RENDERED: June 17, 2005; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001767-MR

COMMONWEALTH OF KENTUCKY,
REAL PARTY IN INTEREST,
AND HONORABLE SHAN EMBRY,
JUDGE, BRECKINRIDGE DISTRICT COURT — APPELLANTS

v.

APPEAL FROM BRECKINRIDGE CIRCUIT COURT
HONORABLE ROBERT A. MILLER, JUDGE
ACTION NO. 03-CI-00177

HUBERT GREENWOOD — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: BARBER AND SCHRODER, JUDGES; HUDDLESTON, SENIOR JUDGE.[1]

BARBER, JUDGE: Appellant, the Commonwealth of Kentucky, appeals the grant of a writ of prohibition by the Breckinridge Circuit Court preventing a retrial in District Court of the Appellee, Hubert Greenwood's (Greenwood), charge of driving under the

[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.

influence on the grounds of double jeopardy. We affirm the trial court's ruling.

Greenwood was tried before a jury in Breckinridge District Court on charges of driving under the influence. During the cross examination of one of the Commonwealth's witnesses, Kentucky State Police Trooper Jeremy Thompson, the following exchange occurred:

> QUESTION: He was not confused about what was going on, in fact, he contacted an attorney before he took the test?
>
> ANSWER: Yes, sir, he did.
>
> QUESTION: Do you know who he called, do you know he called Steve Wheatley?
>
> ANSWER: Yes, I do.
>
> QUESTION: Steve Wheatley is a prosecutor over in Hardin County.

The Commonwealth then moved for a mistrial, stating that defense counsel "is implying that a prosecutor is giving his client advice." The Commonwealth claims that this line of questioning was misleading, prejudicial, and confusing to the jury. The law permits an accused to contact an attorney prior to taking a breathalyzer test. See: KRS 189A.105(3). The record shows that Steve Wheatley is a prosecutor and a native of Breckinridge County. Steve Wheatley was admittedly contacted by Greenwood for advice prior to Greenwood's submitting to a test for intoxication. Wheatley was not involved in the prosecution

of the action in any way and works in a different office, and in a different county, from counsel for the Commonwealth.

Defense counsel objected to the motion for mistrial and argued that a mistrial was unnecessary. After hearing the arguments of counsel, the court granted the mistrial finding manifest necessity therefore pursuant to KRS 505.030(4)(b). The Commonwealth then made evident its plan to retry Greenwood on the DUI charges. The District Court judge ruled that upon retrial Greenwood could not mention Wheatley's name or call him as a witness. Greenwood made a motion to dismiss the District Court retrial on grounds of double jeopardy. That motion was denied. Greenwood then filed a Petition for Writ of Mandamus or Prohibition with the Breckinridge Circuit Court, claiming that there was no manifest necessity for the mistrial granted, and that subjecting him to retrial would be a violation of the law prohibiting double jeopardy. The circuit court entered a judgment and order granting the writ.

As the Commonwealth admits, a writ of prohibition must be granted where failing to do so would subject the defendant to great injustice and irreparable injury for which there is no adequate remedy. Chamblee v. Rose, 249 S.W.2d 775 (Ky. 1952). When a mistrial is granted after a trial has begun and after introduction of the first witness, there can be no retrial unless the mistrial was with the defendant's consent, or there

was a "manifest necessity" that a mistrial be granted. Nichols v. Commonwealth, 657 S.W.2d 932 (Ky. 1983). The circuit court found that the statement objected to did not rise to the level of "manifest necessity" for a mistrial. The court stated in its judgment and order that the jury could have been admonished, or other remedial steps could have been taken. For that reason, the circuit court found that double jeopardy would attach if Greenwood was tried again.

The Commonwealth claims that the granting of a writ was unnecessary, as Greenwood had a remedy by appeal. The Commonwealth cites Haight v. Williamson, 833 S.W.2d 821 (Ky. 1992) as supporting that assertion. Greenwood claims that the stress and expense of two trials on the same issue is a harm that cannot be remedied on appeal. A writ of prohibition is necessary when an accused is in danger of being tried twice when jeopardy should have attached after the initial case. Macklin v. Ryan, 672 S.W.2d 60 (Ky. 1984). In that case, the court held that "since a mistrial, by definition, does not dispose of the merits of a case or necessarily preclude future litigation, the appellant did not have an adequate remedy by appeal from the mistrial order." Id., at 61. A claim of double jeopardy has been ruled an appropriate subject for a writ of prohibition or mandamus. St. Clair v. Roark, 10 S.W.3d 482, 485 (Ky. 2000).

There is no reversible error in Greenwood's request for a writ of prohibition or mandamus.

Kentucky law permits retrial of a criminal matter following grant of a mistrial only where manifest necessity is shown for the granting of a mistrial:

> [T]he principle of double jeopardy does not prevent retrial if the proceedings are terminated because the trial court, in exercise of its discretion, finds that the termination is manifestly necessary. As stated, a finding of manifest necessity is a matter left to the sound discretion of the trial court. Thus, a trial court's grant of a mistrial will be overturned only if it is clearly erroneous or constitutes an abuse of discretion.

Commonwealth v. Scott, 12 S.W.3d 682, 684 (Ky. 2000). The Commonwealth asserts that "the actions of petitioner's attorney caused the mistrial" and that manifest necessity was shown for the grant of mistrial. The record does not support these contentions.

The trial court must properly exercise its discretion in granting or denying a request for a writ of mandamus or prohibition. Rowley v. Lampe, 331 S.W.2d 887 (Ky. 1960). That determination will not be reversed on appeal absent a clear showing of an abuse of discretion on the part of the circuit court. Peterson v. Shake, 120 S.W.3d 707, 713 fn. 2 (Ky. 2003).

Abuse of discretion has not been shown in the present case. For this reason, the circuit court's determination is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Gregory D. Stumbo
Attorney General of Kentucky

Bruce T. Butler
Special Assistant Attorney General
Hardinsburg, Kentucky

BRIEF FOR APPELLEE:

Douglas E. Miller
Radcliff, Kentucky