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NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2005-CA-002576-MR

COMMONWEALTH OF KENTUCKY

APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE WILLIAM L. GRAHAM, JUDGE
ACTION NO. 05-CR-00235

J. MARSHALL HUGHES

APPELLEE

OPINION
VACATING AND REMANDING

** ** * * *

BEFORE: GUIDUGLI AND HENRY, JUDGES; BUCKINGHAM,¹ SENIOR JUDGE.

GUIDUGLI, JUDGE: This case arises from the Franklin Circuit Court's *sua sponte* dismissal of a two-count misdemeanor indictment against J. Marshall Hughes on the basis of the pardon issued by Governor Fletcher in Executive Order 2005-924. The Franklin County Special Grand Jury, summoned by the Attorney General to investigate criminal violations of Kentucky's merit system hiring scheme, returned the indictment against Hughes. The Commonwealth raises three issues in its appeal, contesting

¹ Senior Judge David C. Buckingham, 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 validity of Governor Fletcher's pardon, asserting that Hughes did not accept the pardon and accordingly could not benefit from it, and arguing that the circuit court did not have jurisdiction over the misdemeanor indictment. While we disagree with two of the Commonwealth's arguments in light of the Supreme Court of Kentucky's recent decision of Fletcher v. Graham,² we agree that the circuit court did not have jurisdiction to dismiss the indictment. Accordingly, we vacate the circuit court's order and remand.

By way of background, we shall rely upon the Supreme Court's brief description of the investigation in Fletcher v. Graham:³

The investigation began in May 2005, when an employee of the Kentucky Transportation Cabinet contacted the Attorney General and presented evidence of alleged criminal violations of the state merit employee hiring system.[] On May 25, 2005, upon motion of the Attorney General, the Franklin Circuit Court summoned a special grand jury. For several months, the grand jury proceeded to investigate the matter and eventually issued several indictments against executive branch employees alleging both misdemeanor violations of the merit system laws and felony violations concerning evidence and witness tampering. Some three months into the investigation, on August 29, 2005, Governor Fletcher issued Executive Order 2005-924, whereby he sought to pardon nine

² 192 S.W.3d 350 (Ky. 2006).

³ Id. at 355.

individuals indicted by the grand jury⁴ as well as "any and all persons who have committed, or may be accused of committing, any offense up to and including the date hereof, relating in any way to the current merit system investigation."[]

The grand jury continued its investigation after the pardon had been entered and issued more indictments for pardoned offenses. One such person indicted was J. Marshall Hughes.

Hughes was indicted by the special grand jury on October 20, 2005, on two misdemeanor counts of conspiracy to violate the prohibition against political discrimination.⁵ In particular, Count 1 charged:

On or between January 1, 2004 and May 30, 2005, in Franklin County, Kentucky, the above-named defendant, J. Marshall Hughes, having the intention of promoting or facilitating the commission of a violation of KRS 18A.140(1), agreed with Richard Murgatroyd, Dave Disponett, Dan Druen and other unknown and unindicted co-conspirators that at least one (1) of them would engage in a course of conduct constituting a violation(s) of KRS 18A.140(1) by appointing, promoting, transferring, demoting, dismissing or otherwise favoring or discriminating against persons in some manner related to positions in the state classified (merit) service, based upon their political affiliation or opinion.

Count 2 charged:

⁴ The nine individuals listed by name in the pardon are James L. Adams, Darrell D. Brock, Jr., Danny G. Druen, Tim Hazlette, Charles W. Nighbert, Cory W. Meadows, Richard L. Murgatroyd, Basil W. Turbyfill, and Robert W. Wilson, Jr.

⁵ KRS 506.040, KRS 18A.140(1), and KRS 18A.990.

On or between January 1, 2004 and May 16, 2005, in Franklin County, Kentucky, the above-named defendant, J. Marshall Hughes, having the intention of promoting or facilitating the commission of a violation of KRS 18A.140(1), agreed with Richard Murgatroyd, Cory Meadows, Dan Druen and other unknown and unindicted person(s), that at least one (1) of them would engage in conduct constituting a violation of KRS 18A.140(1) by appointing Marjorie Ann Stewart to the position of Highway District Administrative Manager for the Kentucky Department of Transportation, Warren County, based on her political affiliation or opinion.

On the basis of the pardon, which included "any and all persons who . . . may be accused of committing, any offense up to and including the date hereof, relating in any way to the current merit system investigation[,] . . . including . . . any violation of KRS Chapter 18A[,]"⁶ the circuit court entered a *sua sponte* order dismissing the indictment against Hughes on November 16, 2005. This appeal by the Commonwealth followed.

The Commonwealth raises three issues on appeal, contesting the validity of the pardon, Hughes' acceptance of the pardon, and the subject-matter jurisdiction of the circuit court to dismiss the misdemeanor indictments. Hughes, in turn, disputes each of the arguments the Commonwealth raises. Because the issues raised relate solely to questions of law, we shall review the circuit court's ruling *de novo*.

⁶ The pardon specifically listed a violation KRS 18A.140 as an offense included within its reach.

1. VALIDITY OF THE PARDON

The bulk of the Commonwealth's brief addresses the applicability of Executive Order 2005-924 to future indictments of individuals not named in the pardon. However, the Commonwealth conceded in its reply brief that the Supreme Court decided this issue in Fletcher v. Graham.⁷ The Supreme Court held that Section 77 permits the issuance of blanket pardons, as "[n]othing in the language of Section 77 infers that general pardons are prohibited, nor is there any indication that a governor may not pardon a class of persons."⁸ Likewise, the Supreme Court held that the governor could issue pardons prior to formal indictments for the pardoned offenses: "[T]here is no language whatsoever in Section 77 identifying a particular stage in the criminal proceedings after which a pardon is permissible."⁹

2. ACCEPTANCE OF PARDON

Next, the Commonwealth argues that the dismissal order is invalid because Hughes never formally accepted the pardon granted by the Executive Order, while Hughes asserts that the only requirement is that the defendant must bring the existence

⁷ Fletcher v. Graham was rendered after the Commonwealth filed its initial brief in the present appeal.

⁸ Id. at 358.

⁹ Id. at 359.

of the pardon to the attention of the trial court to obtain its benefit. As with the first issue, the Supreme Court addressed this argument in Fletcher v. Graham.

The Supreme Court, in addressing the acceptance requirement, held that a formal acceptance is not required:

Upon a thorough review of these [foreign] cases, we agree that acceptance of a pardon need not be formal, but may be inferred by the circumstances. This position embodies the notion that a pardon may be rejected, but also the common-sense assumption that such rejection will be the rare exception. Where the circumstances of the case evidence the clear intent of the governor to issue the pardon, and there is no evidence or circumstances from which to infer that it was rejected, acceptance must be assumed.¹⁰

In deciding that acceptance of the pardon was assumed, the Supreme Court held that "there is no indication that any person within its ambit has rejected the pardon."¹¹

In the present case, the Commonwealth argues that under the Fletcher v. Graham analysis, this matter must be remanded to allow it an opportunity to demonstrate, and the lower court to determine, if there is any evidence to infer that Hughes rejected the pardon. We disagree that such fact-finding is necessary in the instant case, as there are no circumstances or evidence showing that there is any question that Hughes

¹⁰ Id. at 362.

¹¹ Id.

accepted the pardon. Indeed, had Hughes evidenced any intention to reject the protection offered by the pardon, he would have contested the circuit court's dismissal and he certainly would not have filed a brief in this appeal opposing the Commonwealth's arguments for reversal.

3. JURISDICTION

For its final argument, the Commonwealth raises the issue of subject-matter jurisdiction. It asserts that the circuit court lacked jurisdiction to dispose of the misdemeanor charges filed against Hughes, as the district court (not the circuit court) has exclusive jurisdiction over such charges pursuant to KRS 24A.110. The Commonwealth relies upon the Supreme Court's opinion in Commonwealth v. Adkins¹² to support this proposition: "KRS 24A.110(2) provides that the district court has exclusive jurisdiction over final disposition of misdemeanors, except when the charge is joined with an indictment for a felony." In this case, the grand jury did not charge Hughes with having committed any felony offenses.

In response, Hughes argues that the special grand jury was under the supervision of the circuit court and would therefore maintain jurisdiction over the charges presented to it, and that it was in the discretion of the circuit court to either retain jurisdiction or remand the matter to the district

¹² 29 S.W.3d 793, 794 (Ky. 2000).

court. Hughes also points out that the Commonwealth is barred from raising this issue on appeal, as it was not previously raised before the lower court and is therefore unpreserved.

Initially, we note that Hughes' preservation argument is not well-taken, as the issue before the Court on this issue relates to subject-matter jurisdiction. "Defects in subject-matter jurisdiction may be raised by the parties or the court at any time and cannot be waived. . . . Specifically, subject-matter jurisdiction may be raised for the first time on appeal."¹³

We agree with the Commonwealth that the circuit court did not have jurisdiction over this case. As the indictment contained only misdemeanor charges, the district court's jurisdiction would necessarily be exclusive.¹⁴ While a remand to the district court will needlessly prolong a case that will immediately be dismissed on the basis of the pardon, we must vacate the circuit court's order as it was without jurisdiction to act.

For the foregoing reasons, the order of the Franklin Circuit Court is vacated, and this matter is remanded to the Franklin District Court for dismissal of the indictment.

ALL CONCUR.

¹³ Privett v. Clendenin, 52 S.W.3d 530, 532 (Ky. 2001).

¹⁴ KRS 24A.110.

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