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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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: FEBRUARY 19, 2004
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

DATE 3-11-04 Ellagrow.kyd.c.

2003-SC-0346-MR

WAYNE WOODWARD — APPELLANT

V.

APPEAL FROM COURT OF APPEALS
2003-CA-0390
KENTON CIRCUIT COURT NO. 99-CR-0478

PATRICIA M. SUMME, JUDGE, — APPELLEE

AND

COMMONWEALTH OF KENTUCKY — REAL PARTY IN INTEREST

MEMORANDUM OPINION OF THE COURT

Reversing

On June 21, 1999, Appellant's wife reported an incident to the Kenton County Police wherein she stated that on June 19, 1999, she confronted Appellant, Wayne Woodward, in the bedroom of their eleven-year-old daughter. Ms. Woodward reported that she observed the daughter partially clothed with her vagina exposed, and that when Appellant noticed Ms. Woodward, he pushed her out of the room.

Following a search of the Woodward premises and the seizure of a computer and a firearm, Appellant was arrested on June 24, 1999, and charged with distribution of matter portraying a sexual performance by a minor, and fourth-degree assault (domestic

violence). Appellant states in his brief that at the time of his arrest, he was also being investigated for possible misconduct with his minor daughter arising out of the events of June 19, 1999.

Appellant was subsequently indicted in the Kenton Circuit Court in September 1999, on one count of distribution of matter portraying a sexual performance by a minor and one count of possession of a handgun by a convicted felon.

Pursuant to a written agreement by the Commonwealth, Appellant entered a plea of guilty to both charges on November 22, 1999. He was sentenced to five years imprisonment, probated for five years. In addition to paying court costs, Appellant was required to serve thirty days in jail, complete a sex-offender treatment program, consent to random drug/alcohol testing as well as home searches, and agree to numerous other conditions restricting contact with his children and his use of the internet. The written plea agreement contained the following language: "This offer specifically DOES NOT INCLUDE any acts of sexual abuse of children should evidence of such acts be discovered." It is reasonable to infer that the reservation of a sexual abuse charge related to the ongoing investigation of allegations concerning Appellant's daughter.

On June 7, 2002, Appellant was indicted by a Kenton County Grand Jury for use of a minor in a sexual performance on or about June 19, 1999. On June 18, 2002, defense counsel filed a motion to prohibit prosecution on the grounds that it violated the terms of Appellant's 1999 plea agreement. Following a hearing on January 16, 2003, the trial court entered an order wherein it recognized that "a defendant is entitled to specific performance of a plea agreement. The corollary conclusion is that the Commonwealth is required to abide by its plea agreement irrespective of whether or not it subsequently considers the agreement to have been unwise." (citation omitted). However, the trial court further concluded:

The enforceability of plea agreements however is not at the heart of this argument. The argument revolves around the interpretation of the agreement. The defendant argues that the Commonwealth agreed not to indict him on anything other than sex abuse. He bases this argument on Section 4 (9) of the Commonwealth's recommendations, which reads:

> This offer specifically DOES NOT INCLUDE any acts of sexual abuse of children should evidence of such be discovered.

Attorney David Steele [former Assistant Kenton County Commonwealth's attorney] testified that "acts of sexual abuse" pursuant to KRS 510 and local standard of practice means a "touching" or a "contact". He further testified that the local standard of practice required the Commonwealth to reserve a cause of action, as it did in Section 4 (9), or it was waived. In his view, the local standard is that the Commonwealth, by entering a plea agreement in a multiple charge case, merges the remaining criminal activity into the agreement and is estopped from further prosecution. Former Commonwealth's Attorney Robert Sanders Jr. also testified.

The Court finds the policies articulated by Mr. David Steele, are not the policies of the current Commonwealth's Attorney. The Court further finds the application of these policies, in the past, were fact and case dependent.

The Court does not find that "acts of sex abuse" in the local standard of practice always mean a "touching" or "contact" for the reasons articulated in this order.

. . .

While the current indictment is under KRS 531.310 and not for "sexual abuse" as defined in KRS Chapter 510, the facts as stated in the indictment and bill of particulars clearly show sexual exploitation under the charging statute of such a nature as to meet as common sense understanding of sexual abuse. Alcorn v. Commonwealth, Ky. App., 910 S.W.2d 716 (1995). The primary purpose of the Kentucky statute relating to sexual exploitation of minors is clearly to protect children from the conduct of being *used* in a sexual performance. The word "use" is the cornerstone of KRS 531.310.

In addition KRS 531.310 is included along with the child abuse statutes from KRS Chapter 510 in KRS 532.045, which outlines exceptions to probation eligibility. It is clear that the legislature intended use of a minor in a sexual performance to be classified with

> other statutes protecting minors from being used for sexual purposes, despite its placement in the pornography chapter of the statutes.
>
> The court concludes that the plea offer uses the phrase "sexual abuse of children" without reference to any specific statute and so should be read with its common meaning and not limited to the definition under KRS 510.110 or the other "sexual abuse" statutes.

On April 7, 2003, the Court of Appeals denied Appellant's petition for a writ of prohibition, on the grounds he has an adequate remedy by appeal. Appellant appealed to this Court as a matter of right. The Commonwealth did not respond to either Appellant's petition for a writ or this appeal until ordered to do so by this Court.

As to the procedural worthiness of Appellant's claim, he argues that he does not have an adequate remedy by appeal. He contends that the current prosecution violates the terms of the plea agreement with which he has fully complied; and if prosecution is permitted to proceed, he has lost the benefit of what he bargained for, namely, the freedom from having to defend himself in such proceedings. Appellant argues that although he would certainly have the right of appeal in the event he is convicted, it cannot remedy the fact of prosecution and its consequences.

Concerning the merits of this case, Appellant asserts that the language of the plea agreement clearly only reserved the Commonwealth's right to prosecute him for sexual abuse (arising from the same June 1999 events). Appellant relies heavily on this Court's decision in Commonwealth v. Reyes, Ky., 764 S.W.2d 62, 64 (1989), wherein we recognized that plea agreements are "constitutional contracts" which are binding and enforceable once an accused enters his plea or takes action to his detriment in reliance upon the offer. Quoting Ricketts v. Adamson, 483 U.S. 1, 107 S.Ct. 2680, 97 L.Ed.2d 1 (1987) (Brennan, J., dissenting). Had the Commonwealth intended to reserve other

causes of action, Appellant contends that it should have either delineated such or should have omitted the language in Section 4(9).

The Commonwealth responds that a writ is not appropriate in this case since Appellant has a remedy by appeal in the event he is convicted on the instant charge. Furthermore, although conceding that a written plea agreement is binding and enforceable once a defendant enters a plea and relies upon it to his detriment, the Commonwealth claims, as did the trial court, that such did not occur in this case. Essentially, it is the Commonwealth's position that the provision in Section 4(9) only applied to the children depicted in the images seized from Appellant's home computer, which formed the basis of the 1999 indictment for distribution of matter portraying a sexual performance by a minor. In other words, the instant charge of using a minor in a sexual performance relates to Appellant's daughter, who was not one of the children depicted in the images. Thus, the Commonwealth claims it was not prohibited by the plea agreement from charging Appellant with any offenses relating to his daughter.

Further, the Commonwealth asserts that the ordinary meaning of "sexual abuse" as defined by BLACK'S LAW DICTIONARY is "illegal acts performed against a minor by a parent, guardian, relative, or acquaintance." Id. at 1375 (6th ed. 1993). As such, the Commonwealth agrees with the trial court's rationale that use of a minor in a sexual performance falls within the common sense definition of sexual abuse.

We are of the opinion that the Commonwealth and the trial court clearly erred in finding that a "common sense understanding of sexual abuse" would include a charge of use of a minor in a sexual performance. The offense of sexual abuse is contained in Chapter 510, Sexual Offenses. The Commentary to KRS 510.110, sexual abuse in the first degree, provides: "Sexual abuse is based on 'sexual contact' as that term is defined

in KRS 510.010(7). An actual touching must occur." See also Bills v. Commonwealth, Ky., 851 S.W.2d 466 (1993).

Use of a minor in a sexual performance, KRS 531.310, is contained in Chapter 531, Pornography, and provides: "(1) a person is guilty of the use of a minor in a sexual performance if he employs, consents to, authorizes or induces a minor to engage in a sexual performance." No physical contact with the minor is required for violation of the statute. Indeed, the Alcorn, supra, case cited by the trial court notes that Chapter 531 indicates the legislature's intent to "prohibit the sexual exploitation of minors including such deviate behavior as Alcorn engaged in in the presence of a child. This would be especially true where the actor used the child in any manner whatsoever whether he physically touched him or not. . . . The fact that the child had no physical contact with appellant does not absolve him of guilt. Gilbert v. Commonwealth, Ky., 838 S.W.2d 376 (1992)." Alcorn, supra, at 717.

Regardless of whether the "local standard of practice" in Kenton County requires a "touching" or "contact" for sexual abuse, the offense as defined in KRS Chapter 510 unquestionably requires such element. The Commonwealth obviously did not find sufficient evidence that Appellant had engaged in physical contact with his daughter in June 1999, for it chose to indict him in 2002 for use of a minor in a sexual performance rather than sexual abuse. To construe the Commonwealth's language in the plea agreement as reserving a right to prosecute Appellant for any additional acts of child exploitation concerning his daughter arising from the same date as the 1999 charges, would effectively eviscerate the purpose of the clause since the initial charge he pled guilty to was distribution of matter portraying a sexual performance by a minor, which, under the trial court's analysis, was sexual abuse. Further, contrary to the trial

court's order, logic dictates that the practices and policies of the Commonwealth's attorney that was in office at the time of Appellant's plea agreement is what is relevant, not those of the current office.

Next, we must determine whether Appellant is entitled to the extraordinary remedy of the writ of prohibition. To obtain such relief, a petitioner must show 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. Southeastern United Medigroup v. Hughes., Ky., 952 S.W.2d 195, 199 (1997). While the decision whether to grant or deny a petition for a writ is within the appellate court's discretion, unless the petition alleges a double jeopardy bar, a court may grant extraordinary relief only when the party seeking the writ has satisfied the threshold requirements. See Commonwealth v. Stephenson, Ky., 82 S.W.3d 876 (2002); Graham v. Mills, Ky., 694 S.W.2d 698 (1985). And such an extraordinary remedy is unavailable unless a petitioner can demonstrate that traditional post hoc appellate procedures do not provide him or her with an adequate remedy. Ignatow v. Ryan, Ky., 40 S.W.3d 861 (2001); Cavender v. Miller, Ky., 984 S.W.2d 848 (1998), cert. denied, 528 U.S. 833 (1999).

We are cognizant of the fact that we recently held in Flynt v. Commonwealth, Ky., 105 S.W.2d 415 (2003), that having to endure a prosecution and the ramifications associated therewith does not change the fact that a defendant has the right to appeal any conviction.

> To accept Appellant Flynt's argument that the disqualifications associated with a felony conviction render his direct appeal right an inadequate remedy, however, we would have to hold that any ruling in a felony case can be reviewed via mandamus or prohibition prior to

> final judgment. And, because we have consistently found that traditional appellate review of allegations of error in felony cases constitute[s] an adequate remedy, we agree with the Court of Appeals that Appellant Flynt's right of direct appeal from any future judgment of conviction would afford him an adequate forum in which to raise his allegations of error.

Id. at 422-23. But see Peterson v. Shake, Ky., 120 S.W.3d 707 (2003) ("If a writ were not issued, Appellant would experience great injustice in that he would have to endure a trial and possibly face conviction of a Class D felony, when the maximum charge he should face is a Class A misdemeanor.")

We perceive a significant distinction between the instant case and the facts of Flynt, supra. Following Flynt's indictment for a felony drug offense (the procedural validity of which was not at issue), he filed an application for entry of a pretrial diversion order. The trial court denied the application and Flynt petitioned the Court of Appeals for a writ of mandamus to compel the trial court "to exercise discretion and to rule upon the Defendant's motion for Felony Diversion under KRS 533.250." Flynt, supra, at 421. Flynt argued that extraordinary relief was proper because if he sought appellate review of the trial court's pretrial ruling in an appeal from a final judgment of conviction, he would first have to suffer the collateral consequences associated with a felony conviction. Id. at 422.

Here, while Woodward is certainly claiming he will suffer irreparable harm if required to face trial on the current charge, what he actually seeks is enforcement of the terms of the plea agreement, which only excluded acts of sexual abuse. Should Woodward be convicted on the instant charge, an appellate court can surely reverse the conviction if it finds the Commonwealth violated the plea agreement. Yet, at that point, enforcement of the plea agreement is moot. In other words, if Woodward's only remedy for a violation of the plea agreement is to appeal any subsequent conviction, the plea

agreement becomes a nullity. And, for all practical purposes, the Commonwealth is free to renege on its end of the bargain. Unlike Flynt, who challenged a pretrial ruling associated with his felony indictment, Woodward challenges the validity of the indictment itself, including the Commonwealth's authority to indict him for a charge that was not reserved in the agreement,

In Shaffer v. Morgan, Ky., 815 S.W.2d 402 (1991), the defendant sought a writ prohibiting the Commonwealth from prosecuting him on a charge that had been dismissed with prejudice, on the grounds that the dismissal of the indictment with prejudice was a final adjudication of the merits and thus barred further prosecution. This Court held that the defendant relied to his detriment on the prosecution's motion to dismiss the indictment and that the Commonwealth reneged on the agreement upon which the defendant had relied. "The Commonwealth must honor its agreement to dismiss the case with prejudice. The prosecution, therefore, is further estopped from any further prosecution of the appellant." Id. at 404. See also Workman v. Commonwealth, Ky., 580 S.W.2d 206 (1979), overruled on other grounds in Morton v. Commonwealth, Ky., 817 S.W.2d 218 (1991). Similarly, in Reyes, supra, the Commonwealth appealed an order of the Christian Circuit Court sustaining the defendant's motion to compel the Commonwealth to carry out its written plea agreement. This Court ultimately upheld the finding of the special circuit judge that "Except as he has been prevented from performing by the Commonwealth, Reyes has fully performed. Perforce, it is now the obligation of the Commonwealth to perform." Reyes, supra, at 69.

Under the circumstances of this case, we cannot conclude that traditional post hoc appellate procedures provide Woodward with an adequate remedy. Enforcement of

the plea agreement is the essential issue in this case, not whether Woodward can appeal any subsequent conviction. To allow the prosecution in this case to continue would not only result in an irreparable injury to Woodward, who relied on the plea agreement and complied with all of its terms, but would relieve the Commonwealth from the performance of its end of the bargain. "If the government breaks its word, it breeds contempt for integrity and good faith. It destroys the confidence of citizens in the operations of their government and invites them to disregard their obligations." Workman, supra, at 207.

For the reasons stated herein, we reverse the order of the Court of Appeals and remand with directions to issue a writ directing the Kenton Circuit Court to dismiss the current charge against Appellant for use of a minor in a sexual performance.

Lambert, C.J., Cooper, Graves, Keller, and Stumbo, J.J., concur.

Johnstone, J., concurs in result only.

Wintersheimer, J., dissents without opinion.

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