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Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-002080-MR

COMMONWEALTH OF KENTUCKY

APPELLANT

v.

APPEAL FROM RUSSELL CIRCUIT COURT
HONORABLE GARY PAYNE, SPECIAL JUDGE
ACTION NO. 05-CR-00074

LEON GRIDER

APPELLEE

OPINION
REVERSING AND REMANDING
WITH DIRECTIONS

** ** * ** * ** *

BEFORE: TAYLOR, CHIEF JUDGE; CLAYTON, JUDGE; LAMBERT,¹
SENIOR JUDGE.

TAYLOR, CHIEF JUDGE: The Commonwealth of Kentucky brings this appeal
from an October 6, 2009, order of the Russell Circuit Court granting Leon Grider's
motion to dismiss an indictment charging him with a total of fifteen counts of

¹ Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

trafficking in a controlled substance and bribing a witness. We reverse and remand with directions.

We begin with a short recitation of the material facts. Grider is a licensed pharmacist in Russell Springs, Kentucky, who owned three pharmacies. In connection with civil and criminal investigations against Grider, vast numbers of documents, including some 124 boxes, were seized from Grider's pharmacies during the period of 2004-2007. Grider was indicted in Russell County in 2005 on eight counts of drug-related offenses and seven counts of bribing a witness. To assist Grider with preparation of his defense, Grider sought return of the original seized documents, access to these documents, or complete copies of the seized documents. By order entered May 1, 2007, the circuit court ordered the Commonwealth to "either immediately return . . . the originals or complete and legible copies of all prescriptions and daily audit logs, . . . or, in the alternative, immediately produce those same records for inspection and copying." Thereafter, on September 9, 2009, Grider filed a motion to dismiss the indictment or in the alternative, to hold the case in abeyance. Grider maintained that the original records were neither returned to him nor were copies of same made available to him by the Commonwealth as ordered by the circuit court.

By order entered October 6, 2009, the circuit court dismissed without prejudice the indictment. As grounds thereof, the court concluded:

Although the Commonwealth has maintained that it has provided meaningful access to all of the seized records in its possession, the Commonwealth has

conceded that it will not return the originals of the seized documents to defendant Leon Grider, Eric Grider or Grider Drug Stores. Indeed, the Commonwealth has informed this Court, through Tad Thomas, Assistant Deputy Attorney General, who was present at the September 14, 2009[,] hearing, that should this Court order the return of the original seized documents to defendant Leon Grider, the Commonwealth will immediately file a petition for a writ of prohibition in the Kentucky Court of Appeals to prevent the return of the defendant's own records to him.

Each of the first eight (8) counts of the indictment involve allegations of trafficking in controlled substances where the prosecution will no doubt contend that the recipients of those controlled substances did not have prescriptions for the drugs they allegedly obtained from defendant Leon Grider. If indeed those confidential informants had prescriptions for the drugs in question, those prescriptions would most likely be in the records seized by the Commonwealth by administrative subpoena and criminal law search warrant.

The defense will need all of their original records returned to them to ensure the validity of their own audits of the inventories of the three Grider Drug Stores to determine whether any controlled substances are missing, which would be necessary regardless of whether any evidence by the Commonwealth indicates that any of the Grider Drug Stores had shortages of the drugs in question.

The seven (7) counts of bribing a witness are premised on Western Union records showing that defendant Leon Grider sent money to two (2) of the confidential informants, Leah Wilson and Phillip Grider. Due to the extensive amount of records seized from the three drug stores, there may be records in the possession of the Commonwealth that apply or are relevant to the seven (7) counts of bribing a witness.

Although the Commonwealth has maintained that it has provided meaningful access to all of the seized records in its possession, the Commonwealth has conceded that in the past it has maintained that defendant Grider would have to pay for the costs of copying all of the records seized from the three Grider Drug Stores. Additionally, the original records to be copied would have to remain in the custody and control of the Commonwealth while being copied. The Commonwealth conceded that the seized records are so numerous that it would require more than a month for the Commonwealth using its own resources to copy all of these records.

There can be no doubt that under those conditions the economic burden on defendant Grider to pay a copying company or others to conduct such an extensive copying process would be great. This expense would be incurred solely to allow defendant Leon Grider to obtain copies of his own business records including items such as prescriptions and audit logs. The Commonwealth at the September 14, 2009[,] hearing did acknowledge that if ordered by this Court to provide copies at government expense, it would comply.

The Commonwealth has represented that it would provide copies of whatever documents the defense specifically requested and has on occasion done so, but the defense has contended that it should be able to have meaningful access to its own records to search through them to determine whether there is anything in these seized records that would be beneficial to the defense.

Even if the Commonwealth provided copies of the seized records, the defense would still have to review all of the original records that remained in the possession of the Commonwealth to ensure that the defense received copies of all of the original records and that no copying mistakes had occurred, such as an unintentional failure to copy both sides of a document.

The Commonwealth contends that it has the right to maintain the original records because there are ongoing

criminal investigations or pending cases involving the records in question, even though these records have been in the Commonwealth's possession for an extended period of time. As a result, the Commonwealth has not offered this Court or defendant Leon Grider a date certain when the original records will be returned to defendant Leon Grider or Grider Drug Stores.

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The defendant, Leon Grider, is not asking for the Commonwealth of Kentucky to produce evidence beneficial to the defense that the Commonwealth has obtained through its own investigation. Brady v. Maryland, 373 U.S. 83 (1963); RCr 7.24. Here the Commonwealth of Kentucky has deprived Leon Grider of all of the pertinent pharmacy records over a prolonged period of time and refuses to provide Leon Grider with any meaningful access to those records.

.....

In defendant Leon Grider's case, the Commonwealth has seized all of the business records in defendant Grider's possession and for years has retained those records denying defendant Grider meaningful access to his own records. And when Eric Grider invoked compulsory process to obtain the return of his own records, the Commonwealth still refused to turn those records over and instituted an original action in the Kentucky Court of Appeals to resist compliance with the order of the Franklin Circuit Court. The Commonwealth has informed this Court that it would take the same action if this Court ordered the original records returned to defendant Leon Grider.

Defendant Leon Grider should not have to specify which records he wants back from the Commonwealth and certainly not why he wants those records. Defendant Leon Grider and his counsel should have the original records returned, particularly after the Commonwealth has had these records for virtually four years for some records and for virtually two years as to

other records. The Commonwealth has had ample time to review the seized records to determine what, if anything, needs to be copied for use in ongoing investigations or for pending cases.

.....

Under Kentucky evidence law there is no compelling need for the Commonwealth to maintain the original records in question, particularly when the Commonwealth has had all of these records for nearly two years and some of these records for almost four years.

In view of the contents of the seized records as indicated by both the administrative subpoenas and the inventory of the one hundred and twenty[-]four (124) boxes of records seized on September 6, 2007, the Commonwealth's retention of these original business records of three separate drug stores must have had and must continue to have adverse economic consequences on defendant Leon Grider and his drug stores.

Requiring the defense to request opportunities to review the contents of each of the one hundred and twenty-four (124) individual boxes at the Office of the Attorney General in Frankfort, Kentucky on the Commonwealth's schedule is not meaningful access to the seized records. Under the conditions imposed by the Commonwealth, the defense representatives were required to expend time traveling to and from Frankfort each time they wished to examine some of the one hundred and twenty-four (124) boxes. If the defense desired to copy the contents of the boxes, that too required repeated trips to and from Frankfort on the Commonwealth's schedule and using the Commonwealth's copying machine, which entailed paying the Commonwealth for the cost of reproduction. Faced with the large number of seized documents, not just the one hundred and twenty-four (124) boxes but also the five (5) years of prescriptions and audit logs from the three (3) drug stores, the Commonwealth's procedure for inspection and

copying these records did not provide the defense with meaningful access to these seized records.

Even if the Commonwealth were ordered at this juncture to copy these records for the defense, the process will, according to the Commonwealth, take months. Following the copying of the records and providing them to the defense, counsel for defendant Grider will need a considerable period of time to review and evaluate these records before trial. Even after receiving copies of the seized records and reviewing the copies, prudent and competent defense counsel may find it necessary to review all of the original documents to ascertain that all of the originals were copied and that no copying errors occurred, such as an unintentional failure to copy both sides of a document.

These seized records are the legitimate business records of defendant Leon Grider's drug stores and are not contraband that can not [sic] be returned to Leon Grider.

The Commonwealth of Kentucky has for years arbitrarily denied Leon Grider the right to the originals of his own pharmacy records or even meaningful access to those original records to use in his own defense. This conduct violates the federal constitutional rights to compulsory process, the right to present a defense and the right to effective assistance of counsel, while generating an unfair litigation advantage to the Commonwealth. Sixth and Fourteenth Amendments to the United States Constitution; Washington, *supra* at 23. See Chambers v. Mississippi, 410 U.S. 284 (1973). “[T]he right to counsel is the right to the effective assistance of counsel.” Strickland v. Washington, 466 U.S. 668, 686 (1984)[(quoting McMann v. Richardson, 397 U.S. 759, 771 , n. 14 (1970)[)]. "Government violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense." Strickland at 686.

A State may not arbitrarily deny a criminal defendant his right to compulsory process to compel testimony and evidence by seizing the defendant's potential evidence and refusing to return that evidence to the defendant for years and by depriving him of meaningful access to the original records. *See Rock v. Arkansas*, 483 U.S. 44, 54-55 (1987).

This arbitrary action by the Commonwealth also violates Sections 2 and 11 of the Kentucky Constitution. Section Two of the Kentucky Constitution prohibits the state from action that is arbitrary, a concept that the courts have found to be broad enough to embrace due process and equal protection, fundamental fairness and impartiality. *Commonwealth Natural Resources and Environmental Protection Cabinet v. Kentec Coal Co., Inc.*, 177 S.W.3d 718 (Ky. 2005).

Although defendant Leon Grider does not seek these records under either his federal constitutional right to exculpatory evidence or Kentucky's discovery rule, it is clear that neither the prosecutors in this case nor any prosecutor acting on their behalf had, seven (7) days before the start of the scheduled trial, examined these records to determine whether they contained exculpatory evidence or discovery materials required to be disclosed to the defense before trial. As for exculpatory evidence under *Brady*, "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." *Kyles v. Whitley*, 514 U.S. 419, 437 (1995). The *Brady* "rule encompasses evidence 'known only to police investigators and not to the prosecutor.'" *Strickler v. Greene*, 527 U.S. 263, 280-282 (1990). Under Kentucky discovery rules, "discovery materials within the knowledge of investigating officers are within the knowledge of the Commonwealth." *Grant v. Commonwealth*, 244 S.W.3d 39, 42 n. 2 (Ky. 2008), citing *Anderson v. Commonwealth*, 864 S.W.2d 909, 912 (Ky. 1993).

"The staff lawyers in a prosecutor's office have the burden of 'letting the left hand know what the right

hand is doing' or has done." Santobello v. New York, 404 U.S. 257, 262 (1971). Thus, these records in the hands of the Attorney General's Office and its investigators were in the possession of the prosecution in this case for purposes of review to determine whether, pursuant to Brady or the discovery rules, disclosure to the defense of any of these records was required. This was true even though the prosecutors in this case claimed no knowledge that these records were in the possession of the Commonwealth.

Not only were the original records not returned to defendant Leon Grider, but those records held by the Commonwealth were apparently not reviewed by any prosecutor familiar with the charges in this case to determine whether pretrial disclosure was required. Ms. Wintergerst had informed defendant Leon Grider's counsel in a letter dated September 14, 2007[,] "that the items seized will be provided in discovery at the appropriate time."

Had the Commonwealth returned the original records or provided complete copies of the original records to defendant Leon Grider a reasonable time before trial, the Commonwealth would not have had any obligation to review the records for either Brady material or items to be produce[d] in discovery.

The trial in this case was scheduled for September 21, 2009. Defendant Leon Grider is entitled, due to the length of time the Commonwealth has had the seized records, to the return of the original records. But, even assuming *arguendo* that defendant Leon Grider is only entitled to meaningful access to these seized records, that would entail the Commonwealth copying all of these records at the Commonwealth's expense and providing them to the defense a reasonable time before trial to allow the defense to review the copies and, most probably, to review, the original records that would remain in the possession of the Commonwealth undoubtedly in Frankfort, Kentucky. None of this has been

accomplished in time for the defense to be prepared for a September 21, 2009[,] trial date.

The Commonwealth's failure to return the original records or provide meaningful access to those records well before the scheduled trial date deprives defendant Leon Grider of his federal and state constitutional rights to present a defense, effective assistance of counsel, compulsory process, due process, fundamental fairness and freedom from the Commonwealth's arbitrary action.

Circuit Court's October 6, 2009, Order, p. 9-22 (footnotes and citations omitted).

To summarize, the circuit court dismissed the indictment without prejudice against Grider due to the Commonwealth's failure either to turn over the original documents or to provide meaningful access to these documents in compliance with its May 1, 2007, order. While we certainly do not condone the Commonwealth's actions, we, nonetheless, believe the circuit court erred by dismissing the indictment and thus reverse the order of dismissal.

As a general rule in Kentucky, a circuit court may not dismiss a facially valid indictment without the consent of the Commonwealth under the premise that the separation of powers doctrine precludes the judiciary from improperly invading the constitutional authority of the executive branch. Kentucky Rules of Criminal Procedure (RCr) 9.64; *Gibson v. Com.*, 291 S.W.3d 686 (Ky. 2009); *Com. v. Baker*, 11 S.W.3d 585 (Ky. App. 2000). There, however, are exceptions to this general rule. A circuit court may properly dismiss a facially valid indictment for outrageous governmental conduct that impacts grand jury proceedings, for violation of the constitutional right to speedy trial, and for

violation of the constitutional right against double jeopardy. Also, the circuit court may dismiss a criminal indictment for a severe and prejudicial refusal by the Commonwealth to comply with a discovery order per RCr 7.24(9). 8 Leslie W. Abramson, *Kentucky Practice – Criminal Practice and Procedure* § 21.73 (2011). Under RCr 7.24(9), the circuit court may impose upon a party any sanction that is “just under the circumstances.”

Here, it is undisputed that the Commonwealth’s alleged misconduct in failing to comply with the circuit court’s order did not affect the grand jury proceedings. And, the facts of this case do not yet rise to violation of any constitutional right, despite the protestations of Grider to the contrary. Rather, we view the Commonwealth’s misconduct as tantamount to violation of a circuit court’s discovery order as opposed to the reasons addressed in the trial court’s order. To remedy same, the circuit court may dismiss the indictment but must initially attempt to compel compliance by a less severe penalty. RCr 7.24(9). For example, the circuit court may properly utilize its contempt powers to compel compliance or may refer any recalcitrant attorney, including those who represent the Commonwealth, to the Kentucky Bar Association for appropriate disciplinary proceedings. Simply put, we believe it incumbent upon the circuit court to utilize the least severe sanction to punish the Commonwealth and to insure its compliance with the court’s discovery order. *See, e.g., U.S. v. Gee*, 695 F. 2d 1165 (9th Cir. 1983); *U.S. v. Euceda-Hernandez*, 768 F. 2d 1307 (11th Cir. 1985); *U.S. v. Wicker*, 848 F. 2d 1059 (10th Cir. 1988); *U.S. v. Bentley*, 875 F. 2d 1114 (5th Cir. 1989);

U.S. v. Maples, 60 F.3d 244 (6th Cir. 1995); *U.S. v. Marshall*, 132 F.3d 63 (D.C. Cir. 1998). Unfortunately, the circuit court did not attempt to utilize any other sanction to compel compliance with its May 1, 2007, order. As such, we hold the circuit court abused its discretion by dismissing the indictment against Grider.² *See Hodge v. Com.*, 17 S.W.3d 824 (Ky. 2000). Upon remand, the circuit court should consider and order less severe sanctions to compel compliance with its May 1, 2007, order. If the Commonwealth continues to disobey court discovery orders upon assessment of sanctions, we do not rule out that dismissal may ultimately become the appropriate remedy in this case.

For the foregoing reasons, the order of the Russell Circuit Court is reversed and this case is remanded with directions that the indictment against Grider be reinstated.

CLAYTON, JUDGE, CONCURS.

LAMBERT, SENIOR JUDGE, CONCURS AND FILES SEPARATE
OPINION.

LAMBERT, SENIOR JUDGE, CONCURRING. With considerable reluctance I have concurred with the majority opinion. I write separately, however, to express my disapproval of the Commonwealth's behavior in this case.

² This opinion should not be misconstrued as holding that the Commonwealth of Kentucky may disregard with impunity the circuit court's May 1, 2007, order to either turn over the original seized documents or make them available to Grider. As specifically mentioned in the opinion, the circuit court should initially utilize less drastic means to compel the Commonwealth to comply with its order before dismissing the indictment. *See* Kentucky Rules of Criminal Procedure 7.24(9).

In a thorough opinion rendered herein on October 6, 2009 (quoted extensively in the majority opinion), the trial court emphatically expressed the view that the Commonwealth had engaged in highly improper litigation practices. “The Commonwealth of Kentucky has for years arbitrarily denied Leon Grider the right to the originals of his own pharmacy records or even meaningful access to those original records to use in his own defense.” Thereafter, the trial court dismissed the indictment without prejudice. Upon the Commonwealth’s appeal to this Court, we have also articulated severe criticism of the Commonwealth. “While we certainly do not condone the Commonwealth’s actions, we, nonetheless, believe the circuit court erred by dismissing the indictment and thus reverse the order of dismissal.” Despite the views of all the judges who have participated in this case, we are reversing the trial court’s dismissal on grounds that less severe sanctions should have been pursued.

Although I have misgivings about our reversal, I have nevertheless concurred because the “without prejudice” trial court dismissal would permit Appellee to be re-indicted requiring the case to start over. On remand, however, the Commonwealth should be fully cognizant that future conduct of the type so severely criticized by the trial court and this Court may result in another dismissal. “If the Commonwealth continues to disobey court discovery orders upon assessment of sanctions, we do not rule out that dismissal may ultimately become the appropriate remedy in this case.”

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