

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-001001-MR

COMMONWEALTH OF KENTUCKY

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MARY M. SHAW, JUDGE
ACTION NO. 14-CI-001155

HON. STEPHANIE PEARCE BURKE,
JEFFERSON DISTRICT COURT

APPELLEE

OPINION
DISMISSING

** ** * ** * ** *

BEFORE: DIXON, D. LAMBERT AND THOMPSON, JUDGES.

THOMPSON, JUDGE: The Commonwealth of Kentucky appeals from the denial of a petition for a writ of prohibition and/or mandamus.

On February 11, 2014, Jefferson County District Court Judge Stephanie Pearce Burke issued an order denying the Jefferson County Attorney's motion to require the defense in a DUI case to submit all motions to suppress no

fewer than thirty days before trial. Judge Burke denied the motion on the basis that Kentucky Rules of Criminal Procedure (RCr) 9.78 prohibited such an order. At the time Judge Burke issued her order, RCr 9.78 stated that “[i]f at any time before trial a defendant moves to suppress, or during trial makes timely objection to the admission of evidence . . . the trial court shall conduct an evidentiary hearing[.]” Judge Burke interpreted RCr 9.78 as prohibiting any restriction of when suppression hearings could be held because it allowed suppression hearings to be held at any time before trial, or during trial after a timely objection. Therefore, Judge Burke concluded the Commonwealth’s motion was not warranted by existing Kentucky law and failed to present a good faith argument for it to be changed. Judge Burke’s order concluded: “Counsel for the Commonwealth is hereby placed on notice that any further similar motions will be considered a violation of [Kentucky Rules of Civil Procedure] CR 11, which authorizes the Court to sanction counsel ‘on its own initiative.’”

Rather than seeking relief in that action, the Commonwealth filed an original action in the circuit court petitioning for a writ of prohibition and/or mandamus. The Commonwealth argued Judge Burke’s order is an illegal and void rule of court or local rule, and violates separation of powers. It argued other district courts in Jefferson County routinely granted similar orders, they were permissible under Jefferson Circuit Court Local Rule 804(A) and denying such orders would result in significant hardship to Jefferson County Attorneys should suppression hearings be conducted and granted mid-trial when jeopardy had

already attached. The Commonwealth requested Judge Burke's new rule be rescinded and she be prohibited from sanctioning its county attorneys for filing such motions.

The circuit court denied the petition, determining RCr 9.78 was mandatory, did not conflict with other rules and other judges allowing such motions did not bar Judge Burke's action. It determined enforcing the protections of RCr 9.78 took priority over any hardship faced by a prosecutor defending an in-trial suppression motion. In considering the threatened future CR 11 sanctions referenced in the order, the circuit court found "the imposition of sanctions by Judge Burke is allowable after a **case-by-case** analysis of the specific pleading, the conduct of the attorney, and the circumstances of the particular matter." The Commonwealth appealed.

While this appeal was pending, the Kentucky Supreme Court deleted RCr 9.78 by Order 2014-22, effective January 1, 2015, and replaced it with RCr 8.27 which states in relevant part:

- (1) **Motion.** A motion to suppress evidence shall be filed by the deadline set by the court pursuant to Rule 8.20 for the filing of such motion. If the court has set no deadline under Rule 8.20, the motion shall be filed within a reasonable time before trial.
- (2) **Hearing.** The court shall conduct a hearing on the record and before trial on issues raised by a motion to suppress evidence. No jury and no prospective juror shall be present at any such hearing.

Based upon these changes to the rules, Judge Burke filed a motion to dismiss the Commonwealth's appeal as moot, arguing prospective Jefferson County Attorney motions requesting orders that motions to suppress be filed thirty days prior to trial would no longer conflict with a non-existent RCr 9.78 and did not conflict with RCr 8.27. Therefore, Judge Burke would never have an occasion to consider imposing CR 11 sanctions for filing such motions.

The Commonwealth's response urges this Court to consider its appeal on the merits, arguing as follows:

[The Commonwealth] is entitled to be heard as a matter of right as the *Order* summarily entered by [Judge Burke] continues to damage the professional reputation of the Jefferson County Attorney and his assistants and has an unwarranted chilling effect on their continued advocacy on behalf of the Commonwealth when appearing before [Judge Burke].

This Court passed the motion to the panel of judges deciding this appeal on its merits. Having fully considered the motion, response and appellate briefs, we dismiss this appeal as moot.

“Appellate courts lack subject matter jurisdiction to decide cases that have become moot.” *Commonwealth, Kentucky Bd. of Nursing v. Sullivan Univ. Sys., Inc.*, 433 S.W.3d 341, 343 (Ky. 2014). “The classic occurrence which necessitates a court's abrogation of jurisdiction for mootness is a change in circumstance in the underlying controversy which vitiates the vitality of the action.” *Commonwealth v. Hughes*, 873 S.W.2d 828, 830 (Ky. 1994).

The deletion of RCr 9.78 and its replacement by RCr 8.27 constitutes a change in circumstances in the underlying controversy. Judge Burke’s decision that sanctions could be forthcoming if the Jefferson County Attorney continued to file motions to request orders limiting motions to suppress to being filed thirty days prior to trial was made in reliance on the then existing law of RCr 9.78. Therefore, its replacement with RCr 8.27, which encourages the court to set a deadline for filing a motion to suppress and states that if no deadline has been set such motions “shall be filed within a reasonable time before trial” would permit the type of motion the Jefferson County Attorney previously filed.

Although there are exceptions to dismissing for mootness, the Commonwealth does not argue that any apply. We agree that none of these exceptions apply. *See Morgan v. Getter*, 441 S.W.3d 94, 99-103 (Ky. 2014) (discussing the “collateral consequences” exception, “voluntary cessation” exception, “capable of repetition, yet evading review” exception and “public interest” exception).

Accordingly, we dismiss the appeal from the Jefferson Circuit Court’s denial of a petition for a writ of prohibition and/or mandamus as moot.

ALL CONCUR.

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