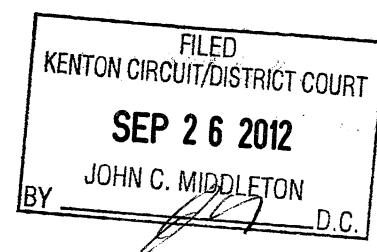


COMMONWEALTH OF KENTUCKY  
KENTON CIRCUIT COURT  
FOURTH DIVISION  
CASE NO. 12-CR-260-001  
CASE NO. 12-CR-260-002



COMMONWEALTH OF KENTUCKY

PLAINTIFF

VS

SARAH JONES  
CHERYL JONES

DEFENDANTS

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MOTION TO STRIKE THE SUBPOENA USED PRIOR TO NOVEMBER 23, 2011

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Detective Inman abused subpoena power. The subpoena referenced a grand jury that did not exist or was simply a ruse to execute the subpoena. There was no grand jury planned for December 8 as placed on the subpoena. The grand jury met March 29 on this case. In fact, Detective Inman used the subpoena like a search warrant. She did not have probable cause, as presented in our Motion to Suppress and at the hearing on the "rumors" from Morgan and Brittney. She used the subpoena and not the search warrant process because she knew she didn't have probable cause. It's improper and everything from the subpoena must be suppressed. For example, the call logs she got from the subpoena gave her more information to assert probable cause in the search warrant affidavit.

The use of subpoenas to obtain documentary evidence or tangible things without an accompanying notice of deposition or notice of hearing or trial has been a recurring problem.<sup>FN1</sup> Evidently some practitioners are unaware that CR 45.01 prohibits such use of subpoenas. As stated in the rule,



“Subpoenas shall not be used for any purpose except to command the attendance of the witness and production of documentary or other tangible evidence at a deposition, hearing or trial.” It is improper to use subpoenas in a manner contrary to the rule. We addressed a parallel \*620 issue in *Stengel v. KBA* <sup>FN2</sup> with respect to the use of Grand Jury subpoenas to obtain documents from out-of-state firms. **We amended RCr 5.06 to permit the use of such subpoenas provided the instrument was not misleading.** *Stengel* does not modify or undermine CR 45.01.

Megibow v. Kentucky Bar Ass'n 173 S.W.3d 618, 619 -620 (Ky.,2005)

RCr 5.06 is simple:

The Clerk, upon request of the foreperson of the Grand Jury or of the attorney for the Commonwealth, shall issue subpoenas for witnesses. The attendance of witnesses may be coerced as in other judicial proceedings, unless, and until, excused, or modified, by the requesting party. RCr 7.02 shall apply to Grand Jury subpoenas except that a subpoena issued pursuant to this rule may command the person to whom it is directed to produce the books, papers, documents or other objects designated therein to the foreperson of the Grand Jury or the Commonwealth's Attorney or his/her agent, without requiring the personal appearance of the witness before the Grand Jury.

There is case law that addresses ex parte use of subpoena power. It is not in the context of police officers, but rather prosecutors. In *Hillard v Commonwealth*, a prosecutor



subpoenaed witnesses for interviews in his office. Here is the relevant portion of the case:

## **V. PROSECUTORIAL MISCONDUCT.**

### *A. Abuse of subpoena power.*

[4] The prosecutor caused subpoenas to be served on N.M. and J.S. to appear at his office for *ex parte* interviews. Civil Rule (CR) 45.01 specifically provides that “[s]ubpoenas shall not be used for any purpose except to command the attendance of the witness and production of documentary or other tangible evidence at a deposition, hearing or trial.” *See Munroe v. Ky. Bar Ass’n*, 927 S.W.2d 839, 840 (Ky.1996) (disciplining member of the Bar for using a subpoena to obtain *ex parte* information in a divorce case). Criminal Rule (RCr) 7.02 is not so explicit. It states that a subpoena “shall command each person to whom it is directed to attend and give *testimony* at the time and place specified therein.” (Emphasis added.) There are no Kentucky cases interpreting this language. However, almost identical language in the corresponding Federal Criminal Rule, FRCrP 17(a), has been consistently interpreted to mean that subpoenas can be used to require a witness's attendance only at formal judicial proceedings and that “[t]he government may not use trial subpoenas to compel prospective trial witnesses to attend pretrial\*765 interviews with government attorneys.” *United States v. LaFuenta*, 991 F.2d 1406, 1411 (8th Cir.1993). *See also United States v. Wadlington*, 233 F.3d 1067, 1075 (8th Cir.2000); *United States v. Villa–Chaparro*, 115



F.3d 797, 804 (10th Cir.1997); *United States v. Keen*, 509 F.2d 1273, 1274–75 (6th Cir.1975); *United States v. Hedge*, 462 F.2d 220, 222–23 (5th Cir.1972); *United States v. Standard Oil Co.*, 316 F.2d 884, 897 (7th Cir.1963). The Commonwealth concedes that use of subpoenas to compel N.M. and J.S. to attend a pretrial interview with the prosecutor was improper. We agree.

A Grand jury is always distinguishable because usually it is an attorney who is provides the subpoena. The Commonwealth attorney may fax an out of state request and voluntary compliance waives the requirements of KRS 421.250. **“In our opinion, it is not unethical to contact an entity out of state and to fax them a subpoena if requested, or to advise them that KRS 421.250 will be used, if necessary (as long as such use is intended at the time) if compliance is not forthcoming. An ‘ethics question’ should only arise if there is a deliberate attempt to circumvent the...Rules as written or customarily applied in the particular forum, perhaps with a view to dispensing with notice to an opponent or securing some unfair advantage. In the absence of same, there would seem to be no real question of ‘ethics’ involved, but only a difference of opinion as to the proper interpretation of the...Rules.”** KBA E–304. **Stengel v. Kentucky Bar Ass’n**, 162 S.W.3d 914, 920 (Ky. 2005)

In *MegiBow v KentuckyBar Association*, the Supreme Court found ethical violations by an attorney who subpoenaed documents without a hearing. “Attorney’s use of subpoenas to obtain documentary evidence, without accompanying notice of deposition or notice of hearing or trial, contrary to rule of civil procedure, violated rule of professional conduct prohibiting disobedience of court rules and rule proscribing false



statements of material fact or law to third person.” Megibow v. Kentucky Bar Ass'n, 173 S.W.3d 618 (Ky. 2005).

However, in this case we are dealing with a detective issuing a subpoena. In Commonwealth v Pride, an officer issued a subpoena to an utilities company for electric usage records on a suspect suspected of growing marijuana. The records were provided and were used in support of the search warrant. The issue was not directly challenged and the Court did not address that it was improper use of a subpoena. The Court found sufficient probable cause because the anonymous tip was corroborated and found to be reliable.

In Bishop v Caudill and Commonwealth of KY, Appellant Dwayne Earl Bishop was indicted by a Floyd County grand jury for the murder of his estranged wife, Carolyn Bishop. The issue now before us pertains to the post-indictment issuance of grand jury subpoenas to two prospective defense trial witnesses requiring them to testify before the grand jury about their knowledge of facts pertaining to this case. Appellant believes the sole or dominant purpose of the subpoenas was to allow the prosecutor to improperly discover evidence relevant to Appellant's defense in order to facilitate the prosecutor's preparation for trial. The trial judge denied Appellant's motion to quash the subpoenas and overruled Appellant's request for permission to question the prosecutor under oath as to the purpose of the proposed grand jury investigation. Appellant then petitioned the Court of Appeals for a writ prohibiting the trial judge from allowing the Commonwealth to use the grand jury process for the purpose of discovery and trial preparation. The Court of Appeals denied the petition, holding that (1) Appellant does not have “standing to prevent testimony by these witnesses before the grand jury,” and (2) Appellant “has an

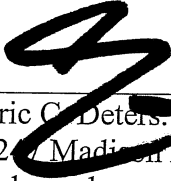


adequate remedy through motions to exclude or suppress the results of the improper use of the grand jury.”

The Court of Appeals affirmed and the Supreme Court said, the issue is not whether the appearance of a witness before the grand jury is a deposition, but **whether the grand jury process is being improperly used as a substitute for discovery depositions which, absent court order or agreement of the parties, are not permitted in a criminal case. RCr 7.10.** And if the purpose of Samantha's testimony is to elicit evidence of separate criminal activity by her mother, why was the subpoena issued under the caption of the murder indictment against Appellant?

Ryan v. Lee (attached) is on point. Detective Inman used the subpoena improperly.

The investigator, Julie Inman, used a Grand Jury date of December 8, in conjunction with the Commonwealth's attorney, as a ruse to obtain the records to corroborate the rumor of Morgan McCafferty. Once they got the records, they had more evidence to support probable cause for the search warrant and enough for a Grand Jury.



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#### CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served upon the persons named below by hand delivering on September 26, 2012.



---



Cc:

Hon. Sara Farmer

Assistant Commonwealth's Attorney

514 West Liberty Street

Louisville, Kentucky 40202

(502)595-2300



Westlaw

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**H**

Only the Westlaw citation is currently available.

Unpublished opinion. See KY ST RCP Rule 76.28(4) before citing.

Supreme Court of Kentucky.  
Dennis LEB, United Community Services of America,  
Inc., International Tesla Electric Company, and Better  
World Technologies, Inc. Appellants  
v.

Honorable Stephen RYAN, Jefferson Circuit Court  
Judge, Serving as Judge of the Jefferson County  
Grand Jury and R. David Stengel, Jefferson County  
Commonwealth Attorney 30<sup>TH</sup> Judicial District Ap-  
pellees

No. 2002-SC-1057-MR.  
June 12, 2003.  
As Modified Sept. 18, 2003.

Following sole shareholder's grand jury indict-  
ments relating to sale of business opportunities  
through corporations, shareholder and corporations  
petitioned for writ of prohibition to prevent discovery  
of corporate records in grand jury proceedings relating  
to corporations and to prevent enforcement of con-  
tempt finding and derivative fines against shareholder,  
and petitioned for writ of mandamus directing judge  
presiding over grand jury to quash grand jury sub-  
poenas and reverse the contempt finding. The Court of  
Appeals denied writs. Shareholder and corporations  
appealed. The Supreme Court, Lambert, J., held that  
an evidentiary hearing regarding the petitions was  
warranted, to determine whether the sole, dominant, or  
motivating purpose of grand jury subpoenas for  
corporations' records was an improper attempt by  
Commonwealth to gather discovery information for  
pending criminal case against sole shareholder.

Reversed and remanded with directions.

Keller, J., concurred in part and dissented in part,  
and filed a statement.

Wintersheimer, J., dissented.

## West Headnotes

[1] Grand Jury 193 36.4(2)193 Grand Jury193k36 Witnesses and Evidence

193k36.4 Compelling Testimony or Produc-  
tion; Subpoenas and Orders

193k36.4(2) k. Indefiniteness or Over-  
breadth; Motive and Purpose. Most Cited Cases

Evidentiary hearing regarding petitions for writs  
of prohibition or mandamus, to determine whether  
sole, dominant, or motivating purpose of grand jury  
subpoenas for corporations' records was an improper  
attempt by Commonwealth to gather discovery in-  
formation for pending criminal case against corpora-  
tions' sole shareholder relating to sale of business  
opportunities, was warranted; pending criminal case  
against shareholder was directly related to his corpo-  
rate entities, through which he marketed business  
opportunities.

[2] Criminal Law 110 393(1)110 Criminal Law110XVII Evidence110XVII(1) Competency in General110k393 Compelling Self-Incrimination110k393(1) k. In General. Most CitedCases

Sole shareholder's Fifth Amendment privilege  
against self-incrimination did not extend to the records  
of his corporate entities. U.S.C.A. Const. Amend. 5.

Appeal from an Original Action before the Com-  
monwealth of Kentucky Court of Appeals. Action  
No.2002-CA-2005.J. Fox Demoisey, Demoisey Law  
Office, Louisville, KY, Jonathan E. Breitenstein,  
Demoisey Law Office, Louisville, KY, for Appellants.

Stephen P. Ryan, Louisville, KY, for Appellee, Ste-  
phen Ryan, Jefferson County Circuit Court Judge,  
Serving as Judge of the Jefferson County Grand Jury.



Not Reported in S.W.3d, 2003 WL 21357609 (Ky.)  
(Cite as: 2003 WL 21357609 (Ky.))

R. David Stengel, Commonwealth Attorney, Louisville, KY, Franklin Todd Lewis, Jefferson Commonwealth Attorney, Louisville, KY, Jeanne Deborah Anderson, Louisville, KY, for Appellee, R. David Stengel, Jefferson County Commonwealth Attorney 30<sup>TH</sup> Judicial District.

MEMORANDUM OPINION OF THE COURT  
LAMBERT, J.

*REVERSING AND REMANDING*

\*1 Dennis Lee is the sole shareholder and executive officer of the following corporate entities: United Community Services of America, Inc. (UCSA), International Tesla Electric Company (ITEC), and Better World Technologies, Inc. (BWT). All three entities are incorporated in Delaware and are primarily located in New Jersey. Lee and his companies sought a writ of mandamus and prohibition in the Court of Appeals. This is an appeal from the denial of same.

Through his corporate entities, UCSA, ITEC, and BWT, Lee engages in the promotion and sale of business opportunities of various products, including a device that supposedly produces free electricity. Lee markets his products via an Internet site. The site offers dealerships for those interested in marketing Lee's products, and it allows individuals to sign up for product demonstrations. The site revealed that Lee would be in Louisville for such a demonstration on October 8, 2001. Lee was subsequently arrested the same day in Louisville for alleged violations of state law regarding the sale of business opportunities. KRS 367.801 et seq.

Lee attempted to conduct another demonstration in Louisville on December 28, 2001. However, on the same day, the office of the Attorney General filed a civil action in Jefferson Circuit Court against Lee's corporate entities, which is still pending, *Commonwealth of Kentucky, ex rel. A.B. Chandler, III, Attorney General v. Dennis Lee d/b/a United Community Services of America, and d/b/a Better World Technologies, and d/b/a Int'l Tesla Electric Co.*, No. 01-CI-8842.

In April of 2002, the Jefferson County Grand Jury issued a two-count indictment against Lee individually, alleging that he, acting alone or in complicity with others, committed the following offenses: (1) Misrepresentation of Sale, Income or Profit of Business Opportunities, and (2) Failure to Register Sale of

Business Opportunities. This indictment is currently pending in the second division of Jefferson Circuit Court, No. 02-CR-0995.

Following additional investigation by the office of the Attorney General, and at the request of the office of the Jefferson County Commonwealth Attorney, the grand jury proceeded to conduct an investigation of Lee's corporate entities. On May 13, 2002, the grand jury issued subpoenas duces tecum to each of Lee's corporate entities. As custodian of records for all three entities, Lee was served the subpoenas while attending his arraignment on the criminal indictment brought against him individually.

On May 29, 2002, Lee attempted to have the grand jury subpoenas stayed by Judge Lisabeth Hughes Abramson, the judge overseeing the grand jury at the time, but the request was denied. Lee also moved the trial court overseeing his individual criminal case to enter an injunction preventing discovery of the records of his corporate entities. Lee argued, *inter alia*, that the office of the Jefferson County Commonwealth Attorney was improperly using the grand jury as a discovery device in contravention of that court's previously entered discovery order. However, the court denied Lee's motion, stating that this was a matter for the judge overseeing the grand jury.

\*2 On August 5, 2002, Judge Stephen P. Ryan, the new presiding grand jury judge, conducted a hearing concerning the grand jury subpoenas at issue. Although it was apparent that Lee would invoke his Fifth Amendment right against self-incrimination if ordered to testify before the grand jury, Judge Ryan determined that a hearing was needed in order to ascertain whether Lee was entitled to Fifth Amendment protection. Lee was then ordered to appear before the grand jury and to provide it with various corporate records sought by the Assistant Commonwealth Attorney. Lee appeared before the grand jury on August 6, 2002, asserted his right against self-incrimination, but failed to produce the records of his corporate entities. On August 12, 2002, Judge Ryan determined that Lee, due to the criminal charges pending against him, did not have to testify before the grand jury, and that his assertion of the Fifth Amendment was proper. However, Judge Ryan further determined that Lee's Fifth Amendment protections did not extend to the records of his corporate entities. Thus, Lee was found in contempt for not turning over the records of his



Not Reported in S.W.3d, 2003 WL 21357609 (Ky.)  
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corporate entities to the grand jury, and was fined \$1000.00 a day until compliance with the order of August 5, 2002.

Lee then petitioned the Court of Appeals for a writ prohibiting (1) the discovery of items, documents, and testimony pursuant to the grand jury subpoenas, and (2) the enforcement of the contempt finding and derivative fines levied against him. Lee also sought mandamus relief directing Judge Ryan to enter a protective order for both himself and his corporate entities, thereby quashing the grand jury subpoenas, and further a reversal of the contempt finding against him. The Court of Appeals denied this petition. Lee now brings this appeal before this Court as a matter of right. CR 76.36(7)(a).

Lee contends that the grand jury subpoenas, which were served on him as custodian of records of his corporate entities, should be quashed because the Commonwealth is in effect circumventing the rules of discovery applicable to the still pending criminal case against him by improperly using the investigative processes of the grand jury. The essence of Lee's contention is that the overriding purpose of the subpoenas is not related to the civil proceedings against his corporate entities. Rather, the overriding purpose of the subpoenas is to allow the prosecution to gather evidence to be used in preparation for the pending criminal case against Lee.

Last year, we considered a case similar to the one at bar, *Bishop v. Caudjil*, Ky., 87 S.W.3d 1 (2002). The issue before us in that case was "whether the grand jury process [was] being improperly used as a substitute for discovery...." *Id.* at 4. Therein we stated that "[i]f the purpose of subpoenaing [witnesses] before the grand jury is to use the grand jury proceedings as a guise for trial preparation, the subpoenas must be quashed." *Id.* at 3. Similarly, if the purpose of issuing subpoenas to Lee, as custodian of records, is to use the grand jury proceedings as a "guise for trial preparation" for the pending criminal case against Lee, then the subpoenas must be quashed.

\* The Commonwealth attempts to distinguish *Bishop* from the case at bar by pointing out that the subpoenas in *Bishop* were issued under a pending indictment number. Here, the corporate entities have not been indicted and the grand jury subpoenas are

not pursuant to Lee's indictment. The Commonwealth also asserts that the clear purpose of the grand jury investigation is to uncover wrongdoing by the corporate entities, and not Lee individually. Furthermore, the Commonwealth contends that the corporate entities lack standing to challenge the subpoenas.

It is generally true that criminal defendants lack standing to inquire into grand jury investigations. *Bishop*, *supra* at 4. However, this is correct only "so long as the motivating purpose of the grand jury investigation is not the accumulation of evidence for a pending criminal case...." *In re Grand Jury Investigation (General Motors Corp.)*, 32 F.R.D. 175, 183 (S.D.N.Y.1963). Here, the Assistant Commonwealth Attorney assigned to the grand jury has made it clear that he may use information that Lee provides to the grand jury in the pending criminal case. Also, in its own brief submitted to this Court, the Commonwealth states that a grand jury investigation of Lee's corporate entities began in part at the request of the Assistant Commonwealth Attorney.

[1] We also note, and the Commonwealth is aware, that Lee is the sole shareholder and executive of UCSA, ITEC, and BWT. The pending criminal indictment against Lee is directly related to his corporate entities, as he markets his products through them. Given the circumstances, and contrary to the Commonwealth's position, we cannot say that the clear purpose of the grand jury investigation is to uncover wrongdoing by the corporate entities, and not to accumulate discovery information in preparation for the forthcoming trial on the criminal indictment against Lee individually.

The remedy that Lee desires in this case, *i.e.*, a writ of prohibition and mandamus, is an extraordinary form of relief. Generally, a writ will only be granted if (1) the lower court is proceeding or is about to proceed outside its jurisdiction, or (2) the lower court is about to act incorrectly, although within its jurisdiction, and there exists no adequate remedy by appeal or otherwise and great injustice and irreparable injury would result. *Southeastern United Medigroup v. Hughes*, Ky., 952 S.W.2d 195, 199 (1997). While we rarely grant such relief, there is a serious question regarding whether the investigative procedures of the grand jury are being used in an improper fashion. In *Bishop*, *supra*, we ultimately reversed the decision rendered by the Court of Appeals and remanded the case for a



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determination to be made as to whether the sole or dominant purpose of the issuance of the subpoenas was to facilitate discovery by the Commonwealth of facts related to a pending criminal indictment. *Id.* at 4. We follow our decision in *Bishop* and hold that, under the circumstances, a like conclusion is appropriate in this case as well.

\*4 [2] Lee also claims he was improperly served the grand jury subpoenas. We find this argument to be wholly without merit and need not address it. As to Lee's argument concerning his right against self-incrimination, we hold that the right simply does not extend to the records of his corporate entities. *See Braswell v. United States*, 487 U.S. 99, 108 S.Ct. 2284, 101 L.Ed.2d 98 (1988); *Bellis v. United States*, 417 U.S. 85, 94 S.Ct. 2179, 40 L.Ed.2d 678 (1974).

Wherefore, for the reasons aforesaid, we reverse the order of the Court of Appeals and remand with directions to grant Lee's petition until such time that the presiding judge in appellant's case can conduct an evidentiary hearing in order to determine whether the sole, dominant, or motivating purpose of the grand jury subpoenas at issue is an attempt by the Commonwealth to gather discovery information for the pending criminal case against Lee. If such a determination is made, the subpoenas shall be quashed forthwith.

LAMBERT, C.J.; COOPER, GRAVES, JOHNSTONE and STUMBO, JJ., concur. KELLER, J., concurs in the decision to reverse and remand this case for the Court of Appeals to issue a writ, but dissents from the majority opinion to the extent that it requires the trial court to proceed directly to an evidentiary hearing in order to resolve the issue of whether trial preparation was the Commonwealth's sole or dominant purpose" for causing the subpoenas to be issued. See *Bishop v. Caudill*, Ky., 87 S.W.3d 1, 4" (2002) (KELLER, J., concurring in part and dissenting in part). WINTERSHEIMER, J., dissents without opinion.

Ky., 2003.  
Lee v. Ryan  
Not Reported in S.W.3d, 2003 WL 21357609 (Ky.)

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