

Commonwealth Of Kentucky

Court Of Appeals

NO. 2002-CA-001744-OA

COMMONWEALTH OF KENTUCKY

PETITIONER

v. ORIGINAL ACTION
REGARDING JEFFERSON CIRCUIT COURT
ACTION NO. 02-CR-001647

HONORABLE STEPHEN P. RYAN, JUDGE
JEFFERSON CIRCUIT COURT

RESPONDENT

AND

MICHAEL JAMES

REAL PARTY IN INTEREST

* * * * *

OPINION AND ORDER
ON PETITION FOR WRIT OF PROHIBITION

BEFORE: BUCKINGHAM, GUIDUGLI, AND KNOPF, JUDGES.

BUCKINGHAM, JUDGE. In this original action, the Commonwealth through two assistant commonwealth's attorneys for the 30th Judicial Circuit is seeking to prohibit the respondent, Judge Stephen P. Ryan, from enforcing an order disqualifying Assistant Commonwealth's Attorney F. Todd Lewis and the entire Jefferson County Commonwealth's Attorney's Office from prosecuting Michael James on Indictment No. 02-CR-001647 charging him with flagrant nonsupport. The court has considered written pleadings and has

considered oral presentations of counsel for the petitioner, for Judge Ryan, and for Michael James as the real party in interest. The court has also considered memoranda submitted by the Jefferson County Commonwealth's Attorney and the Office of the Attorney General. For the reasons that follow, the court denies the relief as to the disqualification of Assistant Commonwealth's Attorney Lewis but grants relief as to the disqualification of the entire Commonwealth's Attorney's Office.

Original actions filed in this court pursuant to CR 81 and CR 76.36, seeking relief in the nature of a writ of prohibition, are extraordinary remedies with very strict standards.

[1] Writs of prohibition, being extraordinary remedies, not to be substituted for appeal, and issued only in the sound discretion of the court, are reserved for those situations in which a lower court is acting either (1) without or beyond its jurisdiction or (2) within its jurisdiction, but erroneously. In the latter category of cases, a prerequisite to the issuance of the writ is a showing that there is no adequate remedy by appeal or otherwise and irreparable injury or great injustice will result without its issuance. Bender v. Eaton, Ky., 343 S.W.2d 799 (1961), Jones v. Hoqq, Ky., 639 S.W.2d 543 (1982), Commonwealth, Revenue Cabinet by Gillis v. Graham, Ky., 710 S.W.2d 227 (1986).

Corns v. Transportation Cabinet, Ky., 814 S.W.2d 574, 577 (1991).

It is within this context that we review the pleadings and the arguments in this original action.

At issue here is the respondent judge's use of KRS 15.733(3) to disqualify an assistant commonwealth's attorney and

the entire Commonwealth's Attorney's Office from a prosecution.

That statutory section states in its entirety:

- (3) Any prosecuting attorney may be disqualified by the court in which the proceeding is presently pending, upon a showing of actual prejudice.

KRS 15.733(3). The respondent judge used this statutory provision to disqualify the assistant commonwealth's attorney and the Commonwealth's Attorney's Office upon finding that the assistant commonwealth's attorney had misled him personally or through other employees of the Commonwealth's Attorney's Office by improperly seeking an arrest warrant immediately after the return of the indictment against Michael James. During the course of a hearing, and by subsequent written order, Judge Ryan disqualified Assistant Commonwealth's Attorney Lewis and the entire Commonwealth's Attorney's staff from the prosecution of Michael James on this indictment.

On August 27, 2002, this court, through Judge Knopf, denied the Commonwealth's motion for emergency relief to suspend enforcement of the disqualification order. The Commonwealth's motion for intermediate relief is now submitted to this panel.

As a procedural matter, we note that the respondent judge took this action on his own initiative during the course of the hearing. It was only after the judge had announced his intention to disqualify the prosecutors that counsel for the defendant made an oral motion for the disqualification. We further note that this matter was before the respondent judge only because he was standing in for another judge in the supervision of the grand jury.

We must also note that there is another and senior indictment against this same defendant being prosecuted in the Jefferson Circuit Court. There is no indication that disqualification of the Commonwealth's Attorney's Office or any of its members has been sought in that indictment. Both indictments are currently proceeding in a different division of the Jefferson Circuit Court.

There is precedent for utilizing an original action to seek review of a circuit court ruling on disqualification of a prosecutor. See Summit v. Mudd, Ky., 679 S.W.2d 225 (1984). But in reviewing the action, we must apply the standards for reviewing a petition for a writ as set out in Corns, supra.

First, we do not believe that Judge Ryan was proceeding without or beyond his jurisdiction. The judge was presented with a properly returned indictment from the Jefferson County Grand Jury and was compelled to address the issue of whether an arrest warrant should be issued and, later, whether that arrest warrant should be quashed. Also, KRS 15.733(3) gives the trial court the authority to remove a prosecutor in appropriate circumstances.

In dealing with the question of whether the respondent judge was acting erroneously within his jurisdiction, we must separate the issues regarding the individual assistant commonwealth's attorney and the Commonwealth's Attorney's Office as a whole. At the circuit court hearing, Judge Ryan first disqualified Lewis and then disqualified the entire Commonwealth's Attorney's Office. The order entered by Judge Ryan disqualifies the entire office and does not address Lewis

separately. We do not believe that this prevents us from treating the issues separately.

We must approach these issues with an awareness that KRS 15.733(3) provides that the court may disqualify a prosecutor only "upon a showing of actual prejudice." Actual prejudice must be shown, and the mere possibility of the appearance of impropriety is not sufficient. Summit v. Mudd, supra. Vindictiveness is not to be presumed. Clayton v. Commonwealth, Ky., 786 S.W.2d 866, 869 (1990); Barnett v. Commonwealth, 979 S.W.2d 98, 102 (1998).

In the case of Assistant Commonwealth's Attorney Lewis, Judge Ryan perceived that misrepresentations had been made to induce him to issue an arrest warrant. Judge Ryan later recalled the warrant, but only after the defendant had been taken into custody. Although Lewis was not present when the trial court actually issued the warrant, Lewis did acknowledge at the hearing before Judge Ryan that he had drafted the motion and had signed it. It is apparent that but for the perceived misrepresentations, Judge Ryan would not have issued the arrest warrant or disqualified the prosecutors.

Regardless of whether we perceive an error in the removal of the assistant commonwealth's attorney, we do not find that Lewis will suffer irreparable injury. An assistant commonwealth's attorney does not have a right to prosecute any individual case. There are other cases for Lewis to prosecute and other assistant commonwealth's attorneys to prosecute this particular indictment.

A different situation is presented as to the entire Office of the Commonwealth's Attorney for the 30th Judicial Circuit. Careful review of the tape of the hearing before Judge Ryan and review of the pleadings submitted does not indicate any fact that justified imputing "actual prejudice" to the Commonwealth's Attorney's Office as a whole. No reasons are stated to justify the disqualification of the entire office, and it was error for the respondent judge to so order.

Moreover, we do find irreparable injury to the Office of the Commonwealth's Attorney here. The Commonwealth's Attorney is an elected official charged with various constitutional and statutory duties, among which is the prosecution of criminal defendants in circuit court. KRS 15.725(1). The Commonwealth's Attorney has the right to the exercise of his office. To strip the Commonwealth's Attorney of the right to prosecute an indictment without an adequate reason and appropriate findings under the statute constitutes irreparable injury and justifies the granting of relief through an original action.

Accordingly, the court ORDERS that, to the extent the petition seeks to prohibit enforcement of the order of disqualification of Assistant Commonwealth's Attorney Lewis, relief is DENIED. The Court further ORDERS that, to the extent the petition seeks to prohibit enforcement of the order of disqualification of the entire Office of the Commonwealth's Attorney for the 30th Judicial District, relief is hereby GRANTED. The respondent judge is hereby PROHIBITED from enforcing so much of his order of August 5, 2002, as disqualifies

the entire Office of the Jefferson County Commonwealth's Attorney
from the prosecution of Indictment No. 02-CR-001647.

ALL CONCUR.

ENTERED: September 13, 2002

/s/ David C. Buckingham
JUDGE, COURT OF APPEALS

PETITION FOR THE COMMONWEALTH:

F. Todd Lewis
Jeanne Anderson
Assistant Commonwealth's
Attorneys
Louisville, Kentucky

ORAL ARGUMENT FOR THE
COMMONWEALTH:

Jeanne Anderson
Assistant Commonwealth's
Attorney
Louisville, Kentucky

MEMORANDUM ON BEHALF OF THE
ATTORNEY GENERAL:

David A. Sexton
Assistant Attorney General
Frankfort, Kentucky

MEMORANDUM ON BEHALF OF THE
COMMONWEALTH'S ATTORNEY FOR
THE 30TH JUDICIAL CIRCUIT:

Jeanne Anderson
Assistant Commonwealth's
Attorney
Louisville, Kentucky

RESPONSE ON BEHALF OF JUDGE
STEPHEN P. RYAN:

Judge Stephen P. Ryan, *Pro Se*
Louisville, Kentucky

ORAL ARGUMENT ON BEHALF OF
JUDGE STEPHEN P. RYAN:

Henry Triplett
Louisville, Kentucky

RESPONSE AND ORAL ARGUMENT ON
BEHALF OF REAL PARTY IN
INTEREST MICHAEL JAMES:

Timothy Denison
Louisville, Kentucky