

COMMONWEALTH OF KENTUCKY
48TH JUDICIAL CIRCUIT
FRANKLIN CIRCUIT COURT – DIVISION II
No. 15-CI-752

FILED
JUL 13 2015
FRANKLIN CIRCUIT COURT
SALLY JUMP, CLERK

ELAINE ROYSE

PLAINTIFF

v.

**COMPLAINT
JURY TRIAL DEMANDED**

REED WILBERS,
In his Individual Capacity

DEFENDANT

Serve: Reed Wilbers
Department of Criminal Investigations
1024 Capital Center Dr., Suite 200
Frankfort, KY 40601

** ** * ** * ** * ** * ** *

Plaintiff Elaine Royse for her complaint against Reed Wilbers states as follows:

I

Nature of the Case

1. Elaine Royse worked as an LPN at the Golden Living nursing home in Frankfort. She found the facility to be chronically understaffed to a degree that inadequate and deficient care was being provided the residents. Royse followed appropriate procedures and alerted Golden Living management of the inadequate staffing and deficient care. When those efforts proved unavailing, Royse tendered her resignation. Management personnel at Golden Living persuaded Royse to reconsider her resignation, praising her for the quality of her work and concern for the facility's residents, while also promising meaningful and ameliorative responses to her concerns about

inadequate staffing and deficient care. However, after the family of a resident complained to state regulatory officials regarding the care their loved one had received at Golden Living, an investigation was commenced by state inspectors and Royse informed state inspectors of her earlier complaints and reports to management about inadequate staffing and deficient care. In retaliation for her candor with the state inspectors, Golden Living terminated Royse's employment for false and pretextual reasons. More than two years later during which the investigation lay dormant, defendant Reed Wilbers aided and influenced the decision to criminally prosecute Royse related to the resident's death. Wilbers was the sole witness before the grand jury and gave false, material testimony that succeeded in getting the grand jury to indict Royse and in issuance of a warrant for her immediate arrest. The Franklin Circuit Court dismissed the indictment because of Wilbers' false, material testimony to the grand jury, the Court of Appeals affirmed the dismissal and the Kentucky Supreme Court denied discretionary review of the Court of Appeals' decision on August 13, 2014. Royse seeks redress in this case for the wrongs done and injuries caused by Wilbers.

II

Jurisdiction and Venue

2. This Court has jurisdiction pursuant to KRS 23A.010 over the claims asserted in this case, because the amount in controversy exceeds this Court's jurisdictional minimum. Venue is proper in Franklin Circuit Court because plaintiff's claims arise arose as a result of actions taken therein.

III

Parties

3. Plaintiff Elaine Royse is a resident of Pinellas County, Florida.

4. Defendant Reed Wilbers, upon information and belief, is employed by the Department of Criminal Investigations, 1024 Capital Center Dr., Suite 200, Frankfort, KY 40601. Wilbers is sued in his individual capacity.

IV

Facts Giving Rise to the Lawsuit

5. Royse is a Licensed Practical Nurse (LPN) and has been so licensed by the Kentucky Board of Nursing since May 1988.

6. On or about October 9, 2007, Royse became employed as an LPN at the Golden Living nursing home (Golden Living) located in Frankfort, Franklin County, Kentucky.

7. Royse's regular assignment as an LPN at Golden Living was on the skilled wing of the facility, meaning the sickest, most acute residents in greatest need of nursing care and attention.

8. In addition to her direct patient care duties as a LPN on her shift, Royse was also required to perform duties and tasks in the dining room related to the feeding of the residents and cleaning up afterwards of the dining room.

9. Royse's dining room duties consumed about 2.5 hours of each of her shifts.

10. Following completion of her dining room duties Royse was

compelled to assume and perform the duties and responsibilities of a Certified Nursing Assistant (CNA) due to staffing shortages.

11. After about four weeks of employment at Golden Living, Royse informed Cheryl Baker, a Registered Nurse (RN) and house supervisor for Royse's shift, that she was encountering persistent staffing shortages that were negatively impacting the quality of care provided to the facility's residents.

12. After determining that Baker lacked authority to address the staffing shortages, Royse reported to Sean Flannery, who was the LPN staffing coordinator at Golden Living, regarding the persistent staffing shortages that she was regularly encountering and that these shortages were negatively impacting the quality of care provided to the facility's residents.

13. Flannery declined to take any action addressing the staffing shortages and its negative impacts on the quality of care provided to the residents, stating to Royse that the facility was staffing consistent with minimum state requirements.

14. Royse also reported to Drema Bowser, the Director of Nursing (DON) at Golden Living, the staffing shortages, and the deficient care that was being provided to the facility's residents as a result.

15. Bowser did not respond meaningfully or helpfully to Royse's report.

16. On or about December 14, 2007, Royse tendered a notice of resignation, giving a 30 days notice. Royse reported to Bowser, the DON,

among other things, the following:

Dreema you do not have enough people to staff this place. Pts. are neglected here on a daily basis. Sean says "staffing is adequate." But what that really means is "staffing is in minimal compliance with state laws." ... I can assure you – pts. do not get the care they need here! ... Patients are neglected. ...

A true copy of Royse's resignation letter is attached hereto as Ex. 1.

17. Royse subsequently retracted her resignation and agreed to continue her employment at Golden Living after Bowser, the DON, and Anne Phillips, the facility administrator, pleaded with her to do so, acknowledged to her the legitimacy of her concerns about the quality of care being provided the residents at the facility and promised her of their intent to make real changes and improvements with her help.

18. Subsequently, the family of a resident at Golden Living complained to state regulatory officials regarding the deficient care their loved one had received while a resident at Golden living.

19. The state inspectors, in response to the family's complaint, started an investigation.

20. On December 27, 2007, when Royse reported to work, she was instructed by Bowser, the DON, that Barbara Leonard, a state inspector, would be contacting, that she should restrict her answers as much as possible to Leonard's questions and that she should not share with Leonard the concerns Royse had raised previously regarding staffing shortages and deficient resident care. Royse informed Bowser that she would be truthful

and forthright with Leonard.

21. Royse was interviewed by Leonard on December 28, 2007, and informed Leonard of persistent staffing shortages at Golden Living and their negative impact on resident care, as well as her previous unsuccessful efforts to induce Golden Living management to address these issues.

22. Golden living made up a false and pretextual reason to terminate Royse's employment and did so on January 4, 2008.

23. Royse was interviewed by another state inspector, Andrea Wilhite, on January 23, 2008. Royse also shared with Wilhite the concerns she had raised at Golden Living regarding the staffing shortages and their impact on patient care.

24. On June 30, 2010, defendant Reed Wilber's appeared before a Franklin County grand jury to testify in support of a proposed felony charge against Royse.

25. Defendant Wilbers was the only witness to testify to the grand jury in regard to and/or in support of the proposed felony charge against Royse.

26. Based on and as a result of Wilber's testimony the grand jury issued a felony indictment against Royse charging her with a felony crime violation of KRS 209.990(2).

27. Based on an as a result of Wilber's testimony to the grand jury and the felony indictment it issued against Royse, a warrant for her immediate rat arrest was also secured.

28. Wilber's testimony to the grand jury was false in numerous material respects including the following; the length of time Royse had been employed at Golden Living; that Royse had failed to notify her superiors of the patient's declining condition; that Royse had failed to properly follow through with lab orders; and that Wilbers failed to fully inform the grand jury of all material facts regarding the patient's care and treatment.

29. As a result of Wilber's false testimony to the grand jury, the grand jury issued a felony criminal indictment against Royse.

30. As a result of Wilber's false testimony to the grand jury, a warrant for her immediate arrest was secured.

31. Royse was arrested in Pinellas County, Florida, where she was living at the time that the indictment was issued and the arrest warrant obtained against her.

32. Following her arrest in Pinellas County, Florida, Royse was compelled to endure five days in custody in the Pinellas County jail.

33. As a result of Wilber's false testimony to the grand jury and its issuance of a felony criminal indictment against her, Royse was obliged to post a cash bail, be subject to pretrial supervision, had her nursing license suspended, was compelled to largely abandoned her established life in Florida in order to deal with the pending felony charges against her that were based on Wilber's false grand jury testimony, was compelled to hire lawyers to defend her against those same felony charges, and was subjected

to great and substantial emotional distress, anxiety and mental anguish.

34. As a result of Wilber's false testimony to the grand jury and its issuance of felony criminal indictment against her, Royse was subjected to a deprivation of liberty.

35. The Franklin Circuit Court dismissed the felony indictment against Royse based on findings that Wilber's had testified falsely to the grand jury with regard to the following material points: the length of time Royse had been employed at Golden Living; that Royse had failed to notify her superiors of the patient's declining condition; that Royse had failed to properly follow through with lab orders; that Wilbers failed to fully inform the grand jury of all material facts regarding the patient's care and treatment; and that an arrest warrant for Royse had been wrongfully obtained. A true copy of the Franklin Circuit Court order dismissing the indictment against voice is attached hereto and marked Exhibit 2.

36. On September 27, 2013, the Kentucky Court of Appeals affirmed the Franklin circuit court's dismissal of the felony indictment against Royse and also ruled that Wilber's had testified falsely to the grand jury with regard to the following material points: the length of time that Royse had been employed at Golden Living; that Royse had failed to notify her superiors of the patient's declining condition; that Royse had failed to properly follow through with lab orders; that Wilbers failed to fully inform the grand jury of all material facts regarding the patient's care and treatment; and that an

arrest warrant for Royse had been wrongfully obtained. A true copy of the Court of Appeals' opinion is attached hereto and marked Exhibit 3.

37. The Commonwealth sought discretionary review by the Supreme Court of Kentucky of the Court of Appeals ruling. The Supreme Court denied the motion for discretionary review by order entered August 13, 2014.

38. Wilbers acted under color of law within the meaning of 42 U.S.C § 1983 while influencing, participating and/or aiding in the prosecution of Royse.

39. Wilbers, at all times pertinent to this action, acted in reckless and gross indifference to Martin's constitutional rights.

V

Causes of Action

Count I – Malicious Prosecution Pursuant to § 1983

40. Royse incorporates paragraphs 1 through 39 hereof as if fully set forth herein.

41. Freedom from malicious prosecution is a clearly established Fourth Amendment right. *Sykes v. Anderson*, 625 F.3d 294, 308 (6th Cir. 2010).

42. Wilbers influenced, aided and/or participated in the decision to prosecute Royse.

43. Because the grand jury indicted Roy solely on the basis of Wilbers testimony, there is no doubt that Wilbers participated in the decision to prosecute Royse.

44. There was no probable cause for the criminal prosecution of Royse.

45. The indictment against Royse was obtained because Wilber's knowingly or recklessly presented false testimony to it.

46. As a consequence of the felony criminal indictment obtained against Royse based on Wilber's false material testimony, Royse suffered a deprivation of liberty apart from her initial arrest.

47. The criminal proceeding against Royse was resolved in her favor.

48. As a direct and/or proximate result of the malicious prosecution of Royse that Wilbers participated in, Royse suffered, is suffering and is reasonably certain to continue suffering damages and injuries.

49. Wilbers, at all times pertinent to this action, acted in reckless and gross indifference to Martin's constitutional rights.

Count II - Malicious Prosecution Under Kentucky State Law

50. Royse incorporates herein paragraphs 1 through 49 hereof as if set fully forth herein.

51. Wilbers influenced, aided and/or participated in the decision to prosecute Royse.

52. Because the grand jury indicted Roy solely on the basis of Wilbers testimony, there is no doubt that Wilbers participated in the decision to prosecute Royse.

53. There was no probable cause for the criminal prosecution of Royse.

54. The indictment against Royse was obtained because Wilber's knowingly or recklessly presented false testimony to it.

55. As a consequence of the felony criminal indictment obtained

against Royse based on Wilber's false material testimony, Royse suffered a deprivation of liberty apart from her initial arrest.

56. The criminal proceeding against Royse was resolved in her favor.

57. As a direct and/or proximate result of the malicious prosecution of Royse that Wilbers participated in, Royse suffered, is suffering and is reasonably certain to continue suffering damages and injuries.

58. Wilbers acted with gross negligence and/or reckless indifference to Royse's rights in his participation in the decision to cause Royse's indictment and prosecution.

VI

Demand For Relief

WHEREFORE, plaintiff Elaine Royse demands judgment herein as follows:

(1) That a judgment be entered awarding her compensatory damages in such amount as found fair and reasonable by a jury at trial;

(2) That a judgment be entered awarding her punitive damages against defendant to punish him for his gross negligence and/or reckless indifference to Royse's constitutional rights and to deter repetition of similar misconduct;

(3) That a judgment be entered awarding Royse monetary damages the evidence at trial shows she sustained as a result of the wrongful actions herein by defendant;

(4) That a judgment be entered awarding Royse her attorney's fees,

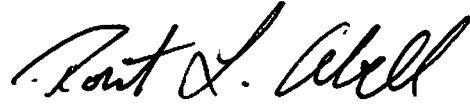
costs, and litigation expenses pursuant to 42 U.S.C § 1988 and CR 54; and,

(5) That Royse be granted such other further relief as he is entitled.

Demand for Trial by Jury

Pursuant to CR 38, Royse demands trial by jury of all issues herein so triable.

Respectfully submitted,



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Robert@RobertAbellLaw.com
COUNSEL FOR PLAINTIFF

Dreema.

12/14/07

ex. 1

I gave Stephen a copy + I want you to have one, too. I am giving a 30 day notice today. I will try to work out the whole thing, it depends on if I get another job + when, but I will give you as much notice as I can. I am sorry for being so upset today. Dreema you do not have enough people to staff this place. Pts. are neglected here on a daily basis. Sean says "staffing is adequate." But what that really means is "staffing is in minimal compliance with state laws." I know it is not your fault directly - you have corporate to answer to. But I can assure you - pts. do not get the care they need here. Meds are empty + not given regularly. Treatments are signed but package never opened. G/T medst + boluses are signed off but the syringe package has never been opened. Patients are neglected.

... the government

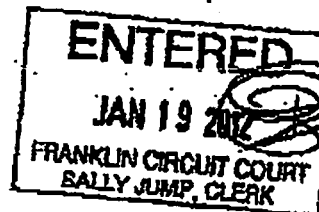
is correct. If you had a ward clerk full time that would help tremendously + eliminate problems such as Mrs. Miracis' dietary changes not being done correctly. The acuity level on South Short is high now. I do not feel adequate working here. No matter how hard I work I cannot care for my patients like I am capable of doing. That puts my license on the line + despite what Golden Living thinks, I own my license + no one else. I may stay on PRN - I need to think it over. Nurse to nurse, Dreema - you need to get out + actually work these floors, not just for a day, but for awhile. You would be amazed at how inadequate pt care really is. It is very disturbing to me. Good luck. I will work out as much of my notice as I can.

Elaine Doyle RN
1/11/11

Order
10-CR-00144

COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION II

CIVIL ACTION No. 10-CR-00144



COMMONWEALTH OF KENTUCKY

PLAINTIFF

vs.

ELIZABETH ELAINE ROYSE

DEFENDANT

ORDER

This matter is before the Court upon Defendant's *Motion to Dismiss Indictment Due to Inapplicability of Statute and Motion to Dismiss Indictment Due to Prosecutorial Misconduct*. Upon review of the parties' briefs and papers, and after being sufficiently advised, the Court hereby **DISMISSES** the Indictment.

Defendant is a Licensed Practical Nurse (LPN) and is charged with a Class C felony pursuant to KRS 209.990(2). The indictment rests on alleged failures to order labs, push fluids, supervise nursing assistants, and contact supervisors about a patient, Mrs. Franks, at Golden Living Center, a nursing home located in Frankfort, Ky.

Generally, a trial court is without the power to summarily dismiss a criminal indictment before trial. CR 9.64; *Commonwealth v. Bishop*, 245 S.W.3d 733, 735 (Ky. 2008). However, a trial court may order the dismissal of an indictment in certain situations. *See Bishop*, 245 S.W.3d at 735; *See also Commonwealth v. Baker*, 11 S.W.3d 585, 588 (Ky. App. 2000). Such situations include prosecutorial misconduct, so long as the Defendant can "demonstrate a flagrant abuse of the grand jury process that resulted in

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both actual prejudice and deprived the grand jury of autonomous and unbiased judgment." *Baker*, 11.S.W.3d at 588.

The parties came before the Court on October 24, 2011, at which time Defendant and an Attorney General Inspector testified. The parties also admitted Defense Exhibits 1-10 and 12-16 and Commonwealth Exhibits 1-4.

In this hearing, facts came to light that the Inspector made certain false and/or misleading statements to the Grand Jury in order to obtain the indictment in this case. For example, the Inspector testified to the Grand Jury that Defendant had worked at Golden Living Center for several months when in fact Defendant had only been employed for eight weeks. This is a material fact as the implied knowledge and authority of a person who worked at any job for several months would largely outweigh that in a person employed for eight weeks.

The Inspector also told the Grand Jury that Defendant failed to notify her superiors about Mrs. Franks' declining condition and that Defendant had some kind of "higher responsibility." In fact, Defendant proved that she contacted her superior several times and had already given her notice of resignation because she felt that the facility was not being operated in a way that allowed nurses to provide high-quality care. She further demonstrated that she possessed no position of authority at Golden Living Center during her short employment there.

The main crux of the Commonwealth's case, however, is that Defendant failed to properly follow through with lab orders for Mrs. Franks. Yet, Defendant proved at the hearing with this Court that she made several notations for labs to be taken, but those notations were not followed through with by her day-shift co-workers. Still, the

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10-CR-00144

Commonwealth seeks, through this action, to place all of the blame on Defendant. Eventually, Mrs. Franks was sent to a hospital where these labs were taken, she was given fluids, and she returned to Golden Living Center that same day. These are all material facts that a Grand Jury must be truthfully informed of before issuing an indictment.

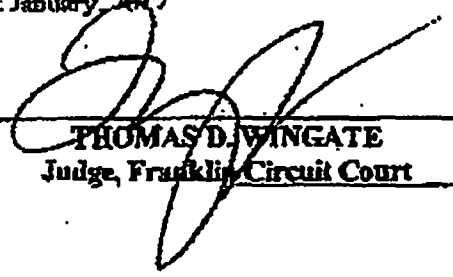
The Court believes that the purpose of a Grand Jury is to indict felonious conduct, not possible negligence or a simple misunderstanding between co-workers. If the Court allowed this matter to go forward, there would be very few nurses in this State who would not be guilty of a Class C felony at one time or another. Such a prosecution is not the intent of the drafters of our penal code.

The Court also notes the troubling nature of Defendant's arrest in this matter. The Commonwealth requested a warrant and such was issued. However, because Defendant was indicted on a Class C felony and has no criminal record except for a speeding ticket, a criminal summons was the most appropriate means of notifying Defendant of these charges. These facts clearly display to the Court that the prosecution of Defendant is unwise, misguided, and not in the best interest of the public.

Therefore, the Court orders the indictment to be **DISMISSED**.

This is a final and appealable order and there is no just cause for delay.

SO ORDERED, this 19th day of January, 2012



THOMAS D. WINGATE
Judge, Franklin Circuit Court

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Order was mailed, this 19th day of January, 2012, to the following:

Hon. Michelle Grant Rudovich
Assistant Attorney General
Office of Medicaid Fraud and Abuse Control
1024 Capital Center Drive
Frankfort, KY 40601

Hon. John L. Smith
Hon. Erin S. Kennedy
600 West Main Street
Suite 100
Louisville, KY 40202


Sally Jump, Franklin County Circuit Court Clerk

RENDERED: SEPTEMBER 27, 2013; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000275-MR

COMMONWEALTH OF KENTUCKY

APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NO. 10-CR-00144

ELIZABETH ELAINE ROYSE

APPELLEE

OPINION
AFFIRMING

** * * * *

BEFORE: CAPERTON, CLAYTON, AND TAYLOR, JUDGES.

CLAYTON, JUDGE: This is an appeal from a decision of the Franklin Circuit Court dismissing the indictment against the appellee, Elizabeth Elaine Royse, due to prosecutorial misconduct. Based upon the following, we affirm the decision of the trial court.

FACTUAL BACKGROUND

Royse was indicted by the Franklin Grand Jury on June 30, 2010. The

Bill of Particulars set forth as follows:

Between the dates of December 12, 2007, to December 25, 2007, the defendant, a Licensed Practical Nurse and caretaker, knowingly neglected Ms. Carolyn Franks, a patient under her care at Golden Living Center (hereinafter "Golden Living") in Frankfort, Kentucky. The defendant failed to perform basic caretaker functions knowing they were necessary to maintain the health and welfare of the victim. These functions include, but are not limited to, a failure to "take off" critical physician orders including labs, antibiotics, and a push fluids order[;] not initiating a [sic] intake/outtake log as required by policy and by standard nursing practices[;] not supervising the certified nursing assistants to ensure the victim was receiving fluids[;] and not contacting supervisors or the doctor when the victim was clearly dehydrated. By failing to perform these functions, the victim became severely dehydrated, was sent to the hospital where drastic steps were taken in order to care for the victim.

There was no formal notice of reciprocal discovery filed; however, the parties exchanged discovery at the pretrial conference on October 21, 2010. On September 20, 2011, Royse filed a Motion to Dismiss the Indictment due to Prosecutorial Misconduct. On October 24, 2011, the trial court heard arguments and testimony on the motion and on January 19, 2012, the trial court issued an order dismissing the indictment. The trial court based this dismissal on the following:

Inspector made certain false and/or misleading statements to the Grand Jury in order to obtain the indictment in this case.

The trial court then went on to make five specific findings as to the misconduct:

1. The Appellee had worked at Golden Living for eight weeks as opposed to several months as the Inspector had testified;
2. The Appellee had proved that she had contacted her superior several times, had provided her notice of resignation due to conditions at the facility, and was not in a position of authority;
3. The Appellee had proved that she made notations for lab orders that co-workers failed to implement;
4. The Appellee's conduct did not rise to felony conduct and only to negligence or a misunderstanding between co-workers; and
5. A criminal summons should have been issued rather than a warrant.

While the trial court originally dismissed the indictment with prejudice, it changed the dismissal to without prejudice and the Commonwealth brought this appeal.

STANDARD OF REVIEW

We review the dismissal of an indictment under an abuse of discretion standard. *Commonwealth v. Baker*, 11 S.W. 3d 585, 591 (Ky. App. 2000). "The test of abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W. 2d 941, 945 (Ky. 1999).

With this standard in mind, we review the decision of the trial court.

DISCUSSION

The Commonwealth first contends that the trial court abused its discretion in dismissing the indictment on a finding of prosecutorial misconduct. It asserts that the trial court's findings regarding the reasons for the dismissal did not demonstrate a flagrant abuse of the grand jury process nor did they demonstrate that the Investigator, Reed Wilbers, knowingly or intentionally presented false, misleading, or perjured testimony to the grand jury.

Pursuant to *Baker, supra*, a court may dismiss a case for prosecutorial misconduct if the defendant can demonstrate that the "prosecutor knowingly or intentionally presents false, misleading, or perjured testimony to the grand jury that results in actual prejudice to the defendant." *Baker* at p. 588. In order for the trial court to dismiss, however, the defendant must "demonstrate a flagrant abuse of the grand jury process that resulted in both actual prejudice and deprived the grand jury of autonomous and unbiased judgment." *Id.*

The Commonwealth argues that the hearing on the motion to dismiss resolved factual disputes that should have been left for a jury to decide. It contends that the trial court, in essence, granted summary judgment, which is not permitted in a criminal proceeding. *Royse*, however, asserts that the trial court had to look at the testimony given to the grand jury by Investigator Wilbers and the evidence he had prior to his testimony in order to determine if there was a flagrant abuse of the grand jury process. In order for this Court to determine whether the trial court abused its discretion in dismissing the indictment, we must look to the specific evidence upon which it based its decision.

The Commonwealth asserts that the trial court's finding that Royse had worked at Golden Living for eight weeks as opposed to several months as the Investigator had testified was a minor distinction. The trial court found this to be "a material fact as the implied knowledge and authority of a person who worked at any job for several months would largely outweigh that in a person employed for eight weeks." The Commonwealth asserts that this distinction is not a materially false statement which resulted in actual prejudice to Royse and it did not deprive the grand jury of autonomous and unbiased judgment. Royse, however, states that it had been many years since she had held a similar job.

Investigator Wilbers clearly stated that Royse had been at her job longer than she actually had. Royse is a licensed practical nurse (LPN). She has been an LPN since 1988 and has worked at other extended living and nursing homes prior to her time at Golden Years. The time between these jobs, however, is prolonged. To say that Royse was at her job for longer than she had been led the jury to believe she had more knowledge of the situation than she had. Consequently, the trial court was correct in finding this was a material distinction.

The Commonwealth also contends that a factual dispute exists as to whether Royse made the proper notation to indicate to her co-workers that labs needed to be taken. The trial court found as follows:

The main crux of the Commonwealth's case, however, is that Defendant failed to properly follow through with lab orders for Mrs. Franks. Yet, Defendant proved at the hearing with this Court that she made several notations for labs to be taken, but those notations were not

followed through with by her day-shift co-workers. Still, the Commonwealth seeks, through this action, to place all of the blame on Defendant. Eventually, Mrs. Franks was sent to a hospital where these labs were taken, she was given fluids, and she returned to Golden Living Center that same day. These are all material facts that a Grand Jury must be truthfully informed of before issuing an indictment.

We agree with the trial court. There is evidence in the record that Franks was getting better even though the tests had not been ordered. When she was taken to the hospital, her physician noted this fact and Royse's supervisor made mention of it as well. There is no indication from any set of facts that Royse's failure to follow through with lab orders for Franks caused her condition to deteriorate. Thus, the trial court correctly found this was a material fact of which the Grand Jury should have been made aware.

The Commonwealth next contends that the trial court abused its discretion in evaluating the criminality of the actions involved. Specifically, it points to the following:

The Court believes that the purpose of a Grand Jury is to indict felonious conduct, not possible negligence or simple misunderstanding between co-workers. If the Court allowed this matter to go forward, there would be very few nurses in this State who would not be guilty of a Class C felony at one time or another. Such prosecution is not the intent of the drafters of our penal code.

The Commonwealth argues that without receiving all of the evidence that would have been presented at trial, the court was not able to make an informed decision as to whether the facts rose to felonious conduct. Instead, it asserts that the proper

time to make such a determination would be after the Commonwealth's case-in-chief had been presented.

Royse, however, argues that the trial court had to look at the evidence in order to determine whether the statute was applicable to Royse's case. She asserts that with the information known to the Investigator and the prosecutor at the time the grand jury indicted her, there was insufficient evidence to indict her.

Consequently, she contends that the prosecutor, through Investigator Wilbers, misled the jury and took simple mistakes and misunderstandings between Royse and her co-workers and made it appear to be conduct constituting a felony charge.

We agree with Royse's argument. There are no facts upon which one could say that Royse's actions rose to felonious conduct; thus, it was not an abuse of discretion for the trial court to dismiss the case.

Finally, the Commonwealth contends that the trial court abused its discretion in considering the circumstances of Royse's arrest. Royse was charged with a Class C Felony, however, rather than being issued a criminal summons, the Commonwealth asked for an arrest warrant. Judge Wingate signed the arrest warrant on July 1, 2010, wherein a \$20,000 cash bond was set. On July 20, 2011, the bond was reduced to \$5,000 with the agreement of the Commonwealth.

The Commonwealth argues that any consideration of the manner in which Royse was notified of the charge against her, or of the bond set by the trial court, was outside the scope of the issue of whether the grand jury testimony of Investigator Wilbers

rose to the level of prosecutorial misconduct. The trial court considered this fact as part of the broader picture of prosecutorial misconduct, which was appropriate.

We,

therefore, affirm the decision of the trial court.

ALL

CONCUR.

BRIEF FOR APPELLANT:

Jack Conway
Attorney General of Kentucky

Michelle Grant Rudovich
Assistant Attorney General
Frankfort, Kentucky

Travis Mayo
Assistant Attorney General
Frankfort, Kentucky

ORAL ARGUMENT FOR
APPELLANT:

Michelle Grant Rudovich
Assistant Attorney General
Frankfort, Kentucky

BRIEF FOR APPELLEE:

John L. Smith
Louisville, Kentucky

Erin S. Kennedy
Louisville, Kentucky

ORAL ARGUMENT FOR
APPELLEE:

John L. Smith
Louisville, Kentucky