

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000460-MR

COMMONWEALTH OF KENTUCKY

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE DENISE CLAYTON, JUDGE
ACTION NO. 99-CR-000712

DEMETRIUS HENDERSON

APPELLEE

OPINION AND ORDER
DISMISSING
APPEAL

** ** * * *

BEFORE: KNOPF, TACKETT AND VANMETER, JUDGES.

VANMETER, JUDGE. This is an appeal from an order entered by the Jefferson Circuit Court dismissing the underlying action with prejudice. For the reasons stated hereafter, we dismiss this appeal.

After his November 1998 arrest, Demetrius Henderson was indicted on several charges including first-degree trafficking in a controlled substance. However, Henderson's incarceration on other charges delayed his arraignment until

October 2001. Shortly before the scheduled trial date of February 21, 2002, the Commonwealth discovered that law enforcement officials had erroneously destroyed the confiscated substance after testing allegedly showed that it was cocaine. The Commonwealth notified Henderson and filed a motion to admit evidence regarding the destroyed substance, while Henderson requested dismissal of the case due to the destruction of evidence. On February 21, the court made oral rulings on the outstanding motions, which were followed by the court's written order stating that:

[T]he Commonwealth's Motion to allow chemist testimony was **denied**; the defendant's Motion to dismiss was **denied**. The Commonwealth's Motion to reconsider was **denied** and the Commonwealth's Motion to dismiss without prejudice was **sustained**.

On March 1, 2002, the Commonwealth filed a notice of appeal stating its "intent to perfect an interlocutory appeal of the trial court's ruling granting the defendant's motion to suppress the chemist's testimony as evidence" below. This court issued a show cause order on March 12, noting that "[i]t appears that this appeal was improperly taken as the underlying action has been dismissed without prejudice on the Commonwealth's motion, and can no longer be an interlocutory appeal pursuant to KRS 22A.020(4)." The Commonwealth was directed to show cause

why the appeal should not be dismissed as having been improperly taken.

After considering the Commonwealth's response to the show cause order, this court on its own motion ordered that the appeal should be dismissed. Unfortunately, this court's dismissal order stated that the show cause order had given the Commonwealth twenty days in which to "show cause why this appeal should not be dismissed for failure to name all appellees in the notice of appeal," even though neither the court nor the parties had previously raised any issue regarding the naming of parties. The Commonwealth filed a motion to reconsider the order of dismissal, based "on the issue of whether the appeal was properly taken," and noting that "[n]owhere in the show cause order did the Court express concern that the proper appellees were not named." This court responded by entering an order which granted the Commonwealth's motion to reconsider, ordered the appeal reinstated, returned the matter to the court's active docket, and directed the Commonwealth to file its brief within sixty days. However, the propriety of the appeal itself was not addressed in that order.

It is clear from our review of the record that this appeal is not properly before us and that it must be dismissed. Although the Commonwealth designated this appeal as "interlocutory," the trial court's order in fact was final as it

sustained the Commonwealth's own motion to dismiss without prejudice and therefore adjudicated all of the parties' rights.¹ CR 54.01. The Commonwealth's request for that dismissal had the effect of waiving any opportunity to challenge either the dismissal or any preceding orders.

The Commonwealth attempts to salvage the appeal by asserting that it was compelled to seek a dismissal without prejudice because it could not prosecute the case in the absence of evidence regarding the destroyed substance. This argument ignores the options which may have been available to the Commonwealth in lieu of dismissal, such as a continuance of the trial or the pursuit of a writ of prohibition. We are compelled to conclude, therefore, that this matter must be dismissed as it is not properly before us on appeal.

Accordingly, this appeal is ORDERED dismissed.

ALL CONCUR.

Date: February 6, 2004

/s/ Laurance B. VanMeter
Judge, Court of Appeals

¹ Although the Commonwealth relies on *Commonwealth v. Blincoe*, Ky. App., 33 S.W.3d 533 (2000), in asserting that the action's dismissal without prejudice does not foreclose this court from considering the merits of an interlocutory order regarding evidence, *Blincoe* is not applicable since it concerned the appeal of an interlocutory order which preceded the action's dismissal by nearly three months, rather than an appeal of a ruling which, as here, was part of the final order dismissing the case without prejudice.

BRIEF FOR APPELLANT:

A.B. Chandler, III
Attorney General

Jeanne Anderson
Special Assistant Attorney
General
Louisville, Kentucky

BRIEF FOR APPELLEE:

J. David Niehaus
Jefferson District Public
Offender
Louisville, Kentucky