

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2013-CA-001557-MR

COMMONWEALTH OF KENTUCKY

APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE BARRY WILLETT, JUDGE  
ACTION NO. 13-CR-000280

JESSE L. WALDON

APPELLEE

OPINION  
VACATING AND REMANDING

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BEFORE: COMBS, STUMBO, AND VANMETER, JUDGES.

COMBS, JUDGE:           The Commonwealth appeals from an order of the Jefferson Circuit Court which dismissed the indictment of Jesse Waldon. After our review, we vacate and remand.

Waldon was charged with theft by unlawful taking over five hundred dollars. He was arraigned in Jefferson Circuit Court on February 25, 2013, and a

trial date was set for July 23, 2013. In its order, the court informed the parties that “[t]he Court has intentionally not scheduled a pretrial conference in this case. The Commonwealth shall produce discovery no later than thirty (30) days after arraignment.”

On March 13, 2013, the Commonwealth submitted its response to the order of discovery, disclosing that it had a 911 recording and then listing several items of discovery which it *intended* to obtain.

On July 23, the parties appeared in the courtroom for trial. The court opened by stating: “[w]e are on for trial today. What’s our status?” The Commonwealth’s attorney responded by advising the court that she had not obtained all of her discovery and that she had not been able to summon the police detective who had investigated Waldon’s case. She said that she would like to have an opportunity to obtain the missing discovery and to call the detective one more time. Without taking comments from either party, the court dismissed the indictment. Our review of the video transcript reveals that the Commonwealth’s attorney rolled her eyes, gathered her belongings, and walked out of the courtroom.

The court’s order of dismissal recited, “Based upon the failure of [detective] to appear in Court on July 23, 2013, the indictment against defendant Jesse L. Waldon is dismissed *with prejudice*.” (Emphasis added.) The Commonwealth now appeals.

Preliminarily, we note that the Commonwealth failed to preserve its allegation of error. The Commonwealth claims that it preserved the error when the

Commonwealth's attorney told the court that she would like to have the opportunity to collect evidence and to call the police officer one more time. It argues that the statement comported with the requirements of Kentucky Rule of Criminal Procedure[s] (RCr) 9.22. That rule provides that formal objections are not necessary for preservation as long as a party "makes known to the court the action which that party desires the court to take or any objection to the action of the court[.]"

The Commonwealth relies on *Commonwealth v. Gonzalez*, 237 S.W.3d 575 (Ky. App. 2007), in support of its contention. In *Gonzalez*, this court held that error had been preserved despite the prosecutor's failure to make a specific objection to an order of dismissal. A motion to dismiss was pending, and although he did not make a formal exception, the prosecutor provided the trial court with its reasons for opposition. This Court held that the statements were sufficient to notify the court that the Commonwealth did not want it to dismiss the action.

However, in the case before us, the Commonwealth made its statement about the opportunity to obtain its discovery *before* the court dismissed the indictment. Unlike the situation in *Gonzalez*, no motion for dismissal was pending. Following the court's ruling, the Commonwealth's attorney remained silent. The act of rolling one's eyes – while surely an indication of pique or disgust – does not constitute a legally cognizable objection. Thus, Commonwealth did not object to the order of dismissal. As the Supreme Court has held, when an objection is not

made to the court, the alleged error is unpreserved. *Baker v. Commonwealth*, 973 S.W.2d 54, 56 (Ky.1998). We cannot conclude otherwise in this case.

Although RCr 10.26 might allow us to analyze this issue for palpable error, we may not do so under the circumstances of this case. Section 28 of the Constitution of Kentucky sets forth the separation of powers doctrine prohibiting any member of one of our Commonwealth's three branches of government from exercising power that is vested in another branch.

The Constitution empowers the executive branch alone to charge and to prosecute crimes. *See* Kentucky Revised Statute[s] (KRS) 15.725. The judicial branch has the power to “conduct criminal trials, to adjudicate guilt and to impose sentences within the penalty range prescribed by the legislature. . . .” *Gibson v. Commonwealth*, 291 S.W.3d 686, 690 (Ky. 2009). A court's dismissal with prejudice must be supported by substantive law or must be the result of serious government misconduct related to the prosecution. Otherwise, “it is not within the province of the judicial branch of our government[.]” *Id.* at 691.

In this case, “serious government misconduct related to the prosecution” occurred. The Commonwealth showed disrespect to both the court and the defense. It was provided a list of discovery four months prior to the trial date; yet, it did not obtain the discovery or subpoena witnesses. It did not give the defense notice that its discovery had not been completed. The defense was prepared for a *trial* – not a pre-trial hearing – on July 23, 2013, per the order of the court. The Commonwealth clearly undermined the fairness of the proceedings

when it caused the defense to prepare for a trial with insufficient discovery and without notice that the discovery was incomplete.

Nonetheless, the Constitution and case law compel us to reverse the dismissal of the indictment. “Dismissal of an indictment with prejudice is the most severe sanction possible and necessarily implicates separation-of-powers principles.” *Commonwealth v. Baker*, 11 S.W.3d 585, 590 (Ky. App. 2000).

Misconduct occurred in this case, but it was not extreme enough to justify dismissal. *Baker* discusses the **egregious** level of governmental misconduct required to warrant dismissal of an indictment with prejudice:

Generally, a 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. A court may utilize its supervisory power to dismiss an indictment where a prosecutor knowingly or intentionally presents false, misleading or perjured testimony to the grand jury that results in actual prejudice to the defendant. (Emphasis added.)

That level of egregiousness was not met in this case to warrant a dismissal with prejudice. *Id.* at 588.

However, the trial court clearly retains the power to “consider alternative sanctions before imposing the ultimate sanction of dismissal with prejudice which precludes any further prosecution.” *Id.* at 591. Sanctions remain available to the trial court to address the misconduct of the Commonwealth in this case.

We vacate and remand for additional proceedings consistent with this opinion.

ALL CONCUR.

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