

IMPORTANT NOTICE
NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

AS MODIFIED: SEPTEMBER 18, 2003
RENDERED: JUNE 12, 2003
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2002-SC-1057-MR

FINAL

DATE 9-18-03 EIA Group, DC

DENNIS LEE,
UNITED COMMUNITY SERVICES OF AMERICA, INC.,
INTERNATIONAL TESLA ELECTRIC COMPANY,
AND BETTER WORLD TECHNOLOGIES, INC.

APPELLANTS

V. APPEAL FROM AN ORIGINAL ACTION BEFORE THE
COMMONWEALTH OF KENTUCKY COURT OF APPEALS
ACTION NO. 2002-CA-2005

HONORABLE STEPHEN RYAN, JEFFERSON
CIRCUIT COURT JUDGE, SERVING AS JUDGE
OF THE JEFFERSON COUNTY GRAND JURY
AND R. DAVID STENGEL, JEFFERSON COUNTY
COMMONWEALTH ATTORNEY 30TH JUDICIAL DISTRICT

APPELLEES

MEMORANDUM OPINION OF THE COURT

REVERSING AND REMANDING

Dennis Lee is the sole shareholder and executive officer of the following corporate entities: United Community Services of America, Inc. (UCSA), International Tesla Electric Company (ITEC), and Better World Technologies, Inc. (BWT). All three entities are incorporated in Delaware and are primarily located in New Jersey. Lee and his companies sought a writ of mandamus and prohibition in the Court of Appeals. This is an appeal from the denial of same.

Through his corporate entities, UCSA, ITEC, and BWT, Lee engages in the promotion and sale of business opportunities of various products, including a device

that supposedly produces free electricity. Lee markets his products via an Internet site. The site offers dealerships for those interested in marketing Lee's products, and it allows individuals to sign up for product demonstrations. The site revealed that Lee would be in Louisville for such a demonstration on October 8, 2001. Lee was subsequently arrested the same day in Louisville for alleged violations of state law regarding the sale of business opportunities. KRS 367.801 et seq.

Lee attempted to conduct another demonstration in Louisville on December 28, 2001. However, on the same day, the office of the Attorney General filed a civil action in Jefferson Circuit Court against Lee's corporate entities, which is still pending.

Commonwealth of Kentucky, ex rel. A.B. Chandler, III, Attorney General v. Dennis Lee d/b/a United Community Services of America, and d/b/a Better World Technologies, and d/b/a Int'l Tesla Electric Co., No. 01-CI-8842.

In April of 2002, the Jefferson County Grand Jury issued a two-count indictment against Lee individually, alleging that he, acting alone or in complicity with others, committed the following offenses: (1) Misrepresentation of Sale, Income or Profit of Business Opportunities, and (2) Failure to Register Sale of Business Opportunities. This indictment is currently pending in the second division of Jefferson Circuit Court, No. 02-CR-0995.

Following additional investigation by the office of the Attorney General, and at the request of the office of the Jefferson County Commonwealth Attorney, the grand jury proceeded to conduct an investigation of Lee's corporate entities. On May 13, 2002, the grand jury issued subpoenas duces tecum to each of Lee's corporate entities. As custodian of records for all three entities, Lee was served the subpoenas while attending his arraignment on the criminal indictment brought against him individually.

On May 29, 2002, Lee attempted to have the grand jury subpoenas stayed by Judge Lisabeth Hughes Abramson, the judge overseeing the grand jury at the time, but the request was denied. Lee also moved the trial court overseeing his individual criminal case to enter an injunction preventing discovery of the records of his corporate entities. Lee argued, inter alia, that the office of the Jefferson County Commonwealth Attorney was improperly using the grand jury as a discovery device in contravention of that court's previously entered discovery order. However, the court denied Lee's motion, stating that this was a matter for the judge overseeing the grand jury.

On August 5, 2002, Judge Stephen P. Ryan, the new presiding grand jury judge, conducted a hearing concerning the grand jury subpoenas at issue. Although it was apparent that Lee would invoke his Fifth Amendment right against self-incrimination if ordered to testify before the grand jury, Judge Ryan determined that a hearing was needed in order to ascertain whether Lee was entitled to Fifth Amendment protection. Lee was then ordered to appear before the grand jury and to provide it with various corporate records sought by the Assistant Commonwealth Attorney. Lee appeared before the grand jury on August 6, 2002, asserted his right against self-incrimination, but failed to produce the records of his corporate entities. On August 12, 2002, Judge Ryan determined that Lee, due to the criminal charges pending against him, did not have to testify before the grand jury, and that his assertion of the Fifth Amendment was proper. However, Judge Ryan further determined that Lee's Fifth Amendment protections did not extend to the records of his corporate entities. Thus, Lee was found in contempt for not turning over the records of his corporate entities to the grand jury, and was fined \$1000.00 a day until compliance with the order of August 5, 2002.

Lee then petitioned the Court of Appeals for a writ prohibiting (1) the discovery of items, documents, and testimony pursuant to the grand jury subpoenas, and (2) the enforcement of the contempt finding and derivative fines levied against him. Lee also sought mandamus relief directing Judge Ryan to enter a protective order for both himself and his corporate entities, thereby quashing the grand jury subpoenas, and further a reversal of the contempt finding against him. The Court of Appeals denied this petition. Lee now brings this appeal before this Court as a matter of right. CR 76.36(7)(a).

Lee contends that the grand jury subpoenas, which were served on him as custodian of records of his corporate entities, should be quashed because the Commonwealth is in effect circumventing the rules of discovery applicable to the still pending criminal case against him by improperly using the investigative processes of the grand jury. The essence of Lee's contention is that the overriding purpose of the subpoenas is not related to the civil proceedings against his corporate entities. Rather, the overriding purpose of the subpoenas is to allow the prosecution to gather evidence to be used in preparation for the pending criminal case against Lee.

Last year, we considered a case similar to the one at bar, Bishop v. Caudill, Ky., 87 S.W.3d 1 (2002). The issue before us in that case was "whether the grand jury process [was] being improperly used as a substitute for discovery. . . ." Id. at 4. Therein we stated that "[i]f the purpose of subpoenaing [witnesses] before the grand jury is to use the grand jury proceedings as a guise for trial preparation, the subpoenas must be quashed." Id. at 3. Similarly, if the purpose of issuing subpoenas to Lee, as custodian of records, is to use the grand jury proceedings as a "guise for trial

preparation” for the pending criminal case against Lee, then the subpoenas must be quashed.

The Commonwealth attempts to distinguish Bishop from the case at bar by pointing out that the subpoenas in Bishop were issued under a pending indictment number. Here, the corporate entities have not been indicted and the grand jury subpoenas are not pursuant to Lee’s indictment. The Commonwealth also asserts that the clear purpose of the grand jury investigation is to uncover wrongdoing by the corporate entities, and not Lee individually. Furthermore, the Commonwealth contends that the corporate entities lack standing to challenge the subpoenas.

It is generally true that criminal defendants lack standing to inquire into grand jury investigations. Bishop, supra at 4. However, this is correct only “so long as the motivating purpose of the grand jury investigation is not the accumulation of evidence for a pending criminal case. . . .” In re Grand Jury Investigation (General Motors Corp.), 32 F.R.D. 175, 183 (S.D.N.Y. 1963). Here, the Assistant Commonwealth Attorney assigned to the grand jury has made it clear that he may use information that Lee provides to the grand jury in the pending criminal case. Also, in its own brief submitted to this Court, the Commonwealth states that a grand jury investigation of Lee’s corporate entities began in part at the request of the Assistant Commonwealth Attorney.

We also note, and the Commonwealth is aware, that Lee is the sole shareholder and executive of UCSA, ITEC, and BWT. The pending criminal indictment against Lee is directly related to his corporate entities, as he markets his products through them. Given the circumstances, and contrary to the Commonwealth’s position, we cannot say that the clear purpose of the grand jury investigation is to uncover wrongdoing by the

corporate entities, and not to accumulate discovery information in preparation for the forthcoming trial on the criminal indictment against Lee individually.

The remedy that Lee desires in this case, i.e., a writ of prohibition and mandamus, is an extraordinary form of relief. Generally, a writ will only be granted if (1) the lower court is proceeding or is about to proceed outside its jurisdiction, or (2) the lower court is about to act incorrectly, although within its jurisdiction, and there exists no adequate remedy by appeal or otherwise and great injustice and irreparable injury would result. Southeastern United Medigroup v. Hughes, Ky., 952 S.W.2d 195, 199 (1997). While we rarely grant such relief, there is a serious question regarding whether the investigative procedures of the grand jury are being used in an improper fashion. In Bishop, supra, we ultimately reversed the decision rendered by the Court of Appeals and remanded the case for a determination to be made as to whether the sole or dominant purpose of the issuance of the subpoenas was to facilitate discovery by the Commonwealth of facts related to a pending criminal indictment. Id. at 4. We follow our decision in Bishop and hold that, under the circumstances, a like conclusion is appropriate in this case as well.

Lee also claims he was improperly served the grand jury subpoenas. We find this argument to be wholly without merit and need not address it. As to Lee's argument concerning his right against self-incrimination, we hold that the right simply does not extend to the records of his corporate entities. See Braswell v. United States, 487 U.S. 99, 108 S. Ct. 2284, 101 L. Ed. 2d 98 (1988); Bellis v. United States, 417 U.S. 85, 94 S. Ct. 2179, 40 L. Ed. 2d 678 (1974).

Wherefore, for the reasons aforesaid, we reverse the order of the Court of Appeals and remand with directions to grant Lee's petition until such time that the

presiding judge in appellant's case can conduct an evidentiary hearing in order to determine whether the sole, dominant, or motivating purpose of the grand jury subpoenas at issue is an attempt by the Commonwealth to gather discovery information for the pending criminal case against Lee. If such a determination is made, the subpoenas shall be quashed forthwith.

Lambert, C.J.; Cooper, Graves, Johnstone and Stumbo, JJ., concur. Keller, J., concurs in the decision to reverse and remand this case for the Court of Appeals to issue a writ, but dissents from the majority opinion to the extent that it requires the trial court to proceed directly to an evidentiary hearing in order to resolve the issue of whether trial preparation was the Commonwealth's "sole or dominant purpose" for causing the subpoenas to be issued. See Bishop v. Caudill, Ky., 87 S.W.3d 1, 4-8 (2002) (Keller, J., concurring in part and dissenting in part). Wintersheimer, J., dissents without opinion.

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ORDER

Appellee's petition for modification of this Court's Memorandum Opinion is granted in part.

The Memorandum Opinion rendered herein on June 12, 2003 is modified by the substitution of new pages 6 and 7 of the Opinion as originally rendered. Said modifications do not affect the holding.

All concur.

Entered: September 18, 2003.



CHIEF JUSTICE