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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000533-DG

JILL BIRRI

APPELLANT

ON DISCRETIONARY REVIEW FROM CAMPBELL CIRCUIT COURT
v. HONORABLE JULIE REINHARDT WARD, JUDGE
ACTION NO. 14-XX-00005

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING

** ** * * * * *

BEFORE: KRAMER, CHIEF JUDGE; D. LAMBERT AND TAYLOR,
JUDGES.

LAMBERT, D. JUDGE: This matter comes before this Court for discretionary review following a motion filed by Jill Birri. The issues presented to this Court are: 1) whether the Commonwealth may appeal to the Campbell Circuit Court an evidentiary order issued by the Campbell District Court after a voluntary dismissal without prejudice, and 2) whether double jeopardy precludes retrial. After careful

review, for the reasons discussed herein, we hold that the Commonwealth may not bring such an appeal, and consequently, because no possibility of retrial exists, double jeopardy analysis is unnecessary in this instance. We reverse the Campbell Circuit Court.

I. FACTUAL AND PROCEDURAL HISTORY

Officer Donald Dornheggen pulled Birri over on March 9, 2014 for suspected DUI, after allegedly observing her weaving into and out of traffic and driving straight through an intersection from a turn-only lane. During the ensuing stop, Birri allegedly failed several standard field sobriety tests and refused to submit to a portable breath test. Dornheggen arrested Birri, after which she allegedly refused to submit to a breath test using the Intoxilyzer 5000. She was charged with Operating a Motor Vehicle Under the Influence First Offense (with aggravated circumstances), Reckless Driving, and driving without having her license in her possession. The citation indicated that an in-car camera recorded the stop.

The Campbell District Court entered the first discovery order on March 21, 2014. Birri appeared with new counsel on June 6, 2014, and again moved for discovery, specifically requesting the video. The District Court granted the motion and ordered the Commonwealth again to provide discovery.

Having still not received the video by the eve of trial, on August 14, 2014, Birri moved to suppress any evidence which would have been captured on the recording. The District Court conducted a suppression hearing, at which

Dornheggen testified, acknowledging the creation of a video during the stop, but conceding that he did not know if the video still existed. The District Court granted to motion to exclude all evidence which would have been seen on the video.

At that point, the Commonwealth moved to dismiss the charges without prejudice. The District Court granted the Commonwealth's motion, dismissing all charges against Birri, without prejudice.

The Commonwealth filed its Notice of Appeal on August 29, 2014, and a timely statement of appeal thereafter. Birri did not file a counter-statement of appeal, or otherwise participate before the Circuit Court. The Circuit Court entered an opinion reversing the District Court's evidentiary ruling on March 4, 2015.

Birri then moved this Court for discretionary review. In her motion she challenges the Commonwealth's authority to bring the appeal, and posits that double jeopardy should prevent her retrial even if we conclude the Circuit Court had the right to issue its ruling.

II. ANALYSIS

A. THE CIRCUIT COURT LACKED SUBJECT MATTER JURISDICTION OVER THIS INTERLOCUTORY APPEAL OF THE DISTRICT COURT'S EVIDENTIARY RULING.

As a threshold matter, the analysis hinges on whether the district court's order dismissing without prejudice operated as an acquittal of the

defendant. Birri argues that the Circuit Court lacked jurisdiction over the appeal because the Commonwealth had no legal authority to bring the appeal of an acquittal. She relies on *Commonwealth v. Angus*, 450 S.W.3d 719 (Ky. App. 2014) and *Commonwealth v. Williams*, 995 S.W.2d 400 (Ky. App. 1999). While, citing *Williams*, the Court in *Angus* did note that the Commonwealth's remedy after the district court's entry of an order dismissing was to seek a writ of mandamus in an original action in circuit court (*Angus* at 728), the ultimate ruling in *Angus* hinged on whether the dismissal operated as an acquittal.

In *Angus*, the trial court dismissed the charges against the defendant after granting a suppression motion in the middle of a bench trial. *Id.* at 723-24. The dismissal came after the trial court specifically made findings that, absent the suppressed evidence, the Commonwealth lacked sufficient evidence to support the charges. *Id.* at 724. The Court held that the Commonwealth lacked the authority to appeal the district court's dismissal, pursuant to Section 115 of the Kentucky Constitution, specifically because it functioned equivalently to a directed verdict of acquittal in a bench trial. *Id.* at 728.

Similarly, the District Court suppressed all evidence surrounding the traffic stop which would have been included in the missing video recording. The Commonwealth's motion to dismiss without prejudice and the District Court ruling in favor of the motion, essentially served as an evaluation of the sufficiency of the evidence remaining after the suppression ruling. In *Cozzolino v. Commonwealth*, 395 S.W.3d 485 (Ky. App. 2012), the "dismissal was not based on a mistrial; it

was related to [the defendant's] factual guilt or innocence[,]” and applying that rule, Birri may not be subjected to facing the charges a second time.

Having resolved the issue of whether the dismissal substituted for an acquittal, we now move to determining whether the Commonwealth had the authority to appeal. It is well-settled that, with a few limited exceptions, that “one can only appeal from a final judgment....” *Blair v. City of Winchester*, 743 S.W.2d 28, 31 (Ky. App. 1987) (citing *Employers’ Liability Assurance Corp. v. Home Indemnity Co.*, 452 S.W.2d 620 (Ky. 1970)).

The controlling case on this issue appears to be *Williams*, which also concerned a prosecution in district court for a DUI. There, the defense prevailed on a motion to suppress, and the Commonwealth sought interlocutory relief in the form of a writ of prohibition before the circuit court. *Williams* at 402. The circuit court dismissed the petition, concluding that admissibility of evidence is not one of the circumstances in which a writ of prohibition may be issued under *Eaton v. Commonwealth*, 562 S.W.2d 637 (Ky. 1978) and *Tipton v. Commonwealth*, 770 S.W.2d 239 (Ky. App. 1989).

The *Williams* Court opined that the circuit court, which had dismissed the petition, had misinterpreted those two cases. *Id.* The *Williams* Court held that *Eaton* stands for the proposition that when the Commonwealth seeks redress for a trial court’s discretionary rulings, the proper avenue of seeking such redress is an appeal. *Id.* The *Williams* Court interpreted *Tipton* to hold that because KRS 23A.080 contains no language authorizing interlocutory appeals from district to

circuit court, then the circuit court may not entertain an interlocutory appeal. The ruling in *Williams* hinged on this interpretation of *Tipton*. *Id.* at 403-04.

The rule of *Tipton* withstood the Kentucky Supreme Court's partial abrogation in *Hoskins v. Maricle*, 150 S.W.3d 1, 10 (Ky. 2004). The Supreme Court abrogated the portion of *Tipton* (and other cases) which required a showing that no adequate remedy on appeal existed in order to confer jurisdiction on the circuit court to entertain a petition for a writ, but not *Tipton*'s prohibition on interlocutory appeals from district court to circuit.

Birri contends that the Circuit Court lacked the subject matter jurisdiction over an interlocutory appeal from the District Court, and we agree. "In conclusion, the circuit court is without jurisdiction to take an interlocutory 'appeal' from district court as the proper method of procedure is through an original action seeking a writ of mandamus or prohibition." *Williams* at 403 (citing *Tipton* at 242); *See also Angus* at 728. Because the Circuit Court lacked the authority to hear the appeal in this action, its ruling was void *ab initio*. *Commonwealth Health Corp. v. Croslin*, 920 S.W.2d 46, 48 (Ky. 1996); *S.J.L.S. v. T.L.S.*, 265 S.W.3d 804, 833 (Ky. App. 2008).

**B. BIRRI'S ARGUMENT REGARDING CONSTITUTIONAL DOUBLE
JEOPARDY PROTECTION IS MOOT.**

Having first concluded that the Circuit Court's opinion reversing the District Court's evidentiary ruling is void, further double jeopardy analysis is obviated. While, as noted above, the District Court's ruling operated as an

acquittal, we also note that *Williams* and *Eaton* both stand for the proposition that an evidentiary ruling is not appropriately reviewed in petitions for writs. The Commonwealth is thus without recourse, and no possibility for retrial exists. The argument that Birri makes regarding double jeopardy is mooted by these facts. Yet, even if the double jeopardy analysis had not been obviated by our ruling on the Circuit Court's jurisdiction to hear the appeal, the dismissal functioned as an acquittal. That action not only deprived the Commonwealth of the right to bring the appeal, but also the Circuit Court of jurisdiction to entertain it.

III. CONCLUSION

Having carefully reviewed the record and considered the arguments of the parties, we conclude that, by two different measures, the Commonwealth acted outside its authority in bringing the appeal. The Circuit Court therefore lacked jurisdiction to issue its ruling and it cannot stand.

Having resolved all issues presented to us, we, therefore, reverse the ruling of the Campbell Circuit Court.

TAYLOR, JUDGE, CONCURS.

KRAMER, CHIEF JUDGE; CONCURS IN RESULT ONLY.

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