RENDERED: December 3, 2004; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002238-MR

JERRY W. LEONARD — APPELLANT

V.

APPEAL FROM MEADE CIRCUIT COURT
HONORABLE ROBERT A. MILLER, JUDGE
CIVIL ACTION NO. 01-CI-00147

CITY OF BRANDENBURG, KENTUCKY;
RONNIE C. JOYNER, INDIVIDUALLY, AND AS
MAYOR OF CITY OF BRANDENBURG, KENTUCKY;
JEFFREY L. COX, INDIVIDUALLY, AND AS
CHIEF OF POLICE OF BRANDENBURG, KENTUCKY — APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; MINTON AND VANMETER, JUDGES.

MINTON, JUDGE. The involuntary dismissal of a civil action with prejudice is the ultimate sanction available to the trial court to punish a plaintiff who has failed to prosecute its case or comply with court orders. The circuit court granted the defendants' motion and involuntarily dismissed Jerry Leonard's wrongful termination case with prejudice after Leonard's counsel moved for another extension on a deadline for production of a

termination hearing transcript. This request followed close on the heels of the court's order that vacated its earlier involuntary dismissal for failure to comply with deadlines for production of this transcript. In that order, the court sanctioned Leonard's counsel with payment of attorney's fees for not furnishing the transcript timely and warned that a failure to comply with further deadlines would result in dismissal. In this *pro se* appeal, Leonard argues that the circuit court abused its discretion by imposing the "death sentence" on his claim to punish the lawyer for missing this deadline. We agree that this dismissal was an abuse of discretion and we reverse.

PROCEDURAL STEPS ENDING IN DISMISSAL

On May 3, 2001, Leonard filed suit against the City of Brandenburg; its mayor, Ronnie Joyner; and its police chief, Jeffrey L. Cox, who are now the Appellees in this appeal. The crux of the suit was an appeal under the Police Officers' Bill of Rights[1] from the City's termination of Leonard's employment with the Brandenburg City Police Department. The procedure for this type of appeal in the circuit court is that the discharged employee is entitled to something less than a trial *de novo*—a quasi trial *de novo*. The onus is on the discharged employee who has the obligation to furnish a record of the evidence heard by

[1] Kentucky Revised Statutes (KRS) 15.520.

the hearing body and who has the right to call such additional witnesses as the employee may desire. The trial court is to consider both the record before the hearing body and the additional testimony. The trial court is limited to a determination of whether the hearing body acted arbitrarily in deciding whether the employee violated the rules and regulations of the police department.[2] Leonard also made claims for violation of his right to due process under U.S. and Kentucky constitutions, intentional infliction of emotional distress, injury to business reputation, embarrassment, and humiliation. The Appellees removed the case to federal court where the case proceeded to a dismissal after about a year. In an order, entered June 24, 2002, the federal court dismissed the federal claims and remanded the state claims to the circuit court.

In an effort to move the case expeditiously toward resolution, the circuit court entered a scheduling order on October 18, 2002, requiring Leonard, within 45 days, to file the transcript of the termination hearing that was conducted on March 29, 2001, before the Mayor and the City Council of Brandenburg. The order also set discovery and briefing

[2] Stallins v. City of Madisonville, Ky.App., 707 S.W.2d 349, 350 (1986). This case makes specific reference to the obligation of the plaintiff to furnish a "transcript" of the administrative hearing, and it appears that the circuit court in the case at hand interpreted this literally to mean that Leonard had to furnish a written transcription of the audio-recorded hearing. Regardless of whether a transcription is mandatory, it appears that Leonard's counsel did not object to furnishing the written transcription.

deadlines and a final submission date. As the court explained in a later order, the transcript was not for discovery purposes since the Appellees already had the audiotapes of the hearing. Rather, "[t]he purpose of the transcript was primarily to assist the courts [sic] in the interest of judicial economy in determining the legal issues in the parties' memoranda without having to listen to the audio recording." Soon after the entry of the scheduling order, Appellees' counsel mailed to Leonard's counsel, Samuel Manly, two audiocassette tapes of the hearing.

After the original 45-day deadline passed without a transcript, Manly moved for more time. He cited as grounds for the extension his own need to attend to his ailing mother who lived in Florida. Without objection from the Appellees, the circuit court entered a new scheduling order on December 19, 2002, which extended the deadline for filing the transcript to January 31, 2003, and extended the other deadlines for discovery, briefing, and submission accordingly. This deadline passed without compliance or a request for extension.

Citing the failure to file the transcript, even after a prodding letter of inquiry to Manly, the Appellees filed a motion on March 19, 2003, seeking involuntary dismissal as a sanction for failure to comply with the court's order. Neither Manly nor Leonard appeared at the scheduled hearing on April 3, 2003, to oppose this motion. The circuit court granted the

motion and entered an order of involuntary dismissal on April 4, 2003.

Manly immediately filed a motion to set aside the dismissal. With the motion, he submitted his own affidavit, dated April 14, 2002, in which he cited the lengthy final illness and death of his mother which necessitated his absence from Kentucky. He also cited his personal health issues to explain his having neglected the preparation and filing of the transcript. Manly blamed his secretary for his failure to appear at the hearing on the motion to dismiss. Manly's affidavit assured the circuit court that the "[p]reparation of the transcript is now underway."

The court heard the motion to set aside the dismissal on May 8, 2003. Two days later, the circuit court entered detailed findings of fact and conclusions of law and an order vacating the dismissal. With obvious skepticism, the circuit judge accepted Manly's excuses for having neglected the January deadline and having failed to appear in court on April 4. But the circuit judge admonished Manly and sanctioned him with costs and attorney's fees, stating:

> The court is reluctant to accept the continuing efforts of counsel to blame their secretary(ies) for their own omissions. Mr. Manly has had sufficient contact with his secretary to handle a highly publicized case through three levels of state courts, yet [he] wants to blame her for improperly

> documenting this action on his docket. The court finds it much easier to accept a responsible counsel's admission of neglect or inattention to his responsibilities than to point the finger at an employee unable to defend herself in a hearing. Mr. Manly has directly violated the court's order and sanctions should be imposed upon him.

The court ordered that the new deadline for the transcript was May 30, 2003; and the other deadlines were again extended accordingly. The order concluded with this clear admonition:

> The deadlines herein set by the court may not be altered by agreement of the parties. Same may only be altered by order of court after notice, motion and hearing and will only be granted based upon exceptional circumstances. Failure of Plaintiff to comply with any deadline set forth in this Order shall be cause for dismissal of this action as a sanction therefore [sic].

On the day the transcript was due, Manly filed a motion asking for an extension until June 6, 2003. Accompanying the motion was the affidavit of a legal transcriptionist, who stated that she had received the audiotapes for transcription on May 19, 2003; and because of the poor quality of the tapes, she could not complete the transcript by the deadline. The Appellees again moved for dismissal, and the circuit court granted their motion after a hearing. Again the court made detailed findings. In its dismissal order, entered July 9, 2003, the circuit judge observed:

> This court attempted to be lenient with the Plaintiff in his initial failure to comply with its prior orders. The ordering and completion of the transcript herein has been delayed previously at Plaintiff's request from the initial deadline of December 2, 2002(45 days after entry of order) to January 31, 2003. That order was based upon Plaintiff's counsel's mother's illness and infirmity. Now over seven months after it initially became known a transcript would be required to be prepared by Plaintiff (no objection to said requirement being raised), he once again requested an additional extension.
>
> The court had some reservations when it granted Plaintiff's motion to vacate the order dismissing this action. It had doubts then whether the Defendants were being prejudiced by granting the extension requested. Procedure required [the court] to follow the course [that the court] took. Now, upon consideration of the repeated failure to comply with its express discovery order with prior notice of the sanctions to be imposed for a failure to meet the reasonable deadline, the court has no further reservation in what it feels justice compels it to do.

ANALYSIS

A trial court may dismiss a civil action with prejudice as a sanction against a party who fails to obey an order to provide discovery.[3] A trial court may dismiss a civil action with prejudice as a sanction against a party who fails to comply with the civil rules, including discovery rules, or any

[3] Kentucky Rules of Civil Procedure (CR) 37.02(2)(c).

order of the court.[4] A trial court may, in the exercise of its inherent power, dismiss a case with prejudice for want of prosecution when necessary to preserve the judicial process.[5] But because of the grave consequences of a dismissal with prejudice, a trial court should resort to this sanction only in the most extreme cases.[6] And on appeal, this Court must carefully scrutinize the trial court's exercise of its discretion.[7] "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles."[8]

In Ward v. Housman,[9] a divided panel of this court recommended that trial courts use the "relevant factors" adopted by the U. S. Court of Appeals for the Third Circuit, which was considering the federal counterpart of CR 41.02,[10] in Scarborough v. Eubanks[11] as "a worthwhile guideline for analysis"

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4 CR 41.02.

5 Nall v. Woolfolk, Ky., 451 S.W.2d 389, 390 (1970).

6 Polk v. Wimsatt, Ky.App., 689 S.W.2d 363, 364-365 (1985).

7 *Id.*

8 Goodyear Tire & Rubber Co. v. Thompson, Ky., 11 S.W.3d 575, 581 (2000).

9 Ky.App., 809 S.W.2d 717 (1991).

10 Fed. R. Civ. P. 41(b).

11 747 F.2d 871, 874-878 (3rd Cir. 1984). In Poulis v. State Farm Fire and Casualty Co., 747 F.2d 863 (3rd Cir. 1984), filed the same day as Scarborough, the Third Circuit recapitulated these factors.

when considering dismissing an entire case as a sanction for dilatory conduct of counsel.[12] Although the issue in Ward dealt with the propriety of using summary judgment as a sanctioning tool for dilatory conduct of counsel, we, too, find the analysis endorsed by Ward to be helpful in assessing a motion to dismiss when used as a sanctioning tool for failure to obey discovery schedules, failure to prosecute, or to failure to comply with other procedural rules. The Ward factors are: (1) the extent of the party's personal responsibility; (2) the history of dilatoriness; (3) whether the attorney's conduct was willful or in bad faith; (4) the meritoriousness of the claim; (5) prejudice to the other party; and (6) alternative sanctions.

We will proceed to examine the case at hand using the Ward factors, keeping in mind that all of them need not be satisfied to warrant dismissal as a sanction. [13]

1. The extent of Leonard's personal responsibility.

Leonard argues in his brief "that any fault for anything less than total compliance with the orders of the Meade Circuit Court lies with counsel for Plaintiff and not with Plaintiff who was in no position to know what was to be required by the Meade Circuit Court." This issue was apparently not

[12] Ward, *supra* at 719.

[13] *See* Hicks v. Feeney, 850 F2d 152, 156 (3rd Cir. 1987) (applying the so-called Polis factors).

considered by the trial court. Consequently, there is no finding concerning Leonard's personal involvement contained in any of the circuit court's orders. Similarly, there is no suggestion in the record that Leonard himself is responsible for the failure to file the transcript as ordered. We infer from the sanction of costs and attorney's fees that the trial court imposed to be paid by Manly and not to be passed on to Leonard that the trial court implicitly held Manly alone to be responsible for dilatory conduct.

And the record does reflect that Manly took full responsibility for the delays. He told the trial court that the reasons for the delay were his attention to his mother's final illness and death, his own illness and injuries suffered in a fall down restaurant steps, his secretary's failure to calendar accurately, and his own decision to postpone hiring transcriptionists. Finally, the trial court mentions more than once that while these factors hindered Manly's compliance with its scheduling order, Manly contemporaneously represented a party in a highly publicized case involving the gubernatorial primary through three levels of the court system. The obvious inference is that Manly neglected this case for that one.

But Leonard's apparent lack of participation in the delay is not absolutely dispositive because it is axiomatic that "[a] litigant may not employ an attorney and then wash his hands

of all responsibility. The law demands the exercise of due diligence by the client as well as by his attorney in the prosecution or defense of litigation."[14] In light of our disposition of this case, we hold for another case an analysis of the serious dilemma posed by the allocation of responsibility between the attorney and the client when the attorney's delinquencies—not the client's—necessitate sanctions for dilatory or contumacious conduct.[15]

2. The history of dilatoriness.

The circuit court notes in its findings its efforts in three orders over seven months to secure the requisite hearing transcript. We are aware of the exhortations to trial courts to move cases toward resolution expeditiously. Time limits imposed by the trial court serve an important purpose for the orderly, fair, and expeditious processing of litigation. If compliance is not feasible within the time limits set by the court, it is incumbent upon counsel to request an extension from the court before the court's deadline passes. We are satisfied that the circuit court's finding of a "repeated failure to comply with its express discovery order" is a finding of a history of

[14] Gorin v. Gorin, 292 Ky. 562, 167 S.W.2d 52, 55 (1942).

[15] *See e.g.*, Carter v. Albert Einstein Medical Center, 804 F.2d 805, 807-808 (3rd Cir. 1986).

dilatoriness. And such a finding is amply supported by the record.

3. Whether attorney's conduct was willful or in bad faith.

The circuit court set aside its first dismissal order "[a]s a result of [a] hearing [on May 8, 2003] and representations of [Manly]." One of those representations was, the court noted, that "[p]reparation of the transcript is now underway." Later, the circuit judge was surprised and dismayed to learn that preparation had not, in fact, been underway as of the hearing on May 8, 2003. As it turned out, an earlier transcriptionist, Ms. Watson, had actually returned the tapes to Manly on April 23, 2003; and Manly decided to wait for the outcome of his motion to vacate the dismissal before incurring the costs for transcription.

The circuit court apparently did not find the last request for a seven days' delay to be based upon one of those "exceptional circumstances" for which the May 10, 2003, scheduling order allowed. And having forewarned Manly that failure to comply with these latest deadlines would result in dismissal absent such exceptional circumstances, the circuit court was unmoved by the plea for yet more time by a second transcriptionist, Ms. Broadhead. Manly argued that inaudible tapes required more time to transcribe. The court responded that

"Mr. Manly knew or should have known of the poor audio quality of the tapes prior to transmittal to either [of the two identified transcriptionists]. He had known a transcript was due since entry of the initial order October 18, 2002."

In analyzing the attorney conduct factor, the Third Circuit in Scarborough looked to "the type of willful or contumacious behavior which was characterized [by the U. S. Supreme Court] as 'flagrant bad faith' in National Hockey League v. Metropolitan Hockey Club, Inc. . . . ."[16] In National Hockey League, the trial court dismissed the case after 17 months, during which the plaintiffs failed to answer crucial interrogatories despite numerous extensions, and broke promises and commitments to the court.[17] As we have reviewed the record in the case before us, it does not support a finding that Manly's dilatory conduct stemmed from this sort of flagrant bad faith.

In Naive v. Jones, our high court suggested that willful conduct on the part of counsel facing dismissal as a sanction under CR 37.05 for failing to answer or object to interrogatories propounded under CR 33 "contemplates a deliberate delinquency as opposed to one stemming from excusable neglect, inadvertence or mistake. This would be a *conscious* and

[16] Scarborough, 747 F.2d at 875; *see also* Poulis, 747 F.2d at 866.

[17] 427 U.S. at 643, 96 S.Ct. 2778, 49 L.Ed.2d 747 (1976).

intentional noncompliance."[18] Against the backdrop of Manly's history of dilatoriness, the judge's finding that Manly knew or should have known for seven months of the poor audio quality of the micro-cassette tapes, and the trial court's clear warning of dismissal for any further missed deadlines, the facts support a finding of willfulness on Manly's part. This conclusion is bolstered by what appears from the record to be Manly's effort intentionally to mislead the court by stating that the transcription was in progress in an effort to convince the judge to set the first dismissal order aside.

4. Meritoriousness of the claim.

The trial court's order does not analyze the meritoriousness of Leonard's claims as having any bearing on the dismissal. And we have no way of doing so from the record. For the purposes of dismissal as a sanction, the meritoriousness of a claim must be evaluated on the facial validity of the pleadings.[19] We cannot say that Leonard has not made out a facially valid claim.

[18] Ky., 353 S.W.2d 365, 366 (1961).

[19] Scarborough at 875.

5. Prejudice to the other party.

If there has been true prejudice to a party by an opponent's failure to comply with a scheduling order of the court, that factor alone must bear substantial weight in support of a dismissal. Here, the trial court specifically concludes that "the defendants are prejudiced by the continued litigation and expense being incurred by the Plaintiff's failure to cooperate and be compliant with discovery . . . ." But under the circumstances of this case, we are unable to discern true prejudice to the Appellees' case from Manly's most recent delay in furnishing a transcript of tapes—tapes that were in the Appellees' hands all along. And as the trial court had done in its earlier order, an award of attorney's fees and costs could have compensated Appellees for any unreasonable expense associated with delay, if any such additional expense were shown. Indeed, the Appellees' motion to dismiss does not argue that a one week's extension to file the transcript prejudiced their case. They do not mention prejudice in their brief to this Court.

Examples of true prejudice are "the irretrievable loss of evidence, the inevitable dimming of witnesses' memories, or the excessive and possibly irremediable burdens or costs imposed

on the opposing party."[20] The record does not support a finding that the Appellees have been so adversely affected by Manly's delay. The trial court erred in finding prejudice to the Appellees.

6. Alternative sanctions.

The trial court concluded that in light of the "prior notice of the sanctions to be imposed for a failure to meet the reasonable deadline" that it felt that "justice compels" dismissal. We fully understand the trial court's frustration that by replacing its earlier dismissal order, which it acknowledged was improvidently granted, with a monetary sanction and a warning, it appeared to fail so quickly to achieve compliance from Manly. But we believe, nevertheless, that dismissal under these facts is an abuse of discretion. Dismissal must be the sanction of last resort. The trial court's earlier warning notwithstanding, a direct and effective sanction for the pattern of attorney delay encountered by the trial court, is the imposition of excess costs and attorney's fees caused by the attorney's dilatory conduct, as authorized by CR 37.01(d), 37.02(2)(d), and 37.02(3). As with the trial court's earlier sanction, these costs and fees should not be

[20] *Id.* at 876.

passed on to the client when the client is not at fault but borne entirely by the offending lawyer.

DISPOSITION

By examining this record guided by Ward v. Housman, we must conclude that the trial court abused its discretion by dismissing the claim with prejudice. Justice compels an alternative sanction to "the death sentence" where, as here, the client appears to have a facially meritorious claim; the client appears to be free of fault for the lawyer's history of willful, dilatory behavior; the delay is of comparatively short duration; and the opposing side has not shown actual prejudice by the delay. For these reasons, we reverse the order of dismissal with prejudice and remand this case to the trial court for further proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

Jerry W. Leonard, *Pro se*
Ekron, Kentucky

BRIEF FOR APPELLEES:

David Whalin
David P. Bowles
Chris J. Gadansky
Louisville, Kentucky