

RENDERED: August 27, 1999; 10:00 a.m.
TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-002907-MR

TIMOTHY ADKINS

APPELLANT

v. APPEAL FROM PIKE CIRCUIT COURT
HONORABLE EDDY COLEMAN, JUDGE
ACTION NO. 95-CR-00303

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING AND REMANDING
** **

BEFORE: JOHNSON, KNOX AND SCHRODER, JUDGES.

JOHNSON, JUDGE: Timothy Adkins, (Adkins) appeals from the judgment of the Pike Circuit Court entered on May 27, 1997, that convicted him for his third offense of Operating a Motor Vehicle While Under the Influence of Alcohol (Kentucky Revised Statutes (KRS) 189A.010(1) and (4)(c)). We reverse and remand for further proceedings.

Adkins was arrested on September 9, 1995, and subsequently indicted by a Pike County Grand Jury, on November 14, 1995, on one felony count and one misdemeanor count. Count one was for operating a motor vehicle with an alcohol concentration of or above 0.10 or while under the influence of

alcohol or other substance which impairs driving ability (DUI), fourth offense, a Class D felony (KRS 189A.010(1)and(4)(d)). Count two was for operating a motor vehicle while license is revoked or suspended for driving while under the influence, first offense, a Class B misdemeanor (KRS 189A.090(2)(a)). After the trial court suppressed one of Adkins' prior DUI convictions, count one of the indictment was amended to DUI, third offense, a misdemeanor. On May 13, 1997, Adkins pled guilty to the misdemeanor DUI charge and the misdemeanor driving on a suspended license charge. On October 3, 1997, at his sentencing hearing, Adkins moved the circuit court to remand the case to Pike District Court on the grounds that the district court has exclusive jurisdiction over misdemeanors, and that the circuit court lost jurisdiction of the case when the only felony charge was reduced to a misdemeanor. However, the circuit court denied the motion and sentenced Adkins to twelve months in the county jail to be probated after serving thirty days of the sentence. This appeal followed.

KRS 23A.010 and 24A.110 vest circuit courts with jurisdiction over felonies and district courts with jurisdiction over misdemeanors. Adkins claims that the circuit court lost jurisdiction of his case when the felony charge was amended to a misdemeanor and that the trial court acted outside its jurisdiction when it sentenced him rather than remanding the case to the district court for sentencing. The Commonwealth argues that Adkins waived his right to object to the circuit court's

jurisdiction when he submitted himself to the jurisdiction of the circuit court by pleading guilty to the two misdemeanor charges. However, by entering a plea of guilty a defendant does not waive a claim that the court lacked the power to adjudicate a charge against him. State v. Perank, 858 P.2d 927, 930 (Utah 1992), citing Blackledge v. Perry, 417 U.S. 21, 30-31, 94 S.Ct. 2098, 2103-04, 40 L.Ed. 628, 636 (1974). Objections to jurisdiction can be made at any time, and cannot be waived. Commonwealth v. Griffin, Ky., 942 S.W.2d 289, 290-91 (1997); Commonwealth Health Corporation v. Croslin, Ky., 920 S.W.2d 46, 47 (1996); and Duncan v. O'Nan, Ky., 451 S.W.2d 626, 631 (1970).

As to the merits of the issue, the Commonwealth relies upon Broughton v Commonwealth, Ky.App., 596 S.W.2d 22 (1979), and argues that when a felony count of an indictment is dismissed and the only remaining charge is a misdemeanor, the jurisdiction originally conferred upon the circuit court as a result of the felony charge is retained. However, we believe Broughton is distinguishable on the grounds that in Broughton, the dismissal of the felony charge occurred during the trial, whereas in the case sub judice, the felony charge was reduced to a misdemeanor before the trial.

In Jackson v Commonwealth, Ky., 806 S.W.2d 643 (1991), where there were two separate indictments, one for a felony and one for a misdemeanor, and the felony indictment was dismissed, the Supreme Court stated:

Even had the offenses been joined in a single indictment, then after the

Commonwealth dismissed the felony charge the trial court should immediately have remanded the misdemeanor to the district court. Had this been done, all of this time, effort and expense would have been avoided.

Justice Wintershimer, speaking for this Court in the case of Kimbro v. Lassiter, Ky., 648 S.W.2d 860 (1983), correctly stated the principle involved here. He said:

The district court has exclusive jurisdiction of a misdemeanor case unless it is joined with a felony. When the felony was dismissed, the circuit court was correct in remanding the misdemeanor charge to the district court for trial.

Jackson, supra, at 646.

Our rules and statutes clearly provide for joining a misdemeanor with a felony in an indictment, and conferring upon the circuit court jurisdiction over the felony and the misdemeanor for a trial on both charges. Kentucky Rules of Criminal Procedure (RCr) 6.18; KRS 23A.010 and 24A.110. Furthermore, after the trial has begun the circuit court retains jurisdiction over the misdemeanor charge when the only felony charge is either reduced to a misdemeanor, dismissed, or where the Commonwealth proves only a lesser-included misdemeanor offense. Broughton, supra, at 23. However, if the felony charge is removed before trial, whether by reduction to a misdemeanor or by dismissal, the circuit court is required to remand the case to the district court for further proceedings. Jackson, supra, at 646. We believe that Jackson requires that we reverse the case sub judice, since in both cases the felony no longer existed before trial, and it was at this point that the circuit court

lost jurisdiction. Thus, we hold that the circuit court abused its discretion when it denied Adkins' motion to remand his case, consisting of only two misdemeanor charges, to district court. Accordingly, the judgment of the Pike Circuit Court is reversed and this matter is remanded for further proceedings consistent with this Opinion.

SCHRODER, JUDGE, CONCURS.

KNOX, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

KNOX, JUDGE, DISSENTING: I respectfully dissent. Under the circumstances of this case, I do not believe the circuit judge was required to remand these misdemeanor charges to the district court. While the district court indeed has exclusive jurisdiction to make final dispositions of public offenses denominated as misdemeanors, the circuit court may nonetheless dispose of misdemeanors that are joined in an indictment also charging a felony. KRS 24A.110. However, we have held that a circuit court, having acquired jurisdiction by virtue of a felony/misdemeanor joint indictment, retains jurisdiction even where the felony is subsequently reduced to a misdemeanor. In so holding, we cited with approval the following authority:

It has been held in similar cases from other jurisdictions that where the trial court's jurisdiction is invoked by a felony indictment, it is not lost by the fact that the state subsequently reduces the charge to a lesser included misdemeanor offense. *Bruce v. State*, 419 S.W.2d 646 (Tex. Cr. App. 1967).

We believe the general rule should be applied in this situation as stated in 22 C.J.S. Criminal Law § 169:

As a general rule, where the court has jurisdiction of the crime for which accused is indicted, sometimes by reason of statute, it is not lost if on the evidence he is convicted of a crime of an inferior grade of which it would not have jurisdiction originally. . . .

Broughton v. Commonwealth, Ky. App., 596 S.W.2d 22, 23 (1979).

I see no reason to distinguish this case simply because the trial court ruled invalid a prior DUI conviction, automatically reducing the felony charge to a misdemeanor, particularly where Adkins then proceeded to plead guilty to all misdemeanor charges. As noted in Commonwealth v. Ramsey, Ky., 920 S.W.2d 526 (1996), which like the case before us, involved reduction of the charge of felony DUI to misdemeanor DUI due to the inadmissibility of prior offenses:

[T]he Commonwealth maintains . . . without introduction of the prior DUI's, the Commonwealth will be limited to proving only a misdemeanor which is outside the Circuit Court's jurisdiction. The Commonwealth has misconstrued the issue of jurisdiction. Once a defendant is indicted on a felony charge, the Circuit Court has jurisdiction. Secondly, the Commonwealth asserts that since the result, i.e. a conviction of DUI, will net only a misdemeanor conviction the Circuit Court will be left without authority to bifurcate the proceeding. Once a guilty verdict is reached, the Circuit Court has the authority to conduct a penalty phase, pursuant to KRS 532.055, in which the prior convictions may be introduced and the appropriate sentence determined, following proper instructions to the jury.

Id. at 528. (Citations omitted).

Here, the circuit court properly obtained jurisdiction. Once Adkins became convicted of the misdemeanor offense, albeit by way of plea, I believe the circuit court had jurisdiction to make a final disposition of the charges.

I do not read the case authority as requiring a remand to district court. Rather, I read the cases as simply providing that felony charges amended to misdemeanors may be remanded. In Jackson v. Commonwealth, Ky., 806 S.W.2d 643 (1991), our highest Court held that where two separate indictments were returned, one charging a felony drug offense and the other a misdemeanor DUI offense, the circuit court would not have jurisdiction to hear the misdemeanor case, since it was not joined in the same indictment charging the felony offense. The case before us is factually distinguishable from Jackson, in that we are addressing a joint felony/misdemeanor indictment, not two separate indictments. Regardless of the dicta in Jackson upon which the majority relies, I believe a better analysis of this case lies in Kimbro v. Lassiter, Ky., 648 S.W.2d 860 (1983).

Kimbro involved the issue of whether remanding a misdemeanor charge to district court, after a felony count with which it had been joined was dismissed, constituted reversible error. Our highest Court said it did not, but more significantly, held that such a remand is merely permissible:

An inherent part of the circuit court's jurisdiction is the authority to remand the remaining misdemeanor. In no sense would such a remand be an interference by a circuit court with the authority of a district court. It is simply an orderly disposition of the

case consistent with the exclusive statutory jurisdiction.

It is the holding of this Court that where a felony and misdemeanor are originally joined but later separated, the circuit court may remand the misdemeanor to the district court for disposition.

Id. at 861. (Emphasis added).

While our highest Court has said that a misdemeanor charge may be remanded to district court when a felony charge with which it was joined in an indictment has been dismissed, I do not read the case law as requiring such a remand, particularly where the felony charge has simply been amended and where the defendant has chosen to resolve it in circuit court by way of a plea. Under such circumstances, I believe the circuit court retains authority to make a final disposition of the misdemeanor charge.

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