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THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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: OCTOBER 23, 2003
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

DATE 1-22-04 ElliAGrant,D.C

2002-SC-0852-MR
AND
2002-SC-0866-MR

COMMONWEALTH OF KENTUCKY — APPELLANT/CROSS-APPELLEE

V.

APPEAL AND CROSS-APPEAL
FROM ORIGINAL ACTION IN COURT OF APPEALS
2002-CA-1744

STEPHEN RYAN, JUDGE,
JEFFERSON CIRCUIT COURT — APPELLEE

AND

MICHAEL JAMES
(REAL PARTY IN INTEREST) — APPELLEE/CROSS-APPELLANT

MEMORANDUM OPINION OF THE COURT

AFFIRMING

This is an appeal and cross-appeal from an order of the Court of Appeals partially granting and partially denying a petition for a writ of prohibition sought by the Commonwealth against Jefferson Circuit Judge Stephen Ryan. In the underlying action, Judge Ryan entered an order disqualifying the entire Jefferson County Commonwealth's attorney's office and, in particular, assistant Commonwealth's attorney F. Todd Lewis from prosecuting Indictment No. 02-CR-1647. That indictment charged the real party in interest, Appellee/Cross-Appellant Michael James, with flagrant nonsupport in connection with his divorce from assistant county attorney Trisha

Zeller. The Court of Appeals issued a writ prohibiting the disqualification of the entire Commonwealth's attorney's office but denied the petition to issue a writ prohibiting the disqualification of Lewis, finding that no irreparable harm would result from the disqualification of any particular assistant Commonwealth's attorney. Both parties appeal that decision to this Court as a matter of right. Ky. Const. § 115; CR 76.36(7)(a). Finding no abuse of discretion on the part of the Court of Appeals, we affirm.

I. FACTS.

Michael James and Trisha Zeller were divorced by a decree of the Oldham Circuit Court. In July 2001, assistant Commonwealth's attorney Lewis sought and received Indictment No. 01-CR-1791 from the Jefferson County grand jury, charging James with flagrant nonsupport, KRS 530.050(2) (Class D felony), for his alleged failure to pay one thousand dollars in uninsured medical expenses incurred for the former couple's children. James filed a motion to dismiss that indictment on May 16, 2002. At an in camera hearing on June 17, 2002, Judge Denise Clayton declined to dismiss the indictment, Commonwealth v. Hicks, Ky., 869 S.W.2d 35, 37 (1994), but noted in a written order of June 25, 2002, that:

> [T]he Court will note as it did in discussions with counsel that if it appears that this is a matter that may result in a directed verdict in favor of the defendant, then this matter should be resolved in some other fashion in order to insure a more reasonable use of judicial resources.

Following the June 17, 2002, hearing, Lewis and James's attorney had a conversation during which Appellant claims Lewis made the following threat: "If James doesn't plead to a misdemeanor nonsupport charge, I'm going to indict him on each

$1,000 that has accrued since the last indictment, get an arrest warrant and see that he gets arrested and goes to jail." Emergency Motion to Quash Subpoena and Arrest Warrant, at 3 (August 2, 2002). Lewis made a similar written plea offer in a letter to James's attorney dated July 29, 2002, viz:

> In exchange for your client's plea of guilt to two misdemeanor counts of Nonsupport, and payment of the amount currently owed in medical expenses pursuant to the divorce action order, the Commonwealth will recommend a six (6) month sentence on each count, obviously to run concurrently for six months. In exchange for this agreement, the Commonwealth will not indict Mr. James for the two additional counts (one for each child) of flagrant non-support [sic] which have accrued since the period set out in the above indictment. The Commonwealth will recommend that the sentence be conditionally discharged for a period of two (2) years.

James maintains that no support order has ever been entered against him and that it is therefore impossible for him to be guilty of flagrant nonsupport.[1] He contends that the divorce was settled by an agreement that provides that any disputes be resolved by binding arbitration.[2] James therefore declined Lewis's plea offer.

Also on July 29, 2002, James's father, Clark James, appeared before the Jefferson County grand jury pursuant to a subpoena to produce rental records

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[1] An element of the offense of flagrant nonsupport is that the duty to provide support must have been established by a court or administrative order. KRS 530.050(2).

[2] The record contains a handwritten settlement agreement that was incorporated by reference into a May 14, 1999, order of the Oldham Circuit Court. Paragraph 12 refers to a "$1,000 cap on yearly uncovered medicals" but does not state who is required to pay it. Paragraph 13 recites "over $1000 (per paragraph 12) referred for binding arbitration." Paragraph 18 recites:

> uncovered medicals – notice w/in 30 days if no notice w/in 60 days then cannot recover – if not paid w/in 30 days of notice – becomes common law judgment – bears interest at 12% unless if contested in writing then to be submitted to arbitrator.

pertaining to his son. Michael James and his attorney accompanied Clark James to the building where the grand jury was meeting. The three were in an anteroom when Zeller appeared and walked past them into the grand jury room. As she passed James, he remarked "there's the b-tch." Affidavit of Jackie Goldman, legal secretary, Commonwealth's attorney's office (August 5, 2002). It is undisputed both that this scurrility was audible to Zeller and that there is no evidence that James "advanced toward" Zeller when he uttered it. Rather, Goldman's affidavit states only that Appellant "did not move away as we walked past him and the two other gentlemen." Id. Following this incident, a Commonwealth's detective ordered James to leave the premises.

On July 30, 2002, Lewis sought and received from the grand jury Indictment No. 02-CR-1647, again charging James with flagrant nonsupport. Lewis argued in the underlying action that the second indictment was warranted because an additional one thousand dollars of nonsupport had accrued since the first indictment was issued.[3] Lewis also filed a written motion for a bench warrant for James's arrest. The motion stated in relevant part that James was "at large" and that he had "made a threatening and intimidating advance toward the victim/witness as she proceeded toward the Grand Jury to testify." Commonwealth's Motion for Bench Warrant, undated (emphasis added).

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[3] The official Commentary to KRS 505.020(1)(c) identifies nonsupport as an offense that is a continuing course of conduct for which multiple prosecutions would constitute double jeopardy.

Judge Clayton, who was presiding over the grand jury, was out of town. Thus, the warrant application was presented to Judge Ryan. According to Judge Ryan, assistant Commonwealth's attorney Stacy Greibe, who presented the motion to him, told him that the "threat" had occurred "in the grand jury room." Relying on this representation and the allegations that James "had made a threatening and intimidating advance" on Zeller "as she proceeded toward the Grand Jury" and that he was "at large," Judge Ryan issued the warrant. (Apparently, it is customary to issue a summons, as opposed to a warrant, on an indictment for flagrant nonsupport.)

On August 2, 2002, James filed an "Emergency Motion to Quash Warrant and Subpoena" and a hearing on the motion was held at 3:00 p.m. that same day. In addition to reading the allegations in the motion, Judge Ryan had also reviewed the official record pertaining to Indictment No. 01-CR-1791, including Judge Clayton's order of June 25, 2002, and determined that James had never failed to appear in court on that charge when required. Concluding that the characterization of James as "at large" was misleading, Judge Ryan recalled the warrant.

At the 3:00 p.m. hearing, Lewis demanded to know why Judge Ryan had sua sponte recalled the warrant before the hearing and accused the judge of engaging in ex parte communications. Judge Ryan responded that he had recalled the warrant after reviewing the official record in Indictment No. 01-CR-1791 and determining that the statement in the warrant application that James was "at large" was a mischaracterization. Judge Ryan elicited from Lewis admissions that Lewis had prepared and signed the motion for the arrest warrant and that James's "threat" against Zeller consisted of James referring to Zeller under his breath as a "b-tch." Judge Ryan

characterized as "lies" the representation in the motion for a warrant that James had "made a threatening and intimidating advance" toward Zeller and the representation by assistant Commonwealth's attorney Greibe that the "threat" occurred "in the grand jury room."

> I was told that he threatened her. I can call you a "b-tch" anytime I want, but that doesn't mean that I'm threatening you. I can call you a "little Nazi" anytime I want, but that doesn't mean that I'm threatening you. It may be derogatory, but it doesn't mean that I'm threatening you.

Judge Ryan also suggested that the second indictment amounted to "judge-shopping" in response to Judge Clayton's expressed doubts as to the merits of the first indictment. He then announced his intention to disqualify Lewis from further prosecution of Indictment No. 02-CR-1647, finding that Lewis's actions demonstrated "actual bias" against James within the meaning of KRS 15.733(3). ("You are being a total a--hole in this case, and you are removed from this case."). The rancor escalated when Lewis requested that an evidentiary hearing be held in the matter on the following Monday, August 5, 2000. Judge Ryan ordered that any evidentiary hearing be held immediately because "at 8:30, Monday morning [when Judge Clayton resumed her duties], I lose jurisdiction of this case." Lewis stated that he was unprepared for an immediate hearing and demanded the right to make an avowal. Judge Ryan offered to administer the witness oath. Lewis refused to be sworn as a witness.

Judge Ryan then announced that he was disqualifying the entire Jefferson County Commonwealth's attorney's office from prosecuting Indictment No. 02-CR-1647. He explained in a written order entered on August 5, 2002, that "James's ex-wife is a prosecutor at Jefferson County Attorney's Office," and "Commonwealth's Attorneys and County Attorneys are charged with representing the state in various criminal actions . . .

[and] work closely with each other;" thus, given that reality and Lewis's actions thus far, "James's due process rights can only be reasonably secured by disqualifying the entire Jefferson County Commonwealth's Attorney's Office in the case of Commonwealth v. James, 02-CR-1647." The Commonwealth responded with this petition for a writ of prohibition.

II. WRIT OF PROHIBITION.

A writ of prohibition is an "extraordinary remedy" that will be issued when:

> (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.

Lexington Pub. Library v. Clark, Ky., 90 S.W.3d 53, 61-62 (2002). Here, there was no question that Judge Ryan was proceeding within his jurisdiction; KRS 15.733(3) provides that "[a]ny prosecuting attorney may be disqualified by the court in which the proceeding is presently pending, upon a showing of actual prejudice." Thus, the only questions presented to the Court of Appeals were whether Judge Ryan was proceeding erroneously, whether there was an adequate remedy by appeal or otherwise, and whether great injustice and irreparable injury would result. "The decision to grant or deny the petition is committed to the sound discretion of the court" to which it is presented. Southeastern United Medigroup, Inc. v. Hughes, Ky., 952 S.W.2d 195, 199 (1997) (citing Haight v. Williamson, Ky., 833 S.W.2d 821, 823 (1992)).

We find no abuse of discretion. The Court of Appeals concluded that "irreparable injury" would not result from the disqualification of any particular assistant in the Commonwealth's attorney's office. We agree. We also agree with the Court of

Appeals' conclusion that "[a]n assistant commonwealth's attorney does not have a right to prosecute any individual case. There are other cases for Lewis to prosecute and other assistant commonwealth's attorneys to prosecute this particular indictment." Furthermore, there was substantial evidence of "actual prejudice" on the part of Lewis to support Judge Ryan's order removing him from the case, e.g., (1) Lewis's threat to seek a second indictment and to have James arrested if he did not accede to his ex-wife's demands in their civil dispute and plead guilty to a lesser included offense with respect to the first indictment; (2) the misrepresentation of the nature of the alleged "threat" against Zeller; and (3) the misleading statement in the warrant application that James was "at large."

It was also within the Court of Appeals' discretion to grant the petition for a writ of prohibition with respect to the disqualification of the entire office of the Jefferson County Commonwealth's attorney. As noted, KRS 15.733(3) provides:

> Any prosecuting attorney may be disqualified by the court in which the proceeding is presently pending, upon a showing of actual prejudice.

We have held that for purposes of KRS 15.733(3), "vindictiveness is not to be presumed." Barnett v. Commonwealth, Ky., 979 S.W.2d 98, 102 (1998). In Summit v. Mudd, Ky., 679 S.W.2d 225 (1984), we held that "[t]he mere possibility of the appearance of impropriety is not sufficient to disqualify the entire staff of the Commonwealth Attorney's office from further prosecution of the case." Id. at 225-26. An evidentiary hearing must be held and the trial court must carefully weigh the evidence suggesting bias on the part of the prosecutor's entire office. Id.; Whitaker v. Commonwealth, Ky., 895 S.W.2d 953, 955 (1995). Indeed, we have held that a prosecutor was not disqualified from prosecuting a defendant whose father had

punched the prosecutor in the nose when a detailed inquiry showed that the prosecutor bore the defendant no ill will. Clayton v. Commonwealth, Ky., 786 S.W.2d 866, 869 (1990).

A careful review of the record supports the Court of Appeals' finding that the evidence before Judge Ryan did not support his conclusion that the entire Commonwealth's attorney's office was actually prejudiced against James. Judge Ryan concluded that the relationship between the offices of the county attorney and Commonwealth's attorney was close enough to impute actual bias on the part of every member of the Commonwealth's attorney's office when the alleged crime victim was an assistant county attorney. Thus, the disqualification decision was based solely on Judge Ryan's findings with regard to Lewis's actual prejudice[4] and his ex ante view about the structural relationship between the prosecutors in these two offices.

However, federal courts have unanimously held that one prosecutor's bias does not automatically infect every other member of the prosecutorial office. E.g., United States v. Vlahos, 33 F.3d 758, 763 n.5 (7th Cir. 1994) ("When an individual government attorney is disqualified from participation in a particular case, the 'vicarious disqualification of a government department is not necessary or wise.'") (quoting United States v. Caggiano, 660 F.2d 184, 191 (6th Cir. 1981)). Indeed, these courts have noted that a blanket disqualification of an entire prosecutorial office without a showing of actual prejudice offends the doctrine of separation of powers. See Vlahos, supra, at 762 (holding that, in disqualifying "the United States Attorney's Office," "the district court

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[4] He did not make a finding with respect to any actual prejudice on the part of Greibe.

exceeded the boundaries of its lawful role by prohibiting the designated representatives of the Executive Branch from prosecuting this criminal contempt action"); In re Grand Jury Subpoena of Rochon, 873 F.2d 170, 174 (7th Cir. 1989) (observing that "a federal district court order prohibiting the Attorney General of the United States from participating in a grand jury investigation is no small matter . . . . Since initiating a criminal case by presenting evidence before the grand jury is an executive function within the exclusive prerogative of the Attorney General, such an order raises sharp separation-of-powers concerns.") (quotations and citations omitted). The Separation of Powers doctrine is articulated in Section 27 of the Kentucky Constitution.

> The powers of the government of the Commonwealth of Kentucky shall be divided into three distinct departments, and each of them be confined to a separate body of magistracy, to wit: Those which are legislative, to one; those which are executive, to another; and those which are judicial, to another.

The Commonwealth's attorney's office is within the executive department. Ky. Const. §§ 97, 98, 108. And, like the federal system, our Constitution provides the executive department with the exclusive power to charge persons with crimes and to prosecute those charges. Ky. Const. § 81. See also KRS 15.190; 15.200; 15.725; Heckler v. Chaney, 470 U.S. 821, 832, 105 S.Ct. 1649, 1656, 84 L.Ed.2d. 714 (1985); United States v. Nixon, 418 U.S. 683, 693-94, 94 S.Ct. 3090, 3100, 41 L.Ed.2d 1039 (1974); Moore v. Commonwealth, Ky., 983 S.W.2d 479, 487 (1998); Commonwealth v. McKinney, Ky. App., 594 S.W.2d 884, 888 (1979). The Jefferson County Commonwealth's attorney is thus charged with the executive function of prosecuting criminal cases in Jefferson County. KRS 15.725.

In our system of justice, the Commonwealth's attorney is elected and accountable to the people for the proper performance of his or her duties. California courts note that the elected nature of the office is a factor to consider when a judge disqualifies the elected prosecutor from the performance of his or her duties.

> Caution is necessary because when the entire prosecutorial office of the district attorney is recused and the Attorney General is required to undertake the prosecution or employ a special prosecutor, the district attorney is prevented from carrying out the statutory duties of his elected office and, perhaps even more significantly, the residents of the county are deprived of the services of their elected representative in the prosecution of crime in the county. The Attorney General is, of course, an elected state official, but unlike the district attorney, is not accountable at the ballot box exclusively to the electorate of the county.

People v. Lopez, 155 Cal.App.3d 813, 822 (Cal. Ct. App. 1984) (quotation omitted).

Thus, Judge Ryan's disqualification of the entire Commonwealth's attorney's office without evidence of "actual prejudice" both violated the right of the Jefferson County electorate to receive "the services of their elected representative in the prosecution of crime in the county," id., and intruded upon the exclusive domain of the executive department protected by Section 27 of our Constitution. In this circumstance, the Court of Appeals did not abuse its discretion in finding irreparable injury to the office of the Commonwealth's attorney. We agree with the Court of Appeals that "to strip the Commonwealth's attorney of the right to prosecute an indictment without an adequate reason and appropriate findings constitutes irreparable injury and justifies the granting of relief through an original action."

Accordingly, the order of the Court of Appeals denying the petition for a writ of prohibition with respect to the disqualification of Lewis and granting the petition for a

writ of prohibition with respect to the disqualification of the entire Jefferson County Commonwealth's attorney's office is affirmed.

Cooper, Graves, Johnstone, Stumbo, and Wintersheimer, JJ., concur. Keller, J., concurs in result only. Lambert, C.J., would affirm the trial judge's order disqualifying the entire Commonwealth's Attorney's office.

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