RENDERED: SEPTEMBER 8, 2000; 2:00 p.m.
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Commonwealth Of Kentucky

Court Of Appeals

NOS. 1999-CA-000644-MR
1999-CA-001233-MR
1999-CA-001619-MR

COMMONWEALTH OF KENTUCKY — APPELLANT

v.

APPEAL FROM MADISON CIRCUIT COURT
HONORABLE JULIA ADAMS, JUDGE
ACTION NO. 99-CR-00006

TROY H. REED — APPELLEE

AND:

NOS. 1999-CA-000645-MR
1999-CA-001234-MR
1999-CA-001620-MR

COMMONWEALTH OF KENTUCKY — APPELLANT

v.

APPEAL FROM MADISON CIRCUIT COURT
HONORABLE JULIA ADAMS, JUDGE
ACTION NO. 99-CR-00002

TIMOTHY A. GADD — APPELLEE

OPINION AND ORDER DISMISSING APPEALS
** ** ** ** **

BEFORE: BARBER, EMBERTON AND GUIDUGLI, JUDGES.

GUIDUGLI, JUDGE. The Commonwealth of Kentucky has appealed the orders of the Madison Circuit Court entered March 9, 1999, declaring KRS 189A.010(4)(c) unconstitutional as it relates to

the appellees herein; Troy H. Reed and Timothy Ray Gadd. Believing that the issue raised by the Commonwealth is moot in that the Commonwealth permitted the appellees to enter a guilty plea to a misdemeanor offense under the same statute, we order the appeals dismissed.

The factual allegations against each appellee are not relevant to the appeal except to note that each had been previously convicted of two prior driving under the influence offenses (DUI) (KRS Chapter 189A) within a five year period of time when each was again charged with a DUI offense. When arrested for this, the third DUI offense within five years, each submitted to a breathalyzer (BA) test in which the reading registered above 0.18. (Reed registered a 0.197; Gadd a 0.221). Each defendant filed a motion seeking to have KRS 189A.010(4)(c) declared unconstitutional because of the different penalty imposed upon one depending on the outcome of the BA test. A third offender who registers below 0.18 on the BA or who refuses a BA test is treated as a misdemeanor offender. However, one whose reading on the BA is 0.18 or above is deemed a felony offender facing one to five years in the state penitentiary.

The trial court conducted a hearing on the motion to declare the statute unconstitutional and thereafter entered the March 9, 1999, order declaring KRS 189A.010(4)(c) unconstitutional finding it to be "arbitrary and not rationally related to the legitimate interest to deter or punish DUI offenders... ." The Commonwealth filed its first appeal in each of the cases based upon this ruling. However, the circuit

court's actions against these defendants did not end there. The cases were again brought before the circuit court to determine how the Commonwealth would proceed in these matters. The following exchanges took place at Gadd's April 8, 1999, hearing before the Madison Circuit Court Judge, Julia Adams:

> Defense Counsel: The Commonwealth in the meantime has filed a notice of appeal...I don't believe that it is appropriate. KRS 22A.020 certainly gives the Commonwealth leave to appeal, however it cannot suspend the proceedings in a criminal matter. They can do it (appeal), but I think we still have a right to a trial or to enter a plea."
>
> Mr. Gadd has been in jail since this incident, he has served over three months, we are open to any misdemeanor plea offers that the Commonwealth would like to make.
>
> Comm. Attorney: I would recommend 12 months (the maximum). We need to find out how that is going to affect our appeal...Would the court grant us leave to pursue an appeal in light of that? (in light of the defendants' guilty pleas) Sort of a reverse conditional plea.
>
> Defense Counsel: I think that would grant their appeal moot.
>
> Judge Adams: Yea, I think it may make the appeal moot...for him to enter a plea.
>
> Comm. Attorney: Well then we probably better set it for trial.
>
> Judge Adams: Or to be convicted at trial...either way I think that moots your appeal.
>
> Comm. Attorney: That is exactly what I am trying to get done.
>
> Defense Counsel: I think they would still be free to certify a question of law without a matter pending, it just would not affect the rights of Mr. Reed or Mr. Gadd.
>
> Judge Adams: It needs to go to certification.

Comm. Attorney: That's not what the people down in Frankfort tell me Judge. They tell me to run an appeal on it...I feel like I'm whipped solid on this thing.

The rationale that I've been given is that in an appeal we have a right to automatically, certification we do not have a right to automatically, we have a right to request, and if the Supreme Court chooses not to grant the certification then we have gained nothing.

Judge Adams: If he were to plead to a misdemeanor that was forced upon you essentially by the court, you may have a right to appeal.

Comm. Attorney: If they would agree that we have a right to appeal that's fine.

Judge Adams: They want you to appeal it too.

Defense Counsel: Just not at the expense of Mr. Gadd. Are we talking about an agreement whereby we would agree that if this appeal is successful, Mr. Gadd...

Judge Adams: Oh, I think Mr. Gadd will be long gone. We don't replow that row.

Comm. Attorney: No, he's pled, he's taken his licking and kept on ticking, so I think what we need to do is resolve the legal issue.

Defense Counsel: He certainly cannot plead with a recommendation of the maximum sentence, but we are willing to...

Judge Adams: If at any time you enter a plea, I think it has to be without recommendation.

Comm. Attorney: That's fine, if he wants to plead without recommendation.

After additional discussions and negotiations, both appellees subsequently plead guilty to operating a motor vehicle while under the influence of alcohol, third offense, a misdemeanor. The court orders entered by Judge Adams on May 6, 1999, accepting the appellees' pleas specifically notes that each

pled to "DUI misdemeanor" as does the docket sheet signed by the judge on that date. Furthermore, the court sentenced each defendant to nine months on the DUI, third offense, conditionally discharging the sentence for two years. Reed had already served 126 days in jail awaiting trial and Gadd had served 137 days prior to his plea. The Commonwealth again filed a notice of appeal in each case to protect its right to appeal the ruling that the statute was unconstitutional.

On June 16, 1999, the defendants were brought back into court for final sentencing. After reviewing the pre-sentence report the trial court entered the following "order noting entry of sentence" as to both, Reed and Gadd:

> The above-named defendant having appeared in open court this date, with his attorney, Hon. Jennifer Hall, and he having entered a plea of guilty to the crimes of Count I-Operating a Motor Vehicle Under the Influence, 3rd offense, misdemeanor; and Count II-Driving on Suspended License, misdemeanor and the Court having determined that the defendant knowingly and understandingly entered said guilty plea and the Court having thereupon adjudged him to be guilty of said crime and having noted the recommendation made by the Commonwealth's Attorney of (no recommendation).

In response to the Commonwealth's appeals, the appellees contend that as both Gadd and Reed have entered guilty pleas and final judgments have been entered against them, double jeopardy principles preclude the appellees from being re-tried by the Commonwealth should the Commonwealth be successful in its appeal. The appellees also argue that since they have entered guilty pleas and have had final judgments rendered against them, there is no longer any case or controversy, thereby mooting the

Commonwealth's appeal of Judge Adams' ruling finding KRS 189A.010(4)(c) unconstitutional. The appellees are of the position that what the Commonwealth is attempting to do is an impermissible reverse conditional guilty plea, whereby the Commonwealth allows the defendants to plead guilty to the lesser offense on the condition that the Commonwealth may re-try the defendants at a later date for the felony offense should the Commonwealth be successful in its appeal.

The Commonwealth contends that there was no plea agreement made. The Commonwealth argues that no promises were ever made to the defendants by the Commonwealth to induce them to plead guilty to the lesser misdemeanor offense. The appellant holds the view that the appellees were simply allowed to plead guilty to the misdemeanor charge, not acquitted of the felony charge, and therefore Section 115 of the Kentucky Constitution entitles the Commonwealth to one appeal as a matter of right. Having thoroughly reviewed this matter, we reject the Commonwealth's contentions.

A careful review of the video tapes of the many court hearings concerning the constitutionality of the statute and the entering of a guilty plea to a misdemeanor DUI offense convinces this Court that the Commonwealth and the defendants reached a plea agreement which is binding. A plea agreement is essentially a contract between the Commonwealth and a particular defendant. There are two elements which need to be present for a valid enforceable plea agreement to be in existence. First, there must be an agreement to which both the Commonwealth and the defendant

are a party to. Commonwealth v. Corey, Ky., 826 S.W.2d 319, (1992). Like any contract, there needs to be a meeting of the minds as to what is being agreed upon. The plea agreement also requires an offer and acceptance. Cope v. Commonwealth, Ky., 645 S.W.2d 703 (1983). Second, for the terms of the plea agreement to be enforceable against the Commonwealth by the defendant, the defendant must have detrimentally relied on the terms of the plea agreement.

In the present appeal, it seems that although the Commonwealth was very cryptic in its guilty plea offer, there was indeed an offer made. To reach this conclusion it is necessary to examine the circumstances surrounding the plea negotiations that occurred at the April 8th motion hour. Both defendants had been incarcerated for over three months and all parties involved were concerned that the Commonwealth's appeal of Judge Adams' ruling finding KRS 189A.010(4)(c) unconstitutional would unduly delay the proceedings. Defense counsel, as well as the trial judge, suggested to the Commonwealth that the proper course of action would be to seek a certification of the law under CR 76.37 so as to enable the defendants to go to trial or alternatively, to enter a plea to the misdemeanor DUI charge. Defense counsel had informed the Commonwealth that both defendants were open to any plea agreements that the Commonwealth would be willing to make. To defense counsel's request for a plea offer, the Commonwealth responded that the defendants could plead guilty, but he would recommend the maximum sentence provided for DUI 3rd misdemeanor offense. Defense counsel informed the Commonwealth

that the Defendants were willing to plead guilty to the misdemeanor DUI charge, but would not do so if the Commonwealth intended to recommend the maximum sentence. Defense Counsel stated that she was not opposed to the Commonwealth's appeal of Judge Adams' order, she just did not want the appeal to be at the expense of the defendants. Both Judge Adams and the Commonwealth, in a very colloquial manner, reassured defense counsel that neither of the defendants would be affected should the Commonwealth be successful in its appeal. Defense counsel then stated, "he certainly cannot plead with a recommendation of the maximum sentence, but we are willing to... ." Judge Adams interrupted and suggested that should the defendants enter a plea, it should be without recommendation. In response to Judge Adams' suggestion, the Commonwealth stated, "That's fine, if he wants to plead without recommendation." Subsequently, the defendants entered the misdemeanor plea without a recommendation by the Commonwealth.

The defendants bargained and negotiated for a particular plea agreement. In return for the defendant's guilty pleas, the Commonwealth promised that: (1) no sentence recommendation be made by the Commonwealth, and (2) should the Commonwealth be successful in its appeal, the Commonwealth would not later re-try the defendants on felony DUI charges. The defendants detrimentally relied upon the plea agreement by entering their unconditional guilty pleas. By entering their guilty pleas, the defendants were giving up numerous constitutional rights including the right to a trial by jury and

the right to appeal their conviction. Since there was a plea agreement to which both the Commonwealth and the defendants were parties, the agreement is enforceable against the Commonwealth by the defendants.

Plea bargaining, the disposition of criminal charges by an agreement between the prosecutor and the accused, is an essential component of the administration of justice. Santobello v. New York, 404 U.S. 257, 30 L.Ed.2d 427, 92 S.Ct. 495 (1971). Properly administered, it is to be encouraged by the Court. Id. The Commonwealth argues that if successful in its appeal, it can prosecute the defendants under the felony provision of KRS 189A.010(4)(c). "When a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be a part of the inducement or consideration, such promise must be fulfilled." Id. At 433. (See also, Misher v. Commonwealth, Ky., 576 S.W.2d 238 (1979)). In the present appeal, it is clear that the guilty pleas of the defendants would not have been entered in the absence of the Commonwealth's promises not to further prosecute the defendants and to make no recommendation as for sentencing. Regardless of the successfulness of its appeal of Judge Adams' ruling KRS 189A.010(4)(c) unconstitutional, the Commonwealth is bound by the misdemeanor agreement. In light of the fact that the Commonwealth is obligated not to re-try the defendants at a later date under the felony DUI charge, there exists no case or controversy, thereby mooting the Commonwealth's appeal.

Another important issued raised by the appellees is that further criminal proceedings in these matters would result in double jeopardy. The Commonwealth on the other hand asserts its right to one appeal in criminal cases pursuant to Section 115 of the Kentucky Constitution. Section 115 gives the Commonwealth the right to appeal except where: (1) such an appeal would otherwise violate the Constitution; or (2) the defendant is acquitted. If either of these conditions is present, then the only option available to the Commonwealth would be to seek a certification of the law. Collins v. Commonwealth, Ky., 973 S.W.2d 50, 52 (1998).

A defendant has both state and federal constitutional protection against being placed in jeopardy multiple times for the same offense. Ky. Const. § 13; U.S. Const. Amend. V. Double jeopardy will act to prevent the re-trial of a person who has previously been convicted, acquitted or pardoned for the same offense. A plea of guilty is the equivalent to a conviction. Wilson v. Commonwealth, Ky. App., 577 S.W.2d 618 (1979). A conviction based on a plea of guilty to a misdemeanor charge in a criminal court is just as effective as if a formal trial were held and the defendant found guilty. McGrew v. Commonwealth, Ky. App., 215 S.W.2d 966 (1948). A former conviction based on a guilty plea is sufficient to sustain a defense of double jeopardy in a subsequent prosecution for the same offense. Kring v. State of Mo., 107 U.S. 221, 2 S.Ct. 443, 27 L.Ed. 506 (1883) (see also, Simpson v. Commonwealth, Ky., 759 S.W.2d 224 (1988)). When a defendant enters a plea of guilty and waives the right to a trial

by jury, the defendant is entitled to a final determination of his fate. Hord v. Commonwealth, Ky., 450 S.W.2d 530 (1970). Once the defendant has been tried and a judgment has been entered fixing his punishment, he has been once placed in jeopardy for the offense charged. Id. He cannot again be placed in jeopardy for the same offense. Id.

By allowing the defendants to plead guilty to the misdemeanor DUI offense on the condition that should the Commonwealth be successful in its appeal it will re-try the defendants under the felony charge, the Commonwealth is attempting to do what can only be called a "reverse conditional guilty plea." For obvious double jeopardy reasons, the conditional guilty plea is an option available only to the accused. RCr 8.09. To allow the Commonwealth to utilize a conditional guilty plea in such a manner would be a clear violation of double jeopardy. The Double Jeopardy Clause prohibits the state from trying a defendant for a greater offense after obtaining the defendant's conviction on a lesser included one. Grady v. Corbin, 495 U.S. 508, 109 L.Ed.2d 548, 110 S.Ct. 2084 (1990). More specifically, the Double Jeopardy Clause bars a subsequent prosecution if, to establish an essential element of an offense charged in that prosecution, the government must prove conduct that constitutes an offense for which the defendant has already been prosecuted. Id. In the present appeal, both defendants have entered unconditional guilty pleas to the offense of misdemeanor DUI 3rd. Judgments have been entered affixing their punishment for these violations. The defendants have a

legitimate expectation of finality in the sentences they received. Successive prosecutions, regardless of whether they follow acquittals or convictions, raise double jeopardy concerns that go beyond merely the threat of an enhanced sentence. Id. "The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State will all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity." Id. at 518. To allow the Commonwealth to re-try the defendants on felony DUI charges after the defendants have entered unconditional guilty pleas to misdemeanor DUI charges would violate both the spirit and the letter of the Double Jeopardy Clause. Since allowing the Commonwealth to re-try the defendants under the felony DUI charge would violate Double Jeopardy Clause, the Commonwealth's appeal is improper.

Judge Adams summed up this case very well when she stated at the April 18, 1999, hearing, "The problem is this is a case where we all want a definitive appellate answer. The problem is no one wants to lock you up in perpetuity (Mr. Gadd)...on the other hand no one wants to estop a resolution." Unfortunately the Commonwealth has chosen the wrong path in its pursuit of resolution. As this case involves the constitutionality of a statute, the proper course would have been for the Commonwealth to have sought a certification of the law pursuant to CR 76.37.

In that the Commonwealth entered into a binding plea agreement in this case, and further that double jeopardy would prohibit further proceedings in this matter upon remand (if we were to reverse the trial court's order), we believe the issues raised by the Commonwealth herein are improperly before this Court and are moot and therefore, order the appeals dismissed.

ALL CONCUR.

Daniel T. Guidugli
JUDGE, COURT OF APPEALS

ENTERED: September 8, 2000

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