

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1997-CA-002210-MR

BOYD HENSLEY

APPELLANT

V. APPEAL FROM LESLIE CIRCUIT COURT  
HONORABLE R. CLETUS MARICLE, JUDGE  
ACTION NO. 96-CR-15

COMMONWEALTH OF KENTUCKY

APPELLEE

### OPINION AFFIRMING

\* \* \* \* \*

BEFORE: GUDGEL, Chief Judge; COMBS and DYCHE, Judges.

GUDGEL, CHIEF JUDGE: This is an appeal from an order entered by the Leslie Circuit Court denying a post-conviction motion to dismiss an indictment. For the reasons stated hereafter, we affirm.

In July 1996 appellant, Boyd Henley, was charged with four counts of first-degree sexual abuse, four counts of first-degree unlawful transaction with a minor, three counts of second-degree rape, three counts of incest and two counts of second-degree sodomy. At the time the indictment was returned, appellant was incarcerated in a federal prison. On August 7, 1996, the Commonwealth filed with the circuit court a verified

petition for a writ of habeas corpus ad prosequendum. See KRS 455.140. The requested writ was issued the same day.

On March 5, 1997, appellant withdrew his previously entered plea of not guilty and sought leave to enter an unconditional plea of guilty to two counts of second-degree rape in return for the Commonwealth's offer to dismiss the fourteen remaining counts of the indictment and a recommendation that he receive a total sentence of ten years' imprisonment. The court accepted the plea and on June 4 entered a final judgment of conviction consistent with the agreement. The remaining fourteen counts of the indictment were ordered dismissed.

On June 13, appellant filed a pro se motion seeking an order dismissing the indictment on the ground that there was a defect in the proceeding instituted to obtain a writ of habeas corpus ad prosequendum in that the governor did not sign the order releasing him from federal custody. The court denied the motion on July 11, 1997, and thereafter we granted appellant's motion for a belated appeal.

On appeal, appellant contends that the court erred by failing to dismiss the indictment on the ground that the Commonwealth did not obtain a trial date before the writ of habeas corpus ad prosequendum was issued. However, appellant clearly has waived any right to challenge the indictment on this ground.

First, we note that appellant does not collaterally attack the judgment of conviction. Indeed, appellant makes no

claim that he did not enter his guilty plea knowingly, intelligently, and voluntarily. Moreover, at the time appellant filed his motion to dismiss the indictment, fourteen of the sixteen counts of the indictment had been dismissed with prejudice. Further, appellant had already entered an unconditional guilty plea to the two remaining counts. Thus, in the instant action appellant seeks to obtain dismissal of two counts of an indictment to which he pled guilty.

In Tollett v. Henderson, 411 U.S. 258, 267, 93 S.Ct. 1602, 36 L.Ed.2d 235 (1973), the Supreme Court stated the following as to the effect of a guilty plea:

[A] guilty plea represents a break in the chain of events which has preceded it in the criminal process. When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea.

Indeed, the entry of a knowing, intelligent, and voluntary guilty plea waives all defenses except that the indictment fails to charge a public offense. Corbett v. Commonwealth, Ky., 717 S.W.2d 831 (1986).

Here, appellant entered an unconditional guilty plea to two counts of second-degree rape. Although he could have entered a conditional plea of guilty and appealed in regard to alleged defects in his prosecution, see RCr 8.09, he chose not to do so. Since he did not do so, appellant's guilty plea had the effect of

waiving "all non-jurisdictional and procedural defects and constitutional infirmities in any prior stage of the proceeding," 8 Leslie W. Abramson, Kentucky Practice § 22.121 (3d ed. 1997), including his claim regarding defects in the proceeding for a writ of habeas corpus ad prosequendum.

Moreover, we also note that the issue raised on appeal differs from the issue raised in the trial court. In the trial court, appellant claimed that the indictment should be dismissed because the governor did not sign the order releasing him from federal custody. On appeal, however, he concedes that this argument is without merit and instead contends that the Commonwealth did not obtain a trial date before the writ was issued. However, a party cannot assert a new theory of error on appeal which was not initially presented to the trial court. See Harrison v. Commonwealth, Ky., 858 S.W.2d 172 (1993), cert. denied, 512 U.S. 1238, 114 S.Ct. 2746, 129 L.Ed.2d 864 (1994). More important, as noted earlier, any defect in this vein was waived in any event.

The court's order is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Mark Wettle  
Louisville, KY

BRIEF FOR APPELLEE:

A.B. Chandler III  
Attorney General

William L. Daniel II  
Assistant Attorney General  
Frankfort, KY