

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-001661-MR

JERRY HENSLEY

APPELLANT

v. APPEAL FROM GRAVES CIRCUIT COURT
HONORABLE JOHN T. DAUGHADAY, JUDGE
ACTION NO. 97-CR-00097

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING
** **

BEFORE: BARBER, BUCKINGHAM, AND COMBS, JUDGES.

BARBER, JUDGE: Appellant, Jerry Hensley ("Hensley"), appeals the denial of his post-sentencing motion to hold the sale of his real property in abeyance during the pendency of his appeal. While we disagree with the denial of the motion, Hensley's appeal was unsuccessful, so the error was harmless.

Hensley entered a conditional guilty plea to charges of trafficking in a controlled substance. The plea agreement provides on its face that it was conditional. Hensley stated before the trial court that the plea was conditioned on his right to appeal to federal court. He was sentenced to serve five years. The terms of the plea agreement required the forfeiture

of his home as part of the sentencing in the case. The plea agreement did not address whether the forfeiture was to be immediate or was conditional on the results of Hensley's appeal.

After the plea was entered, the trial court entered an immediate order of forfeiture authorizing the Commonwealth to sell Hensley's home. Kentucky law provides for forfeiture of property used in the commission of an offense where the defendant is found guilty of an offense requiring forfeiture. Smith v. Commonwealth, Ky., 707 S.W.2d 342, 343 (1986).

Hensley appealed the charges against him and argued on appeal that there was no connection between his home and the sale or purchase of any illegal substances. After filing the appeal, Hensley filed a pro se motion asking that the trial court set aside the order of forfeiture until his appeal was final. The trial court denied this motion. The Commonwealth put Hensley's house up for sale during the pendency of the appeal.

As a general rule, the Commonwealth may retain property of a defendant until final disposition of the charges against him. Commonwealth v. Batchelor, Ky. App., 714 S.W.2d 158, 159 (1986). Federal law provides that forfeiture of property by a criminal defendant may be held in abeyance during the pendency of an appeal. 21 U.S.C. § 853(h).

The Commonwealth argues that Hensley's plea was not conditional, because he did not specify what he was appealing. The Commonwealth asserts that because Hensley did not state that the plea was conditional upon the Commonwealth not auctioning his home until the appeal was final that term cannot apply to the

plea bargain. Where the terms of a plea agreement are not made part of the record, the parties may take the actions commonly allowed to persons similarly situated. Commonwealth v. Fint, Ky., 940 S.W.2d 896, 897 (1997). Appeal of a conditional plea is allowed, especially where, as here, the plea states on its face that it is conditional, and the record indicates that the condition was the right to appeal.

The trial court denied the motion to hold the forfeiture in abeyance on July 9, 2001. On July 30, 2001, Hensley filed the instant appeal. Hensley's federal habeas corpus petition was denied on August 8, 2001. Hensley's attempt to appeal to the Sixth Circuit was denied on October 5, 2001. The Commonwealth does not indicate when the home was sold, but the record indicates that the auction took place prior to the final disposition of Hensley's appeals.

Under Kentucky law, a conviction which is still on appeal is not a final conviction. Hodge v. Commonwealth, Ky., 17 S.W.3d 824, 852 (2000). Where the forfeiture of property is part of the plea agreement, such forfeiture is properly held in abeyance until such time as the appeal is final. U.S. v. Buchanan, 904 F.2d 349, 349, 352 (6th Cir. 1990). Even where there has been a prior criminal conviction, a defendant is not estopped from contesting the forfeiture of his property. United States v. Three Tracts of Property Located on Beaver Creek, Ky., 994 F.2d 287 (6th Cir. 1993). Disposition of the real property prior to the finality of the conviction was in error.

Under federal law, the Court may require the posting of a bond by the defendant to allay loss caused by the delay in the ability of the government to take ownership of the property. 21 U.S.C. § 853(h). Similarly, Kentucky Courts may require the posting of an appeals bond to protect the non-appealing party from damage. CR 62.03.

The sale of Hensley's forfeited real property was premature. The denial of his motion to hold the sale in abeyance pending the resolution of his appeal was in error. No damages resulted from the premature sale, so the error was harmless. Therefore, we affirm.

ALL CONCUR.

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