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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-000617-MR

GARY BRANDENBURG APPELLANT

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE PATRICIA M. SUMME, JUDGE
ACTION NO. 12-CI-00017

COMMONWEALTH OF KENTUCKY,
KENTON COUNTY; AND HON. KENNETH
L. EASTERLING, KENTON DISTRICT JUDGE APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: LAMBERT, MAZE, AND MOORE, JUDGES.

MAZE, JUDGE: This appeal originates from the Kenton Circuit Court's denial of Appellant, Gary Brandenburg's, petition for a writ of prohibition following his conditional plea to the charge of operating a motor vehicle under the influence of

alcohol or drugs (DUI), first offense. Because we perceive no abuse of the circuit court's discretion in its denial of Brandenburg's petition, we affirm.

Background

Brandenburg was arrested on December 7, 2009, and charged with DUI. Following Brandenburg's arraignment, defense counsel filed a motion for discovery and, after a pre-trial conference, the district court set a trial date of February 22, 2010. Brandenburg's trial was delayed, however, following his motion to suppress evidence, an issue for which the trial court set a hearing on February 26. Before this hearing could take place, however, the Commonwealth informed the court and defense counsel that the arresting officer, Officer Rose, had been summoned for immediate overseas deployment with the United States Army. Following this revelation, less than twenty-four hours after notice, the trial court held an emergency deposition of Officer Rose on February 25. Subsequently, the trial court denied Brandenburg's motion to suppress.

On August 17, 2010, Brandenburg entered a conditional plea of guilty preserving his right to appeal the denial of his motion to exclude Officer Rose's testimony. Nearly one year later, the Kenton Circuit Court reversed and remanded the district court's denial of the motion to exclude. After returning to the district court's docket on September 27, 2011, the case was eventually set for trial on January 5, 2012.

Prior to trial, defense counsel filed a motion to dismiss the case against Brandenburg on the basis that the delay between December 2009 and

January 2012 violated his right to a speedy trial. The district court heard and denied the motion to dismiss. Defense counsel then petitioned the Kenton Circuit Court, via an original action, for a writ of prohibition against the district court. In denying Brandenburg's petition, the circuit court held: 1) That a writ of prohibition was not available to Brandenburg because he sought "to control the discretionary acts of a trial judge [acting] within his jurisdiction" and an adequate remedy against such acts was available "by way of appeal of a conviction . . . ;" and 2) that any delay in Brandenburg's trial resulting from his appeal to the circuit court was "attributable to [Brandenburg] and tolls the running of the speedy trial clock." It is from this decision of the circuit court that Brandenburg now appeals.

Analysis

A writ of prohibition is an extraordinary remedy available only in certain narrowly-defined circumstances. *See Eaton v. Commonwealth*, 562 S.W.2d 637, 638 (Ky. 1978); *see also Commonwealth v. Williams*, 995 S.W.2d 400, 403 (Ky. App. 1999). In claiming that the district court, despite acting within its discretion, erred in denying the motion to dismiss, Brandenburg must establish his right to relief under the second of two classes of writ cases identified by our Supreme Court in *Toyota Motor Mfg., Kentucky, Inc. v. Johnson*, 323 S.W.3d 646, 649 (Ky. 2010).

> . . . The second [class] is when a lower court is acting or is about to act erroneously, although within its jurisdiction, and there exists no adequate remedy by appeal or otherwise and great injustice and irreparable injury will result if the petition [for a writ] is not granted.

> Under a special subclass of the second class of writ cases, a writ may issue even absent irreparable injury to the writ-petitioner if the lower court is acting erroneously and a supervisory court believes that if it fails to act the administration of justice generally will suffer the great and irreparable injury.

Id. (*citing to Hoskins v. Maricle*, 150 S.W.3d 1 (Ky. 2004)) (internal citations and quotations omitted).

As the above standard indicates, and as the Supreme Court expounded in *Hoskins*, "a showing of inadequate remedy by appeal [is] a prerequisite to consideration of the alleged error (as opposed to a mere factor to be considered)[,]" whereas great and irreparable harm to the petitioner is not, in some circumstances. 150 S.W.3d at 9 (*citing to Bender v. Eaton*, 343 S.W.2d 799, 801 (Ky. 1961)). After brief consideration of our jurisdiction over Brandenburg's appeal, as well as our standard of review, we apply the above standard to Brandenburg's petition.

A. Jurisdiction

At oral argument, the Commonwealth asserted its belief that Brandenburg did not timely bring this case according to the procedural steps associated with this Court's discretionary review of his appeal. As this raises a jurisdictional question, we briefly address the Commonwealth's argument before discussing the merits of Brandenburg's appeal.

Indeed, this case involves a circuit court's review and judgment regarding a district court. However, it is well-established in various sources of Kentucky law that a petition for a writ of mandamus or prohibition is an action

brought under the circuit court's original, not its appellate, jurisdiction. *See* Ky. Const. § 112(5) ("[t]he Circuit Court shall have original jurisdiction of all justiciable causes not vested in some other court. . . ."); Kentucky Supreme Court Rules (SCR) 1.040(6) ("[p]roceedings for relief in the nature of mandamus or prohibition against a district judge shall originate in the circuit court[.]"); Kentucky Rules of Civil Procedure (CR) 81; and *Delahanty v. Commonwealth, ex rel Maze*, 295 S.W.3d 136, 140 (Ky. App. 2009) (holding that "[r]elief heretofore available by the remedies of mandamus [and] prohibition . . . may be obtained by original action in the appropriate court."). Thus, Brandenburg properly brought this appeal as a matter of right; and we review it accordingly.

B. Standard of Review

The proper standard of our review depends on the class, or category, of writ case. In *Grange Mut. Ins. Co. v. Trude*, 151 S.W.3d 803 (Ky. 2004), our Supreme Court outlined the possible standards.

> *De novo* review will occur most often . . . where the lower court is alleged to be acting outside its jurisdiction, because jurisdiction is generally only a question of law. *De novo* review would also be applicable under the few second class of cases where the alleged error invokes the 'certain special cases' exception or where the error involves a question of law.

Grange at 810 (*citing to Bender v. Eaton*, 343 S.W.2d 799 (Ky. 1961); *Lexington Pub. Library v. Clark*, 90 S.W.3d 53 (Ky. 2002); CR 81; and CR 52.01).

> But in most of the cases under the second class of writ cases, *i.e.*, where the lower court is acting within its jurisdiction but in error, the court with which the petition

> for a writ is filed only reaches the decision as to issuance of the writ once it finds the existence of the 'conditions precedent,' *i.e.*, no adequate remedy on appeal, and great and irreparable harm. 'If [these] procedural prerequisites for a writ are satisfied, whether to grant or deny a petition for a writ is within the [lower] court's discretion.'

Id.

Brandenburg concedes that the district court in the present case was acting within its jurisdiction when it denied his motion to dismiss. Therefore, his petition clearly falls under the second class of writ cases. He further states that our review on appeal is for an abuse of discretion on the part of the circuit court; and he is correct. As *Grange* states, this is usually the rule when the second class of writ cases is involved. Furthermore, when a court is asked to consider the merits of a petition for a writ of prohibition, it has been held that the decision whether or not to do so lies squarely within that court's discretion. *See St. Clair v. Roark*, 10 S.W.3d 482, 485 (Ky. 2000); *see also Commonwealth v. Stephenson*, 82 S.W.3d 876, 880 (Ky. 2002). Hence, we will not disturb the circuit court's decision absent an abuse of that discretion.

C. Adequacy of Brandenburg's Remedy By Appeal

Whether the right of direct appeal is an adequate remedy is an issue necessarily determined on a case-by-case basis. *Hoskins*, 150 S.W.3d at 19. For example, where a defendant seeks merely to correct procedural or trial errors, the right of appeal is an adequate remedy. *Id*. To demonstrate the absence of an adequate remedy, a petitioner "must show an injury that 'could not thereafter be

rectified in subsequent proceedings in the case.'" *St. Clair v. Castlen*, 381 S.W.3d 306, 308-09 (Ky. 2012) (*quoting Bender*, 343 S.W.2d at 802).

In its order denying Brandenburg's petition for a writ of prohibition, the circuit court held that Brandenburg's petition failed because he had an adequate remedy by appeal if convicted. Brandenburg responds on appeal by comparing his right to a speedy trial to the right against double jeopardy, which our Supreme Court has declared to be so precious that the normal appellate process can be inadequate. *See Hoskins* at 20. Accordingly, Brandenburg asks us to announce that the constitutional right to a speedy trial, like that against double jeopardy, is so precious that the process of conducting a trial, obtaining a conviction, and pursuing a conventional direct appeal is both futile and inadequate as a remedy against the divestment of that right. Under the circumstances of this case, we cannot agree.

In the context of a writ asserting a defendant's right against double jeopardy, our Supreme Court has said that the trial court considering such a writ

> may, in its discretion, address the merits of the issue within the context of the petition for the writ, or may decline to do so on grounds that there is an adequate remedy by appeal. Neither approach is mandatory and the exercise of discretion may well depend on the significance of the issue as framed by the facts of the particular case.

Roark, 10 S.W.3d at 485; *see also Stephenson*, 82 S.W.3d at 880. The Court went on to state that although an individual's right against double jeopardy can form the

subject of a writ of prohibition, it is not mandatory that it be addressed in such a manner. *Castlen*, 10 S.W.3d at 309 (Ky. 2012) (*citing Roark*).

First, the facts of this case were such that the trial court did not abuse its discretion in refusing to address the merits or to grant the writ. The delay in Brandenburg's trial was less than two years; it was, as Brandenburg concedes, not the result of any bad faith on the part of the Commonwealth; and Brandenburg never asserted his desire for a speedy trial. In sum, these facts do not invoke a need for the extraordinary relief Brandenburg seeks; nor do they indicate a clear abuse of discretion in the trial court's conclusion to that effect based on these facts.

Furthermore, assuming, *ad arguendo*, that an equivalency exists between the individual's right against double jeopardy and his right to a speedy trial, the reasoning in *Roark* and *Castlen* must also apply. Employing that reasoning, the right to a speedy trial, like that against double jeopardy, would not compel the trial court to consider the merits of an underlying constitutional claim if the court believed a defendant possessed an adequate remedy by post-conviction appeal. Rather, the court retains the discretion to deny the petition without addressing the greater constitutional issue; and this trial court acted within that discretion in denying Brandenburg's writ.

Conclusion

To be clear, the trial court did not address the merits of Brandenburg's speedy trial claim, and we also decline to do so. Therefore, nothing in this opinion should be interpreted to preclude Brandenburg's appeal of that issue on direct appeal from a conviction at trial.

Nevertheless, neither the facts of this case, nor the significance of the asserted right compelled the trial court to consider the merits of Brandenburg's speedy trial claim upon his petition for a writ of prohibition. Furthermore, Brandenburg's petition failed to meet the legal standard required for issuance of the extraordinary writ he sought because he retains an adequate remedy upon direct appeal. Therefore, finding no abuse of discretion, we shall not disturb the circuit court's decision on appeal. The order of the Kenton Circuit Court is affirmed.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR APPELLANT:

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BRIEF FOR APPELLEE:

No brief for Appellee

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