

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000639-MR

COMMONWEALTH OF KENTUCKY

APPELLANT

v.

APPEAL FROM MASON CIRCUIT COURT
HONORABLE STOCKTON B. WOOD, JUDGE
ACTION NO. 11-CR-00235

JOSEPH MORRIS

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * ** * ** *

BEFORE: CLAYTON, COMBS, AND NICKELL, JUDGES.

NICKELL, JUDGE: The Commonwealth has appealed from an order of the Mason Circuit Court dismissing a criminal indictment for burglary in the third degree¹ filed against Joseph Morris. The Commonwealth asserts the trial court

¹ Kentucky Revised Statutes (KRS) 511.040, a Class D felony. The indictment also included a separate charge of criminal mischief in the third degree (KRS 512.040, a Class B misdemeanor). The trial court did not dismiss that portion of the indictment, but remanded it to the district court for disposition.

usurped the function of the jury in assessing the weight of the evidence and determining the Commonwealth could not prove its case. We agree and reverse.

Morris was indicted for burglary and criminal mischief after he entered an office space owned by Dr. James Traxel and Dr. Rachel Naylor and removed a large desk. Morris had previously leased the space but had vacated it in 2009. After the space was leased to a new tenant in 2011, Morris inquired of Dr. Naylor about a desk he had left when he moved out of the space. Dr. Naylor informed Morris she was unaware of the location of the desk, stating her assumption he had abandoned it when he moved out some eighteen months earlier. Nevertheless, Dr. Naylor informed Morris she would attempt to contact the current tenant regarding the desk and, if it was still on the premises, attempt to arrange for Morris to retrieve it at a convenient time for all parties.

On June 20, Dr. Naylor received a call from the tenant informing her someone had entered the office, taken his desk, and left his belongings in a pile on the floor. When contacted, Morris's receptionist confirmed Morris had entered the office during the preceding weekend using a key he had retained after he moved out and took the desk. The key was returned to Dr. Naylor that same day. These criminal charges followed.

Morris subsequently moved the trial court to dismiss the charges levied against him. The Commonwealth opposed the motion. Two hearings were

held on the motion. At the first hearing, the trial court inquired of the Commonwealth about its proof regarding Morris's intent to commit a crime when he entered the premises, stating its belief that "taking back his own desk" was not a crime. The Commonwealth responded that ownership of the desk was in question and was a factual matter for a jury to decide. The trial court gave the Commonwealth two weeks to determine who would claim ownership of the desk.

At the second hearing, Morris argued for dismissal based on the lack of proof on the intent element of the burglary charge. The Commonwealth again asserted that ownership of the desk was in dispute and the matter should be put to a jury. The trial court again requested proof supporting the Commonwealth's theory of the case. No further information was forthcoming.

On March 14, 2012, the trial court entered a written order dismissing the burglary charge based on the Commonwealth's "failure to timely identify the crime alleged to have been intended by the Defendant." The Commonwealth's subsequent motion to alter, amend or vacate the order was denied. This appeal followed.

The sole issue presented is whether a circuit court may dismiss criminal charges without the Commonwealth's consent. As this issue is strictly one of law, we review the trial court's ruling *de novo*. *Commonwealth v. Groves*, 209 S.W.3d 492, 495 (Ky. App. 2006).

RCr² 9.64 states:

² Kentucky Rules of Criminal Procedure.

The attorney for the Commonwealth, with the permission of the court, may dismiss the indictment, information, complaint or uniform citation prior to the swearing of the jury or, in a non-jury case, prior to the swearing of the first witness.

In *Commonwealth v. Isham*, 98 S.W.3d 59, 62 (Ky. 2003), the Supreme Court of Kentucky confirmed “the authority to dismiss a criminal complaint before trial may only be exercised by the Commonwealth, and the trial court may only dismiss via a directed verdict following a trial.”

In the case *sub judice*, the Commonwealth neither requested nor consented to a dismissal of the charges against Morris. The dismissal resulted from the trial court’s belief the Commonwealth could not produce evidence regarding one of the elements of the charged offense. “It is premature for the trial court to weigh the evidence prior to trial to determine if the Commonwealth can or will meet [its] burden.” *Id.* (quoting *Commonwealth v. Hamilton*, 905 S.W.2d 83, 84 (Ky. App. 1995)). The trial court’s action here was clearly improper.

In *Commonwealth v. Hicks*, Ky., 869 S.W.2d 35 (1994), we held that it was not the province of a trial judge to evaluate evidence in advance in order to decide whether a trial should be held. *Id.* at 37. It was further held that the proper time for such an evaluation is upon motion for a directed verdict. *Id.*

Only the Commonwealth had the ability, with the permission of the trial court, to dismiss the complaint against [the Defendant]. However, the Commonwealth never sought a dismissal of the complaint. The district court simply lacked the authority to dismiss the complaint prior to trial. Consequently, such dismissal was an abuse of discretion on the part of the district judge.

Isham, 98 S.W.3d at 62. This logic and holding are equally applicable to the case at bar. Therefore, because the trial court overstepped its authority and abused its discretion in dismissing the burglary charge, we must reverse and remand to the Mason Circuit Court with directions that the charges against Morris be reinstated.

CLAYTON, AND COMBS, JUDGES, CONCUR IN RESULT

ONLY.

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