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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2018-CA-000941-DG

GREGORY THIEMANN

APPELLANT

ON DISCRETIONARY REVIEW FROM JEFFERSON CIRCUIT COURT
v. HONORABLE BARRY WILLETT, JUDGE
ACTION NO. 17-XX-000054

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING IN PART,
VACATING IN PART,
AND REMANDING

** ** * ** * ** *

BEFORE: KRAMER, LAMBERT, AND K. THOMPSON, JUDGES.

KRAMER, JUDGE: This case is before us on Gregory Thiemann's petition for discretionary review of the order of the Jefferson Circuit Court vacating and remanding the Jefferson District Court's order dismissing all charges against him. We granted discretionary review and for the following reasons, affirm the circuit

court's order in part, vacate in part, and remand this case to the district court to reinstate the charges against Thiemann.

Factual and Procedural History

We review the factual history of this case only briefly for context. Officer Deandre Simpson of the Louisville Metro Police Department found Thiemann asleep behind the wheel of his running vehicle on or about December 18, 2015. The interaction between Officer Simpson and Thiemann was recorded via a body camera worn by Officer Simpson, and the footage was later entered into evidence by the district court. After several minutes of interaction, Officer Simpson stated, "You could have been on your way already, but I guarantee you when my sergeant gets here, you're going to jail." The district court deemed Thiemann under arrest at that point – a finding that is not contested by either party. Thiemann was charged in Jefferson District Court with driving under the influence (DUI), menacing, and wanton endangerment.

Thiemann filed a "Motion to Dismiss/Suppress," and the district court held a hearing on February 8, 2017. The district court entered an order finding Officer Simpson did not have probable cause to arrest Thiemann and suppressed all evidence gleaned after the arrest. The Commonwealth filed a motion to

reconsider, and the district court denied the motion.¹ A trial was eventually scheduled for August 29, 2017.

On July 26, 2017, the Commonwealth filed a “Motion for Clarification of Court Order.” The motion stated, in relevant part, “[s]ince the Court has heard all the evidence that can be presented at trial and determined there was not probable cause to arrest for the charged offenses, the Commonwealth would like the court to clarify if it is dismissing the charges for lack of probable cause.” Although the district court heard the Commonwealth’s motion on August 15, 2017, the video recording contained in the record before us stops prior to the district court calling the case.² It is unknown what oral argument(s), if any, the Commonwealth presented to the district court against dismissal of the charges. The record before us contains only a docket sheet signed by the district court which states, “Dismissed NO TRIAL {BY COURT}.” The reasoning behind the district court’s dismissal of the charges is unknown to this Court.

¹ The Commonwealth’s motion to reconsider does not appear in the record before us; however, the record does contain a video recording dated May 12, 2017, in which the district court orally denied the motion. If the order was reduced to writing, it does not appear in the record before us.

² It is the duty of the appellant to ensure the record is complete and contains all of the evidence necessary to facilitate complete appellate review. *See Gambrel v. Gambrel*, 501 S.W.3d 900, 902 (Ky. App. 2016) (citing *Steel Techs., Inc. v. Congleton*, 234 S.W.3d 920, 926 (Ky. 2007), *abrogated by Osborne v. Keeney*, 399 S.W.3d 1 (Ky. 2012)).

The Commonwealth appealed the order of dismissal to the circuit court. The circuit court first found that the district court abused its discretion in dismissing the charges against Thiemann without the consent of the Commonwealth. The circuit court went further, finding that probable cause did exist to arrest Thiemann. Therefore, the circuit court vacated the district court's suppression order and remanded the case to the district court for further proceedings. We granted Thiemann's petition for discretionary review.

In his arguments to this Court, Thiemann asserts that the circuit court erroneously 1) substituted its own facts for the district court's findings; 2) found that the Commonwealth did not consent to the dismissal; and 3) vacated the district court's order suppressing evidence. For its part, the Commonwealth argues it properly invoked the appellate jurisdiction of the Jefferson Circuit Court and that the circuit court correctly concluded that the district court erred in dismissing the charges against Thiemann.

Analysis

We begin our analysis by pointing out that the parties are operating under misapprehensions regarding the proper procedural mechanisms in this case. We cannot address whether the district court erred in its order suppressing evidence—including Thiemann's argument that the circuit court substituted its own findings of fact for the district court's—because, even though the parties

argue the point extensively, that question is not properly before us. The law is well settled that to seek relief from the district court's suppression order, the Commonwealth's only avenue of relief was via a writ of prohibition or mandamus in an original circuit court action following entry of the district court's suppression order (*see* KRS³ 23A.080, CR⁴ 81, and SCR⁵ 1.040(6)).⁶ Herein, however, the Commonwealth improperly attempted to bootstrap what should have been the merits of an *original action* in circuit court for interlocutory relief from the suppression order to its *appeal as a matter of right* of the district court's dismissal of the charges against Thiemann.

Once a district court suppresses evidence, the Commonwealth has the option to: 1) proceed to trial anyway, or 2) seek review of the district court's interlocutory suppression order.⁷ *Commonwealth v. Bell*, 365 S.W.3d 216, 222

³ Kentucky Revised Statute.

⁴ Kentucky Rule of Civil Procedure.

⁵ Kentucky Supreme Court Rule.

⁶ "A writ of mandamus or prohibition may be granted upon a showing that (1) the lower court is proceeding or is about to proceed outside of its jurisdiction and there is no remedy through an application to an intermediate court; or (2) that the 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 is not granted." *Mahoney v. McDonald-Burkman*, 320 S.W.3d 75, 77 (Ky. 2010) (citation omitted).

⁷ KRS 22A.020 allows the Commonwealth to take an interlocutory appeal, under limited circumstances, from an adverse ruling in the circuit court. However, there is no statutory counterpart when the case begins in district court, as is the case here.

(Ky. App. 2012). If the Commonwealth elects to proceed to trial without the suppressed evidence, upon acquittal it is prohibited from seeking appellate review of the suppression order. *See* KY. CONST. § 115; *Ballard v. Commonwealth*, 320 S.W.3d 69, 72 (Ky. 2010). If the Commonwealth opts to seek review, it can do so *only* by requesting a writ of prohibition or mandamus through an original action in the circuit court. *See* KRS 23A.080; *Commonwealth v. Williams*, 995 S.W.2d 400, 403 (Ky. App. 1999).

In the instant action, the record before us shows the Commonwealth *appears* to have opted to proceed to trial without the suppressed evidence, at least initially. The suppression order was entered by the district court on March 28, 2017. After its motion for reconsideration was denied, the Commonwealth did not seek a writ from the circuit court. The Commonwealth also did not appear to be inclined to engage in settlement negotiations with Thiemann as shown in the video recording contained in the record dated May 12, 2017. The video shows that, after the district court denied the Commonwealth's motion to reconsider, the parties conferenced, and the district court recalled the case. Upon recall, defense counsel appeared without the Commonwealth and stated, "Judge, once again we have attempted to engage the Commonwealth in settlement negotiations and once again they refuse to participate in those, so we're asking for a trial date to be set at this time. If they want to go forward with no evidence, I guess they can."

The Commonwealth then waited until approximately one month prior to the scheduled trial date to file its motion for clarification. The Commonwealth neither specifically objected or consented to dismissal of the charges in the motion. Although the motion’s language is ambiguous, we disagree with Thiemann that the Commonwealth consented to dismissal of the charges and decline to interpret the language contained in the motion as consent.

Once the district court dismissed the charges against Thiemann, the Commonwealth appealed to the circuit court. While we agree that the Commonwealth properly invoked the appellate jurisdiction of the circuit court following the final order of dismissal of the charges,⁸ the arguments made by the Commonwealth to the circuit court do not address why the charges should not have been dismissed. Instead, the Commonwealth asserted what would have been appropriate arguments had it properly requested a writ from the circuit court (*i.e.*, that the district court erred in suppressing the evidence because there was probable cause to arrest Thiemann). *Williams*, 995 S.W.2d at 403. Nevertheless, we are compelled to agree with the Commonwealth and the circuit court that the district court erroneously dismissed the charges based on separation of powers.

⁸ KRS 23A.080(1) states that “[a] direct appeal may be taken from District Court to Circuit Court from any final action of the District Court.” Finality is assessed under CR 54.01 which states, in relevant part, “[a] final or appealable judgment is a final order adjudicating all the rights of all the parties in an action or proceeding[.]” Here, the district court’s order dismissing all charges against Thiemann was inarguably a final action even though the order was perfunctory in that it appeared only as a signed docket sheet.

“[P]rosecution of crime is an executive function and . . . the duty of the executive department is to enforce the criminal laws.” *Flynt v. Commonwealth*, 105 S.W.3d 415, 424 (Ky. 2003) (internal quotation marks and footnote omitted). This includes, but is not limited to, proceeding to trial without all available evidence, if the Commonwealth sees fit to do so. *Commonwealth v. Gonzalez*, 237 S.W.3d 575, 579 (Ky. App. 2007). We agree with the reasoning of the circuit court and incorporate it herein:

The district court abused its discretion in dismissing the criminal charges against Mr. Thiemann without consent of the Commonwealth. *See Commonwealth v. Isham*, 98 S.W.[3d] 59, 62 (Ky. 2003) (holding that “the authority to dismiss a criminal complaint before trial may only be exercised by the Commonwealth, and the trial court may only dismiss via directed verdict following a trial”); *Commonwealth v. Gonzalez*, 237 S.W.3d 575, 578 (Ky. App. 2007) (holding that a district court “overstepped its authority and abused its discretion” in dismissing without prejudice several criminal charges against a defendant based solely on the arresting officer’s absence from two pretrial conferences). Kentucky’s Rules of Criminal Procedure do not authorize a pre-trial motion to dismiss for lack of probable cause to arrest, so the district court never should have entertained the portion of Mr. Thiemann’s motion that sought dismissal of the charges against him for lack of probable cause to arrest, given that it essentially (and improperly) sought an adjudication of the charges against him before trial. *See* RCr^[9] 8.16 (“A party may raise by pretrial motion any defense, objection or request that the court can determine *without a trial of the general issues.*”) (Italics added). *See also* RCr 8.18 (outlining the defenses, objections, and requests

⁹ Kentucky Rule of Criminal Procedure.

that must be made before trial, none of which include a pre-trial motion to dismiss for lack of probable cause to arrest). Nor do the rules permit a trial court to dismiss a criminal complaint for lack of probable cause to arrest. *See Isham*, 98 S.W.3d at 62 (although noting that pursuant to RCr 8.18 a trial court could recognize a lack of jurisdiction or failure to charge an offense in a criminal complaint at any point during the proceedings, holding that only the Commonwealth, with the court's permission, could dismiss a complaint). *See also* RCr 9.64 ("The attorney for the Commonwealth, with the permission of the court, may dismiss the indictment, information, complaint or uniform citation prior to the swearing of the jury or, in a non-jury case, prior to the swearing of the first witness.") For those reasons, the Court holds that the district court erred in dismissing the charges against Mr. Thiemann without the consent of the Commonwealth.

(Footnotes omitted.)

The separation of powers doctrine made it improper for the district court to dismiss the charges without consent of the Commonwealth, and the Commonwealth properly appealed the dismissal as a final action of the district court. However, it was impermissible for the Commonwealth to bypass the proper procedure to obtain a writ of prohibition or mandamus in an original action in the circuit court and instead present its arguments regarding the interlocutory suppression order as an appeal. *See Williams*, 995 S.W.2d at 403 ("[T]he 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."). Although the circuit court correctly ruled that the

district court erred in dismissing the charges against Thiemann, the circuit court, in turn, erred in addressing the merits of the Commonwealth's argument that the evidence was improperly suppressed. The circuit court lacked jurisdiction over the Commonwealth's interlocutory appeal of the suppression order. *Id.* We therefore vacate the portion of the circuit court's order that vacated the district court's suppression order.

Conclusion

For the foregoing reasons, we affirm the circuit court insofar as it found the district court improperly dismissed the charges against Thiemann. However, we vacate the circuit court's order to the extent that it vacated the district court's suppression order. Finally, we remand the case to the district court to reinstate the charges against Thiemann.

ALL CONCUR.

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