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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001239-MR

COMMONWEALTH OF KENTUCKY — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES D. ISHMAEL JR., JUDGE
ACTION NO. 05-CR-01500-002

HOLLIS DESHAUN KING — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; MAZE AND THOMPSON, JUDGES.

MAZE, JUDGE: This appeal arises from the Fayette Circuit Court's dismissal of an indictment against Appellee, Hollis King. The Commonwealth contends on appeal that the trial court exceeded its constitutional authority in dismissing King's indictment with prejudice. After a thorough review of the record, we agree. We therefore reverse and remand.

Background

The facts of this case are not in dispute. King entered a conditional plea of guilty to drug-related charges, reserving his right to appeal the propriety of a police search of his home, the fruits of which led to those charges. Following a lengthy appeals process, the United States Supreme Court reversed and remanded King's plea. *Kentucky v. King*, --- U.S. ---, 131 S.Ct 1849 (2011). Kentucky's Supreme Court ultimately granted King's motion to suppress the evidence in question, and then remanded the case to the trial court. *See King v. Commonwealth*, 386 S.W.3d 119 (Ky. 2012).

On remand, King asked the trial court to dismiss with prejudice the indictment against him in light of the suppressed evidence. The Commonwealth objected and asked the trial court to dismiss the indictment without prejudice. Following an evidentiary hearing and briefing of the issue, the trial court dismissed the indictment against King with prejudice. In its June 13, 2013 order, the trial court reasoned that, "[w]ith all evidence Ordered to be Suppressed by the Kentucky Supreme Court, there is no evidence upon which the Commonwealth could proceed against the Defendant arising out of these facts or circumstances. Time will not change that fact." The Commonwealth now appeals.

Standard of Review

The parties offer differing views regarding the appropriate standard of this Court's review. Citing *Keeling v. Commonwealth*, 381 S.W.3d 248 (Ky. 2012), the Commonwealth suggests that we review the trial court's dismissal of the indictment *de novo*. King asserts that a *de novo* review is appropriate only when "[t]he record does not reflect why the trial court denied the motion to dismiss." *Keeling* at 253, n. 5. Because the trial court granted the motion to dismiss, and because its reasons are apparent from the record, King argues that we must affirm the trial court's decision absent an abuse of discretion. This assertion is also supported in precedent. *See Commonwealth v. Grider*, 390 S.W.3d 803, 817 (Ky. App. 2012) (citing *Baker v. Commonwealth*, 11 S.W.3d 585, 590 (Ky. App. 2000)).

A trial court is indeed afforded discretion in deciding the more general question of whether to grant or deny a motion to dismiss an indictment. *Id.* However, the more specific and more crucial question in the present case concerns the propriety of the trial court's choice between dismissal with prejudice or without prejudice, which is a question of law. Therefore, concerning the trial court's decision to grant King's motion, we must affirm the trial court's decision to dismiss the indictment unless it was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *See Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). However, a court also abuses the discretion afforded it when "(1) its decision rests on an error of law ... or a clearly erroneous factual finding, or (2) its decision ... cannot be located within the range of permissible decisions." *Miller v.*

Eldridge, 146 S.W.3d 909, 915 (Ky.2004) (internal citations, emphasis, and quotations omitted). Therefore, we review *de novo* the more specific question of whether the trial court had the authority to dismiss the indictments with prejudice.

Analysis

The sole, but certainly significant, issue on appeal is whether the trial court acted appropriately in dismissing the indictment with prejudice and over the objection of the Commonwealth. The Commonwealth asserts that the trial court exceeded its authority in dismissing the indictment with prejudice over the Commonwealth's objection. King contends that the trial court acted properly and within its discretion in preventing what he calls "frivolous proceedings," namely, a new trial.

Kentucky's Constitution specifically endorses and clearly articulates a separation of powers among our government's three branches. *See Gibson v. Commonwealth*, 291 S.W.3d 686, 690 (Ky. 2009) (citing to *Hoskins v. Maricle*, 150 S.W.3d 1, 11 (Ky. 2004)); *see also* Kentucky Constitution §§ 27-28. Among these delineated powers are those of the executive branch, which include the "exclusive authority and absolute discretion in deciding whether to prosecute a case, and … what crime to charge and penalty to seek[.]" *Gibson* at 690. Our Constitution clothes Kentucky's Judicial Branch, and the many trial courts within it, with the power to conduct trials, adjudicate guilt, and impose punishment according to the laws promulgated by the legislative branch. *Id*. From this express

separation of powers a natural and implicit limitation of powers also emerges. "No person or collection of persons, being of one of those departments, shall exercise any power properly belonging to either of the others, except in the instances hereinafter expressly directed or permitted." Ky. Const. § 28.

In the context of the issue before us, past courts have repeatedly cited the separation of powers in holding that "a trial judge has no authority to weigh the sufficiency of the evidence prior to trial or to summarily dismiss indictments in criminal cases." *Commonwealth v. Bishop*, 245 S.W.3d 733, 735 (Ky. 2008) (citing to *Commonwealth v. Hayden*, 489 S.W.2d 513, 516 (Ky. 1972); *Barth v. Commonwealth*, 80 S.W.3d 390, 404 (Ky. 2001); *Flynt v. Commonwealth*, 105 S.W.3d 415, 425 (Ky. 2003). This rule is "subject to exceptions usually related to a claim of egregious prosecutorial misconduct[,] deprivation of a defendant's right to a speedy trial…" or violation of the rule against double jeopardy. *See Gibson*, 291 S.W.3d at 690. While this list of exceptions may not be exhaustive, it does indicate the gravity of constitutional or equitable deprivation necessary to warrant dismissal of the indictment. *See Gibson* at 690-91 ("There are a variety of situations which may result in a dismissal of a criminal case…" and that a defendant must assert "a deprivation of rights which, under [Kentucky's double jeopardy statute] or under recognized principles of Constitutional law, forecloses a future attempt to prosecute her.")

Our review of the facts and the record, as they exist before us and as they existed before the trial court, reveals no such grave deprivation excepting the

present case from the general rule against summary dismissal of an indictment prior to trial. King does not allege that perpetuation of his prosecution would violate his constitutional right to a speedy trial. He does not allege that the Commonwealth has behaved so outrageously, unethically, or in direct contravention of his constitutional rights. He does assert that the continuation of the Commonwealth's case against him, even if dismissed without prejudice, would violate double jeopardy, as well as his due process right to finality and "against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." We address each of these arguments in turn before returning to King's broader argument and the separation of powers.

King's legal arguments regarding finality and double jeopardy are, in fact, one and the same; and they are unpersuasive. King quotes Justice Stevens's concurring opinion in *Oregon v. Kennedy*, 456 U.S. 667, 682, 102 S. Ct. 2083, 2092-93, 72 L. Ed. 2d 416 (1982):

> The defendant's interest in finality is not confined to final judgments; he also has a protected interest in having his guilt or innocence decided in one proceeding. That interest must be balanced against society's interest in affording the prosecutor one full and fair opportunity to present his evidence to the jury.

(Internal citations omitted). Justice Stevens's words are well-taken. However, King's reliance on them, and his assertion of the principle of finality as a means of barring future prosecution of the indictment against him, is misplaced.

As Justice Stevens himself points out, the "constitutional policy of finality" is served by our Constitution's prohibition against double jeopardy. *Kennedy*, 456 U.S. at 682, 102 S.Ct. at 2087 (Stevens, J., concurring). As the majority in the same case held, double jeopardy "does not offer a guarantee to the defendant that the State will vindicate its societal interest in the enforcement of the criminal laws in one proceeding." *Id.*, 456 U.S. at 672, 102 S.Ct. at 2087. Double jeopardy "attaches" only upon the impaneling and swearing of a jury, s*ee*, *e.g.*, *Cardine v. Commonwealth*, 283 S.W.3d 641, 647 (Ky. 2009); and with very few exceptions, if prosecution of the case halts prior to that definitive point, it may be brought again. This fact is basic. That King finds it "arbitrary" to draw such a line on the timeline of a case does not change the fact that this "line" is the law in Kentucky.

The reversal and remand of King's plea of guilty returned this case to a pretrial posture. Despite King's perfunctory claim to the contrary, and following an exhaustive search of the record, we observe no basis for his argument that the case was beyond the pretrial stage when the trial court dismissed the indictment. No jury was impaneled or sworn. Hence, double jeopardy did not attach and that prized constitutional precept cannot be appropriately implicated in support of the trial court's dismissal of the indictment with prejudice.

King next argues that continuation of the case against him infringes on his due process rights and violates the mandate that the Commonwealth must

prove every element of the charged offense beyond a reasonable doubt. Hence, he contends that this constitutional violation justifies dismissal of the indictment with prejudice under *Gibson*. This argument is also unpersuasive.

King is correct that failure to prove every element of a crime violates the accused's right to due process. *See*, *e.g.*, *Anderson v. Commonwealth*, 352 S.W.3d 577, 581 (Ky. 2011); *see also In re Winship*, 397 U.S. 359, 364, 90 S. Ct. 1068, 1072, 25 L. Ed. 2d 368 (1970). However, this is the Commonwealth's burden *at trial* and not before. It is an absolute constitutional prerequisite to conviction, not to continuation of the prosecution. Therefore, by asserting that continuation of the case against him would "pave the way for 'an error of constitutional proportion'" (quoting *Miller v. Commonwealth*, 77 S.W.3d 566, 576 (Ky. 2002), and by suggesting that we permit the trial court to dismiss the indictment because the Commonwealth cannot currently meet its burden, King asks us to impose the reasonable doubt burden on the Commonwealth pretrial and to answer a fictional breach of due process with a definite violation of the separation of powers. We will not do so.

The Commonwealth is not required to prove its case beyond a reasonable doubt to avoid dismissal of an indictment with or without prejudice. Any assertion to the contrary goes against the vast weight of constitutional precedent in this Commonwealth. Therefore, the Commonwealth's alleged failure

to do so is not a constitutional deprivation, and it could not possibly justify dismissal of the indictment under *Gibson*.

Finally, we take special exception to King's unabashed and unsupported assertion that it is the constitutional responsibility of the judiciary at the pretrial stage "to screen out frivolous, unsubstantiated cases for which there is no evidence." We first cite the elementary legal fact that there is recourse for such cases: probable cause, directed verdict, judgment notwithstanding the verdict, *et cetera*. Furthermore, as we have explained, Kentucky's Constitution bestows no such pretrial authority upon the judiciary; in fact, it withholds it. King's wide-sweeping claims to the contrary are misguided.

The separation of powers so ingeniously devised by our founders, and so rightly exalted by our courts, reserves the drafting of laws to our legislators; the prosecution of those laws to our executive; and the orderly application of the laws to our judiciary. To permit the judiciary, summarily and prior to trial, to "screen out" cases it deems "frivolous" would place the judiciary squarely in the stead of the executive and bestow the members of the judiciary with boundless power our Constitution dictates they ought not have.

It is true in Kentucky that an indictment does not "belong" to the prosecutor. *See Hoskins*, 150 S.W.3d at 12. However, nor does it belong to the trial court. The indictment belongs to the grand jury, an institution which maintains "functional independence from the Judicial Branch…." *Id*. at 17 (quoting *United States v. Williams*, 504 U.S.36, 48, 112 S.Ct. 1735, 1742, 118 L.

Ed. 2d 352 (1992)). "Although the courts exercise a supervisory role over grand juries, that role is limited…." *See Commonwealth v. Baker*, 11 S.W.3d 585, 590 (Ky. 2000). Accordingly, a trial court's power to dismiss a grand jury's indictment is reserved for very specific and extreme circumstances – circumstances that do not exist in this case.

Conclusion

For the foregoing reasons, we hold that the Fayette Circuit Court abused its discretion in granting the motion to dismiss, as it did not have the authority to do so with prejudice. Hence, we reverse and we remand, whereupon, if the trial court deems it appropriate, the indictment may be dismissed without prejudice.

ALL CONCUR.

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