

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-000684-MR

COMMONWEALTH OF KENTUCKY

APPELLANT

v.

APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE LEWIS B. HOPPER, JUDGE
ACTION NO. 03-CR-00023

RICKY E. JOHNS,
and DONNIE JOHNSON

APPELLEES

OPINION

AFFIRMING IN PART

AND

REVERSING AND REMANDING IN PART

** ** * * *

BEFORE: GUIDUGLI, MINTON AND VANMETER, JUDGES.

VANMETER, JUDGE. The Commonwealth of Kentucky has appealed from an order of the Laurel Circuit Court granting a motion to dismiss the perjury indictments against appellees, Ricky E. Johns ("Johns") and Donnie Johnson ("Johnson"). For the reasons stated hereafter, we affirm in part, reverse in part and remand for further proceedings.

Jimmy Johns was tried in three separate criminal trials, which resulted in hung juries on each occasion.¹ In these trials, appellees Johns and Johnson were called to testify against the interests of the Commonwealth. On January 24, 2003, the Laurel County grand jury returned an indictment against Johns for three counts of perjury in the first degree and in the same indictment, Johnson was charged for one count of perjury in the first degree.² Johns and Johnson filed a motion to dismiss the indictment on February 20, 2003,³ which was granted by the circuit court on February 24, 2003. This appeal followed.

Appellant argues that the circuit court erred in granting the motion to dismiss a criminal indictment prior to trial. Johns and Johnson contend that the circuit court's dismissal was appropriate, as the prosecutor failed to uphold an agreement that it would not prosecute if they testified before the grand jury concerning another Jimmy Johns trial.

In *Commonwealth v. Isham*, Ky., 98 S.W.3d 59, 62 (2003), the court held that the trial court lacks the authority to weigh the evidence prior to trial and then dismiss the criminal indictment after determining that the Commonwealth will

¹ The Laurel County Circuit Court, tried the case of *Commonwealth v. Jimmy Johns*, No. 00-CR-061, on May 17, 2001, May 14, 2002, and on October 14, 2002.

² Ricky Johns was indicted for perjury based on his testimony in the three separate trials against Jimmy Johns. Donnie Johnson was indicted for perjury based on his testimony before the Laurel County grand jury on December 20, 2002.

³ The same attorney represented Johns and Johnson.

not meet its burden of proof. *Relying on Commonwealth v. Hamilton*, Ky. App., 905 S.W.2d 83, 84 (1995). See also *Commonwealth v. Hayden*, Ky., 489 S.W.2d 513, 516 (1972) (“[t]here is no authority for the use of summary judgment procedure in a criminal prosecution, and it is our opinion that the evidence could not properly be considered on the motions to dismiss.”)

After a careful review of the record, it is unclear whether the trial judge dismissed the perjury indictments upon determining that the Commonwealth had insufficient evidence to succeed in its prosecution against Johns and Johnson. Nonetheless, we conclude that the circuit court reached the correct result in dismissing Johnson’s criminal indictment;⁴ however, the circuit court erroneously dismissed the indictment against Johns.

Specifically, the prosecutor promised Johnson that “anything he was to say in the grand jury room on his past conduct would not be used against him.” Despite this agreement, Johnson was indicted for perjury. Therefore, dismissal was appropriate.

⁴ A correct decision by a trial court will be upheld on review, even though it was reached by an improper route or reasoning. See *Bank One v. Commonwealth, Natural Resources and Environmental Protection Cabinet*, Ky. App., 901 S.W.2d 52, 56 (1995); *Revenue Cabinet v. Joy Technologies, Inc.*, Ky. App., 838 S.W.2d 406, 410 (1992).

In *Workman v. Commonwealth, Ky.*, 580 S.W.2d 206 (1979), overruled on other grounds by *Morton v. Commonwealth, Ky.*, 817 S.W.2d 218 (1991), the Commonwealth promised a defendant that it would dismiss his murder charges if he passed a polygraph examination. Upon passing the polygraph exam, the defendant filed a motion to dismiss the criminal indictment because the Commonwealth failed to uphold its agreement. The trial court denied the motion and the defendant was subsequently tried, convicted and sentenced to life imprisonment. *Id.* Reversing the trial court's judgment, the court held:

If the government breaks its word, it breeds contempt for integrity and good faith. It destroys the confidence of citizens in the operation of their government and invites them to disregard their obligations. . . . We deal here with a "pledge of public faith a promise made by state officials and one that should not be lightly disregarded."

Id. at 207 (quoting *State v. Davis, Fla. App.*, 188 So.2d 24, 27 (1966)). Similarly, in *Cash v. Commonwealth, Ky.*, 892 S.W.2d 292 (1995), the prosecutor promised a witness that if she testified truthfully and honestly to all questions asked at trial, then the prosecutor would not pursue perjury charges for her prior testimony before the grand jury. In reaching its decision, the court held that the prosecutor's failure to uphold the promise rose to "a level of prosecutorial misconduct" and

was "a violation of the principles as set out in *Workman*, and thus, will not be tolerated by this Court." *Id.* at 294-95.⁵

Here, in November 2002, Johnson was subpoenaed to testify before the grand jury. In December 2002, believing that a perjury investigation had developed, counsel for Johns and Johnson advised the prosecutor that his clients would assert their Fifth Amendment rights against self-incrimination and would not testify. During a status hearing on December 20, 2002, and upon being questioned by the circuit court about an agreement, the prosecutor stated:

We had reached an agreement. . . . I had sent a letter to [appellee's attorney] . . . in which I stated specifically that Donnie Johnson was not a target of a perjury investigation, that we knew of nothing in his testimony that would subject him to a charge of perjury . . . I will call Mr. Johnson first as a witness . . . and that anything he were to say in the grand jury room on his past conduct would not be used against him.

In response, counsel for Johns and Johnson stated: "So long as it holds for both and I believe that it does, then neither of these boys has any problem with going before the grand jury and answering the questions as propounded to them."⁶ After the

⁵ In *Cash*, 892 S.W.2d at 294, the court held that even though the facts in *Cash* involved a promise made to a witness and *Workman*, 580 S.W.2d at 207, involved a promise made to a defendant, the legal principles were the same. Here, the Commonwealth failed to uphold a promise made to a witness.

⁶ It appears from the record that "both" and "boys" refers to Shawn Wagers, a minor, not Ricky Johns. Wagers was also involved in this agreement with the

hearing, Johnson testified before the grand jury, but both Johnson and Johns, were subsequently indicted for perjury.

Accordingly, the circuit court did not err in dismissing the perjury indictment against Johnson, as the prosecutor failed to uphold the agreement. Moreover, the record "disclosed no rational basis which would relieve the attorney for the Commonwealth from the performance of his bargain or justify the refusal of the trial judge to grant the motion to dismiss." *Workman*, 580 S.W.2d at 207.

With respect to Johns, the record is not clear as to the basis for the circuit court's dismissal of his indictment. The record lacks evidence supporting the assertion that the prosecutor broke a promise with Johns, as Johns was not included in the agreement made between the prosecutor and Johnson, and Johns did not testify before the grand jury. Therefore, we find that the dismissal of the perjury indictment against Johns was erroneous.

Based on the foregoing reasons, the order dismissing Johnson's perjury indictment is affirmed, and the order dismissing the perjury indictment against Johns is reversed, and is remanded to the Laurel Circuit Court for further proceedings consistent with this Opinion.

MINTON, JUDGE, CONCURS.

Commonwealth; however, the status of Wagers as a witness is not pertinent here.

GUIDUGLI, JUDGE, CONCURS IN PART, DISSENTS IN PART,
AND FILES SEPARATE OPINION.

GUIDUGLI, JUDGE, CONCURRING IN PART AND DISSENTING IN
PART. I concur in part and respectfully dissent in part. While
the majority would affirm only the dismissal of the perjury
charge against Johnson, I believe the trial court properly
dismissed the charges as to both Johnson and Johns. There is no
question in my mind that the prosecutor engaged in misconduct in
this case and presented false and/or misleading information to
the grand jury which lead to the indictments against the
appellees. Commonwealth v. Isham, Ky., 98 S.W.3d 59 (2003), is
not applicable in this case since the trial court is not
weighing the evidence but dismissing the indictment based upon
prosecutorial misconduct. I would affirm the order of the
Laurel Circuit Court dismissing the perjury indictment as to
both Johnson and Johns.

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