

RENDERED: SEPTEMBER 27, 2013; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000275-MR

COMMONWEALTH OF KENTUCKY

APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NO. 10-CR-00144

ELIZABETH ELAINE ROYSE

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CAPERTON, CLAYTON, AND TAYLOR, JUDGES.

CLAYTON, JUDGE: This is an appeal from a decision of the Franklin Circuit Court dismissing the indictment against the appellee, Elizabeth Elaine Royse, due to prosecutorial misconduct. Based upon the following, we affirm the decision of the trial court.

FACTUAL BACKGROUND

Royse was indicted by the Franklin Grand Jury on June 30, 2010. The

Bill of Particulars set forth as follows:

Between the dates of December 12, 2007, to December 25, 2007, the defendant, a Licensed Practical Nurse and caretaker, knowingly neglected Ms. Carolyn Franks, a patient under her care at Golden Living Center (hereinafter "Golden Living") in Frankfort, Kentucky. The defendant failed to perform basic caretaker functions knowing they were necessary to maintain the health and welfare of the victim. These functions include, but are not limited to, a failure to "take off" critical physician orders including labs, antibiotics, and a push fluids order[;] not initiating a [sic] intake/outtake log as required by policy and by standard nursing practices[;] not supervising the certified nursing assistants to ensure the victim was receiving fluids[;] and not contacting supervisors or the doctor when the victim was clearly dehydrated. By failing to perform these functions, the victim became severely dehydrated, was sent to the hospital where drastic steps were taken in order to care for the victim.

There was no formal notice of reciprocal discovery filed; however, the parties exchanged discovery at the pretrial conference on October 21, 2010. On September 20, 2011, Royse filed a Motion to Dismiss the Indictment due to Prosecutorial Misconduct. On October 24, 2011, the trial court heard arguments and testimony on the motion and on January 19, 2012, the trial court issued an order dismissing the indictment. The trial court based this dismissal on the following:

Inspector made certain false and/or misleading statements to the Grand Jury in order to obtain the indictment in this case.

The trial court then went on to make five specific findings as to the misconduct:

1. The Appellee had worked at Golden Living for eight weeks as opposed to several months as the Inspector had testified;
2. The Appellee had proved that she had contacted her superior several times, had provided her notice of resignation due to conditions at the facility, and was not in a position of authority;
3. The Appellee had proved that she made notations for lab orders that co-workers failed to implement;
4. The Appellee's conduct did not rise to felony conduct and only to negligence or a misunderstanding between co-workers; and
5. A criminal summons should have been issued rather than a warrant.

While the trial court originally dismissed the indictment with prejudice, it changed the dismissal to without prejudice and the Commonwealth brought this appeal.

STANDARD OF REVIEW

We review the dismissal of an indictment under an abuse of discretion standard. *Commonwealth v. Baker*, 11 S.W. 3d 585, 591 (Ky. App. 2000). “The test of abuse of discretion is whether the trial judge’s decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Commonwealth v. English*, 993 S.W. 2d 941, 945 (Ky. 1999).

With this standard in mind, we review the decision of the trial court.

DISCUSSION

The Commonwealth first contends that the trial court abused its discretion in dismissing the indictment on a finding of prosecutorial misconduct. It asserts that the trial court's findings regarding the reasons for the dismissal did not demonstrate a flagrant abuse of the grand jury process nor did they demonstrate that the Investigator, Reed Wilbers, knowingly or intentionally presented false, misleading, or perjured testimony to the grand jury.

Pursuant to *Baker, supra*, a court may dismiss a case for prosecutorial misconduct if the defendant can demonstrate that the "prosecutor knowingly or intentionally presents false, misleading, or perjured testimony to the grand jury that results in actual prejudice to the defendant." *Baker* at p. 588. In order for the trial court to dismiss, however, the defendant must "demonstrate a flagrant abuse of the grand jury process that resulted in both actual prejudice and deprived the grand jury of autonomous and unbiased judgment." *Id.*

The Commonwealth argues that the hearing on the motion to dismiss resolved factual disputes that should have been left for a jury to decide. It contends that the trial court, in essence, granted summary judgment, which is not permitted in a criminal proceeding. Royse, however, asserts that the trial court had to look at the testimony given to the grand jury by Investigator Wilbers and the evidence he had prior to his testimony in order to determine if there was a flagrant abuse of the grand jury process. In order for this Court to determine whether the trial court abused its discretion in dismissing the indictment, we must look to the specific evidence upon which it based its decision.

The Commonwealth asserts that the trial court's finding that Royse had worked at Golden Living for eight weeks as opposed to several months as the Investigator had testified was a minor distinction. The trial court found this to be "a material fact as the implied knowledge and authority of a person who worked at any job for several months would largely outweigh that in a person employed for eight weeks." The Commonwealth asserts that this distinction is not a materially false statement which resulted in actual prejudice to Royse and it did not deprive the grand jury of autonomous and unbiased judgment. Royse, however, states that it had been many years since she had held a similar job.

Investigator Wilbers clearly stated that Royse had been at her job longer than she actually had. Royse is a licensed practical nurse (LPN). She has been an LPN since 1988 and has worked at other extended living and nursing homes prior to her time at Golden Years. The time between these jobs, however, is prolonged. To say that Royse was at her job for longer than she had been led the jury to believe she had more knowledge of the situation than she had. Consequently, the trial court was correct in finding this was a material distinction.

The Commonwealth also contends that a factual dispute exists as to whether Royse made the proper notation to indicate to her co-workers that labs needed to be taken. The trial court found as follows:

The main crux of the Commonwealth's case, however, is that Defendant failed to properly follow through with lab orders for Mrs. Franks. Yet, Defendant proved at the hearing with this Court that she made several notations for labs to be taken, but those notations were not

followed through with by her day-shift co-workers. Still, the Commonwealth seeks, through this action, to place all of the blame on Defendant. Eventually, Mrs. Franks was sent to a hospital where these labs were taken, she was given fluids, and she returned to Golden Living Center that same day. These are all material facts that a Grand Jury must be truthfully informed of before issuing an indictment.

We agree with the trial court. There is evidence in the record that Franks was getting better even though the tests had not been ordered. When she was taken to the hospital, her physician noted this fact and Royse's supervisor made mention of it as well. There is no indication from any set of facts that Royse's failure to follow through with lab orders for Franks caused her condition to deteriorate. Thus, the trial court correctly found this was a material fact of which the Grand Jury should have been made aware.

The Commonwealth next contends that the trial court abused its discretion in evaluating the criminality of the actions involved. Specifically, it points to the following:

The Court believes that the purpose of a Grand Jury is to indict felonious conduct, not possible negligence or simple misunderstanding between co-workers. If the Court allowed this matter to go forward, there would be very few nurses in this State who would not be guilty of a Class C felony at one time or another. Such prosecution is not the intent of the drafters of our penal code.

The Commonwealth argues that without receiving all of the evidence that would have been presented at trial, the court was not able to make an informed decision as to whether the facts rose to felonious conduct. Instead, it asserts that the proper

time to make such a determination would be after the Commonwealth's case-in-chief had been presented.

Royse, however, argues that the trial court had to look at the evidence in order to determine whether the statute was applicable to Royse's case. She asserts that with the information known to the Investigator and the prosecutor at the time the grand jury indicted her, there was insufficient evidence to indict her.

Consequently, she contends that the prosecutor, through Investigator Wilbers, misled the jury and took simple mistakes and misunderstandings between Royse and her co-workers and made it appear to be conduct constituting a felony charge. We agree with Royse's argument. There are no facts upon which one could say that Royse's actions rose to felonious conduct; thus, it was not an abuse of discretion for the trial court to dismiss the case.

Finally, the Commonwealth contends that the trial court abused its discretion in considering the circumstances of Royse's arrest. Royse was charged with a Class C Felony, however, rather than being issued a criminal summons, the Commonwealth asked for an arrest warrant. Judge Wingate signed the arrest warrant on July 1, 2010, wherein a \$20,000 cash bond was set. On July 20, 2011, the bond was reduced to \$5,000 with the agreement of the Commonwealth.

The Commonwealth argues that any consideration of the manner in which Royse was notified of the charge against her, or of the bond set by the trial court, was outside the scope of the issue of whether the grand jury testimony of Investigator Wilbers

rose to the level of prosecutorial misconduct. The trial court considered this fact as part of the broader picture of prosecutorial misconduct, which was appropriate.

We,

therefore, affirm the decision of the trial court.

ALL

CONCUR.

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