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NO. 95-CA-3259-MR

JESSIE BLEVINS

APPELLANT

v. APPEAL FROM JESSAMINE CIRCUIT COURT
HONORABLE ROBERT J. JACKSON, JUDGE
ACTION NO. 95-CI-221

C. HUNTER DAUGHERTY, JUDGE
JESSAMINE DISTRICT COURT

APPELLEE

OPINION
AFFIRMING

* * * * *

BEFORE: COMBS, GUIDUGLI, and KNOPF, Judges.

KNOPF, JUDGE: This is an appeal from a denial of a petition for a writ of prohibition. Finding no error, we affirm.

The facts of this action are well known to all of the parties, and were outlined by another panel of this court in a previous appeal, (Jessie Blevins v. Commonwealth of Kentucky, No. 94-CA-1393-DG, rendered May 5, 1995). It suffices to say that the appellant, Jessie Blevins, appeared before the Jessamine District

Court and entered a plea of guilty on the charge of operating a motor vehicle under the influence of intoxicants (DUI), first offense. After the appellant had left the courtroom, but prior to the signing or entry of the judgment, the district judge called him and his counsel back and informed them that a mistake had been made on the court calendar. The court records did not correctly reflect the offense as charged on the uniform citation of DUI, second offense. The court set aside the guilty plea and scheduled Blevins for arraignment on the correct charge of DUI, second offense.

The district court ultimately found that jeopardy had not attached so that the guilty plea could be set aside. This court previously dismissed Blevins' first appeal, holding that it was not made from a final judgment. Following remand of that action, Blevins brought a petition for a writ of prohibition in the circuit court, seeking to prevent the district court judge from proceeding to resentencing or rearraign him on the charge of DUI, second offense. The circuit court denied the petition, and this appeal followed.

Although the circuit court questioned if double jeopardy was even applicable, it based its conclusion on the finding that Blevins has an adequate remedy on appeal for the double jeopardy issue. From the opinion entered below, it is obvious that the circuit judge had difficulty reconciling the conflicting case law on this question. Abney v. United States, 431 U.S. 651, 52 L.Ed.2d 651, 97 S.Ct. 2034 (1977); But see, Haight v. Williamson, Ky., 833

S.W.2d 821 (1992). We conclude that Blevins is not entitled to a writ of prohibition based upon the merits of his petition.

Blevins argues that jeopardy attached when the trial court accepted the guilty plea. While Blevins is partially correct, but a guilty plea is not finally accepted until the judgment is signed and entered by the clerk. RCr 11.04(3).

It is elementary that a court of record speaks only through its records. An order is not an order until it is signed. Until then the judge can change his mind and not enter it. The order of the trial court that is under attack here has not been signed, hence the guilty plea has not been officially accepted. In this status the defendant is as free to withdraw it as the trial court is to accept or reject it.

Allen v. Walter, Ky., 534 S.W.2d 453, 455 (1976)

All of the parties agree that Judge Daugherty had not signed nor had the clerk entered the judgment when the judge noticed the discrepancy between the court calendar and the post-arrest complaint. He immediately summoned Blevins back to the courtroom and set aside the guilty plea. Consequently, we find that jeopardy had not attached at that time.

Furthermore, Blevins was actually charged with DUI, second offense in the post-arrest complaint. The charge was listed on the court calendar as DUI, first offense, because the arresting officer used the incorrect violation code on the citation. The district clerk relied on that code to prepare the court calendar and file jacket. We know of no reason why the district judge cannot direct the clerk of the court to correct the mistaken court

records to properly show the offense Blevins was charged with in the post-arrest complaint. RCr 10.10. Thereafter, Blevins can be properly arraigned on the offense with which he was charged.

Lastly, we remind the Commonwealth that allegations of fraud should be made cautiously. Blevins did not misstate any facts or mislead the trial court during his guilty plea. Indeed, Judge Daugherty found in his initial order that Blevins' counsel believed in good faith that the prior DUI conviction was more than five (5) years old. The facts of this case present nothing more than a mistake which was caught in time by an alert trial judge.

Accordingly, the decision of the Jessamine Circuit Court denying the petition for a writ of prohibition is affirmed.

ALL CONCUR.

BRIEF AND ORAL
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