RENDERED: October 3, 2003; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-002259-MR

COMMONWEALTH OF KENTUCKY — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE BARRY WILLETT, JUDGE
ACTION NO. 01-CR-002571

SIDNEY TERRANCE FORD — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: DYCHE, JOHNSON AND PAISLEY, JUDGES.

JOHNSON, JUDGE: The Commonwealth of Kentucky has appealed from an order entered by the Jefferson Circuit Court on October 8, 2002, which dismissed the indictment against Sidney Terrance Ford with prejudice. Having concluded that the trial court erred in dismissing the indictment, we reverse and remand for further proceedings.

On November 7, 2001, Sidney Ford was indicted by a Jefferson County grand jury on one count of robbery in the first

degree[1] and on one count as being a persistent felony offender in the first degree (PFO I).[2] The indictment charged that on or about September 9, 2001, Ford robbed Matthew Casey, who was homeless.

The charges against Ford arose in a somewhat unusual manner. Officers from the Louisville Police Department were investigating Ford as a suspect in the homicide of John Daugherty, another homeless man. As part of the Daugherty homicide investigation, Detective Gary Huffman and another officer visited a location in Louisville known to be frequented by homeless persons. Det. Huffman was in the process of showing a police mug shot of Ford to a group of men, when Casey approached Det. Huffman and identified Ford as the man who had robbed him earlier that month.[3]

Prior to Ford's indictment by the grand jury, a probable cause hearing was held in Jefferson District Court on October 12, 2001. Both Det. Huffman and Casey testified at this hearing. Casey identified Ford as the individual who had robbed him. Approximately one year later, on August 23, 2002, a

[1] Kentucky Revised Statutes (KRS) 515.020. Robbery in the first degree is a Class B felony.

[2] KRS 532.080(3).

[3] Up until the time Casey identified Ford from the photograph as the man who had robbed him, the detectives were not aware that any such robbery had allegedly taken place. According to the record, the detectives' sole purpose in showing the photograph to the homeless men was to gather information related to the Daugherty homicide investigation.

suppression hearing was held to determine the admissibility of Casey's identification of Ford as the alleged robber.[4] Casey did not attend the suppression hearing held on August 23, 2002. Testimony from Det. Huffman, as well as statements made by Ford's attorneys, indicated that substantial efforts had been made to procure Casey's attendance, but that those efforts had failed. Hence, the trial court continued the suppression hearing to October 3, 2002, to allow the Commonwealth additional time to locate Casey.

On the October hearing date, the Commonwealth produced a document indicating that Casey had been served with a subpoena compelling his attendance, but Casey nonetheless failed to appear. The trial court did not address the issue regarding the admissibility of Casey's identification of Ford. Instead, after expressing doubts as to whether Casey would ever be found, the trial court dismissed the indictment against Ford with prejudice. This appeal followed.

As a preliminary matter, we deal first with Ford's assertions that the alleged error[5] presented by the Commonwealth was not preserved for appellate review, and that the brief filed

[4] Defense counsel for Ford argued that the manner in which Casey identified Ford as the perpetrator was "unnecessarily suggestive" and in violation of Ford's state and federal constitutional rights.

[5] The Commonwealth's sole argument on this appeal is that the trial court erred in dismissing the indictment against Ford.

on behalf of the Commonwealth failed to show where in the record and in what manner this alleged error was preserved for review.[6]

First, Ford's claim that the alleged error was not properly preserved for review is without merit. Our review of the record shows the following. After it was discovered that Casey was not present at the August 23, 2002, suppression hearing,[7] defense counsel moved the trial court to dismiss the indictment against Ford. The Commonwealth clearly objected to this motion by urging the trial court to go forward with the testimony of Det. Huffman. Indeed, the trial court agreed with the Commonwealth and allowed Det. Huffman to testify. However, when the hearing was rescheduled for October 3, 2002, once again, Casey was not present. At the second hearing, the Commonwealth again argued against dismissal, and urged the trial court to let the case "proceed to trial." Pursuant to RCr[8] 9.22, an alleged error will be preserved for appellate review if a party "makes known to the court the action which that party desires the court to take. . . ."[9] In the case at bar, the

[6] See Kentucky Rules of Civil Procedure (CR) 76.12(4)(c)(v). This rule requires that briefs shall contain "at the beginning of the argument a statement with reference to the record showing whether the issue was properly preserved for review and, if so, in what manner."

[7] The parties agree that Casey had not been served with a subpoena compelling his attendance on this date.

[8] Kentucky Rules of Criminal Procedure.

[9] See also Price v. Commonwealth, Ky., 474 S.W.2d 348, 350 (1971)(holding that "[i]n order to effectuate an objection '. . . it is sufficient that a party,

arguments made by the Commonwealth in response to defense counsel's motion to dismiss were sufficient to make known to the trial court the action the Commonwealth desired. Accordingly, Ford's claim that the issue was not preserved for appellate review is without merit.

Second, while it is true that the original brief filed on behalf of the Commonwealth did not comply with CR 76.12(4)(c)(v), the Commonwealth's reply brief to this Court contains citations to the record showing where and in what manner the alleged error was preserved for review. This is a proper method by which to correct such a procedural mistake.[10] Accordingly, we now turn to the merits of this case.

We agree with the Commonwealth that under the facts of this case, the trial court erred by dismissing the indictment against Ford. In Commonwealth v. Isham,[11] our Supreme Court recently discussed the power of a trial court to dismiss an indictment against a criminal defendant:

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at the time the ruling or order of the court is made or sought, make known to the court the action which he desires the court to take. . .'")(quoting RCr 9.22).

[10] See Hollingsworth v. Hollingsworth, Ky.App., 798 S.W.2d 145, 147 (1990) (holding that "[e]ven though the appellant omitted the reference in his original brief, he did insert the necessary references in his reply brief to correct the omission. This serves the very purpose for which CR 76.12(4)(c)[(v)] was enacted; therefore, a reply brief may be used to both supplement an appellant's original brief and to correct a procedural defect related to CR 76.12(4)(c)[(v)]").

[11] Ky., 98 S.W.3d 59, 62 (2003).

> The Commonwealth also contends that the Court of Appeals erred by concluding that the district court had the authority to dismiss the criminal complaint against Isham. It is argued that the authority to dismiss a criminal complaint before trial may only be exercised by the Commonwealth, and the trial court may only dismiss via a directed verdict following a trial. We agree.
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> RCr 9.64 provides that "[t]he attorney for the Commonwealth, with the permission of the court, may dismiss the indictment, information, complaint or uniform citation prior to the swearing of the jury or, in a non-jury case, prior to the swearing of the first witness."

Hence, under the facts of the case sub judice, the trial court lacked the authority to dismiss the indictment against Ford prior to trial.

An analogous situation is found in the case of Commonwealth v. Hicks,[12] where the Supreme Court stated:

> From the transcript of the hearing at which the motion to dismiss was granted, it is unmistakable that the trial judge perceived an indifference by the Kentucky State Police to its duty to provide breathalyzer technicians to testify in court. As a punitive gesture toward the state police, the judge determined that the case should be dismissed. In so doing, he overlooked clear authority to the contrary. It is an age-old principle that a party is not required to produce all the evidence which might be in existence, nor even the most persuasive evidence which might be obtainable. A party who announces ready for trial is entitled to go forward and it is

[12] Ky., 869 S.W.2d 35 (1994).

> not within the province of the trial judge to evaluate the evidence in advance to determine whether a trial should be held. The time for such an evaluation is upon motion for a directed verdict.[13]

Similarly, in the case at bar, the trial court expressed doubt that the Commonwealth would be able to produce its key witness at the trial scheduled for January 28, 2003. Despite the Commonwealth's contention that it would be ready for trial on the scheduled date, the trial court dismissed the indictment with prejudice, thereby precluding any future prosecution of Ford on the charge of robbing Casey. Under the facts of this case, the trial court lacked the authority to dismiss the indictment with prejudice.[14]

Based on the foregoing reasons, the order of the Jefferson Circuit Court is reversed and this matter is remanded for further proceedings consistent with this Opinion.

ALL CONCUR.

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[13] Id. at 37.

[14] Commonwealth v. Hayden, Ky., 489 S.W.2d 513, 516 (1972).

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