

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001274-DG

COMMONWEALTH OF KENTUCKY

APPELLANT

ON DISCRETIONARY REVIEW FROM BULLITT CIRCUIT COURT
v. HONORABLE RODNEY BURRESS, JUDGE
ACTION NO. 08-XX-00002

TERRY PAYNE

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, DIXON, AND THOMPSON, JUDGES.

CLAYTON, JUDGE: This is an appeal from a case that originally arose in Bullitt District Court. It was appealed to Bullitt Circuit Court and we granted discretionary review. Based upon the following, we affirm the decision of the circuit court.

Appellee, Terry Payne, was charged with assault in Bullitt District Court. At a hearing before the district court judge, the victim stated that he did not

want to testify against Payne and Payne's attorney moved for a dismissal. The Commonwealth, however, would not agree and wanted to proceed. The district court "deferred" the case for ninety days and the Commonwealth appealed that decision to the Bullitt Circuit Court.

The Bullitt Circuit Court held that the appeal was premature. The circuit judge held that there was no dismissal of the case and that, therefore, the issue was not ripe for appeal. Consequently, the circuit judge dismissed the appeal. The Commonwealth then filed for discretionary review in this court and we granted the motion. Since the issue here is one of law, we will review the decision of the circuit court *de novo*.

The Commonwealth contends that the district court violated the separation of the three branches of government by "deferring" the case. The circuit court, however, found that the issue was not properly before it as the district court had simply "deferred" the case and had not dismissed it.

In *Com. v. Gonzalez*, 237 S.W.3d 575 (Ky. App. 2007), a panel of this Court held that the trial court had the authority to dismiss an action only after trial had begun through a motion for a directed verdict. Consequently, the *Gonzalez* Court found that a dismissal by the trial court prior to trial without the consent of the Commonwealth was an abuse of discretion. *Id.* at 578 quoting *Commonwealth v. Isham*, 98 S.W.3d 59 (Ky. 2003). In *Flynt v. Com.*, 105 S.W. 3d 415, 423-424, the Kentucky Supreme Court also held that a defendant could not be placed in pretrial diversion without the consent of the Commonwealth.

In this action, however, the district court did not dismiss the case against Payton, it “deferred” it. The circuit court found that the “deferral” was not a dismissal and we agree. Since there was no dismissal either with or without prejudice by the district court, the Commonwealth brought the appeal prematurely. The Bullitt Circuit Court, therefore, correctly held that the district court did not abuse its discretion. We affirm the decision of the Bullitt Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

NO BRIEF FOR APPELLEE.

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