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DECEMBER 12, 2007

(FILE NO. 2007-SC-0481-D)

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001147-MR

SHANNON GIBSON — APPELLANT

v.

APPEAL FROM GRAYSON CIRCUIT COURT
HONORABLE ROBERT A. MILLER, JUDGE
ACTION NO. 03-CR-00119

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: THOMPSON AND VANMETER; JUDGES; PAISLEY,[1] SENIOR JUDGE.

VANMETER, JUDGE: Shannon Gibson appeals from a Grayson Circuit Court order dismissing an indictment against her without prejudice. The issue we must resolve is

[1] Senior Judge Lewis G. Paisley, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

whether the circuit court abused its discretion in refusing to issue the dismissal with prejudice. Finding no error, we affirm.

In September 2003, Shannon Gibson and Travis Wilson were indicted by the Grayson County Grand Jury for theft of services over $300. The basis of the charge was an alleged diversion of electrical service by the use of a wire on an electrical meter to obtain electricity without it being registered on the meter. The property serviced by the meter was commercial lease space, and the electricity used by Gibson's and Wilson's space was paid for by an adjacent business, Leitchfield Mobility. After a number of continuances, the Commonwealth filed a motion to dismiss in January 2006, approximately ten days before trial. The trial court granted the motion and entered an order dismissing the indictment without prejudice.

Gibson then filed a motion to amend the order to provide that the dismissal was with prejudice. The trial court denied the motion and Gibson appeals.

Gibson advances a number of reasons that her dismissal should be with prejudice, primarily centered around the evidence she expected to introduce at trial to both obtain a not guilty verdict, and "clear her name."

While we have carefully considered the evidence presented, we disagree with Gibson's analysis that the factors set forth under *Sublett v. Hall*, 589 S.W.2d 888 (Ky. 1979), apply herein to require a dismissal with prejudice. Gibson's citation to *Sublett* is based on her argument that CR[2] 41.01(2) authorizes a trial court to impose

[2] Kentucky Rules of Civil Procedure.

"such terms and conditions as [it] deems proper[ ]" on any dismissal not provided in CR 41.01(1). While we acknowledge the Kentucky Supreme Court cited CR 41.01 in *Commonwealth v. Berry*, 184 S.W.3d 63, 65 (Ky. 2005), to support the proposition that the dismissal of a criminal indictment before the swearing of a jury is without prejudice, we do not believe that CR 41.01 is applicable to this criminal case. Specifically, RCr[3] 13.04 applies the Rules of Civil Procedure to criminal cases "to the extent not superseded by or inconsistent with" the criminal rules. The criminal rules in fact contain a rule which, like CR 41.01(1), expressly addresses "voluntary" dismissals by the "plaintiff" in that under RCr 9.64, "[t]he attorney for the Commonwealth, with the permission of the court, may dismiss the indictment . . . prior to the swearing of the jury[.]"

The other difficulty in applying the *Sublett* factors to this case is that *Sublett* was a civil case. We have found, and Gibson has cited, no Kentucky case, reported or unreported, which applies these factors to a criminal dismissal.

The issue in this case, as we view it, is whether a trial court has the discretion to order, over the objection of the Commonwealth, that a dismissal of a criminal indictment is with prejudice. Again, we have found, and the parties have cited, no Kentucky case which directly addresses this issue. Further, even if we assume without deciding that dismissal with prejudice is authorized, no Kentucky case has set forth any parameters to be considered by the trial courts in making such determination.

In *Hoskins v. Maricle*, 150 S.W.3d 1 (Ky. 2004), the Kentucky Supreme Court took pains to delineate the separation of powers between the respective branches of

[3] Kentucky Rules of Criminal Procedure.

government with respect to criminal offenses, noting that "'Kentucky is a strict adherent to the separation of powers doctrine.'" *Id.* at 11 (quoting *Diemer v. Commonwealth*, 786 S.W.2d 861, 864 (Ky. 1990)). Thus, the power to define crimes and assign their penalties belongs to the legislative branch; the power to charge persons with crimes and to prosecute those charges belongs to the executive branch; and the power to conduct criminal trials, to adjudicate guilt, and to impose sentences within the penalty range prescribed by the legislature belongs to the judicial branch of government. *Id.* at 11-12.

Because of the separation of powers, a trial court has limited power, "usually related to a defendant's claim of a denial of the right to a speedy trial, . . . to dismiss, amend, or file away before trial a prosecution based on a good indictment." *Id.* at 13. Thus, a trial court does not have authority to dismiss criminal charges prior to trial without the Commonwealth's consent. *Commonwealth v. Isham*, 98 S.W.3d 59 (Ky. 2003). In this same vein, "it 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). Thus, for us to adopt Gibson's analysis and direct a trial court to evaluate evidence in advance of trial would violate the separation of powers.

Finally, KRS 505.030 appears to curtail the court's ability to limit further prosecutions for an indictment which was dismissed under RCr 9.64. This statute sets out four circumstances which serve to bar a subsequent prosecution:

(1) The former prosecution resulted in:

(a) An acquittal, or

(b) A conviction which has not subsequently been set aside; or

(2) The former prosecution resulted in a determination by the court that there was insufficient evidence to warrant a conviction; or

(3) The former prosecution was terminated by a final order or judgment, which has not subsequently been set aside, and which required a determination inconsistent with any fact or legal proposition necessary to a conviction in the subsequent prosecution; or

(4) The former prosecution was improperly terminated after the first witness was sworn but before findings were rendered by a trier of fact. Termination under either of the following circumstances is not improper.

(a) The defendant expressly consents to the termination or by motion for mistrial or in some other manner waives his right to object to the termination; or

(b) The trial court, in exercise of its discretion, finds that the termination is manifestly necessary.

Only KRS 505.030(2) approaches the scenario implicitly urged by Gibson, *i.e.*, "a determination by the court that there was insufficient evidence to warrant a conviction[.]" The commentary to KRS 505.030, however, makes clear that this determination is made only when the trial court, "after hearing the evidence, [concludes] that the defendant's conviction would have been unwarranted." Such a situation would occur in a criminal trial after the presentation of evidence with a motion for a directed verdict. *See Isham*, 98 S.W.3d at 62.

We are aware that in certain other jurisdictions, a trial court's dismissal of a criminal case with prejudice has been upheld as incident to the court's inherent power to "administer justice." *See, e.g., State v. Moriwake*, 65 Haw. 47, 55-56, 647 P.2d 705, 711-12 (1982); *State v. Gonzales*, 132 N.M. 420, 49 P.3d 681, (App. 2002); *State v. Witt*, 572 S.W.2d 913, 917 (Tenn. 1978); *State v. Sauve*, 164 Vt. 134, 140, 666 A.2d 1164, 1167 (1995); *see generally*, Annotation, *Propriety of Court's Dismissing Indictment or Prosecution Because of Failure of Jury to Agree after Successive Trials*, 4 A.L.R.4th 1274 (1981). The common thread in most of those cases, however, has been a consideration of whether further prosecution should be barred based on one or more mistrials due to a deadlocked jury. We will leave for another day whether a Kentucky trial court has such discretion since the facts under the present case involve dismissal prior to trial.

We are not unsympathetic to Gibson's plight in regard to the fact that her criminal record may not be expunged of the fact that she was charged with a felony that was dismissed. *See* KRS 431.076. Her remedy in this regard, however, lies with the legislature rather than with the courts.

The order of the Grayson Circuit Court is affirmed.

PAISLEY, SENIOR JUDGE, CONCURS.

THOMPSON, JUDGE, CONCURS WITH RESULT ONLY AND FILES SEPARATE OPINION.

THOMPSON, CONCURRING: I concur with this result, however, I disagree with my esteemed colleagues as to the interpretation of the law. Further, I desire to express my frustration with the current status of Kentucky law on this subject.

The majority opinion in this matter, I believe, proposes to establish a broad principle that the trial court has no authority to dismiss with prejudice an indictment absent a request from the Commonwealth. As recited in RCr 9.64, this is the general rule. The courts, however, have recognized some limited power to dismiss by the judiciary. The most prevalent wherein there has been a constitutional infringement upon the rights of the defendant either to a speedy trial or other constitutional infringements. *U.S. v. Gillock*, 771 F.Supp. 904, 908 (W.D. Tenn. 1991)

In *Commonwealth v. Baker*, 11 S.W.3d 585 (Ky. App. 2000), this court held that the inherent power of the court included the supervisory power to dismiss an indictment where there had been a flagrant abuse of the grand jury process that resulted in both actual prejudice and deprived the grand jury of an autonomous and unbiased judgment. Nevertheless, in *Baker*, the court held that dismissal under the facts was an abuse of discretion since there was no indication that the evidence had been irrevocably tainted.

I believe there is an inherent power of the courts to efficiently and effectively administer justice, and that whether a case is dismissed with or without prejudice, would come within the purview of that power.

In many other states, dismissals with prejudice have been granted by courts and have been upheld on appeal. *See e.g.*, *State v. Jones*, 601 A.2d 502 (Vt. 1991). *State v. Marquess*, 168 Ariz. 123, 811 P.2d 375 (Ariz. App. 1991). *State v. Sadler*, 920 So.2d 647 (Fla. App. 5 Dist. 2005). *People v. Dowell*, 199 Mich. App. 554, 502 N.W.2d 757(Mich. App. 1993). *State v. Hart*, 723 N.W.2d 254 (Minn. 2006). *State ex rel. Torres v. Montana Eighth Judicial Dist. Court, Cascade County*, 877 P.2d 1008 (Mont. 1994). *State v. Simmons*, 752 A.2d 724 (N.J. Super.App. 2000).

In addition, many other state cases reveal the authority to dismiss, however, in those cases the court stated that the facts do not justify dismissal with prejudice. *See e.g.*, *State v. Naple*, 143 P.3d 358 (Wyo. 2006). *State v. Tweeten*, 679 N.W.2d 287 (N.D. 2004). *State v. Davis*, 248 Wis.2d 986, 637 N.W.2d 62 (Wis. 2001). *Commonwealth v. Corbett*, 533 N.E.2d 207 (Mass. App. Ct. 1989). *State v. Bolen*, 13 P.3d 1270 (Kan. 2000).

The constitutions of many of these other states are substantially similar to our constitution. Therefore, it is my belief, that the judiciary does have the power to dismiss with prejudice. However, our judiciary has not addressed this problem.

It has been stated that "a grand jury can indict a ham sandwich", and this is true. Many times in the grand jury process the defendant is unaware that he is the subject of a pending indictment. He can present no defense. On many occasions in the grand jury process, the evidence produced is embellished or perjured by a witness with an

agenda against the defendant. On many occasions, the person is indicted based upon inaccurate and untruthful hearsay testimony.

Then, after being unjustly indicted, when the defendant is ready to have his day in court, the overworked Commonwealth Attorney discovers that the charges cannot be sustained before a jury. The Commonwealth Attorney then moves the court for a dismissal without prejudice, and that motion is granted. The defendant wrongfully indicted, forever, must carry the burden of a felony indictment charge. This criminal record, even though dismissed, causes damage in employment opportunities, credit opportunities, and other damages to this wrongfully indicted person.

I believe that our judiciary should propose a criminal rule allowing dismissal of an indictment with prejudice at the discretion of the trial court after an evidentiary hearing based upon the evidence presented by the Commonwealth.

We must remember that felonies have no statute of limitations. We must remember that newly discovered evidence, on some occasions, can cause a reindictment. Although we must be careful not to infringe upon the right of the prosecution to bring the guilty to justice, we must balance that need with the injustice which has occurred to the wrongfully charged.

I would encourage prosecutors to utilize ultimate good faith, and to move the court for dismissal with prejudice if the Commonwealth Attorney believes he will never reindict the defendant. I encourage the trial court and defense counsel to attempt to secure agreed orders with time limits which would allow for conversion to a dismissal

with prejudice if no reindictment has occurred within a reasonable amount of time after the dismissal without prejudice.

It is my opinion that a criminal rule proposed by our judiciary could be rejected by the legislature when presented to the appropriate committees within the Senate and the House. Therefore, there would be no infringement upon the legislative branch by utilization of an appropriate criminal rule. A possible criminal rule to begin to address this injustice would be a rule which would cause all Class D felonies which were dismissed without prejudice to be converted to a dismissal with prejudice if no reindictment within two years.

I concur with the conclusion of my esteemed colleagues when they state that no Kentucky case has set forth any parameters to be considered by the trial court when making such a determination. I further concur with the result, and I agree with the statement that we are not unsympathetic to Gibson's plight in regard to the fact that a criminal record may not be expunged of the fact that she was charged with a felony that was dismissed. I disagree wherein my colleagues believe that the remedy in this regard, however, lies with the legislature rather than with the courts.

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