

RENDERED: FEBRUARY 4, 2011; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000266-MR

WILLIAM JOSEPH REED

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MITCHELL PERRY, JUDGE
ACTION NO. 09-CR-001439

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING IN PART AND VACATING IN PART

** ** * * * * *

BEFORE: LAMBERT AND MOORE, JUDGES; ISAAC,¹ SENIOR JUDGE

LAMBERT, JUDGE: William Reed appeals from the Jefferson Circuit Court's judgment of conviction and sentence entered on December 21, 2009, imposing a felony fine in the amount of \$1,000.00. Because we believe the trial court had previously found Reed to be indigent, the imposition of a felony fine was in error,

¹ Senior Judge Sheila R. Isaac sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

and we therefore vacate the portion of the judgment imposing such. Otherwise, we affirm the trial court's judgment.

Reed was charged in the Jefferson Circuit Court in Indictment No. 09-CR-001439 with burglary in the second degree, criminal mischief in the first degree, fleeing or evading police in the second degree (motor vehicle), and fleeing or evading police in the second degree (pedestrian). Reed, who was found to be indigent, was represented by an assistant public defender from the Office of the Louisville Metro Public Defender.

Reed entered into an agreement with the Commonwealth to plead guilty to the above charges, and the Commonwealth recommended a sentence of five years' imprisonment. Part of the agreement stated, "Commonwealth recommends a fine of \$1,000.00." A hand-written notation on the agreement stated, "Defense counsel objects to felony fine." On November 5, 2009, Reed entered pleas of guilty to each of the above charges, and his plea was accepted, but sentencing was passed to December 9, 2009.

On that date, the trial court imposed the five-year sentence and a felony fine in the amount of \$1,000.00. Reed's counsel again objected to the fine, citing KRS 534.030 and *Simpson v. Commonwealth*, 889 S.W.2d 781 (Ky. 1994). Final judgment was entered on December 21, 2009. Reed's counsel tendered an order to the trial court to allow him to proceed *in forma pauperis* on appeal. On January 5, 2010, the Jefferson Circuit Court entered the *in forma pauperis* order,

and in an order entered on April 23, 2010, this Court granted Mr. Reed a belated appeal.

On appeal, Reed argues that the imposition of the \$1,000.00 fine was in error and that the portion of the judgment ordering the payment of the fine should be vacated. We agree.

KRS 534.030(1) states: “[A] person who has been convicted of any felony shall, in addition to any other punishment imposed upon him, be sentenced to pay a fine in an amount not less than one thousand dollars (\$1,000) and not greater than ten thousand dollars (\$10,000) or double his gain from commission of the offense, whichever is the greater.” However this same statute states, “[f]ines required by this section *shall not* be imposed upon any person determined by the court to be indigent pursuant to KRS Chapter 31.” KRS 534.030(4) (emphasis added).

In *Simpson v. Commonwealth*, 889 S.W.2d 781, 784 (Ky. 1994), our Supreme Court addressed the same issue presented in Reed’s appeal and concluded:

Pursuant to [KRS 534.030], the judge must independently determine the appropriateness of any fine, and if so, the appropriate amount and method of payment thereof. In so doing, the judge must also consider whether the appellant is indigent. In this connection, we observe that at sentencing in this case, the appellant was represented by an assistant public advocate. Thus, we may assume that the trial judge had already determined that the appellant was indigent. For this reason, imposition of any fine was inappropriate, and

accordingly, we vacate such portions of the sentence as pertain thereto.

Before this Court, the Commonwealth concedes that under KRS 534.030 and *Simpson*, Reed's argument that a fine was incorrectly included in his judgment is correct. However, the Commonwealth argues that under *O'Neil v. Commonwealth*, 114 S.W.3d 860 (Ky. App. 2003), Reed is not entitled to the relief he is requesting, specifically that this Court vacate the portion of the judgment imposing the \$1,000.00 fine. Instead, the Commonwealth contends that under *O'Neil*, Reed is not entitled to pick and choose which terms of a plea agreement he desires to have enforced.² The Commonwealth also argues that the Kentucky Supreme Court's decision in *McClanahan v. Commonwealth*, 308 S.W.3d 694 (Ky. 2010), supports its arguments.

In *McClanahan*, the defendant accepted a plea agreement with a recommended sentence of ten years' imprisonment. *Id.* at 696. Because the defendant wanted to be released from jail to tend to family matters but was unable to post the required bail, the Commonwealth agreed that the defendant could be released on his own recognizance, provided that he agreed to what the trial court and the parties in the case referred to as a "hammer clause," whereby if he failed to fully cooperate with the authorities throughout sentencing he agreed to serve a

² Although the Commonwealth does not make such an argument, we note that in *Taylor v. Commonwealth*, 2010 WL 323180 (Ky. App. 2010) (2008-CA-001585-MR), this Court held that a defendant who knowingly pleaded guilty to a felony fine was not permitted to then argue that the felony fine violated KRS 534.030. In that case, unlike here, the defendant did not object to the felony fine prior to accepting the terms of the plea agreement, as Reed did in the instant case. Therefore, the facts in this case are distinguishable from *Taylor*.

forty-year sentence and to forfeit his right to seek probation or shock probation.

Id. The defendant failed to appear for sentencing, and the trial judge determined that the potential charges reflected in the guilty plea judgments added up to only thirty-five years. The trial judge then sentenced him to thirty-five years imprisonment accordingly.

Finding that the thirty-five year sentence exceeded the lawful range of punishment established by the General Assembly for the defendant's crimes, the Supreme Court held that the trial court's imposition of such a sentence violated the separation of powers doctrine embodied in Sections 27 and 28 of the Kentucky Constitution and amounted to an abuse of discretion. *Id.* at 698. Based on its finding that the plea agreement was a contract between the defendant and the Commonwealth, and that an agreement that runs contrary to the law will not be enforced, the Supreme Court found that the plea agreement between the Commonwealth and the defendant could not be enforced. Accordingly, the Court reversed the matter and remanded it to the trial court for further proceedings permitting the defendant to withdraw his guilty plea. *Id.* at 701-02.

In the instant case, the Commonwealth argues that the Court may not vacate the portion of the judgment imposing a fine, but instead, as the Court did in *McClanahan*, must reverse the judgment and remand for further proceedings in the trial court. We disagree with the Commonwealth's arguments and find the Kentucky Supreme Court's holding in *Simpson* to still be controlling and sound precedent. The facts in the instant case are directly analogous to *Simpson*, in

which the Court simply vacated the portion of the judgment requiring the indigent defendant to pay a felony fine. Furthermore, *McClanahan* did not in any way overrule *Simpson*, which is indicative of the Supreme Court's decision not to overturn plea agreements improperly imposing felony fines.

For the foregoing reasons, the portion of the December 21, 2009, judgment requiring Reed to pay a felony fine of \$1,000.00 is hereby vacated. The judgment is otherwise affirmed.

ISAAC, SENIOR JUDGE, CONCURS.

MOORE, JUDGE, DISSENTS BY SEPARATE OPINION.

MOORE, JUDGE, DISSENTING: Respectfully, I must dissent from the majority's opinion. First, I am not certain that Reed's argument is properly preserved. His guilty plea was not conditionally entered, and there is no mention in his brief that he filed a motion to withdraw his guilty plea. Nonetheless, even assuming that the issue is properly preserved, I do not join in the majority's application of *Simpson v. Commonwealth*, 889 S.W.2d 781 (Ky. 1994), to the facts of this case.

I do agree with the majority, however, that *McClanahan v. Commonwealth*, 308 S.W.3d 694 (Ky. 2010), can be read to apply to the case at bar, and even the Commonwealth appears to concede this. At the time the trial court entered the judgment of sentence in this case, it did not have the benefit of *McClanahan*.

As noted in *McClanahan*, "plea agreements in criminal cases are contracts between the accused and the Commonwealth, and are interpreted according to

ordinary contract principles.” 308 S.W.3d at 701 (citations omitted). Courts cannot enforce agreements that are contrary to the law. *Id.* (citations omitted). *McClanahan* dealt with a plea agreement that included a “hammer clause” making the sentence agreed to in the plea agreement longer than that called for by the law. The Court in *McClanahan* held that the trial court should have rejected the plea agreement because it contravened the law and was accordingly legally invalid and unenforceable.

Likewise, in Reed’s case, the trial court should have rejected the plea agreement, as there was not a legally enforceable bargain between the parties. In *McClanahan*, the Kentucky Supreme Court reversed and remanded the case to the trial court, ruling that the trial court erred when it did not allow the appellant to withdraw his guilty plea because it was based on an invalid and unenforceable contract with the Commonwealth.

I agree with the majority that *McClanahan* did not overrule *Simpson*, but, unlike the majority, I do not think that *Simpson* applies to this case. *Simpson* did not involve a plea agreement. But, instead, the fine in that case was imposed after a jury trial. Rather than entering into a bargain with the Commonwealth, Simpson went to trial. Thus, the issue in *Simpson* was not a plea agreement, *i.e.*, a contract with the Commonwealth, as was the case in *McClanahan*. Consequently, *Simpson* is distinguishable and does not apply to the case at bar because the fine in *Simpson* was imposed by the court following a jury trial.

In Reed's case, he did not have to stand before a jury to be tried.

Rather, he voluntarily chose to waive his right to a jury trial, voluntarily agreed to enter into the plea agreement--against the advice of counsel-- and received a lesser prison sentence than he may have received if he exercised his right to a jury trial.

To allow Reed to benefit from a plea agreement that the trial court should have rejected, in my view, actually goes against the holding in *McClanahan*.

Presumably, in lieu of the agreed upon fine, the Commonwealth may have offered a higher sentence. Nonetheless, the plea agreement, pursuant to *McClanahan*, is unenforceable and should have been rejected by the trial court; hence there really is not an enforceable agreement between Reed and the Commonwealth.

Accordingly, I believe that *McClanahan* compels that we reverse and remand this matter to the trial court, rather than allowing Reed to benefit from a plea bargain that is contrary to law and one which the Commonwealth likely would not have offered had *McClanahan* been the law at the time the agreement was made.

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