COMMONWEALTH OF KENTUCKY
SUPREME COURT
2011-SC-000157

COMMONWEALTH OF KENTUCKY — APPELLANT

v.

Certification of Law from Jefferson District Court
Division 304
Honorable Sheila Collins, Judge
File No. 11-M-004285

MICHAEL L. WILSON — APPELLEE

AMICUS CURIAE BRIEF OF R. DAVID STENGEL, COMMONWEALTH'S ATTORNEY 30TH JUDICIAL CIRCUIT

Submitted by:

R. DAVID STENGEL
Commonwealth's Attorney

Dorislee Gilbert

DORISLEE GILBERT
Assistant Commonwealth's Attorney
514 West Liberty St.
Louisville, KY 40202
(502) 595-2300

CERTIFICATE OF SERVICE

The Undersigned does hereby certify that copies of this brief were served upon the following named individuals by mail or delivery on January 3, 2012: Hon. Sheila Collins, Judge and Hon. Erica Lee Williams, Judge, Jefferson District Court, Hall of Justice, 600 West Jefferson Street, Louisville, KY 40202; Hon. Michael J. O'Connell and Hon. David A. Sexton, Counsel for Appellant, Fiscal Court Building, 531 Court Place, Suite 900, Louisville, KY 40202; Hon. Paul Gold, Counsel for Appellee, Suite 320, Republic Plaza, 200 South Seventh Street, Louisville, KY 40202; and Hon. Jack Conway, Attorney General, 700 Capitol Avenue, Suite 118, Frankfort, KY 40601. The undersigned does also certify that the record on appeal was not withdrawn in preparation of this brief.

Dorislee Gilbert
Dorislee Gilbert

STATEMENT OF POINTS AND AUTHORITIES

PURPOSE OF BRIEF

ARGUMENT

PURPOSE OF BRIEF

This is the amicus curiae brief of R. David Stengel, Commonwealth's Attorney for the 30th Judicial Circuit. As head of the busiest felony prosecutorial office in Kentucky and a representative of the people of Jefferson County, the Commonwealth's Attorney has a supreme interest in the process by which properly obtained arrest warrants may be set aside. It is the Commonwealth's Attorney's position that ex parte motions by criminal defendants to set aside arrest warrants without notice to and an opportunity for the Commonwealth to be heard are improper and contrary to Kentucky law.

ARGUMENT

Between January 2011 and November 2011, 2,512 cases were presented before the Jefferson County Grand Jury for a total of 10,033 charges. Five hundred thirty-nine of those charges were termed violent offense charges—murder, first-degree manslaughter, first-degree assault, first-degree rape, first-degree robbery, or first-degree sodomy charges. One hundred ninety-eight of the charges were considered crimes against children charges. Also during this time, the grand jury requested 330 bench warrants related to these cases. 2011 Monthly Final Reports of the Jefferson County Grand Jury, available at http://www.louisvilleprosecutor.com/circuit_court_reports.htm. Many of the cases indicted by the Grand Jury during this time came before that body through Jefferson District Court. Given the substantial number of serious felony crimes prosecuted by the Commonwealth's Attorney's Office and the number of such cases in which the Grand Jury requests warrants authorizing arrests of indicted individuals as well as the number of those cases which reach the grand jury through Jefferson District Court, the procedure by which validly issued arrest warrants are being set aside in the Jefferson

District Court is of supreme interest to the Commonwealth's Attorney. Many of the attorneys practicing criminal defense law in the Jefferson District Court are the same attorneys practicing criminal defense law in the Jefferson Circuit Court, and the Commonwealth's Attorney fears it is only a matter of time before the ex parte procedure engaged in by the Jefferson District Court leaks into the Jefferson Circuit Court.

The Commonwealth's Attorney has received and reviewed the "Brief for the Commonwealth" submitted by Attorney General Jack Conway and Jefferson County Attorney Michael J. O'Connell. The Commonwealth's Attorney adopts the arguments made in that brief, but believes that because of his unique position and interest in what occurred, this brief is necessary to add to and address other issues. The ex parte procedure that has apparently become common practice in the Jefferson District Courts is improper and should not be condoned by this Court. If this Court affirms that practice, it is only a matter of time before that practice becomes commonplace in the Jefferson Circuit Courts, where grand jury bench warrants, like the 330 issued this year, will be under attack, where the people of the Commonwealth will be at risk because violent offenders are being released without the Court being adequately informed about the facts and protections necessary, and where the appearance and rendition of justice will be marred by unnecessary ex parte communications.

There is no Kentucky case or statute that specifically addresses the practice undertaken in the Jefferson District Courts, whereby arrest warrants are routinely set aside without notice to or an opportunity to be heard by the Commonwealth. However, this procedure is contrary to the tradition of our adversarial criminal justice system. It interferes with the Commonwealth's obligations under the Crime Victims Bill of Rights.

It is inconsistent with the procedures that would apply for a change of bond upon arrest. It robs the public of its right to an open court and injures the truth-seeking mission of justice in our courts, which is best served by open courts.

I. The ex parte proceeding below denigrates the adversarial nature of our criminal justice system.

"Our adversary system is designed around the premise that the parties know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief." Castro v. United States, 540 U.S. 375, 381-383, 124 S.Ct. 786, 157 L.Ed.2d 778 (2003). Thus, "we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present." Greenlaw v. United States, 554 U.S. 237, 243, 128 S.Ct. 2559, 2564, 171 L.Ed.2d 399 (2008). Accordingly, "[a] basic precept of American jurisprudence is that everyone is entitled to present their side of a dispute." Whittington v. Cunnagin, 925 S.W.2d 455, 460 (Ky. 1996) (King, dissenting). And "[w]hile defendants have no duty to assist the State in proving their guilt, they *do* have the duty to refrain from acting in ways that destroy the integrity of the criminal-trial system." Davis v. Washington, 547 U.S. 813, 833. 126 S.Ct. 2266, 2280 (2006). "The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, . . ." United States v. Nixon, 418 U.S. 683, 709, 94 S.Ct. 3090, 3108, 41 L.Ed.2d 1039 (1974).

> "We have elected to employ an adversary system of criminal justice in which the parties contest all issues before a court of law. The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts."

Id. at 709, 94 S.Ct. at 3108. "The purpose and existence of the courts is for the ascertainment of the truth and the administration of justice, and this can only be done fairly and impartially when persons having knowledge of the transactions inquired of are brought before the courts for examination, without hindrance or obstruction from any one." Henderson v. Commonwealth, 218 S.W. 53, 56, 188 Ky. 232 (Ky. App. 1919). In other words, "[w]hen the facts of a case have not been examined, there can be little confidence in the result achieved." Whittington, 925 S.W.2d at 460 (Ky. 1996) (King, dissenting).

"[E]xperience tells us that ex parte statements are too uncertain and unreliable to be considered in the investigation of controverted facts." People v. Hadley, 257 Cal. App. 2d Supp. 871, 877-878, 64 Cal. Rptr. 777, 781 (Cal. App. 1967) (internal quotations omitted). "Particularly where liberty is at stake, due process demands that the individual and the government each be afforded the opportunity not only to advance their respective positions but to correct or contradict arguments or evidence offered by the other. United States v. Abuhamra, 389 F.3d 309, 322 (2nd Cir. 2004). Notice serves "to protect the adverse party in his right of cross-examination and his right, if need be, to present evidence opposing that of the applicant." Hadley, 257 Cal. App. 2d Supp. at 877, 64 Cal. Rptr. at 781.

In accord with these ideas, the Jefferson District Court rules require written notice 24 hours before a motion is on the docket. Jefferson District Court Local Rule 604. Nevertheless defense attorneys and judges throughout Jefferson County District Court have adopted a procedure that denies the Commonwealth its opportunity to present its case for the execution of a validly issued arrest warrant and prohibits the Court from

adequately considering both sides of the matter because it excuses any notice to the Commonwealth, even during the middle of the day when there is no question that a representative of the Commonwealth would be available. Importantly, the procedure also permits relief from a judge who is not the judge who originally issued the arrest warrant—the very item under attack in the ex parte proceeding. This procedure denigrates the adversarial nature of the criminal justice system. As part of that system, "[i]t is the duty of the prosecutor to advance the Commonwealth's case with persuasiveness and force." Commonwealth v. Mitchell, 165 S.W.3d 129, 132-133 (Ky. 2005). Yet, when the proceedings occur without any notice to the Commonwealth, the Commonwealth is unable to carry out this duty.

The problem with the ex parte proceeding that occurred below is the same as was the problem before the court in People v. Hadley, 257 Cal. App. 2d Supp. 871, 64 Cal. Rptr. 777 (Cal. App. 1967), wherein the California Court of Appeals considered the propriety of a bail related hearing without any notice to the government. There the court explained:

> "Clearly the trial court would have been greatly benefited by the adversary responsibility of counsel for the People. By his presence credibility of the evidence could have been better tested and the opportunity offered to elicit possible conflicting evidence. The burden of investigation and adversary proof is with respective counsel for the parties and is not the obligation nor function of the court. It is, however, the province of the court to insure the accomplishment of that concept. It is fundamental to our system that every judicial act must imply not only a conscientious resolution of the issues from the facts presented but also equal certitude that there are no other influential facts reasonably obtainable."

People v. Hadley, 257 Cal.App.2d Supp. 871, 878, 64 Cal.Rptr. 777, 781-782 (Cal. App. 1967). Further, the court recognized that "a court after any judicial order regularly made,

may not enter another and different order without notice to the adversary party." Id. at 876, 64 Ca. Rptr. at 780.

There can be no doubt "that the Government's regulatory interest in community safety can, in appropriate circumstances, outweigh an individual's liberty interest." U.S. v. Salerno, 481 U.S. 739, 748, 107 S.Ct. 2095, 2102 (1987). In fact, the authority of the government in some circumstances "to restrain individuals' liberty prior to or even without criminal trial and conviction" is "well-established." Id. at 749, 107 S.Ct. at 2103. An individual's strong liberty interest may "be subordinated to the greater needs of society." Id. at 750-751, 107 S.Ct. at 2103. Hearings regarding a defendant's release "fit comfortably within the sphere of adversarial proceedings closely related to trial." Abuhamra, 389 F.3d at 323. And, like probable cause and suppression hearings, requests for a defendant's release "are frequently hotly contested and require a court's careful consideration of a host of facts about the defendant and the crimes charged." Id. "[A]cceptance of ex parte in camera evidence in conjunction with bail hearings is antithetical to well established concepts of a fair adversarial hearing." Carman v. State, 564 P.2d 361, 364 (1977) (Alaska 1977).

Undoubtedly, the Commonwealth has an interest in the execution of an arrest warrant that it initially sought. And, as noted above, the Jefferson County District Court local rules require notice. The court and attorneys have an obligation to uphold the integrity of our adversarial system of criminal justice. By accepting and perpetrating a system in which defense counsel, without any reason, can approach any district court judge with an ex parte request to set aside a validly issued arrest warrant, the Jefferson District Court rejects the adversary system that is the bedrock of criminal justice. If

Appellee was entitled to have the warrant set aside, he would suffer no harm by notifying the Commonwealth and having them present. If he was not entitled to have the warrant set aside, he gained great and undue advantage by not notifying the Commonwealth of his motion. Either way, the procedure he engaged was inappropriate, and the Jefferson District Court must be told so.

II. This ex parte practice prevents the Commonwealth from complying with its obligations under the Crime Victims Bill of Rights.

"Although victims may have limited standing, they deserve, at the very least, the right to be there, to see and hear what is going on." Fryear v. Parker, 920 S.W.2d 19, 522 (Ky. 1996) (discussing proper procedure for defendants seeking to have their sentences declared unconstitutional and have sentences imposed that could lead to their earlier release). To this end, the Crime Victims Bill of Rights places certain requirements on attorneys for the Commonwealth. In particular, the law obligates the Commonwealth to give prompt notification to victims desiring notification "of judicial proceedings relating to their case, including, but not limited to, the defendant's release on bond and any special conditions of release; of the charges against the defendant, the defendant's pleading to the charges, and the date set for the trial; of notification of changes in the custody of the defendant and changes in trial dates; . . . . " KRS 421.500(5)(b). The law also requires: "The victim shall be consulted by the attorney for the Commonwealth on the disposition of the case including dismissal, release of the defendant pending judicial proceedings, any conditions of release, a negotiated plea, and entry into a pretrial diversion program." KRS 421.500(6).

In this case, Appellee was charged with fourth-degree assault (domestic violence). His victim had certain rights under the Crime Victims Bill of Rights including the right to

be consulted by the Commonwealth regarding his release pending any judicial proceedings as well as his release on bond and conditions of his release. KRS 421.500. Most assuredly, the victim had been advised that an arrest warrant had been issued for Appellee. Yet, the Commonwealth was not able to timely notify her that the warrant had been set aside and Appellee remained free with no conditions because the Commonwealth itself was not informed about the proceeding which resulted in the setting aside of the warrant.

The error in this case is particularly egregious because this was a case of domestic violence. Domestic violence often "escalate[s] over time, increasing in severity, frequency, and danger." The Center for Women and Families, "What is Domestic Violence?", brochure available at http://www.thecenteronline.org/wp-content/uploads/2009/04/what_is_dv.pdf. The goal of an abuser is "to have power and control" over his victim. Id. It may involve threatening or intimidating actions aimed at controlling the victim's behavior. Id. "It has been estimated that as many as sixty to eighty percent of domestic violence victims ultimately either recant their testimony or refuse to testify altogether against their batterers." Bailey, Kimberly, "Lost in Translation: Domestic Violence, 'The Personal is Political,' and the Criminal Justice System," 100 J. Crim. L. & Criminology 1255, 1257 (Fall 2010). It is also believed that domestic violence is underreported. Id. It is not uncommon for a domestic violence case to be prosecuted without the victim's participation through what is called an "evidence-based" prosecution. Id. at 1269. "[M]any victims probably need the resources of the criminal justice system in order to be adequately protected from the violence in their lives." Id. at 1272. "[F]ear is sometimes a reason that victims hesitate to engage with the

criminal justice system." Id. at 1275. Even when victims are willing participants in the criminal justice system, the system "often fails to protect" them. Id. at 1280.

In this case the arrest warrant was issued by one judge, and defense counsel approached a second judge, who had no familiarity with the case or the reasons that an arrest warrant was properly issued in the first place, in order to have the warrant set aside. Given that this was a domestic violence case, this fact, troubling in any case, is extremely worrisome. It seems that part of defense counsel's argument for why the arrest warrant should have been set aside was that the victim had allegedly recanted. Commonwealth's Brief, P. 4. Without the Commonwealth's presence and in front of a judge who had not been the judge who originally issued the arrest warrant, defense counsel was free to make this assertion without it being tested in any way. For instance, the court was not told that it was hospital personnel, not the victim, who originally notified police of the crime or that photographs of the victim's injuries existed. Commonwealth's Brief, P. 2. Because it was not notified of the motion or the hearing, the Commonwealth had no opportunity to contact the victim. She may have confirmed what defense counsel said, she may have disagreed and maintained that Appellee had abused her, or she may have had any number of other responses. For example, she may have said that she was scared about what would happen if she came to court or that she just wanted the whole thing to be over with as quickly as possible or that she needed Appellee to pay the rent. The point is that the Commonwealth did not have the opportunity to notify her or consult with her or to present other evidence besides the victim in support of the arrest warrant. Yet, the Court accepted the uncorroborated, untested assertions of defense counsel. Clearly, those assertions were in conflict with the original issuance of the arrest warrant. This

circumstance demanded more information; information that would have been more readily available if the Commonwealth was present.

The ex parte procedure utilized by the Jefferson District Court put the victim and the community in potential danger—danger for which the Commonwealth would have undoubtedly been blamed and held responsible in the media, had it come to fruition—for no reason. There is no excuse for defense counsel or the District Court not notifying the Commonwealth. The County Attorney's Office is in the same building as the court. It was the middle of the day, and assistant county attorneys were participating in other cases all day. The ex parte procedure unfairly interferes with the Commonwealth's responsibilities and endangers victims. This Court should declare it improper.

III. The procedure employed in the Jefferson District Court is inconsistent with and contrary to other procedures relating to changing bond and its conditions.

If a defendant would not be entitled to changes in the conditions of his release without a written motion (RCr 4.40(1)), he should not be permitted to set aside a valid arrest warrant in an ex parte proceeding. It is entirely proper for the Commonwealth to seek arrest and pretrial detention in certain cases. See Salerno, 481 U.S. at 748, 107 S.Ct. at 2102. Accordingly, RCr 2.04(1) requires that "[i]f from an examination of the complaint it appears to the judge . . . that there is probable cause to believe that an offense has been committed and that the defendant committed it, the judge . . . shall issue a warrant for the arrest of the defendant . . . ." RCr 2.06(3) also requires that "[i]f the offense charged is bailable, the judge issuing a warrant of arrest shall fix the amount of bail and type of security, if any, and endorse it on the warrant."

On February 17, 2011, a judge of the Jefferson District Court found probable cause for commission of a crime by Appellee and issued an arrest warrant. (See Commonwealth's Brief, App. 3). If Appellee had been arrested on the warrant, his bail would have been the amount affixed by the judge when she issued the warrant. Appellee would have then been entitled to apply for a change in his bail, but only by "written motion." RCr 4.40(1), RCr 4.38. He would have been entitled to an "adversary hearing" on his motion. RCr 4.40(1).

In this case, Appellee surreptitiously avoided RCr 4.40's requirement of a written motion and an adversary hearing by approaching a judge before the arrest warrant was executed. In doing so, Appellee undercut the Supreme Court's reasoned rules designed "to provide for a just determination of every criminal proceeding." RCr 1.04. The Jefferson District Court and defense attorneys practicing in Jefferson County should not be exempted from the rules simply because their violation has become common practice. The people of Jefferson County are entitled to equal enforcement of the rules and equal justice. The ex parte procedure utilized commonly in the Jefferson District Court to set aside arrest warrants should be prohibited by this Court.

IV. The procedure utilized in the District Court interferes with the rights of the public to an open court as well as the Commonwealth's obligations as the representative of the public in criminal prosecutions.

"[T]he public is a party to all criminal proceedings. The proceeding is prosecuted in the name of the public." Johnson v. Simpson, 433 S.W.2d 644, 647 (Ky. App. 1968). "The public . . . has a definite and concrete interest in seeing that justice is swiftly and fairly administered." Gannett Co., Inc. v. DePasquale, 443 U.S. 368, 383, 99 S.Ct. 2898, 2907, 61 L.Ed. 2d 608 (1979). "[J]ustice cannot survive behind walls of silence."

Ashland Pub. Co. v. Asbury, 612 S.W.2d 749 , 751 (Ky. App. 1980). And the public's rights are best protected by public presence and openness in courts during trial and pretrial proceedings and by the active participation of the parties in the litigation. Johnson, 433 S.W.2d at 647; Ashland Pub. Co., 612 S.W.2d at 751-752; Gannett Co., Inc., 443 U.S. at 384, 99 S.Ct. at 2908. Public proceedings ensure that judges and prosecutors and other participants carry out their duties responsibly, encourage witnesses to come forward, improve the quality of testimony, discourage perjury, and give the public an opportunity to see the judicial system at work. Waller v. Georgia, 467 U.S. 39, 46, 104 S.Ct. 2210, 2215 (1984); Gannett Co., Inc., 443 U.S. at 383, 99 S.Ct. at 2907.

Hearings related to bail, in particular, "are frequently hotly contested and require a court's careful consideration of a host of facts about the defendant and the crimes charged. Thus, there is an interest in conducting such hearings in open courtrooms so that persons with relevant information can come forward." Abuhamra, 389 F.3d at 323. Of course, a court may order closure of criminal proceedings, but only "after a determination is made that there is a substantial probability that the right of the accused to a fair trial or his other constitutional rights will be otherwise irreparably damaged." Ashland Pub. Co., 612 S.W.2d at 753. The court considering closure must also "consider the utility of other reasonable methods available to protect the rights of the accused short of closure." Id.

The District Court did not consider any of these factors prior to engaging in ex parte communications to set aside Appellee's arrest warrant. It does not appear that the District Court made any inquiry at all as to why the Commonwealth had not been notified about the motion to set aside the arrest warrant. This type of ex parte proceedings about a

criminal defendant's potential avoidance of an arrest warrant compromised the public's right and interest in an open criminal proceeding. See Abuhamra, 389 F.3d at 321. The District Court could not be properly informed because only one party was represented. The Commonwealth could not test the "evidence" presented by defense counsel on the public's behalf because the Commonwealth had no notice that defense counsel intended to seek to have the arrest warrant set aside.

"With examination comes truth, with truth comes justice, with justice comes public trust." Whittington, 925 S.W.2d at 460 (King, dissenting). The ex parte proceeding below deprived the public of its opportunity to see that justice was done with regard to whether Appellee would be arrested and transported to jail. See Abuhamra, 389 F.3d at 323, 328. It vitiated the public trust, and jeopardized some of the most basic principles underlying our criminal justice system. Such a procedure should not be approved by this Court.

CONCLUSION

This state's criminal justice system is based on the idea that adversarial testing results in truth and justice. The system properly allows for pretrial arrest and detention of defendants under certain circumstances. It also provides an adversarial method for defendants to obtain relief from pretrial detention or conditions of release. In order for the system to work, parties must be notified of motions and given an opportunity to be heard, especially because the liberty interests of defendants accused of crimes, the need to secure a defendant's presence at future proceedings, and the safety interests of victims and the community must be balanced. The Jefferson District Court, however, has adopted a procedure that allows for the setting aside of an arrest warrant through the

untested allegations that may be brought before any judge of the Jefferson District Court, regardless of which judge initially approved the arrest warrant.

As the representative of the people in criminal proceedings, the Commonwealth has certain obligations to the community and the victims of crime. One of these is to zealously advocate the cause of the justice. Another is to ensure that victims of crime are properly notified of changes to a defendant's bail or conditions of release. By exercising its duties, the Commonwealth helps ensure the safety of victims and the community and fairness of the criminal justice system. The ex parte procedure adopted in the Jefferson District Court substantially interferes with the Commonwealth's exercise of its duties. It results in exclusion of the public and its representative from the courtroom with no just reason.

The Jefferson District Court's ex parte procedure for setting aside arrest warrants interferes with the proper administration of justice in the Jefferson District Court. Because many of the cases that end up in Circuit Court and underneath the Commonwealth's Attorney's authority to prosecute make their way through the Jefferson District Court and because many of the defense attorneys and defendants overlap from Jefferson District to Jefferson Circuit Court, an affirmation of the procedure by this Court would give license to defense attorneys, defendants, and judges to engage in the same type of unjustified procedure in Jefferson Circuit Court and throughout the state.

WHEREFORE, the Commonwealth's Attorney, as amicus curiae, requests that this Honorable Court declare the ex parte procedure for setting aside arrest warrants adopted by the Jefferson District Court improper.

Respectfully submitted,

R, DAVID STENGEL
Commonwealth's Attorney

Dorislee Gilbert

DORISLEE GILBERT
Assistant Commonwealth's Attorney
514 West Liberty St.
Louisville, KY 40202
(502) 595-2300