

RENDERED: March 11, 2005; 2:00 p.m.

NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000891-MR

COMMONWEALTH OF KENTUCKY

APPELLANT

v.

APPEAL FROM RUSSELL CIRCUIT COURT
HONORABLE VERNON MINIARD, JR., JUDGE
ACTION NO. 03-CR-00092

THOMAS MOORE

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: MINTON AND TACKETT, JUDGES; HUDDLESTON, SENIOR JUDGE.¹

TACKETT, JUDGE: The Commonwealth of Kentucky appeals from an order of the Russell Circuit Court dismissing an indictment for jury tampering against Thomas Moore. The Commonwealth argues that the trial court usurped the function of the jury in making a factual determination that it could not prove the elements of

¹ Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

the offense at trial. We agree; hence, the order is reversed and this case is remanded for a jury trial.

Moore was indicted for jury tampering after he sent a letter to the foreperson of a grand jury which he believed was investigating allegations of possible criminal activity against him. His counsel filed a motion to dismiss the indictment arguing that, since Moore was not in fact charged with an offense at the time the letter was written, he could not be guilty of the offense as a matter of law. The trial court denied the motion stating that it was without authority to dismiss an indictment unless the Commonwealth agreed to the dismissal. Moore filed a motion to reconsider, and the trial court, after a second hearing, dismissed the indictment. This appeal followed.

The Commonwealth argues that the trial court erred by granting what amounts to summary judgment in a criminal case. The Kentucky Supreme Court has previously held that it is an abuse of discretion for a trial court to dismiss criminal charges prior to trial without the Commonwealth's consent. Commonwealth v. Isham, 98 S.W.3d 59 (Ky. 2003). "[I]t is not within the province of the trial judge to evaluate the evidence in advance to determine whether a trial should be held. The time for such an evaluation is upon motion for a directed verdict." Commonwealth v. Hicks, 869 S.W.2d 35, 37 (Ky. 1994).

After his first motion to dismiss was denied, Moore cited Commonwealth v. Baker, 11 S.W.3d 585 (Ky. App. 2000), wherein we upheld the trial court's authority to dismiss an indictment without prejudice due to prosecutorial misconduct. In Baker, the Commonwealth's sole witness to present testimony to the grand jury testified falsely regarding the evidence. There is no evidence in this case that the Commonwealth presented false evidence against Moore. The only evidence presented to the grand jury was the testimony of Tonya Meece to whom Moore had written a letter while she was serving as foreperson on a previous grand jury.

Meece testified that Moore sent a letter to her at her place of employment, Jamestown Bank, while she was serving as grand jury foreperson. She stated that Moore had accounts at the bank, but that she had not had personal contact with him. Meece also testified that she had no idea how Moore became aware that she was serving on the grand jury. She read the letter into evidence and it was displayed to the members of the current grand jury. While Moore does not dispute the truthfulness of Meece's testimony, he portrays the Commonwealth as engaging in prosecutorial misconduct by inquiring into his confidential banking transactions. We disagree. The questions directed towards Meece about Moore's banking accounts attempted to establish whether she was familiar with his signature and

whether she had any personal dealings with him at the bank such that he would be aware of her grand jury service. The Commonwealth did not seek to elicit any meaningful information about his accounts including whether they were business or personal, how many there were, or what balances they had.

The only remaining issue is whether the indictment failed to charge a crime. Kentucky Revised Statute (KRS) 524.090 describes the offense of jury tampering as follows:

(1) A person is guilty of jury tampering when, with intent to influence a juror's vote, opinion, decision or other action in a case, he communicates or attempts to communicate, directly or indirectly, with a juror other than as a part of the proceedings in the trial of the case.

(2) Jury tampering is a Class D felony.

Moore argues that he cannot, as a matter of law, be guilty of jury tampering because there was no case against him; thus, Meece would not be in any position to make a decision in a case. The following excerpt from his letter clearly shows that Moore believed that he was being investigated by the grand jury and was seeking to influence Moore's decision as to whether she would vote to indict him:

It is my understanding that a matter either is, or will soon be before the Grand Jury with regard to me personally in connection with the activities and events surrounding the bankruptcy and liquidation of State Dock and other marina-related entities.

I hereby request that I be given the opportunity to appear personally before the Grand Jury should a matter concerning me be introduced.

I want to explain the facts from my perspective of whatever allegations made by others with respect to my personal actions, motivation and intent surrounding the unfortunate events and consequential damage done to individuals and businesses that were involved and the significant losses that were a consequence of the liquidation.

I am confident that if the facts were known, a large amount of Russell County's money and resources can be saved by avoiding the expense of judicial proceedings to the benefit of all. . . .

The letter specifically states that it is addressed to Meece in her capacity as foreperson of the grand jury, and that a copy is being sent to the Assistant Commonwealth's Attorney. The comments to KRS 534.090 state that the statute applies to instances where no benefit is conferred to the juror. The offense requires proof only of an unauthorized communication and the intent to influence a juror; actual influence need not be shown.

Moore argues alternatively that his letter is merely an attempt to inform the grand jury that he wishes it to consider his testimony. However, Kentucky Rule of Criminal Procedure 5.08 governs the procedure a defendant wishing to testify before the grand jury must follow. The rule states, if notified in writing that a defendant wishes to testify, the

Commonwealth's Attorney must inform the grand jury, but that the jurors are not required to hear the testimony. Thus, even if Moore's letter did not seek to influence Meece's potential vote on an indictment, an argument exists that he improperly tried to influence her vote on whether the grand jury would hear his testimony.

The trial court, during the hearing on Moore's motion for reconsideration, stated that the Commonwealth would have difficulty proving intent and that it did not believe a jury would convict Moore of jury tampering. This is exactly the kind of decision which a trial court is without authority to make under Isham. Consequently, the indictment must be reinstated and the Commonwealth given the opportunity to present its evidence to a jury.

For the foregoing reason, the judgment of the trial court is reversed, and this case is remanded for trial by jury.

ALL CONCUR.

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