

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2003-CA-001432-MR

COMMONWEALTH OF KENTUCKY

APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT  
v. HONORABLE DENISE CLAYTON, JUDGE  
ACTION NO. 01-CR-001791 AND NO. 02-CR-001647

MICHAEL L. JAMES

APPELLEE

OPINION

REVERSING AND REMANDING

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BEFORE: GUIDUGLI, JOHNSON AND MINTON, JUDGES.

GUIDUGLI, JUDGE. The Commonwealth of Kentucky has appealed from the Jefferson Circuit Court's June 25, 2003, Opinion and Order dismissing, without prejudice, two indictments for Flagrant Nonsupport returned against Michael L. James (hereinafter "James") due to prosecutorial misconduct. Having considered the parties' arguments made in their respective briefs and at oral argument, as well as the certified record and the applicable

case law, we must reverse and remand this matter for further proceedings.

On July 25, 2001, the Jefferson County Grand Jury, on a direct submission, returned an indictment against James, charging him with two counts of Flagrant Nonsupport pursuant to KRS 530.050, a Class D felony, for failing to pay amounts exceeding \$1000 owed from March 1, 2000, and May 1, 2001.<sup>1</sup> Although the case was originally assigned to Division 13, the matter was eventually reassigned to Division 5 on James's motion due to other pending matters involving the same parties and transactions.<sup>2</sup> Attorney F. Todd Lewis (hereinafter "Lewis") was the Assistant Commonwealth's Attorney assigned to prosecute the indictment.

On May 16, 2002, James moved the circuit court to dismiss the Commonwealth's case, arguing that a support order was never entered, that the indictment was obtained based upon false testimony before the Grand Jury, and that the Commonwealth failed to prosecute him in a timely manner. The circuit court held a hearing on the motion to dismiss on June 17, 2002, and spent a portion of that hearing off the record in chambers where they discussed whether there was a valid support order. The circuit court denied the motion on June 27, 2002, but indicated in the order that the case might result in a directed verdict

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<sup>1</sup> Indictment No. 01-CR-001791.

<sup>2</sup> It is unclear from the record what these other pending matters were.

for the defendant, so that the parties should try to resolve the matter. A trial date was then set for September 16, 2002.

Between June 17 and July 29, 2002, the Commonwealth and James engaged in some type of plea negotiations. The Commonwealth ultimately extended the following offer: In exchange for James's guilty pleas to two misdemeanor counts of Nonsupport and the payment of all currently owed medical expenses, the Commonwealth would recommend six-month concurrent sentences, conditionally discharged for two years, and would agree not to seek an indictment on the additional counts of Flagrant Nonsupport that had accrued. This offer was apparently made around the time the Grand Jury was hearing testimony regarding a second indictment on July 29, 2002. James, through his attorney, apparently made an oral counter-offer in response, to the effect that he would agree not to sue Lewis and the Commonwealth Attorney's office in exchange for a dismissal of the criminal action. Lewis then completed a letter to James's attorney, mailed on July 29, 2002, in which he renewed the previously offered plea agreement, including the promise not to indict,<sup>3</sup> and confirmed James's counter-offer not to sue. He indicated in the letter that the offer would remain open until August 20, 2002. By letter dated August 2, 2002, counsel for

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<sup>3</sup> At a June 24, 2003, hearing, Lewis testified that he meant to remove the part of the offer regarding his promise not to seek an indictment on the additional charges.

James responded to Lewis's July 29, 2002, letter and offer, and rejected the offer "to settle the case for a misdemeanor since there is no support order which would give rise to either a non-support felony or misdemeanor plea of guilty." In the same letter, counsel for James also withdrew the offer for a covenant not to sue in exchange for a dismissal.

Once James's attorney had orally rejected Lewis's offer, Lewis asked the Grand Jury to indict James on the new charges, which the Grand Jury did by a true bill entered July 30, 2002.<sup>4</sup> Lewis also sought and received a bench warrant from the Grand Jury Judge Stephen P. Ryan, citing James's threats toward his ex-wife, Trisha Zeller. This warrant was later recalled, and Judge Ryan removed both Lewis and the Commonwealth Attorney's office from their prosecutorial duties in that matter, finding, in part, that "Mr. Lewis's statements rise to such a level as to show actual prejudice."<sup>5</sup> The circuit court eventually consolidated the two indictments and recused Lewis from prosecuting either case.

On August 8, 2002, James moved the circuit court to dismiss indictment No. 01-CR-001791,<sup>6</sup> citing prosecutorial

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<sup>4</sup> Indictment No. 02-CR-001647.

<sup>5</sup> This Court granted in part the Commonwealth's writ of prohibition sought in regard to this removal, holding that the Commonwealth's Attorney's office should not have been removed, but that there was sufficient evidence to uphold the removal of Lewis. The Supreme Court of Kentucky affirmed this decision in an opinion rendered October 23, 2003.

<sup>6</sup> In a later memorandum of authorities in support of the motion to dismiss, James also included indictment No. 02-CR-001647.

misconduct on the part of Lewis. This matter came before the circuit court for a hearing on June 23 and 24, 2003.<sup>7</sup> James introduced expert testimony from Louisville attorney Frank Mascagni, who testified regarding Lewis's purported deviation from professional responsibility and ethics. Lewis also testified at the hearing regarding the events that transpired in July and August 2002 as to the plea offer and the circumstances of the second indictment.

On June 25, 2003, the circuit court entered the following order granting James's motion to dismiss due to prosecutorial misconduct:

This action comes before the Court on a Motion to Dismiss for Prosecutorial Misconduct. The Court held a hearing on the Motion on Monday, June 23<sup>rd</sup> and Tuesday, June 24<sup>th</sup>, 2003. The Court also received expert testimony presented on behalf of the defendant. However, this testimony was not relied upon by the Court in reaching its decision.

After reviewing the record and considering the case law of this Commonwealth, this Court finds that there has been a finding of actual prejudice to the defendant due to the misconduct of the prosecutor in Case No. 02 CR 1647 made by Circuit Court Judge Stephen P. Ryan and that there has also been a showing of

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<sup>7</sup> The circuit court also heard argument and testimony regarding James's other motions to dismiss based on his lack of a speedy trial and on the Commonwealth's withdrawal of a later plea offer after he had detrimentally relied upon it, pursuant to Workman v. Commonwealth, Ky., 580 S.W.2d 206 (1979). We shall not review the merits of these motions as the circuit court did not consider the issues raised in them, but rather determined that they were moot in light of its ultimate ruling.

prosecutorial misconduct and actual prejudice in Case No. 01 CR 1791. As a result, both indictments shall be dismissed pursuant to the defense's Motion so requesting.

The defense has also brought Motions to Dismiss based upon a Workman challenge and due to lack of speedy trial. As a result of the decision on this Motion, however, this Court finds that those Motions are now moot.

#### OPINION

As these indictments have a long and convoluted history, this Court will only recite those facts necessary to explain its decision. The defendant, Michael L. James, was originally indicted for Flagrant Non-Support due to his allegedly failing to pay his support obligation on July 25<sup>th</sup>, 2001. Said indictment was assigned to Division Five (5) of Jefferson Circuit Court. During negotiations between the Commonwealth and the defendant, the Assistant Commonwealth Attorney who was handling this action, Todd Lewis, extended an offer to the defendant's counsel, Timothy Denison. That offer was made by letter dated July 29, 2002. Part of the offer was as follows:

...In exchange for this agreement, the Commonwealth will not indict Mr. James for the two additional counts (one for each child) of flagrant non-support which have accrued since the period set out in the above indictment.  
(Defendant's Exhibit F.)

Mr. Lewis also set forth within the above letter that the offer would expire on August 20, 2002 at 8:30 a.m. On July 30<sup>th</sup>, 2002, the Commonwealth's office indicted Mr. James on the two additional counts which culminated in Case No. 02 CR 1647. Mr. James contends that such action was

prosecutorial misconduct as the offer made by the Commonwealth specifically set forth that said indictments would not be taken. He asserts that the offer was clearly open and had not been rejected and that, therefore, this Court should find that there was prosecutorial misconduct in this action and dismiss Cases No. 01 CR 1791 and 02 CR 1647. This Court agrees with Mr. James.

In order to dismiss an indictment based upon prosecutorial misconduct, a court must find not only that there was misconduct, but that there was actual prejudice to the defendant as well. See: Bank of Nova Scotia v. U.S., 487 U.S. 250, 108 S.Ct. 2369, 101 L.Ed.2d 228 (1988). In the present action, Mr. Lewis's actions in extending the offer to Mr. James and then continuing on with the other two indictments was clearly prosecutorial misconduct. The remaining issue to be addressed by this Court is whether actual prejudice resulted from the misconduct.

Mr. James has had additional criminal charges brought against him and was unable to act upon the Commonwealth's offer. This Court believes that is more than sufficient to show that he was prejudiced by the actions of Mr. Lewis. Thus, this Court believes the indictments brought against Mr. James should be dismissed. Said dismissal shall include both those in Case No. 01 CR 1791 and 02 CR 1647.

For the foregoing reasons, this Court will dismiss without prejudice the indictments in Case Nos. 01 CR 1791 and 02 CR 1647 against Mr. James.

ORDER

WHEREFORE IT IS HEREBY ORDERED AND ADJUDGED that the Motion to Dismiss due to Prosecutorial Misconduct be and hereby is GRANTED; and

The indictments set forth in Case Nos. 01 CR 1791 and 02 CR 1647 be and hereby are DISMISSED without prejudice. The indictments are remanded from the trial docket.

The Commonwealth filed its notice of appeal from this order on July 1, 2003, while James filed a CR 59.05 motion to dismiss the actions with prejudice, which the circuit court denied on July 18, 2003. James did not file a cross-appeal.

On appeal, the Commonwealth challenges the circuit court's dismissal of the two indictments, asserting that the rescinding of a plea offer does not constitute prosecutorial misconduct; that there was no evidence to establish an abuse of the grand jury process to support a dismissal; and that even if there were evidence of prosecutorial misconduct, the appropriate remedy would be to reinstate the original plea offer. In his brief,<sup>8</sup> James relies upon Commonwealth v. Baker, Ky.App., 11 S.W.3d 585 (2000), and several federal cases to assert that Lewis's prosecutorial misconduct resulted in actual prejudice sufficient to warrant a dismissal of the indictments.<sup>9</sup>

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<sup>8</sup> This Court has ignored those portions of the counterstatement outside of the record on appeal.

<sup>9</sup> The record does not support James's claims in his brief that Judge Clayton removed Lewis in indictment No. 01-CR-001791 due to his prosecutorial misconduct (the November 25, 2002, order removing Lewis indicates that the decision was made due to the ruling of the Court of Appeals upholding his removal in indictment No. 02-CR-001647 and that it would not be proper for him to remain on one case once the two indictments were consolidated) or that Judge Ryan found that Lewis presented false, misleading or perjured testimony to the grand jury resulting in actual prejudice (Judge Ryan made a finding



As the Commonwealth points out, the circuit court based its decision on two findings: 1) Judge Ryan's finding of actual prejudice in indictment No. 02-CR-1647, and 2) Lewis's misconduct in bringing the second indictment in contravention of the open plea offer and the actual prejudice this caused. The circuit court relied upon the United States Supreme Court's decision in Bank of Nova Scotia v. U.S., 487 U.S. 250, 108 S.Ct. 2369, 101 L.Ed.2d 228 (1988), for the proposition that there must be a finding of prosecutorial misconduct that caused actual prejudice to a defendant in order to dismiss an indictment for prosecutorial misconduct. However, we note that Bank of Nova Scotia actually deals with prosecutorial misconduct as it relates to the grand jury process. The United States Supreme Court enunciated the standard courts should apply as follows: "where a dismissal is sought for nonconstitutional error, . . . dismissal of the indictment is appropriate only 'if it is established that the violation substantially influenced the grand jury's decision to indict,' or if there is 'grave doubt' that the decision to indict was free from the substantial influence of such violations." Id. at 256, 108 S.Ct. at 2374, 101 L.Ed.2d at 238 (quoting United States v. Mechanik, 475 U.S. 66, 78, 106 S.Ct. 938, 945, 89 L.Ed.2d 50, 61 (1986) (O'Connor, J., concurring)). In Commonwealth v. Baker, Ky.App., 11 S.W.3d

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that Lewis had misrepresented the truth in his affidavit for a bench warrant.)

585, 588 (2000), this Court adopted the same standard, and held that, "[a] court may utilize its supervisory power to dismiss an indictment where a prosecutor knowingly or intentionally presents false, misleading or perjured testimony to the grand jury that results in actual prejudice to the defendant."

We must hold that the circuit court's reliance on the standard enunciated in Bank of Nova Scotia is somewhat misplaced as there was no allegation concerning the propriety of the grand jury process in this case. Rather, the actions complained of relate to other aspects of the prosecution of the two indictments. Nevertheless, we agree that a defendant must show actual prejudice in order to support a motion to dismiss based upon a finding of prosecutorial misconduct. In this case, it is apparent from the record that James cannot establish either prosecutorial misconduct or actual prejudice, as the circuit court found, due to the return of the second indictment. If the circumstances were as the circuit court found them, i.e., that James was unable to act on the Commonwealth's offer and additional charges were brought, the result in this case might be different. However, James's responses, through his attorney, both in oral and in written form, belie his claim that he was denied the opportunity to act upon the Commonwealth's offer. Based upon the August 2, 2002, letter from James's attorney, James never had any intention of entering a guilty plea to the

first indictment because of his defense that there was no order in place that would support either a felony or a misdemeanor nonsupport charge. Even if the Commonwealth had not asked for the second indictment prior to the end date indicated in the letter, it is clear that James never had any intention of accepting the Commonwealth's offer or entering a guilty plea. Therefore, there is no support for the circuit court's finding that James was unable to act upon the Commonwealth's offer. In fact, James did act upon the offer, and rejected it both orally and in writing. As such, James could not have been actually prejudiced by the return of the second indictment.

Additionally, we must take issue with the circuit court's findings regarding Judge Ryan's actions. Judge Ryan's August 5, 2002, order addresses Lewis's actions relating to an affidavit attached to his motion for a bench warrant filed in relation to the second indictment. Due to the statements Lewis made in the affidavit and in court, Judge Ryan found actual prejudice on his part and removed him from prosecuting the case, presumably pursuant to KRS 15.733(3). The statute provides, in relevant part, that, "[a]ny prosecuting attorney may be disqualified by the court in which the proceeding is presently pending, upon a showing of actual prejudice." As the Commonwealth pointed out in its brief, James has already received his remedy for Lewis's actions as to the second

indictment in that Lewis was removed and another prosecutor was assigned to that particular case.

For these reasons, we must hold that the circuit court erred in granting James's original motion to dismiss for prosecutorial misconduct. However, we recognize that the circuit court mooted the other pending motions to dismiss, which were based upon a Workman challenge and upon the lack of a speedy trial. Due to our ruling, those motions are no longer moot, and upon remand, the circuit court must review the issues raised in those motions and enter rulings accordingly before a trial on the merits may take place.

For the foregoing reasons, the Jefferson Circuit Court's Opinion and Order dismissing both indictments without prejudice is reversed, and this matter is remanded for reinstatement of both indictments.

MINTON, JUDGE CONCURS.

JOHNSON, JUDGE, CONCURS AND FILES SEPARATE OPINION.

JOHNSON, JUDGE, CONCURRING: I concur with the Majority Opinion, but I choose to write separately to express my concerns about this troublesome case that has consumed an inordinate amount of judicial resources. While I do not know the personalities involved in this case, I cannot help but to observe that an otherwise routine case has developed into a quagmire. The reasons for some of the unjudicious actions that

have occurred in this case are no doubt many and varied, and there appears to be plenty of blame to go around. There is no doubt that nonsupport of a child is a serious crime and zealous prosecution of such offenses is commendable. However, it is perplexing to me as to why the underlying crux of this case, i.e., the validity of an order of support, has not been resolved in the civil action. Since the validity of the obligation to support is central to the criminal prosecution, it would appear that confirmation of that obligation by the civil court would not only further the successful prosecution of the criminal offense, but further the important goal of obtaining the support for the child. The underlying civil action has expanded to include this criminal action and a federal court action claiming civil rights violations. I would implore all the parties to mediate all the issues in this matter with the goal of putting the best interests of the children first and bringing this case to a judicious and expeditious conclusion.

BRIEF FOR APPELLANT:

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