwealth's belief that petitioner contrived requested handwriting exemplars during her previous trial for bribery of a public official. Petitioner was acquitted on the bribery charge, and thus claims that a trial on the tampering with evidence charge either violates her Constitutional protection against double jeopardy or is foreclosed under the

doctrine of collateral estoppel.

The respondent trial court denied motions to dismiss the tampering charges by orders entered November 14 and November 27, 2000. The trial was previously scheduled on March 14, 2001, but has now been rescheduled for July of 2001.

Pursuant to the holding of the Kentucky Supreme Court in Commonwelath v. Burge, Ky., 947 S.W.2d 805 (1997), cert. denied sub nom., Effinger v. Kentucky, 522 U.S. 971, 118 S. Ct. 422, 139 L. Ed. 2d. 323 (1997), the key issue for double jeopardy analysis is whether each of the charged offenses requires proof of an element that the other offense does not. Based on that analysis there is no double jeopardy violation in this case. The proof required on a bribery charge involves numerous elements not required for a tampering with evidence charge, and the proof required for tampering with evidence is not even necessary in a bribery charge.

With regard to collateral estoppel, the Kentucky Supreme Court, in Benton v. Crittenden, Ky., 14 S.W.3d 1 (1999), adopted a standard from the United States Supreme Court in Ashe v. Swenson, 397 U.S. 436, 90 S.Ct. 1189, 25 L. Ed. 2d 469 (1970). The test adopted for collateral estoppel involves whether, in determining the previous verdict, a rational jury could have relied on an issue other than the one petitioner claims is foreclosed. Benton, at 4. Based on a careful review of the petition and response in this action, it is clear to this Court that a rational jury could have relied on evidence other than the

accuracy and honesty of the handwriting exemplars in delivering a verdict of acquittal on the bribery charge.

Accordingly, the petition pursuant to CR 76.36 for a writ of prohibition to prevent her trial on the charge of tampering with physical evidence is hereby DENIED.

Having considered petitioner's motion for oral argument in the above-styled action, and being otherwise sufficiently advised, this Court ORDERS that this motion be, and it is hereby, DENIED.

SCHRODER, JUDGE, CONCURS.

MILLER, JUDGE, DISSENTS.

MILLER, JUDGE, DISSENTING: I dissent. In my opinion this prosecution violates the fundamental fairness doctrine implicit in the due process clauses of our federal and state constitutions. See Matthews v. Commonwealth, Ky., 997 S.W.2d 449, 455 (1999) (Stephens, J., dissenting, citing Brandy v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963)), and Burks v. Commonwealth, Ky., 471 S.W.2d 298 (1991).

I am of the opinion that the petition should be granted.

ENTERED: April 20, 2001

/s/ William L. Knopf
JUDGE, COURT OF APPEALS