

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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED “NOT TO BE PUBLISHED.” PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

RENDERED: OCTOBER 1, 2009

Supreme Court of Kentucky

2009-SC-000047-MR

NOT TO BE PUBLISHED
FINAL
DATE 10/22/09 Kelly Klaber D.C.
APPELLANT

JACK RANDALL KIRK

V.

ON APPEAL FROM COURT OF APPEALS
CASE NO. 2008-CA-000432
BOYD CIRCUIT COURT NO. 97-CR-00033

HONORABLE DAVID HAGERMAN, JUDGE,
BOYD CIRCUIT COURT

APPELLEE

AND

COMMONWEALTH OF KENTUCKY

REAL PARTY IN INTEREST

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Jack Randall Kirk, *pro se*, appeals as a matter of right from the Court of Appeals' denial of his petition for a writ of prohibition. The Court of Appeals denied the petition on grounds that Appellant had failed to produce any evidence that the circuit court was acting incorrectly within its jurisdiction and that the arguments presented in the petition should have been raised on direct appeal or in one of Appellant's other post-conviction motions. Appellant argues to this Court that the circuit court lacked subject matter jurisdiction (because the circuit court violated the Fifth Amendment's Double Jeopardy

clause), and that the Court of Appeals abused its discretion in denying his petition for a writ of prohibition. We affirm, albeit on other grounds.

I. BACKGROUND

On September 8, 1978, Appellant was indicted by a Boyd County Grand Jury and charged with murder. That indictment was dismissed in 1979 due to Appellant's incompetence to stand trial. On April 14, 1997, Appellant was reindicted for the same offense. A jury convicted Appellant and he was sentenced to serve a life sentence. Appellant appealed his conviction and this Court affirmed.¹ Appellant thereafter attacked his conviction by filing a habeas corpus action in federal court and an RCr 11.42 motion, both of which were denied. Appellant then filed a *pro se* petition for a writ of prohibition in the Court of Appeals, requesting it vacate his conviction and order his immediate release from custody, on the grounds that the subsequent indictment placed him in double jeopardy. He also filed other motions not in question in this appeal. The Court of Appeals denied his writ of prohibition. He now appeals as a matter of right.

II. ANALYSIS

Our best reading of Appellant's *pro se* brief is that he argues that the order dismissing the original indictment did not indicate whether it was with prejudice or without prejudice, and therefore, was with prejudice and was an adjudication on the merits, and therefore, the reindictment was in violation of the Fifth Amendment's Double Jeopardy clause. He further argues that

¹ Kirk v. Commonwealth, 6 S.W.3d 823 (Ky. 1999).

because the process was in violation of the Double Jeopardy clause, the Boyd Circuit Court did not have subject matter jurisdiction to enter a judgment of conviction against him, and therefore, the writ of prohibition should be granted.

A writ of prohibition is an extraordinary remedy, available only in two instances: 1) when a “lower court is proceeding or is about to proceed outside its jurisdiction and there is no remedy through an application to an intermediate court; 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 or irreparable injury will result.”

Ally Cat, LLC v. Chauvin, 274 S.W.3d 451, 456-57 (Ky. 2009) (quoting Hoskins v. Maricle, 150 S.W.3d 1, 10 (Ky. 2004)). “[A]lthough 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.” St. Clair v. Roark, 10 S.W.3d 482, 485 (Ky. 1999) (citing Haight v. Williamson, 833 S.W.2d 821, 823 (Ky. 1992); Jones v. Hogg, 639 S.W.2d 543, 543 (Ky. 1982)). Additionally,

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.

St. Clair, 10 S.W.3d at 485.

The standard of review we must apply when reviewing a denial of a writ of prohibition depends on the class or category of writ. Grange Mutual

Insurance Co. v. Trude, 151 S.W.3d 803, 810 (Ky. 2004). When the lower court is alleged to be acting outside its jurisdiction, the proper standard is de novo review because jurisdiction is generally only a question of law. Id. When an appellant alleges that the court against which the writ was filed is acting within its jurisdiction but in error, the standard is abuse of discretion. Id. In the case before us, Appellant argues that the trial court did not have jurisdiction because the indictment violated double jeopardy. This is incorrect. The circuit court is the proper court in which a charge of murder is to be tried.² Thus, the circuit court had subject matter jurisdiction. A double jeopardy violation does not remove a court's jurisdiction over a case; rather, it is an allegation that the court is acting erroneously within its jurisdiction. Therefore, we review this case under an abuse of discretion standard.

Section 13 of the Kentucky Constitution provides that “[n]o person shall, for the same offense, be twice put in jeopardy” See also U.S. Const. amend. V. The U.S. Supreme Court has held that “[t]he federal rule that jeopardy attaches when the jury is empaneled and sworn is an integral part of the constitutional guarantee against double jeopardy” and that the rule is binding on the states. Crist v. Bretz, 437 U.S. 28, 38 (1978). See also Cardine v. Commonwealth, 283 S.W.3d 641, 646-47 (Ky. 2009). Appellant did not make any double jeopardy arguments before the trial court. However, we have held that double jeopardy questions may always be raised on appeal, despite a failure to preserve the issue at trial. Terry v. Commonwealth, 253 S.W.3d 466,

² See KRS 23A.010(1).

470 (Ky. 2007). This petition for a writ of prohibition is the first time Appellant has raised the issue of double jeopardy.

The order dismissing the original indictment, with or without prejudice, was not contained in the record. The previous opinion relating to this case stated that the original indictment was dismissed due to Appellant's incompetence to stand trial.³ It does not mention whether the dismissal was with or without prejudice. Appellant argues that it was the Commonwealth's obligation to produce the order which dismissed the original 1978 indictment and that their failure to do so estopped them from requesting that the court deny Appellant's petition for a writ of prohibition.

It is well-established that it is the duty and obligation of the appellant to establish error upon appellate review, and to see that the record is complete on appeal. Steel Technologies, Inc. v. Congleton, 234 S.W.3d 920, 926 (Ky. 2007). When a record is incomplete, there is a presumption of correctness of the judgment upon review. Clark v. Commonwealth, 223 S.W.3d 90, 102 (Ky. 2007); Commonwealth, Dept. of Highways v. Richardson, 424 S.W.2d 601, 604 (Ky. 1967).

Accordingly, we cannot say that the Court of Appeals abused its discretion in denying Appellant's writ of prohibition, and hence, affirm.

Minton, C.J., Cunningham, Schroder, Scott, and Venters, JJ., concur.
Noble and Abramson, JJ., concur in result only.

³ Kirk, 6 S.W.3d at 826.

Jack Randall Kirk, *PRO SE*
#136875, Kentucky State Reformatory
3001 West Highway 146
LaGrange, KY 40032

COUNSEL FOR APPELLEE:

Honorable Charles David Hagerman
Judge, Boyd Circuit Court
P. O. Box 491
Catlettsburg, KY 41129

COUNSEL FOR REAL PARTY IN INTEREST:

Jack Conway
Attorney General

Kenneth Wayne Riggs
Assistant Attorney General
Office of the Attorney General
1024 Capital Center Drive
Frankfort, KY 40601