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NOT TO BE PUBLISHED OPINION

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RENDERED: AUGUST 21, 2008
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL
DATE 9-11-08 [illegible] D.C.

2008-SC-000084-MR

CURTIS GORDON JR. APPELLANT

V.

ON REVIEW FROM COURT OF APPEALS
CASE NUMBER 2007-CA-001921
JEFFERSON CIRCUIT COURT NO. 07-CR-000428

HONORABLE JUDITH McDONALD-BURKMAN,
(JUDGE, JEFFERSON CIRCUIT COURT, DIVISION 9)
AND COMMONWEALTH OF KENTUCKY
(REAL PARTY IN INTEREST) APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Curtis Gordon Jr., seeks a writ of prohibition asking us to forbid the trial court from retrying him on one count of forgery in the second degree and forty-three counts of theft by deception over $300. Without any discussion of the facts or any explanation whatsoever for its decision, the Court of Appeals denied Gordon's petition for a writ. After careful review, we affirm.

I. FACTUAL AND PROCEDURAL HISTORY.

Gordon, a police officer, owned a business that provided security services to the Louisville Metro Housing Authority ("Housing") and other customers. Gordon's business charged Housing a higher hourly rate for security guards who had law enforcement qualifications than it did for those lacking such

qualifications. Gordon was charged with one count of forgery stemming from his allegedly forging the signature of a local police chief to falsely reflect that one of Gordon's security guards had law enforcement qualifications. Gordon was charged with forty-three counts of theft by deception over $300 for allegedly charging Housing the higher hourly rate for employees who did not actually have law enforcement credentials.

Shortly after Gordon's arraignment, the trial court issued a discovery order stating, "[w]ithin the time frames outlined in the Rules of Practice of the Jefferson Circuit Court, counsel shall comply with the Rules of Criminal Procedure regarding discovery." Although Gordon apparently never moved for reciprocal discovery under Kentucky Rules of Criminal Procedure (RCr) 7.24, the Commonwealth purportedly provided over five hundred pages of discovery to Gordon. Meanwhile, Gordon was filing open records requests with Housing, seeking documents relating to the relationship between Housing and Gordon's business. Gordon also had subpoenas served upon officers who participated in the investigation that led to his indictment. The Commonwealth filed a motion to quash those subpoenas, arguing that the requested material was outside the scope of discovery because of its claimed status as "work product."

The trial court held a hearing on the Commonwealth's motion to quash the subpoenas, at which time Gordon argued that he had no obligation to provide reciprocal discovery because he had not moved for reciprocal discovery. Gordon contends that the trial court, acting on its own motion, raised the idea that the Commonwealth move for reciprocal discovery. In any event, after the hearing,

the trial court issued an order stating that the Commonwealth had moved for reciprocal discovery and that the Commonwealth was entitled to receive reciprocal discovery from Gordon.

The trial court ruled that a local rule in Jefferson County, Jefferson County Rule of Practice 803, required the Commonwealth to provide discovery, after which the Commonwealth was entitled to reciprocal discovery from the defendant unless the defendant declined, in writing, the discovery tendered by the Commonwealth. Several days later, Gordon filed a document entitled "Notice of Compliance [w]ith Court's Discovery Order" in which he stated that he had provided several documents to the Commonwealth. Gordon's notice of compliance did not suggest that he had any additional discoverable documents; although, Gordon contends that he orally stated at the hearing on the Commonwealth's putative motion for reciprocal discovery that he had additional materials that the Commonwealth was free to inspect.

Approximately one week after Gordon submitted his notice of compliance, the charges against him proceeded to a jury trial. After a jury had been empanelled and sworn, and shortly before cross-examination of the Commonwealth's third witness had begun, Gordon's counsel showed the Commonwealth over thirty documents intended to be offered as defense trial exhibits, many of which the Commonwealth claimed it had never seen before. After a brief discussion about whether these documents were to be used solely to impeach the Commonwealth's witness, cross-examination began. During that brief cross-examination, the trial court excluded two documents that it ruled were

not being used for impeachment purposes. The Commonwealth then sought either a mistrial or a continuance to allow it time to review the remaining documents, but the trial court declined to grant a continuance because the judge was scheduled to attend a judicial college the following week. Over Gordon's objection, the trial court granted the Commonwealth's motion for a mistrial.

Gordon has filed a petition for a writ of prohibition asking us to bar a retrial, which is currently set for August 2008. Gordon contends that a retrial would constitute double jeopardy. We disagree.

II. ANALYSIS.

A. Mistrial May Be an Appropriate Remedy for a Violation of a Valid Discovery Request.

We may grant a writ only "upon a showing that (1) the lower court is proceeding or is about to proceed outside of its jurisdiction and there is no remedy through an application to an intermediate court; or (2) that the lower court is acting or is about to act erroneously, although within its jurisdiction, and there exists no adequate remedy by appeal or otherwise and great injustice and irreparable injury will result if the petition is not granted."[1] Because the trial court clearly was vested with the authority to preside over the charges against Gordon, our focus is on the second type of writ classification. To the extent possible, the "no adequate remedy by appeal" prong should be analyzed separately from the "irreparable injury" prong.[2]

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1 Hoskins v. Maricle, 150 S.W.3d 1, 10 (Ky. 2004).

2 Bender v. Eaton, 343 S.W.2d 799, 801 (Ky. 1961).

A writ is an extraordinary remedy that should be issued only in exceptional circumstances.[3] Indeed, we have ruled that the requirement that a writ may issue only if a petitioner lacks an adequate remedy by appeal is "absolute."[4] In other words, a writ may not issue "unless the petitioner can demonstrate that traditional post hoc appellate procedures do not provide him or her with an adequate remedy."[5]

RCr 7.24(9) sets forth the remedies available to a trial court for discovery violations. That subsection provides, in pertinent part, that when a party fails to comply with its discovery obligations, a trial court "may direct such party to permit the discovery or inspection of materials not previously disclosed, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may enter such other order as may be just under the circumstances." Gordon contends that the trial court should have utilized another remedy, such as a continuance, instead of declaring a mistrial. But we have held that a mistrial is among the proper sanctions that a trial court may impose upon a party who fails to comply with valid discovery obligations.[6] So the trial court's imposition of a mistrial was a permissible remedy provided Gordon failed to comply with his discovery obligation. And the question becomes whether Gordon actually failed to fulfill his discovery obligation.

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3 *See, e.g.,* Fletcher v. Graham, 192 S.W.3d 350, 356 (Ky. 2006).

4 Adventist Health Systems v. Trude, 880 S.W.2d 539, 541 (Ky. 1994), *overruled on other grounds by* Sisters of Charity Health Systems, Inc. v. Raikes, 984 S.W.2d 464 (Ky. 1998). *See also* Bender, 343 S.W.2d at 801.

5 Flynt v. Commonwealth, 105 S.W.3d 415, 422 (Ky. 2003).

6 Weaver v. Commonwealth, 955 S.W.2d 722, 725 (Ky. 1997).

B. It is Not Necessary to Determine the Existence of an Impeachment Exemption From Reciprocal Discovery Process.

Under our statewide discovery rule, reciprocal discovery generally is not triggered until a defendant requests discovery from the Commonwealth.[7] However, for whatever reason, the local rule in the Jefferson Circuit Court is markedly different. Under the Rules of Practice of the Jefferson Circuit Court, as approved by this Court in July 2006, the Commonwealth is obligated to provide discovery to a criminal defendant, seemingly, regardless of whether the defendant even requests discovery.[8] Under Local Rule 803(C), a defendant is obligated to provide reciprocal discovery to the Commonwealth automatically unless the defendant notifies the Commonwealth, in writing, that he or she is declining discovery.[9]

In the case at hand, there is no indication that Gordon notified the Commonwealth, in writing, that he did not seek discovery. So, despite his

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[7] *See* RCr 7.24(1)-(3).

[8] *See* Jefferson Circuit Court Rule 803(A)-(B) (available online at http://apps.kycourts.net/localrules/rules/C30localrules.pdf).

[9] Jefferson Circuit Court Rule 803(C) provides as follows:

> If the Defendant(s) does not desire discovery pursuant to RCr 7.24(1) and (2), notice declining discovery shall be provided, in writing, to the Commonwealth within five (5) days of arraignment. Otherwise, within ten (10) days of compliance by the Commonwealth, the Defendant(s) shall permit the Commonwealth to inspect, copy or photograph (1) books, papers, documents or tangible objects which the Defendant(s) intends to introduce into evidence and which are in the Defendant's possession, custody or control; and (ii) any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with this particular case or copies thereof, within the possession, custody or control of the Defendant(s) and which the Defendant(s) intends to introduce as evidence or which were prepared by a witness whom the Defendant(s) intends to call at trial when the results or reports relate to the witness' testimony [RCr 7.24(3)].

protestation to the contrary, Gordon was obligated to provide the Commonwealth with reciprocal discovery.[10]

Having determined that Gordon was required to provide discovery to the Commonwealth, we must now determine whether the documents in question were properly within the scope of materials that the Commonwealth was entitled to receive under the reciprocal discovery process. Our review of this matter is greatly hampered by the fact that since we have a truncated version of the record before us, as is common in writ cases, we have not been provided with the specific documents in question. But that omission is not fatal to our review because the reason Gordon seems to contend that the materials were not discoverable is the so-called impeachment exception under which materials planned to be used for impeachment purposes are somehow rendered non-discoverable. And it appears that the trial court may have also believed such an exemption existed. But the issue of whether an impeachment exception may exist in our criminal rules is not necessary to the resolution of this case because Gordon clearly intended to use the materials in question in his case in chief.

The documents in question would appear to fall directly within the scope of both Jefferson Circuit Court Rule 803(C), which requires a defendant to permit discovery by the Commonwealth of any "papers" or "documents" that a defendant intended to introduce into evidence, and RCr 7.24(3)(A)(ii), which likewise requires a defendant to permit discovery by the Commonwealth of "papers,

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[10] The Commonwealth contends that it provided discovery to Gordon's attorney at the day of Gordon's arraignment, that Gordon thereafter changed attorneys, and that Gordon's new attorney was the one who disputed his client's reciprocal discovery obligation.

documents, or tangible objects which the defendant intends to introduce into evidence and which are in the defendant's possession, custody, or control." Although we recently questioned whether an attorney could intend to "introduce impeachment evidence before trial has even begun and before he or she even knows what witnesses may need to be impeached,"[11] our criminal rules do not explicitly provide for an impeachment exception.[12] And reasonable minds could differ as to whether our rules contain an implied impeachment exception. But we need not resolve that issue today since it is clear that Gordon sought to introduce the documents in question because they had been pre-marked for introduction into evidence. So it is clear that Gordon planned on using the materials at issue in his case in chief, not just for possible impeachment of a Commonwealth's witness. Furthermore, discovery was envisioned to avoid surprises at trial.

This leads to the conclusion that the trial court correctly found that Gordon had committed a discovery violation.[13] And, as previously stated, a trial court has the discretion to declare a mistrial for a discovery violation.[14] The question

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[11] Gray v. Commonwealth, 203 S.W.3d 679, 685 n.1 (Ky. 2006).

[12] *See* RCr 7.24.

[13] Although Gordon's counsel stated at the hearing on the Commonwealth's motion to quash that "boxes" of materials were available for the Commonwealth to inspect, the written notice of discovery-order compliance, which Gordon submitted after the hearing, did not contain a reference to any additional discoverable materials outside the ones listed in that notice. So we agree with the Commonwealth that "[t]he tendering of some documents and not others, without any additional notation that the appellant retained documents which were subject to the court's discovery order, would cause anyone to believe that the tendered documents were the only ones that the appellant intended to introduce at trial."

[14] Weaver, 955 S.W.2d at 725.

becomes, therefore, whether the trial court abused its discretion when it declared a mistrial.[15]

C. The Trial Court Did Not Abuse its Discretion in Granting Mistrial.

Although we have held that a court may decline to address a claim of double jeopardy in a writ context because a petitioner has an adequate remedy by appeal,[16] we have also held that a criminal defendant does not have an adequate right of appeal when the trial court grants the Commonwealth's motion for a mistrial over the defendant's objection.[17] So, although our review of this case is hampered by the lack of written findings by the trial court[18] and by the lack of explanation by the Court of Appeals for its cursory denial of Gordon's petition for a writ, we will exercise our discretion to review Gordon's double jeopardy claim in this writ context.

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[15] Commonwealth v. Scott, 12 S.W.3d 682, 684 (Ky. 2000) ("a trial court's grant of a mistrial will be overturned only if it is clearly erroneous or constitutes an abuse of discretion.").

[16] St. Clair v. Roark, 10 S.W.3d 482, 485 (Ky. 2000) ("we conclude that although double jeopardy is an appropriate subject for a writ of prohibition, it is not mandatory that it be addressed in that context. The court in which the petition is filed may, in its discretion, address the merits of the issue within the context of the petition for the writ, or may decline to do so on grounds that there is an adequate remedy by appeal. Neither approach is mandatory and the exercise of discretion may well depend on the significance of the issue as framed by the facts of the particular case.").

[17] Macklin v. Ryan, 672 S.W.2d 60, 61 (Ky. 1984).

[18] Gordon has placed in the record what purport to be DVDs of the trial court's proceedings. However, those DVDs bear the name and phone number of what appears to be a private video recording business. As we recently explained in another writ case, we may not review non-certified copies of the trial court proceedings. Estate of Cline v. Weddle, 250 S.W.3d 330, 337 n. 20 (Ky. 2008) ("We were not provided with certified transcripts or videotapes of the trial court's hearings on these matters. Instead, the Estate appended a CD purporting to contain video of the trial court's hearings to the briefs. The Civil Rules do not provide for our review of such non-certified recordings, however."). However, because the parties do not appear to disagree with the nature and sequence of events and discussions that led to the declaration of a mistrial, we do not perceive that our viewing those relevant proceedings would alter the outcome of this appeal.

In cases in which a first trial results in the declaration of a mistrial once jeopardy attaches but before the rendering of a verdict, the double jeopardy clause bars retrial "if the mistrial was granted without the defendant's consent and in the absence of a manifest necessity to do so."[19] An appellate court must be deferential to a trial court's decision to grant a mistrial.[20]

We reject Gordon's argument that declaring a mistrial is somehow rendered invalid by the trial court's alleged failure explicitly to find that there was a manifest necessity for a mistrial. Obviously, such explicit findings by trial courts are an invaluable aid both to counsel and to a reviewing court. But the lack of

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[19] Grimes v. McAnulty, 957 S.W.2d 223, 224 (Ky. 1997). KRS 505.030(4), which we relied upon and cited in Grimes, refers, in pertinent part, to retrial being barred by a former prosecution if "[t]he former prosecution was improperly terminated after the first witness was sworn but before findings were rendered by a trier of fact." Thus, in another recent case involving a petitioner seeking a writ to bar retrial after the declaration of a mistrial, we again relied upon KRS 505.030(4) to determine that jeopardy attached after the swearing in of the first witness. Radford v. Lovelace, 212 S.W.3d 72, 79 (Ky. 2006). However, in other cases, we have held that "[j]eopardy attaches only when the jury is impanelled and sworn." Lear v. Commonwealth, 884 S.W.2d 657, 661 (Ky. 1994). Importantly, the United States Supreme Court has declared that the federal rule that jeopardy attaches when the jury is impaneled and sworn is binding on the states. Crist v. Bretz, 437 U.S. 28, 37-38, 98 S.Ct. 2156, 57 L.Ed.2d 24 (1976). Thus, KRS 505.030(4), which was enacted before the decision in Crist, appears to be in direct conflict with the United States Supreme Court's interpretation of the federal double jeopardy clause. But we need not definitively resolve this quandary in this case because the jury had been sworn and witnesses had been sworn, meaning that jeopardy had attached in Gordon's trial under both Crist and KRS 505.030(4).

[20] Grimes, 957 S.W.2d at 225 ("In reviewing a decision to grant a mistrial, the trial court must have a measure of discretion. The interest in orderly, impartial procedure would be impaired if he were deterred from exercising that power by a concern that at any time a reviewing court disagreed with his assessment of the trial situation a retrial would automatically be barred. Furthermore, [t]he adoption of a stringent standard of appellate review in this area . . . would seriously impede the trial judge in the proper performance of his 'duty, in order to protect the integrity of the trial. . . .") (quotation marks and citations omitted).

such findings is not fatal to the declaration of a mistrial, provided that the record supports the trial court's decision to grant a mistrial.[21]

In the case at hand, we do not find that the trial court abused its discretion in declaring a mistrial based upon manifest necessity. As noted by the Commonwealth, Gordon's own actions (or inactions) were responsible for the situation that led to the mistrial and, given the apparently voluminous number of documents in question, any continuance would likely have been lengthy to allow the Commonwealth adequate time to examine and evaluate the documents.

We agree with the Sixth Circuit's conclusion that the granting of a mistrial is appropriate and fair in cases in which the mistrial is directly attributable to the defendant's conduct—"[t]o hold otherwise would allow a defendant to avoid prosecution by creating error purposefully while refusing to move for a mistrial."[22] Moreover, the charges against Gordon appear to have largely depended upon various contracts and documents between Gordon and Housing, meaning that Gordon's failure fully to comply with his reciprocal discovery obligation to provide documents from, or relating to, Housing is rendered more detrimental to the Commonwealth. Moreover, the trial court did not hastily declare a mistrial. Rather, the trial court first attempted to exclude documents not provided in discovery, although that situation proved unduly time-consuming because it

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[21] Arizona v. Washington, 434 U.S. 497, 516-17, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978) ("The absence of an explicit finding of "manifest necessity" appears to have been determinative for the District Court and may have been so for the Court of Appeals. If those courts regarded that omission as critical. [T]hey required too much. Since the record provides sufficient justification for the state-court ruling, the failure to explain that ruling more completely does not render it constitutionally defective.") (footnote omitted).

[22] United States v. Gantley, 172 F.3d 422, 430 n.5 (6th Cir. 1999).

required the Commonwealth to object to each of the documents improperly sought to be introduced. In short, although we agree with Gordon that the trial court could have remedied the situation through the imposition of other sanctions such as excluding evidence or granting a continuance, we are not convinced that the trial court abused its discretion by declaring a mistrial.[23]

III. CONCLUSION.

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

All sitting, except Venters, J. All concur.

[23] Actually, as noted by the Commonwealth, the exclusion of the documents in question would likely have been a harsher remedy than a mistrial because Gordon's defense presumably would have been hampered if all of the documents in question had been excluded from evidence. As matters now stand, assuming they otherwise comply with the Rules of Evidence, the documents presumably may be utilized by Gordon upon retrial.

COUNSEL FOR APPELLANT:

Thomas E. Clay
Clay, Kenealy, Wagner & Adams, PLLC
462 South Fourth Avenue, Suite 1730
Louisville, Kentucky 40202

COUNSEL FOR APPELLEE
HONORABLE JUDITH McDONALD-BURKMAN,
(JUDGE, JEFFERSON CIRCUIT COURT, DIVISION 9):

Judith E. McDonald-Burkman
Jefferson Circuit Judge
600 West Jefferson Street
Louisville, Kentucky 40202

COUNSEL FOR APPELLEE
COMMONWEALTH OF KENTUCKY
(REAL PARTY IN INTEREST):

Jack Conway
Attorney General of Kentucky
118 Capitol Building
700 Capital Avenue
Frankfort, Kentucky 40601

John Balliet
Assistant Commonwealth's Attorney
514 West Liberty Street
Louisville, Kentucky 40202

Teresa Ann Young
Assistant Commonwealth's Attorney
514 West Liberty Street
Louisville, Kentucky 40202