

RENDERED: DECEMBER 8, 2006; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2005-CA-001715-MR

DAVID ROBBINS

APPELLANT

v.

APPEAL FROM DAVIESS CIRCUIT COURT
HONORABLE THOMAS O. CASTLEN, JUDGE
ACTION NO. 05-CI-00721

CMI, INC.

APPELLEE

OPINION
REVERSING

** ** * * * * *

BEFORE: DIXON AND TAYLOR, JUDGES; KNOPF,¹ SENIOR JUDGE.

TAYLOR, JUDGE: David Robbins brings this appeal from a July 21, 2005, order of the Daviess Circuit Court setting aside an order and subpoena/subpoena duces tecum of the Daviess District Court directing a resident of Kentucky to appear as a witness in a criminal action in the Florida Fourth Judicial Circuit in Duvall County, Florida. We reverse.

¹ Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

The procedural facts of this case are particularly convoluted. We shall, nevertheless, attempt to set forth the relevant procedural history in a succinct fashion.

The genesis of this appeal originated in a criminal action pending in the Fourth Judicial Circuit in Duval County, Florida. Willie D. Sapp was charged with driving under the influence by the State of Florida in Case No. 2004-CT-018301. To aide in his defense, Sapp, through his attorney, David Robbins, sought to secure the testimony of and certain documentation from a Kentucky resident, Glen Gilbreath. Gilbreath was an employee of CMI, Inc., the manufacturer of the Intoxilyzer 5000.

To compel Gilbreath's appearance, Florida County Judge, Ronald P. Higbee, entered a "Certificate to the Honorable David Payne" (Certificate). In the Certificate, the Florida Court requested the Commonwealth of Kentucky, Daviess District Court Judge David Payne to issue a summons to "Gilbreath of CMI, Inc., 316 E. 9th Street, Owensboro, Kentucky, 42303" directing his appearance in the Florida proceedings. The Certificate specifically sought to compel Gilbreath's testimony and the production of certain documents.² In the Certificate, the Florida Court noted that Florida was "a signatory to the Uniform

² These documents included the software code, schematics, and parts list for the Intoxilyzer 5000.

Act to Secure the Attendance of Witnesses From Within or Without a State in Criminal Proceedings, Chapter 942, Florida Statutes."

On January 28, 2005, District Court Judge Payne, signed an "Order Directing Witness to Appear" (January 28, 2005, order). This order was styled State of Florida v. Willie D. Sapp and bore the Florida Case No. 2004-CT-018301. Curiously, there appeared no Daviess District Court case number upon the face of the order.³ The January 28, 2005, order was directed to "Glen Gilbreath, CMI, Inc., 316 E. 9th Street, Owensboro, Kentucky, 42303." Gilbreath was ordered to testify and to produce certain documents relating to the Intoxilyzer 5000 in the Florida criminal proceeding. As authority, the Daviess District Court cited Kentucky Revised Statutes (KRS) 421.240. Pursuant to the January 28, 2005, order, a Subpoena and Subpoena Duces Tecum was issued by the Daviess Circuit Clerk directing Gilbreath to appear and to produce certain documents in the Florida criminal proceeding.

On May 19, 2005, the Florida Court entered an "Order to Produce or File Proper Objection." Therein, the Florida Court noted that Gilbreath appeared as a witness in Florida but failed to produce the documents subpoenaed concerning the Intoxilyzer 5000. The Florida court ordered:

³ CMI Inc., also alleged there existed no record of the January 28, 2005, order or of any proceedings related thereto with the clerk. This creates a problem for review by an appellate court as lower courts speak only through their records. See McDonald v. Whallen, 415 S.W.2d 840 (Ky. 1967).

CMI, Inc., by and through a corporate representative, has 45 days from the date of this order, to either file a proper objection with this court to the Order Directing Witness to Appear or produce all items listed within that order.⁴

On May 26, 2005, CMI filed a "Motion to Quash Order/Subpoena From Florida Issued by Respondent" in the Daviess Circuit Court.⁵ CMI named itself as petitioner and David Robbins as respondent. Robbins was the attorney representing Sapp in the Florida criminal proceeding. CMI sought to vacate the Daviess District Court's January 28, 2005, order and subpoena, which compelled the attendance of Gilbreath and the production of documents in Florida. In this motion, CMI specifically attacked the Daviess District Court Order of January 28, 2005. CMI claimed that the Daviess District Court did not comply with and did not have jurisdiction under the Uniform Act To Secure The Attendance of Witnesses From Within or Without a State In Criminal Proceeding (Uniform Act to Secure Witnesses), codified in KRS 421.230 - 421.270. Through local counsel, Robbins filed a motion to dismiss. Robbins argued that the Daviess Circuit Court was without "jurisdiction" and that he was not a proper

⁴ We question whether the Florida court has any jurisdiction to compel compliance from a Kentucky resident by a subpoena issued under the Uniform Act To Secure The Attendance of Witnesses From Within or Without a State In Criminal Proceeding. KRS 421.240(4) provides that the court in Kentucky issuing the subpoena would be the proper authority from whom enforcement may be sought.

⁵ We note that this was an original proceeding filed in the Daviess Circuit Court. The motion does not state the procedural or statutory basis for filing this original action to trigger the jurisdiction of the circuit court.

party. Without conducting an evidentiary hearing, the Daviess Circuit Court granted CMI's motion and declared the District Court's January 28, 2005, order and subpoena/subpoena duces tecum "void *ab initio*." This appeal follows.

Robbins argues the Daviess Circuit Court committed reversible error by setting aside and declaring void the January 28, 2005, order and subpoena/subpoena duces tecum of the Daviess District Court. For the reasons hereinafter elucidated, we agree.

Some four months after the January 28, 2005, order was signed by the Daviess District Court Judge, CMI inexplicably filed a "Motion to Quash Order/Subpoena" in the Daviess Circuit Court. As noted, the motion specifically attacks the District Court order, yet no attempt was made in the Daviess District Court to set aside the order. The motion cites no procedural rule or statute as authority. And, it is clear that the motion constitutes neither a direct appeal of the January 28, 2005, order of the Daviess District Court, nor a petition for writ of prohibition. Ky. R. Civ. P. (CR) 72 and CR 81.

The Rules of Civil Procedure provide specific avenues for directly and collaterally attacking a judgment of a court. Generally, a motion seeking to set aside or to declare void a judgment must be initially made in the court that rendered the

judgment.⁶ See State Highway Comm'n v. Dotson, 307 Ky. 33, 209 S.W.2d 703 (1948). Here, the January 28, 2005, order was rendered in the Daviess District Court; however, CMI filed its motion to set aside and declare void the January 28, 2005, order in the Daviess Circuit Court.

Accordingly, we hold that CMI's motion to set aside and declare void the January 28, 2005, order of the Daviess District Court was improperly filed in the Daviess Circuit Court. As a motion seeking to set aside a judgment must be filed in the court that rendered the judgment, the proper procedure was to file a CR 60.02 motion in the Daviess District Court. As such, we are of the opinion that the Daviess Circuit Court committed reversible error by setting aside and declaring void the January 28, 2005, order and subpoena/subpoena duces tecum of the Daviess District Court.⁷ However, we further hold that the Florida court has no jurisdiction to directly enforce the order or subpoena/subpoena duces tecum issued by the Daviess District Court directed against Gilbert, a Kentucky resident, under the Uniform Act to Secure Witness. Such enforcement,

⁶ An exception exists for obtaining the extraordinary relief available by writ of prohibition/mandamus. Ky. R. Civ. P. (CR) 76.36 and CR 81. The petition for a writ is filed as an original action in the next highest court.

⁷ We express no opinion upon whether the proper parties were named in this action or upon whether the Uniform Act To Secure The Attendance of Witnesses From Within or Without a State In Criminal Proceeding (KRS 421.230-421.270) was properly followed.

including sanctions, may only be made through the Daviess District Court.

For the foregoing reasons, the order of the Daviess Circuit Court is reversed.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR
APPELLANT:

John W. Tullis
Owensboro, Kentucky

BRIEF AND ORAL ARGUMENT FOR
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