

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-002202-MR

MARK JARVIS

APPELLANT

v. APPEAL FROM CARTER CIRCUIT COURT
HONORABLE SAMUEL C. LONG, JUDGE
ACTION NO. 00-CR-00030

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING

** ** * * *

BEFORE: BARBER, DYCHE, AND McANULTY, JUDGES.

BARBER, JUDGE: Appellant Mark Jarvis appeals from an attempt by the Commonwealth to prosecute him in a case dismissed with prejudice more than a year before a second, identical indictment was filed. Jarvis appeals from a second order of the trial court, entered after the new indictment, retroactively asserting that the earlier dismissal was "without prejudice." We find that the earlier dismissal was made with prejudice and that the later order does not affect the earlier dismissal. For this

reason, the attempt by the Commonwealth to re-indict Jarvis for the same offense is barred by law.

Jarvis was indicted in April 2000 for failure to make required disposition of over \$300. On December 21, 2000, discovery orders were entered by the circuit court. The Commonwealth failed to provide requested discovery within thirty days in accordance with the trial court's orders. On May 29, 2001, Jarvis moved to dismiss the indictment due to the Commonwealth's ongoing refusal to provide discovery responses. The trial judge sustained Jarvis' motion to dismiss from the bench, and so noted on the court docket sheet.

On June 12, 2001, the trial court entered a written order. This Order states in its entirety:

This matter having come before the Court on the Defendant's Motion to Dismiss, this matter having been dismissed on 5 June, 2001,

IT IS HEREBY ORDERED that the bail bond posted with the Carter Circuit Court Clerk in the above-styled action shall be released forthwith. The Carter Circuit Court Clerk is to pay \$7,500.00 of said bond to Hon. Michael R. Campbell pursuant to the Assignment of Bond filed on 21 August, 2000.

The order was served on all parties. The order fulfills the requirements of CR 54.01 holding that a final judgment is ". . . a written order of a court adjudicating a claim or claims in an action or proceeding." The Commonwealth did not object to the dismissal or appeal from the order stating

that the action had been dismissed. The order of dismissal therefore became final and binding as a matter of law. Hicks v. Commonwealth, Ky., 869 S.W.2d 35, 38 (1994).

In April, 2002, approximately a year after the dismissal of the action, Jarvis was indicted for the same offense based on the same facts underlying the earlier indictment. Jarvis made a motion to dismiss the second indictment because the earlier indictment had not been dismissed without prejudice. The trial court denied the motion to dismiss, and entered a new written order stating, in pertinent part, "this Indictment [00-CR-00030] is hereby DISMISSED without prejudice, the Grand Jury having indicted defendant in Carter Circuit Court Indictment Number 02-CR-00040."

Jarvis argues that the trial court's dismissal of the action from the bench on June 4, 2001, coupled with the written order entered June 12, 2001, was a final adjudication upon the merits and that any attempt to re-indict him for the same offense is barred by law. The Commonwealth admits that pursuant to CR 41.02(3) "a dismissal under this Rule, and any dismissal not provided for in Rule 41 . . . operates as an adjudication upon the merits." Jarvis asserts that the trial court's notation on the docket sheet coupled with the June 12, 2001, Order constitute the written order of dismissal required by law. An order of dismissal "must be construed as being with prejudice

unless it says otherwise." Commonwealth v. Hicks, Ky., 869 S.W.2d 35, 38 (1994). For this reason, the trial court's order of June 12, 2001, must be held to have been a dismissal with prejudice.

Jarvis argues that the trial court's September, 2002, written order, entered fifteen months after the dismissal, was untimely and of no effect. In the September, 2002 order, the trial court attempted to retroactively change the earlier dismissal with prejudice to a dismissal without prejudice. We find that this attempt was ineffective and does not operate to alter the earlier dismissal with prejudice.

The Commonwealth argues that the court's oral statements sustaining the motion to dismiss, and the notation on the court's calendar stating that the action was dismissed, were not final or appealable and cannot operate as a final adjudication on the merits. The Commonwealth argues that "the fact that the parties had actual notice or were aware that the appellant's motion to dismiss was sustained is irrelevant" and asserts that the docket sheet cannot serve as a written order of dismissal. The Commonwealth fails to address the written order of June 12, 2001, which states clearly that the action had been dismissed. We hold that the written order dismissing the action is clear on its face, and is binding and valid because it was not appealed.

The Commonwealth asserts that the trial court's September, 2002 order, entered fifteen months after the dismissal, was a permissible correction of a clerical error. As Jarvis shows this Court, there is nothing in the order or the record to indicate that the trial court believed it was correcting a clerical error. Without such a showing, a claim of clerical error cannot be made in this case. We find that there is no support in the record for the Commonwealth's assertion.

Finally, the Commonwealth argues that Jarvis cannot claim double jeopardy or res judicata barring prosecution on the second indictment. The Commonwealth argues that a finding that the earlier indictment was dismissed with prejudice does not bar prosecution on the second indictment for the same offense. Kentucky law holds that a dismissal with prejudice operates to preclude another action on the same matter, regardless of the reason for the dismissal. Polk v. Wimsatt, Ky. App., 689 S.W.2d 363, 365 (1985). Res judicata bars the attempt to re-indict Jarvis for the same offense based on the same facts. For this reason, we find that Jarvis' motion to dismiss the second indictment was improperly denied, and that the attempted revision of the earlier order of dismissal was ineffective and void. For the foregoing reasons, we reverse the trial court's order permitting Jarvis to be reindicted.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Donald E. Blair II
Michael R. Campbell
Morehead, Kentucky

ORAL ARGUMENT FOR APPELLANT:

Michael R. Campbell
Morehead, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler, III
Attorney General of Kentucky
Frankfort, Kentucky

Janine Coy Bowden
Assistant Attorney General
Frankfort, Ky. 40601

ORAL ARGUMENT FOR APPELLEE:

Janine Coy Bowden
Frankfort, Kentucky