

**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**NOT TO BE PUBLISHED OPINION**

***THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.***

# Supreme Court of Kentucky

2004-SC-0354-MR

WALLACE L. HADLEY

APPELLANT

V.

APPEAL FROM THE COURT OF APPEALS  
2004-CA-0424-OA  
NELSON CIRCUIT COURT NO. 2003-CR-0373

HON. CHARLES C. SIMMS, III, JUDGE,  
NELSON CIRCUIT COURT

APPELLEE

AND

COMMONWEALTH OF KENTUCKY

REAL PARTY IN INTEREST

## MEMORANDUM OPINION OF THE COURT

### AFFIRMING

Pursuant to CR 76.36(7)(a), Appellant, Wallace L. Hadley, appeals an order of the Court of Appeals denying his petition for a writ of mandamus. Through the writ, Appellant sought to compel Judge Charles C. Simms, III, of the Nelson Circuit Court to dismiss the indictment of first-degree sexual abuse against him on the grounds that the indictment was defective for its failure to state the name of the victim.

On December 17, 2003, a Nelson County Grand Jury indicted Appellant on a single count of first-degree sexual abuse. The indictment read in pertinent part that Appellant engaged "in sexual contact with another person by the use of forcible compulsion." On January 30, 2004, Appellant filed a motion to dismiss the indictment

for failing to identify the victim. The trial court denied the motion on February 9, 2004, but required the Commonwealth to provide the defense with discovery within forty-five days. Appellant filed an original action in the Court of Appeals on February 2, 2004, requesting a writ of mandamus compelling the trial court to dismiss the indictment. The Court of Appeals denied the writ stating that the "extraordinary remedy of mandamus is unavailable where, as here, there exists an adequate remedy by appeal." We agree.

This Court decides the propriety of the denial of a writ by determining whether the Court of Appeals exercised sound discretion or acted arbitrarily. Humco, Inc. v. Noble, Ky., 31 S.W.3d 916, 920-21 (2000). A writ of mandamus is an extraordinary remedy that should only be granted under two sets of circumstances: 1) when the lower court is proceeding or about to proceed without jurisdiction, and there is no adequate remedy by law, or 2) to establish that the lower court, although acting with jurisdiction, is about to act incorrectly and there is no adequate remedy by appeal and great injustice or irreparable injury would occur. Id.

We agree with the Court of Appeals that a writ of mandamus is not appropriate under the circumstances presented in this case. An attack on the sufficiency of an indictment is a cognizable claim on appeal. Varble v. Commonwealth, Ky., 125 S.W.3d 246 (2004); Salinas v. Commonwealth, Ky., 84 S.W.3d 913 (2002), cert. denied, 538 U.S. 930, 123 S. Ct. 1585, 155 L. Ed. 2d 326 (2003); Thomas v. Commonwealth, Ky., 931 S.W.2d 446 (1996). Therefore, we cannot conclude that the Court of Appeals acted arbitrarily.

Further, the Appellant's motion to supplement the record, to which the Commonwealth had no objection, is granted. Additionally, the Appellant's motion to

advance the appeal and to stay the underlying action pending the appeal's outcome is denied as moot.

For the foregoing reasons, the decision of the Court of Appeals is affirmed.

All concur.

COUNSEL FOR APPELLANT:

Keith D. Duerr  
Northside Place, Suite 5  
4000 North Dixie Highway  
Elizabethtown, KY 42701

COUNSEL FOR APPELLEE:

Charles C. Simms, III  
Geoghegan & Associates  
116 East Stephen Foster Avenue  
Bardstown, KY 40004

COUNSEL FOR REAL PARTY IN INTEREST:

Gregory D. Stumbo  
Attorney General of Kentucky

Michael L. Harned  
Assistant Attorney General  
Criminal Appellate Division  
Office of the Attorney General  
1024 Capital Center Drive  
Frankfort, KY 40601-8204