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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2008-CA-001992-MR

JAMES A. SWOFFORD

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE MARTIN J. SHEEHAN, JUDGE
ACTION NO. 08-CR-00065

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
VACATING AND REMANDING

** ** * * * * *

BEFORE: CAPERTON AND MOORE, JUDGES; BUCKINGHAM,¹ SENIOR JUDGE.

BUCKINGHAM, SENIOR JUDGE: James A. Swofford appeals from an order of the Kenton Circuit Court denying his motion to conduct a pretrial evidentiary hearing to determine his entitlement to immunity from prosecution. For the

¹ Senior Judge David C. Buckingham 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.

following reasons, we vacate Swofford's conviction and remand the case for further proceedings.

A Kenton County grand jury indicted Swofford on a charge of first-degree assault for shooting Demonta Behanon with a gun when Behanon allegedly refused to leave Swofford's property. Swofford filed a motion to dismiss claiming immunity pursuant to KRS 503.085² or, in the alternative, for a hearing to determine if he met the requirements of the immunity statute. The circuit court found that Kentucky law did not require a pretrial hearing on Swofford's claim of immunity and that the court would rule on the claim at trial upon a motion for a directed verdict.

The parties subsequently entered into a plea agreement in which the Commonwealth agreed to amend the charge from first-degree assault, a Class B felony, to first-degree assault under extreme emotional disturbance, a Class D felony. The Commonwealth also agreed to forego prosecution on the uncharged offense of possession of a firearm by a felon. The Commonwealth recommended a five-year sentence, but Swofford was free to argue for a lesser sentence. Further, Swofford maintained the right to appeal the court's order denying the immunity hearing. The court accepted the conditional guilty plea and sentenced Swofford to five years' imprisonment. Thereafter, Swofford appealed from the court's final judgment and sentence.

² KRS 503.085(1) states: "A person who uses force as permitted by KRS 503.050, 503.055, 503.070, and 503.080 is justified in using such force and is immune from criminal prosecution and civil action for the use of such force . . . As used in this subsection, the term 'criminal prosecution' includes arresting, detaining in custody, and charging or prosecuting the defendant."

Swofford's original brief in this case contained arguments concerning pretrial hearings under KRS 503.085 that were subsequently considered by the Kentucky Supreme Court in another case, *Rodgers v. Commonwealth*, 285 S.W.3d 740 (Ky. 2009). After the Supreme Court rendered the *Rodgers* opinion, Swofford filed a supplemental brief addressing how the Court's discussion of KRS 503.085 immunity in *Rodgers* affected this case. In its brief, the Commonwealth agreed that, pursuant to *Rodgers*, the circuit court erred in failing to hold a hearing on the issue of immunity but that Swofford was only entitled to a non-evidentiary hearing based on a probable cause standard.

In *Rodgers*, the Kentucky Supreme Court concluded that KRS 503.085 requires a pretrial hearing once a defendant claims immunity. *Rodgers*, 285 S.W.3d at 753-56. Specifically, the Court stated that “[b]ecause immunity is designed to relieve a defendant from the burdens of litigation, it is obvious that a defendant should be able to invoke KRS 503.085(1) at the earliest stage of the proceeding.” *Id.* at 755.

Additionally, the Court determined that the applicable standard to be utilized during an immunity hearing is a probable cause standard:

[W]e infer from the statute that the controlling standard of proof remains “probable cause.” Thus, in order for the prosecutor to bring charges or seek an indictment, there must be probable cause to conclude that the force used by the defendant was not fully justified under the controlling provision or provisions of KRS Chapter 503. Similarly, once the matter is before a judge, if the defendant claims immunity the court must dismiss the case unless there is

probable cause to conclude that the force used was not legally justified.

Id. at 754.

The Court expressly rejected Rodgers' contention that an evidentiary hearing was required at which the defendant could counter with proof that the force was justified. Explaining its reasoning, the Court noted as follows:

An evidentiary hearing on immunity . . . would involve the same witnesses and same proof to be adduced at the eventual trial, in essence a mini-trial and thus a process fraught with potential for abuse. Moreover, it would result in one of the elements of the alleged crime (no privilege to act in self-protection) being determined in a bench trial. In RCr 9.26 this Court has evinced its strong preference for jury trials on all elements of a criminal case by providing specifically that even if a defendant waives a jury trial in writing, the court and the Commonwealth must consent to a bench trial. Thus, where probable cause exists in criminal matters the longstanding policy has been to submit those matters to a jury and we find no rational basis for abandoning that stance.

Id. at 755. The Court determined that the burden of demonstrating probable cause was upon the Commonwealth and that the Commonwealth could prove probable cause "by directing the court's attention to the evidence of record including witness statements, investigative letters prepared by law enforcement officers, photographs and other documents of record." *Id.*

Thus, pursuant to the Court's holding in *Rodgers*, Swofford is entitled to a probable cause hearing on his claim of immunity. We decline, however, to examine whether Swofford is immune from prosecution, as requested by Swofford.

The circuit court made no specific findings as to probable cause in its decision not to hold a hearing on immunity. Moreover, because there was no trial in this case, there was never an examination of the immunity issue by either the court or a jury. The trial court must first be allowed to make its decision before we can review the merits of that decision. The foundation of appellate review is based on the principle that the lower court has first had a chance to deliberate and decide upon the issues. *Florman v. MEBCO Ltd. Partnership*, 207 S.W.3d 593, 607 (Ky. App. 2006).

Accordingly, we vacate Swofford's conviction and sentence and remand this matter to the Kenton Circuit Court for a probable cause hearing. Given our remand of the case, the remainder of the parties' arguments are rendered moot.

ALL CONCUR.

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