

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000717-MR

ROBERT HAMMONS

APPELLANT

v. APPEAL FROM BOONE CIRCUIT COURT
HONORABLE ANTHONY W. FROHLICH, JUDGE
ACTION NO. 05-CR-00139

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: DIXON, MOORE, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Robert Hammons brings this appeal from a February 16, 2006, final judgment of conviction and sentence of the Boone Circuit Court (and a March 20, 2006, amended order correcting a clerical error) upon a jury verdict finding him guilty of possession of a controlled substance (oxycodone) and of being a persistent felony offender in the second degree. We affirm.

On March 1, 2005, Hammons was indicted by a Boone County Grand Jury upon the following: Count 1 - first-degree trafficking in a controlled substance

(percocet), Count II - first-degree possession of a controlled substance (oxycodone), Count III - third-degree trafficking in a controlled substance (oxycodone) and Count IV - first-degree persistent felony offender. The Commonwealth subsequently filed a motion to amend the indictment. Therein, the Commonwealth sought to amend Count I of the indictment from trafficking in a controlled substance (percocet) to trafficking in a controlled substance (oxycodone) and to amend Count III of the indictment from trafficking in a controlled substance (oxycodone) to trafficking in a controlled substance (diazepam). On January 5, 2006, the morning of trial, the Commonwealth made an oral motion to dismiss Count II and Count III of the indictment. The court orally "sustained" the Commonwealth's motion to dismiss Counts II and III. The court's order amending Count I to trafficking in oxycodone and amending Count III to trafficking in diazepam was entered on January 5, 2006. That order did not, however, address dismissal of Counts II or III of the indictment, and at that time Hammons' counsel did not move the court to enter such an order.

Following a jury trial, Hammons was convicted of first-degree possession of a controlled substance (a lesser included offense of trafficking in a controlled substance) and adjudged a persistent felony offender in the first degree. By a February 16, 2006, judgment, Hammons was sentenced to a total of six (6) years' imprisonment. Subsequently, by order entered February 20, 2006, the circuit court dismissed Counts II and III of the indictment. Thereafter, on March 20, 2006, the court corrected a clerical

error in the judgment to reflect that Hammons was actually adjudged a persistent felony offender in the second degree. This appeal follows.

Hammons contends the circuit court erroneously instructed the jury on possession of a controlled substance (oxycodone) because Count II of the indictment, possession of a controlled substance (oxycodone), had been dismissed with prejudice. Hammons specifically contends that the Commonwealth was bound to honor its “agreement” to dismiss Count II of the indictment charging possession of a controlled substance (oxycodone) pursuant to *Shaffer v. Morgan*, 815 S.W.2d 402 (Ky. 1991) and, thus, could not thereafter instruct the jury upon such offense. We disagree.

In *Shaffer*, the Court addressed the effect of a complete dismissal of a criminal indictment with prejudice. *Id.* In that case, Shaffer had been indicted upon a charge of murder, and the Commonwealth ultimately agreed to dismiss the indictment with prejudice. However, several months later, Shaffer was again indicted upon the same murder charge. Shaffer argued that “dismissal of the indictment with prejudice bars a future indictment on the same charge” and that by again indicting upon the same charge, the Commonwealth reneged upon its agreement. *Id.* at 403. The Court in *Shaffer* ultimately agreed.

The issue in *Shaffer* was whether the defendant could be re-indicted upon the same charge after the indictment had been dismissed with prejudice by an agreement with the Commonwealth. By contrast, in the case *sub judice*, Hammons was not re-indicted upon the charge of possession of a controlled substance after dismissal of that

count (Count II), rather Hammons was convicted of possession of a controlled substance as a lesser included offense of Count I, trafficking in a controlled substance. As such, *Shaffer* is clearly distinguishable from the case at bar.

Hammons next contends that dismissal of Count II of the indictment, possession of a controlled substance (oxycodone), was tantamount to an acquittal of that charge; thus, his conviction upon possession of a controlled substance violated double jeopardy. Although the court orally “sustained” the Commonwealth's motion to dismiss Count II of the indictment prior to trial, the order dismissing it was not entered in the court's record until February 20, 2006, four days after the final judgment was entered.

It is well-established that an order is not effective until it is entered in the record by the clerk. *Hawes v. Cumberland Contracting Co.*, 422 S.W.2d 713 (Ky. 1968); *Commonwealth v. Hicks*, 869 S.W.2d 35 (Ky. 1994); *West v. Commonwealth*, 147 S.W.3d 72 (Ky.App. 2004).¹ The record discloses that the written order was not entered by the clerk until February 20, 2006. The judgment of conviction and sentence was entered four days earlier, on February 16, 2006. Therefore, Count II of the indictment, possession of a controlled substance (oxycodone), had not been dismissed when Hammons was tried and convicted. As Hammons was convicted and sentenced upon the possession of a controlled substance charge before an order dismissing that count of the

¹ Robert Hammons cited as authority the case of *Commonwealth v. Hicks*, 869 S.W.2d 35 (Ky. 1994) for his argument that double jeopardy was violated. We point out that *Hicks* also discusses the distinct legal consequences of an “oral pronouncement” versus a written order/judgment. Relevant to this appeal, the *Hicks* Court recognized that an oral pronouncement by the court is not a judgment until reduced to writing.

indictment was entered, double jeopardy was not offended. As such, we reject Hammons' contention that double jeopardy was violated.

For the foregoing reasons, the final judgment of conviction and sentence and amended order correcting clerical error of the Boone Circuit Court are affirmed.

DIXON, JUDGE, CONCURS.

MOORE, JUDGE, CONCURS IN RESULT AND FILES SEPARATE OPINION.

MOORE, JUDGE, CONCURRING. I concur fully with the majority's opinion but write separately only to note that I do not believe the evidence supports a finding that there was an “agreement” between the parties for the dismissal of Count II as anticipated under the *Shaffer* case. Thus, Hammonds' arguments that the Commonwealth was bound to honor its “agreement” facially lack merit.

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