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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

RENDERED: SEPTEMBER 18, 2003
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

DATE 10-9-03 ELIA Grown D.C.

2003-SC-00247-MR

RONALD LEAKE — APPELLANT

V.

APPEAL FROM COURT OF APPEALS
2003-CA-0399-OA
JEFFERSON CIRCUIT COURT NO. 2002-CR-0455

LISABETH HUGHES ABRAMSON,
JUDGE, JEFFERSON CIRCUIT COURT — APPELLEE

AND

COMMONWEALTH OF KENTUCKY — REAL PARTY IN INTEREST

MEMORANDUM OPINION OF THE COURT

AFFIRMING

I. INTRODUCTION

In an original action brought in the Court of Appeals, Appellant sought a writ that would require the Appellee trial judge to dismiss a Jefferson Circuit Court Indictment, which charges Appellant with Felony Receiving Stolen Property (as a First-Degree Persistent Felony Offender (PFO)) and three (3) misdemeanor offenses. The Court of Appeals denied Appellant's petition, and Appellant appeals to this Court as a matter-of-right. The crux of Appellant's argument is that the Jefferson County Grand Jury lacked jurisdiction to return this indictment against him because "this same receipt of stolen property charge" was previously amended to a misdemeanor offense by the Jefferson District Court. We conclude that Appellant has an adequate remedy by appeal and that

extraordinary relief is thus inappropriate. We therefore affirm the decision of the Court of Appeals.

II. FACTUAL BACKGROUND

Appellant was arrested and charged with Felony Receiving Stolen Property and the misdemeanor offenses of Carrying a Concealed Deadly Weapon, Terroristic Threatening, and Harassment. On January 28, 2002, those charges came before the Jefferson District Court for a preliminary hearing[1] to determine whether probable cause existed to hold Appellant to answer in the Jefferson Circuit Court.[2] After examining the evidence introduced at the hearing, Judge Martin McDonald found no probable cause to support the felony offense and then, on his own motion, amended it to the misdemeanor offense of Unauthorized Use of an Automobile. Judge McDonald then set all four (4) charges for trial in Jefferson District Court on February 27, 2002.

Two (2) days before the scheduled trial date, the Jefferson County Grand Jury returned Jefferson Circuit Court Indictment No. 2002-CR-0455, which charged Appellant with one (1) count each of Felony Receiving Stolen Property, Carrying a Concealed

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[1] See KRS 24A.110(3) ("The District Court has, concurrent with Circuit Court, jurisdiction to examine any charge of a public offense denominated as a felony or capital offense or which may be punished by death or imprisonment in the penitentiary and to commit the defendant to jail or hold him to bail or other form of pretrial release.").

[2] See RCr 3.14(1):

> [I]f . . . from the evidence it appears to the judge that there is probable cause to believe that an offense required to be prosecuted by indictment pursuant to Section 12 of the Kentucky Constitution has been committed and that the defendant committed it, the judge shall hold the defendant to answer in the circuit court and commit the defendant to jail, release the defendant on personal recognizance or admit the defendant to bail if the offense is bailable; otherwise the defendant shall be discharged.

Deadly Weapon, Terroristic Threatening, and Harassment, and which charged Appellant with being a First-Degree PFO. With the exception of the PFO charge, the charges in the indictment are identical to the charges that were previously considered at the preliminary hearing, and both sets of charges relate to the same alleged conduct.

Appellant unsuccessfully moved the trial court to dismiss the indictment on the grounds that the Jefferson District Court's amendment of the felony offense precluded the actions taken by the Jefferson County Grand Jury. In short, Appellant's argument is that: (1) KRS 24A.110(4), which provides that "[t]he District Court may, upon motion and for good cause shown, reduce a charge of a felony to a misdemeanor in accordance with the Rules of Criminal Procedure,"[3] authorized the Jefferson District Court to amend the Felony Receiving Stolen Property charge to Unauthorized Use of an Automobile, a misdemeanor; and (2) once that amendment occurred, the Jefferson District Court had exclusive jurisdiction over the charge pursuant to KRS 24A.110(2), which provides that "[t]he District Court has exclusive jurisdiction to make a final disposition of any charge or public offense denominated as a misdemeanor or violation, except where the charge is joined with an indictment for a felony[.]"[4] After reviewing the

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[3] KRS 24A.110(4). See also RCr 9.13:

> If before or during the preliminary hearing of any person arrested pursuant to a warrant, or appearing in response to a summons or citation, it appears that the complaint does not properly name or describe the defendant, or the offense with which the defendant is charged, or that although not guilty of the offense specified in the complaint, there is probable cause to believe that the defendant is guilty of some other offense, the judge shall not discharge or dismiss the defendant but shall permit the attorney for the Commonwealth to amend the complaint if substantial rights of the defendant are not prejudiced. (Emphasis added).

[4] KRS 24A.110(2).

relevant Kentucky caselaw, the trial court denied Appellant's motion to dismiss the indictment. Appellant then filed an original action in the Court of Appeals in which he sought extraordinary relief on the same grounds. The Court of Appeals denied Appellant's petition, and Appellant has now appealed to this Court.

III. ANALYSIS

In order to obtain extraordinary relief, the petitioner must meet certain procedural prerequisites, i.e., "a showing that: 1) the lower court is proceeding or is about to proceed outside its jurisdiction *and there is no adequate remedy by appeal*, 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.*"[5] Although it is black-letter law that "whether to grant or deny a petition for a writ is within the appellate court's discretion,"[6] unless the petition alleges a double jeopardy bar,[7] a court may grant extraordinary relief *only* when the party seeking the writ has first satisfied the threshold requirements for such relief.[8] And thus "[d]iscretion

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[5] See Southeastern United Medigroup v. Hughes, Ky., 952 S.W.2d 195, 199 (1997) (emphasis added) (quoting Tipton v. Commonwealth, Ky.App., 770 S.W.2d 239 (1989)).

[6] Commonwealth v. Deloney, Ky., 20 S.W.3d 471, 473 (2000). Cf. St. Clair v. Roark, Ky., 10 S.W.3d 482, 485 (2000) (referencing "the oft-repeated maxim that although a writ of prohibition will issue only in exceptional circumstances, whether to do so lies within the sound discretion of the court in which the writ is sought."); Haight v. Williams, Ky., 833 S.W.2d 821, 823 (1992) ("Issuance of, or refusal to issue a writ of prohibition is in the sound discretion of the trial court."); Rowley v. Lampe, Ky., 331 S.W.2d 887 (1960) ("The granting of prohibition may not be demanded as a matter of right, but the granting or refusal thereof lies within the sound discretion of this Court.").

[7] See Commonwealth v. Stephenson, Ky., 82 S.W.3d 876, 880 (2002); St. Clair v. Roark, supra note 6 at 485 (authorizing the issuance of writs in double jeopardy cases notwithstanding the availability of an adequate remedy by appeal).

[8] Graham v. Mills, Ky., 694 S.W.2d 698, 700 (1985) ("[Writs] may be used by a court in a discretionary manner and *only when the situation is so exceptional that there*

is not properly exercised when the appropriate remedy is to appeal."[9] "The requirement of showing that there is no adequate remedy by appeal emphasizes that a writ is an extraordinary remedy used 'to shield a [party] from injustice, against which there [is] no other adequate remedy[.]'"[10]

Appellant asserts that he has no adequate remedy by appeal in this case because, unless a writ is granted, he will be forced to face trial under an indictment that he alleges is invalid. We have found similar allegations insufficient to demonstrate the inadequacy of appellate review.[11] Accordingly, we find that Appellant is unable to make the required threshold showing for the relief he requests. If Appellant is convicted of the felony offense charged in the indictment, traditional appellate procedures will permit Appellant an adequate forum in which to assert his claim. Accordingly, we hold that the Court of Appeals correctly denied Appellant's petition for a writ of prohibition.

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is no adequate remedy at law to prevent a miscarriage of justice." (emphasis added)); Southeastern United Medigroup v. Hughes, supra note 5 at 199 ("Where a petition for one of the extraordinary writs alleges that a lower adjudicatory body within its jurisdiction has acted incorrectly, *and the threshold factors of inadequate remedy and irreparable injury are satisfied*, the writ should be issued only upon a showing that the challenged action reflects an abuse of discretion." (emphasis added)). See also 52 AM. JUR. 2D *Mandamus* § 26 (2000) ("The issuing court's decision will not be disturbed on appeal unless there was an abuse of discretion. This means sound juridical discretion . . . *in accordance with the principles governing the granting of extraordinary remedies*." (footnotes omitted)).

[9] 52 AM. JUR. 2D *Mandamus* § 28 (2000).

[10] Kentucky Labor Cabinet v. Graham, Ky., 43 S.W.3d 247, 251 (2001) (quoting Ohio River Contract Co. v. Gordon, 170 Ky. 412, 186 S.W. 178, 181 (1916), *aff'd* 244 U.S. 68, 37 S.Ct. 599, 61 L.Ed. 997 (1917)).

[11] See Flynt v. Commonwealth, Ky., 105 S.W.3d 415, 422-3 (2003) ("[W]e have consistently found that traditional appellate review of allegations of error in felony cases constitute[s] an adequate remedy."). See id. n.19 (collecting cases).

IV. CONCLUSION

For the above reasons, we affirm the Court of Appeals's denial of Appellant's petition for extraordinary relief.

Lambert, C.J.; Graves, Johnstone, Keller, Stumbo and Wintersheimer, concur. Cooper, J., concurs in result only.

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