

RENDERED: SEPTEMBER 30, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001448-MR

TOMMY BOCOOK

APPELLANT

v. APPEAL FROM MONTGOMERY CIRCUIT COURT
HONORABLE WILLIAM EVANS LANE, JUDGE
ACTION NO. 08-CR-00152

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION AND ORDER DISMISSING

** ** * * * * *

BEFORE: TAYLOR, CHIEF JUDGE; DIXON AND LAMBERT, JUDGES.

LAMBERT, JUDGE: Tommy Bocook appeals from an order of the Montgomery Circuit Court denying his motion for the return of property seized during his arrest. Because we agree with the Commonwealth that the money taken from Bocook was seized during a separate arrest for different charges, we dismiss this case for lack of jurisdiction.

On July 11, 2008, Bocook was indicted in indictment number 08-CR-152 on the charges of rape, sodomy, and unlawful imprisonment in the first degree. Based on a review of the record, Bocook was indicted within a short time in indictment number 08-CR-158 for possession of marijuana, possession of a controlled substance, and possession of a handgun by a convicted felon.

A status hearing on January 22, 2010, indicated that the rape charges in indictment number 08-CR-152 were going to be dropped. A DVD of the record in this hearing denotes the judge saying that there would be an order prepared addressing the return of property, but it is not clear from that hearing what property would be returned, or to which case the property pertained.

On February 9, 2010, an order to dismiss without prejudice and for the return of property was entered in the instant case. That order indicated that a cell phone and Polaroid camera were to be returned to Bocook, but that the items held by the Mt. Sterling Police Department that involved controlled substances “shall be retained by the Department, including all cash seized.”

On March 18, 2010, Bocook filed a *pro se* motion requesting release of additional property, specifically \$694.00 seized from him in relation to his drug crimes, arguing the money was not from “ill-gotten gains.” The Commonwealth filed a response and indicated it had viewed all of the felony cases on Bocook and discovered that other items taken--\$694.00, a .38 caliber handgun, and ammunition—were also evidence in case number 08-CR-158, which related to the drug charges. The Commonwealth indicated that it had prepared a motion and order for

forfeiture of these items, for which Bocook was sentenced on February 27, 2009, but that the documents had not been finalized and filed in that case because the current case, 08-CR-152, was not yet final and the evidence had to be retained. The Commonwealth went on to indicate that there was no doubt that the cash seized was drug money based on all of the drugs and paraphernalia in the residence, and it also pointed out that Bocook could not retrieve the guns because he is a convicted felon.

On July 12, 2010, a notation in the record indicated that Bocook's motion for the release of additional property in this case was denied. Bocook was granted in forma pauperis status, and filed his *pro se* Notice of Appeal on August 3, 2010. That pleading stated that Bocook "appeals the decision to deny his motion to dismiss filed on or about March 15, 2010, and subsequently denied on July 12, 2010."

On appeal, Bocook argues that he was denied due process of law when the court denied his motion to return cash seized from him without a hearing. In response, the Commonwealth argues that the cash in question resulted from a forfeiture of drug money and guns related to case number 08-CR-158 rather than the current case, and accordingly, this Court should dismiss the current appeal because no appeal was taken in case number 08-CR-158. Accordingly, there is no order in the current case, 08-CR-152, for Bocook to appeal. We agree with the Commonwealth and therefore dismiss this appeal.

As noted above, the charges in the instant case involved unlawful imprisonment and crimes of a sexual nature, while the charges in 08-CR-158 involved drug related crimes as well as possession of a gun by a convicted felon. As set forth in the record, the facts were not fully developed in this case and the charges were dropped. Furthermore, Bocook was convicted of the drug related offenses in 08-CR-158 more than a year prior to the charges in this case being dropped. Therefore, Bocook's attempt to file a *pro se* motion in this case is a clever attempt to skirt around the facts and applicable law of case number 08-CR-158.

The record in this case does not flesh out the facts surrounding the drug related offenses for which Bocook was convicted of in February 2009. However, in that case a specific motion for forfeiture of the money and ammunition seized was addressed. In the instant case, the only reference in the record to any items seized occurs in an order dated February 9, 2010, in which the trial court ordered that a cell phone and camera were to be returned to Bocook. In that same order, the Court held that items that involved controlled substances held by police were to be retained by the police, including the cash in question. It is not clear from that order whether the trial court was specifically ordering the items to be forfeited by statute. In fact, Bocook's counsel on appeal indicates in the brief's statement of the case that "there is no order of forfeiture in the record[.]" As no final order of forfeiture was entered in case number 08-CR-00152, there is no final and appealable order of forfeiture from which Bocook can appeal. As such, no

proper appeal has been perfected in this case. *See Gosney v. Commonwealth*, 309 Ky. 187, 217 S.W.2d 225 (1949) (where no final judgment was entered into the record, this Court is without jurisdiction to entertain an appeal).

Accordingly, because there is no final order in the instant case from which Bocook has properly appealed, we dismiss this case for lack of jurisdiction.

ALL CONCUR.

ENTERED: September 30, 2011

/s/ James H. Lambert
JUDGE, COURT OF APPEALS

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