COMMONWEALTH OF KENTUCKY
SUPREME COURT
CASE NO. 10-SC-74-DG

COMMONWEALTH OF KENTUCKY **APPELLANT**

V. On Discretionary Review from the Kentucky Court of Appeals
Appeal from Shelby Circuit Court
Hon. Charles Hickman, Judge
Indictment No. 08-T-855

ANGELA D. PETERS **APPELLEE**

BRIEF OF APPELLEE, ANGELA D. PETERS

The undersigned attorney for Appellee, Angela D. Peters, hereby certifies that copies hereof were on April 8, 2011, served by mail, postage pre-paid, upon the Hon. Courtney J. Hightower, Assistant Attorney General, Office of Criminal Appeals, Office of the Attorney General, 1024 Capital Center Drive, Frankfort, Kentucky, 40601; Hon. Charles Hickman, Judge, Shelby Circuit Court, 501 Main Street, Shelbyville, Kentucky, 40065; Hon. Donna G. Dutton, Judge, Shelby District Court, 501 Main Street, Shelbyville, Kentucky, 40065; Hon. John C. Robinson, Shelby County Attorney's Office, 501 Main Street, Suite 10, Shelbyville, Kentucky, 40065; Hon. Laura Donnell, Commonwealth Attorney, 544 Main Street, Shelbyville, Kentucky, 40065; and Kathy Nichols, Shelby Circuit Clerk, 501 Main Street, Shelbyville, Kentucky, 40065.

The undersigned further certifies that the record on appeal was not withdrawn by Appellee.

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INTRODUCTION

Angela Peters, hereinafter Appellee, is a Defendant in an action in the Shelby District Court, presided over by the Hon. Donna G. Dutton. The Commonwealth of Kentucky, hereinafter Appellant, obtained a Writ of Prohibition against the Appellee and Judge Dutton in the Shelby Circuit Court, Hon. Charles Hickman presiding. The Appellee filed an appeal as a matter of right with the Kentucky Court of Appeals, which reversed the decision of the Circuit Court on January 8, 2010. The Appellant moved for Discretionary Review with this Court, which was granted. This Brief is in response to the Appellant's Brief, filed herein on January 10, 2011.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

COUNTERSTATEMENT OF THE CASE

The Defendant in the original case, who is the Appellee herein, is Angela Dawn Peters. On February 25, 2008, Ms. Peters was charged with operating a motor vehicle under the influence of alcohol, first offense. Ms. Peters retained counsel to represent her in this action. At her arraignment on March 25, 2008, the Defendant entered a not guilty plea, waived a formal reading of the charges, and requested the matter be set for a pre-trial conference. At that time, the Commonwealth objected to a pre-trial conference and stated that they would not produce the arresting officer, Deputy Lauren Batts of the Shelby County Sheriff's Office. After considerable argument, the Defendant was permitted to and did file on April 17, 2008 a Response to the Commonwealth's objection to the pre-trial conference. Thereafter, on May 12, 2008, the Commonwealth filed a document entitled Commonwealth's Response/Position Statement regarding Pre-trial Conferences and the Compelled Production of Witnesses at same. This triggered an additional document by the Defendant, entitled Reply to Commonwealth's Response regarding Pre-trial Conferences and the Compelled Production of Witnesses, filed on or about June 4, 2008. On July 15, 2008, District Judge Dutton issued an Order stating, in part, that "the production of prosecuting witnesses (*i.e.*, the officer) prior to trial has proven to be the most effective method used in the 53rd Judicial District to expedite cases and aid in the disposition of cases," as well as "[a]dditionally, pre-trial conferences in Shelby County are currently held informally, off the record, without the presence of the Judge. However, if necessary, pre-trial conferences can be held formally, on the record, in the presence of the Judge."

After receiving this Order, on or about July 16, 2008, the Commonwealth filed a Motion to Clarify Court's Order dated July 15, 2008. This was placed on the Court's docket for July 29, 2008, when the Court declined to issue a second formal written opinion, but affirmed her prior Order and ordered the Commonwealth to produce the arresting officer at a pre-trial conference. On or about August 4, 2008, the Commonwealth filed a Writ of Prohibition in the Shelby Circuit Court. The Defendant filed a Response on or about August 13, 2008. The Writ of Prohibition was granted by the Shelby Circuit Court on August 29, 2008. This Writ of Prohibition states, in part, that "the District Court's Order is erroneous and unsupported by law ... the irreparable harm and great injustice herein are that the precedential effect of the District Court's Order would not only effect [sic] the Commonwealth's prosecution of Angela Peters, but also would impact every other pending and future prosecutions undertaken by the Commonwealth in the 53rd Judicial District," as well as "[i]t is worrisome that the District Court ordered the police officer's appearance to engage in what would essentially be an unsworn deposition regarding the case," and ultimately that "[t]here is no basis found in the Kentucky Rules of Criminal Procedure or in applicable case law which would support the District Court's Order." The Defendant appealed said Writ of Prohibition to the Kentucky Court of Appeals, which overturned same by Opinion rendered January 8, 2010. The Commonwealth then requested Discretionary Review by the Kentucky Supreme Court, which was granted.

Although this is a Review of the Court of Appeals' Opinion reversing the Shelby Circuit Court's Writ of Prohibition, the underlying and significant question at hand regards the inherent power of a District Judge in his/her Courtroom to regulate procedures that are well within his/her jurisdiction.

ARGUMENT

I. THE COMMONWEALTH CORRECTLY STATES THAT THEY DO NOT HAVE AN ADEQUATE REMEDY ON APPEAL.

In her original appeal from the Shelby Circuit Court, the Appellee argued that the Writ of Prohibition entered by said Court against the Shelby District Court was premature, in that an adequate remedy on appeal, or otherwise, existed. However, after considering the pleadings herein and understanding the logic of the Opinion Reversing and Remanding entered on January 8, 2010 by the Kentucky Court of Appeals, the Appellee now concedes this issue. However, the Appellee still strongly believes that the entry of the Writ of Prohibition was improper on multiple grounds.

II. THE KENTUCKY COURT OF APPEALS CORRECTLY APPLIED THE APPROPRIATE STANDARD OF REVIEW.

Before arguing the points on which the parties disagree, the questions of law where the parties agree should be stipulated. As has been previously argued in the pleadings, Writ of Prohibition cases are divided into two classes: the first being where the Court is acting outside of its jurisdiction; and the second being where the Court is acting within its jurisdiction, but erroneously. Since all parties seem to agree that the Shelby District Court was acting within its jurisdiction here, the question then becomes whether it was acting erroneously, which it was not.

In order for the reviewing Court to issue a Writ of Prohibition, it must find that

there exists no adequate remedy, by appeal or otherwise, and great injustice or irreparable injury will result if the Petition is not granted. Hoskins v. Maricle, 150 S.W. 3d 1, 10 (Ky. 2004). As is now conceded by the Appellee, and ruled upon by the Kentucky Court of Appeals, it is apparent that no adequate remedy, by appeal or otherwise, exists here. Whether or not the Commonwealth's seeking a Writ of Prohibition was appropriate, therefore, depends on whether or not great injustice or irreparable injury would result in the absence of the Writ. Here begins the confusion.

The Appellant's argument that the Court of Appeals applied the incorrect standard of review is somewhat unclear. Their Brief states "[a]ccordingly, the proper standard of review in this case was whether the Shelby Circuit Court abused its discretion when it granted the Commonwealth's Writ of Prohibition." (Appellant's Brief, page 4). Later, the Appellant states "[a]ccordingly, the Shelby Circuit Court's finding of great and irreparable harm should have been reviewed for clear error by the Kentucky Court of Appeals." The Appellant apparently believes there may be some "blending" of the two, distinct standards of review that are appropriate on each level of review here—one when issuing a Writ, and the other when appealing a Writ. But that belief is clearly wrong.

The first standard of review to be examined is that used by the Shelby Circuit Court in granting the Writ of Prohibition against the Shelby District Court. In order for this extraordinary remedy to be granted, the Circuit Court must establish that the lower Court acted in clear error. Grange Mutual Insurance Co. vs. Trude, 151 S.W. 3d 803 (Ky. 2004). This case states "but the requirement that the Court must make an actual finding of great and irreparable harm before exercising discretion as to whether to grant the Writ then requires a third standard of review, *i.e.*, ... clear error...."

This is not the standard of review, however, for an Appellate Court to use in determining whether the Writ of Prohibition was appropriate. In reviewing the decision of the Shelby Circuit Court, the Kentucky Court of Appeals is charged with determining whether an abuse of discretion occurred by the Circuit Court. In the case of Corns vs. Transportation Cabinet, Dept. of Highways, Commonwealth of Kentucky, 814 S.W. 2d 575 (Ky. 1991), the Supreme Court opines "we are called upon to decide whether or not the Court of Appeals abused its discretion by granting a Writ of Prohibition...." Necessarily, and as explained above, this Court must also determine whether or not the Shelby District Court's Order requiring the officer to appear for a pre-trial conference was in clear error. But the standards of review are very different, and must be applied correctly on appeal.

III. THE KENTUCKY COURT OF APPEALS CORRECTLY OVERTURNED THE WRIT OF PROHIBITION ENTERED BY THE SHELBY CIRCUIT COURT AGAINST THE SHELBY DISTRICT COURT.

As has just been shown, the Shelby Circuit Court must find clear error by the Shelby District Court in order to grant a Writ of Prohibition. Clear error occurs only when there is no substantial evidence in the record to support to the findings of the trial Court. MPS vs. Cabinet for Health and Family Services, 979 S.W. 2d 114, 116 (Ky., 1998). Fortunately, the Shelby District Court issued a very clear, concise, and well-supported written Opinion specifically justifying its Order. Using the clear error standard, the Shelby Circuit Court must determine that the Appellant would suffer great and irreparable injury should a Writ of Prohibition not be entered. In Bender v. Eaton, 343 S.W. 2d 799 (Ky., 1961), the Court of Appeals opined that the reviewing Court must

be cautious and conservative, both in entertaining petitions for and granting Writs of Prohibition. The Bender Court also ruled that if the movant cannot show it will suffer great and irreparable injury, the petition should be dismissed forthwith. Additionally, this Court has long held that a Writ or Prohibition is an inappropriate way to dictate to a lower Court how to act or to interfere with its exercise of discretion. Stallard vs. McDonald, 826 S.W. 2d 840, 842 (Ky., 1992), citing Humana of Kentucky, Inc. vs. NKC Hospitals, Inc., 751 S.W. 2d 369, 374 (Ky., 1988).

Great and irreparable injury occurs when "the failure to succeed in the particular case should inevitably be followed by consequences of great and ruinous nature." Osborn vs. Wolfford, 39 S.W. 2d 672, 673 (Ky., 1931). In other words, catastrophic results must be shown before a Writ of Prohibition can be entered. There has not been a sufficient showing of these requirements here. If the Commonwealth had complied with the District Court's Order, the arresting officer in the underlying case would have appeared before the Court, where a pre-trial conference could have been conducted on the record. All applicable evidentiary and privilege rules would have protected the officer's testimony. In fact, a pre-trial conference on the record provides additional protection to all parties, due to the fact that the testimony is under oath and recorded.

A pre-trial conference with the arresting officer is hardly a novel idea. In fact, it is so exceedingly common in District Courts in the Commonwealth of Kentucky that is has seldom been questioned and, in fact, is preferred and used by virtually every Judge, prosecutor, and defense attorney. It has long been standard procedure in the Shelby District Court for defense counsel to conduct pre-trial conferences with the officer, typically with the prosecutor present. Therefore, it is erroneous for the Shelby Circuit

Court to grant a Writ of Prohibition based on the idea that great and irreparable injury to the Commonwealth would occur should a pre-trial conference take place in the underlying case. They take place every day across the Commonwealth, and every day Shelby District Court has been in session for as long as anyone can remember. It is simply unfathomable to believe that it would be "ruinous" if the Defendant Peters were allowed to have a pre-trial conference when that opportunity is afforded to every other Defendant that appears before the Shelby District Court.

This was best pointed out by the Kentucky Court of Appeals when they opined "[w]e are not persuaded that the potential results enumerated by the Circuit Court and the Commonwealth qualify as great and irreparable harm — much less harm at all." (Order Reversing and Remanding, Commonwealth of Kentucky, Court of Appeals, page 5).

IV. ANY HARM ALLEGED BY THE COMMONWEALTH IS PURELY SPECULATIVE.

The arguments presented by the Appellants are based on conjured-up fears of inappropriate discovery, which would encourage unfettered "fishing expeditions" or allow a defense attorney to become a witness at trial. (Writ of Prohibition, pp. 4, 5). As opined in Parsley vs. Knuckles, 346 S.W. 2d 1, 3 (Ky., 1961), great and irreparable injury must be "shown by specific allegations of facts and acceptable proof of them." Such is hardly the case in this action. Unfounded fear of possible, future great and irreparable injury and the actual existence of such injury are very different things. The reason the Appellant can only allege possible future injury is because no present injury has occurred as a result of the Shelby District Court's well-reasoned Order.

The Appellant argues that no witness, not even a police officer, can be compelled

to Court to testify by surmising that "this infringement on a potential witness' liberty would also amount to great and irreparable harm in the future." (Appellant's Brief, page 7). However, as opined by the Kentucky Supreme Court in National Gypsum Company vs. Corns, 736 S.W. 2d 325 (Ky., 1987), "so long as a trial Court is acting within its jurisdiction, error or probable error, standing alone, does not provide a basis for the issue of a Writ...." The Writ of Prohibition issued by the Shelby Circuit Court simply speculates that a Defendant might ask an inappropriate discovery question, or that the potential exists for an infringement on the rights of the officer to occur. However, a hypothetical potential for future misconduct is not, by itself, sufficient grounds for a Writ of Prohibition.

The Shelby District Court acted within its authority to order the arresting officer to appear at a pre-trial conference. As has been stipulated by all parties involved herein, there is not a specific Kentucky Rule of Criminal Procedure regarding the attendance of an arresting officer at a pre-trial conference. Following that logic, police officers would never have to appear before a Court to explain the specifics regarding the investigation and/or arrest of a Defendant. If the allegations made by the Appellant are true, an officer would not need to appear before the Court to answer questions presented to him/her at a motion to suppress, preliminary hearing, or trial. Obviously, when taken to its logical conclusion, this argument fails. Certain information is known only by the arresting officer, and one holding a position of authority in law enforcement must be subject to appear in Court from time-to-time.

The Appellant alleges that the appearance of officers at pre-trial conferences is simply a courtesy and convenience on the part of the Commonwealth. (Appellant's Brief, pp. 7-8). But Appellee maintains that this so-called "courtesy and convenience" is much more beneficial to the Commonwealth. Specifically, if a Defendant is unable to determine the facts of a case by speaking with the officer, then the Commonwealth would be overwhelmed with lengthy discovery and other motions. Nevertheless, this is not the question at hand. Although the vast majority of all pre-trial conferences conducted in District Court are informal in nature, the Appellee is not attempting to enforce her right to an informal discussion with the officer. The Appellee simply asserts the proposition, supported by Kentucky law, that a District Court may order an officer to appear and give testimony at a routine pre-trial conference. The Appellee agrees that there is no "automatic" right to informal discovery in criminal cases. However, from time-to-time, a District Judge has the authority to order an officer to appear in Court for a pre-trial conference when the Judge believes it is an appropriate step to promote a fair and expeditious trial.

That is the true issue at the heart of this case, and the law supporting this proposition is overwhelming. RCr 7.24 allows a Defendant to be provided with numerous pieces of information, all of which is discoverable and can be obtained easily through the testimony of the arresting officer. RCr 8.03 allows the Court, upon its own motion or motion of any party, to order an individual to appear for one or more conferences to consider such matters that would promote a fair and expeditious trial. Therefore, where a District Court believes that an officer's appearance at a pre-trial conference to give information about the case would promotes a fair and expeditious trial

of the matter, it is certainly within that Judge's power to order the officer to appear.

Finally, RCr 13.04 clearly grants the District Court authority to employ the Rules of Civil Procedure in all criminal proceedings to the extent not superseded by or inconsistent with the Rules of Criminal Procedure. Therefore, unless directly contradictory to already existing rules, all the Rules of Civil Procedure apply to criminal cases, and no argument has been made that the Civil Rules would not apply in this instance. The Kentucky Rules of Civil Procedure address pre-trial conferences in much more detail. The Civil Rules also specify the great discretion afforded to a presiding Court in their application. CR 16 regarding pre-trial procedures states that in any action "the Court may in its discretion direct the attorneys for the parties to appear before it in a conference to consider ... (f) such other matters as may aid in the disposition of the action." Additionally, CR 16(2) states that "the Court shall make an Order which recites the actions taken at the conference...." Therefore, it is clearly within a Court's discretion, even if not a Criminal Rule, to create such Orders as would expedite cases and aid in the disposition of the action. There is no law or authority preventing a District Judge from invoking the Kentucky Rules of Civil Procedure and, in accordance with CR 16, issuing an Order for an arresting officer to appear at a pre-trial conference when the Court believes that such an Order would disclose information necessary to comply with the Criminal Rules and would aid in the disposition of the action and expedite the case.

Accordingly, the Appellee is not demanding the absolute right to question an officer informally at a pre-trial conference in order to obtain information that could be used in her defense. She simply contends that the law in Kentucky allows a District Court Judge the ability to enter such an Order where necessary and appropriate.

V. THE SHELBY DISTRICT COURT'S ORDER IS NOT A SPECIAL CASE AS SET OUT IN BENDER VS. EATON, THE ORDER DOES NOT RESULT IN A SUBSTANTIAL MISCARRIAGE OF JUSTICE, AND CORRECTION OF THE ALLEGED ERROR WAS NOT NECESSARY AND APPROPRIATE IN THE INTEREST OF ORDERLY JUDICIAL ADMINISTRATION.

The Appellant continues to define the Rules of Criminal Procedure narrowly and in a manner that is consistent with the Commonwealth's argument. As previously demonstrated, both the Kentucky Rules of Criminal Procedure and the applicable Rules of Civil Procedure expressly grant Judges the authority to issue appropriate Orders in their own courtrooms as the need arises. The Appellant's argument that a substantial miscarriage of justice will result fails by the same defects that preclude a finding of great harm and irreparable injury here. The Appellee's argument defeats both bases for supporting the Writ of Prohibition. The Appellant has cited no facts, law, or circumstances that render the case at hand a "special case" pursuant to Bender vs. Eaton that would justify the Shelby Circuit Court's Writ of Prohibition against the Shelby District Court.

VI. THE WRIT OF PROHIBITION ENTERED BY THE SHELBY CIRCUIT COURT DENIED THE DEFENDANT, ANGELA DAWN PETERS, HER RIGHT TO EQUAL PROTECTION UNDER THE LAWS OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND SECTION 3 OF THE KENTUCKY CONSTITUTION.

The Appellant has made no attempt to explain why the Commonwealth is attempting to define and apply the Rules of Procedure narrowly to only one Defendant, the Appellee. By their silence in these pleadings and their continued and current actions in the Shelby District Court, the Appellant concedes the fact that having the officer present at a pre-trial conference is a continuing practice for all other Defendants except

the Appellee. This is an unjust and unequal application of the laws of our Commonwealth. Section One of the Fourteenth Amendment of The United States Constitution states, in part "...nor shall any state deprive any person of life, liberty or property without the due process of law; nor deny to any person within its jurisdiction equal protection of the laws." Additionally, Section 3 of The Kentucky Constitution states "all men, when they form a social compact, are equal; and no grant of exclusive, separate public emoluments or privileges shall be made to any man or set of men...."

In its Writ of Prohibition, the Shelby Circuit Court, adopting the arguments of the Commonwealth, states "the District Court ordered the attendance of the police officer at the pretrial conference on the basis of long standing practice and tradition ...," and "the practice of police officers attending pretrial conferences in the 53rd Judicial Circuit seems to be a courtesy and a convenience on the part of the Commonwealth to undertake an informal disclosure of discovery pursuant to RCr 7.24. These informal conferences minimize written discovery requests and responses on the part of the Commonwealth and local defense counsel thereby expediting the transfer of information of disposition of cases." (Writ of Prohibition, pages 2, 3). Therefore, taking the best argument in support of the Writ of Prohibition made by the Shelby Circuit Court and the Commonwealth, it is clear that it has been a long-standing tradition to allow pre-trial conferences to occur with a police officer. The reasons for allowing these conferences to occur is clearly defined by the Writ of Prohibition itself, and this "accommodation" continues to be offered to all Defendants that currently present themselves before the Shelby District Court, with the exception of the Appellee. By having an officer present to discuss a case at an informal pre-trial conference with all other Defendants in District

Court, except for the Appellee, the Commonwealth has denied the Appellee equal protection under our laws due to the fact that she is being treated differently than all other similarly-situated Defendants in the same Court. This is so even if the Shelby District Court Judge somehow cannot order an officer to appear a pre-trial conference. The Writ of Prohibition entered by the Shelby Circuit Court has been applied to exactly one Defendant—the Appellee. The Appellee has become "unequal" with others similarly-situated and, therefore, the Writ of Prohibition denied the Appellee equal protection under the law. The Court of Appeals' reversal of the improper Writ should be affirmed accordingly.

CONCLUSION

The Appellant attempts to convince this Honorable Court that a standard pretrial procedure all across the Commonwealth, which continues to this very day in the Shelby District Court, will somehow cause great harm and irreparable injury, or a substantial miscarriage of justice, if provided to one more Defendant—the Appellee. This despite the fact that a District Judge is granted inherent authority to create orders that will expedite the Court's docket and promote fairness. The Rules of Procedure, both Criminal and Civil, are intentionally broad because it would be impossible to propound a specific Rule contemplating every conceivable situation that comes before the District Court. For all the reasons stated herein and in the briefing below, it was completely unfounded and inappropriate for the Shelby Circuit Court to enter a Writ of Prohibition against the Shelby District Court in this instance. The Writ of Prohibition was an abuse of discretion by the Shelby Circuit Court, and this Honorable Court should affirm the decision of the Kentucky Court of Appeals overturning same.

Respectfully submitted,

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