

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002034-MR

COMMONWEALTH OF KENTUCKY

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE GARY D. PAYNE, JUDGE
ACTION NO. 05-CR-00905

ROBERT D. LITTERAL

APPELLEE

OPINION
REMANDING

** ** * * * * *

BEFORE: STUMBO AND TAYLOR, JUDGES; HENRY,¹ SENIOR JUDGE.

STUMBO, JUDGE: This appeal arises from an Opinion and Order finding that the Commonwealth entered into an immunity agreement with Robert Litteral (Appellee) which required dismissal of criminal charges against Mr. Litteral. The Commonwealth appeals and argues that a new hearing is called for due to errors committed by the lower court. Specifically it alleges that the trial court erred by

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

allocating the burden of proof to the Commonwealth, by employing a subjective standard in determining the existence of the agreement as opposed to a reasonable person standard, in not hearing from the prosecuting attorney, and by dismissing the case against Mr. Litteral.

After reviewing the facts of this case and the law, we find that no new hearing is required. We do find however that the trial court's Opinion and Order was unclear in respect to the burden of proof and standard of review (subjective or objective) employed in reaching its decision. For this reason, we remand the case to the lower court for action in accordance with this opinion.

The facts of this case are irrelevant because the agreement itself is not being contested, only the lower court's actions during the hearing. Kentucky law is unclear regarding the burden of proof for a defendant in establishing the existence of an immunity agreement. It appears that most jurisdictions utilize the standard set forth in *Zani v. State*, 701 S.W.2d 249 (Tex. Cr. App. 1985), which states that "the initial burden is on the defendant to show the existence of an agreement by a preponderance of the evidence . . . the burden then shifts to the State to show beyond a reasonable doubt why the agreement is invalid or why prosecution should be allowed despite the agreement." *Id.* at 254. We believe that the burden of proof is upon the defendant to prove the existence of the agreement. The Commonwealth argues that here the lower court allocated the burden to it by requiring the Commonwealth to present its evidence first. While the party who bears the burden of proof normally presents its evidence first, this is not always the

case. See CR 43.02(3); RCr 9.42; and *Jenkins v. Louisville and Jefferson County Planning and Zoning Commission*, 357 S.W.2d 846, 847-848 (Ky. 1962) (Where the normal order of the introduction of evidence was changed by the trial judge in order for him to have a better understanding of the case).

The Commonwealth argues that this shift in the order of the presentation of evidence demonstrates that the trial court believed the Commonwealth had the burden of proving no agreement existed. We disagree. In the Opinion and Order the trial court states: “This Court finds that the Defendant believed he had an agreement to produce evidence in exchange for immunity. . . .” This finding indicates that the trial court properly understood that the burden of proof lay with Mr. Litteral to prove the existence of an immunity agreement. By finding Mr. Litteral believed he had an agreement, the trial court is stating that he proved the existence of the agreement. We do not find that the unusual order in which the evidence was presented at the hearing constitutes a shift in the burden of proving the agreement’s existence. We do, however, find that it is not apparent from the face of the Opinion and Order what burden of proof the trial court applied to Mr. Litteral’s evidence. For this reason, we remand the case to the lower court for it to apply the *Zani* standard to the evidence presented at the hearing.

The Commonwealth’s second argument is based on the court’s finding that Mr. Litteral “believed he had an agreement. . . .” The Commonwealth asserts that the court used the subjective state of mind standard in its ruling rather than the objective, reasonable person standard. We believe that the test set forth in

Roberts v. Commonwealth, 896 S.W.2d 4, 6 (Ky. 1995), concerning plea agreement discussions can be used analogously for immunity agreements. The *Roberts* test has two parts. First, it must be determined whether the accused “exhibited an actual subjective expectation to negotiate a plea at the time of the discussion.” *Id.* Second, it must be determined whether the accused’s “expectation was reasonable given the totality of the objective circumstances.” *Id.* We believe this is the appropriate way to decide whether the discussion Mr. Litteral had with the prosecuting attorney was an immunity agreement discussion. Clearly Mr. Litteral was looking for some kind of immunity agreement, but the trial court’s order does not set forth whether his expectations were reasonable. We believe it is necessary to determine whether Mr. Litteral reasonably believed he had some kind of immunity agreement. For this reason, we remand the case to the trial court to determine whether Mr. Litteral’s expectations were objectively reasonable.

The Commonwealth also argues that the court erred in not hearing from the prosecuting attorney personally. We find this argument without merit because the Commonwealth had the opportunity to call the prosecuting attorney as a witness at the hearing and failed to do so.

Finally, the Commonwealth argues that the trial court erred by dismissing the charges against Litteral. The trial court found that Mr. Litteral had an agreement with the Commonwealth that rendered him immune from any prosecution. The Commonwealth believes there was no agreement to begin with,

but argues that if there was, it was not for complete immunity. The Commonwealth asserts that if there was an agreement, it protected Mr. Litteral from jail time only, not complete immunity from prosecution. After reviewing the trial tapes, testimony, and briefs, we find that the trial court was in the best position to judge what kind of agreement existed. The trial judge heard all the testimony and evidence and found that a total immunity agreement was in place.

For the above reasons, we remand the case to the trial court for application of the *Zani* burden of proof and *Roberts* objective reasonableness standard to the evidence presented at the hearing.

HENRY, SENIOR JUDGE, CONCURS.

TAYLOR, JUDGE, DISSENTS BY SEPARATE OPINION.

TAYLOR, JUDGE: I respectfully dissent. I would affirm the trial court's Opinion and Order without resort to further explanation.

BRIEFS FOR APPELLANT:

Gregory D. Stumbo
Attorney General of Kentucky

Courtney J. Hightower
Assistant Attorney General
Frankfort, Kentucky

BRIEF FOR APPELLEE:

R. Burl McCoy
Lexington, Kentucky