

IMPORTANT NOTICE **NOT TO BE PUBLISHED OPINION**

THIS OPINION IS DESIGNATED “NOT TO BE PUBLISHED.” PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

RENDERED: JANUARY 21, 2010

NOT TO BE PUBLISHED

Supreme Court of Kentucky

2009-SC-000276-MR

DATE 2/11/10 Kelly Klaben D.C.

DOCK B. HILLMAN

APPELLANT

V. ON APPEAL FROM COURT OF APPEALS CIRCUIT COURT
CASE NO. 2009-CA-000157
JEFFERSON CIRCUIT COURT NO. 06-CR-003457

HON. MITCH PERRY (JUDGE
JEFFERSON CIRCUIT COURT), ET AL.

APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING IN PART AND VACATING IN PART

Appellant, Dock B. Hillman, appeals as a matter of right¹ from an order of the Court of Appeals denying his petition for a writ of prohibition seeking to prohibit Judge Mitch Perry of the Jefferson Circuit Court from imposing sentence on him pursuant to a guilty plea on the grounds that such would violate double jeopardy principles under the United States and Kentucky Constitutions. The Court of Appeals denied his petition upon the rationale that by pleading guilty Hillman waived double jeopardy as a defense.

Because Hillman has already been sentenced and the circuit court no longer retains jurisdiction over the cause, Hillman's petition for a writ to

¹ Kentucky Const. § 110(2)(b).

prohibit sentencing is moot. We accordingly affirm the Court of Appeals, albeit on different grounds. We further vacate the portion of the Court of Appeals' order addressing the issue of waiver on the merits, lest it unduly influence Hillman's potential post-conviction remedies.

FACTUAL AND PROCEDURAL BACKGROUND

The basic facts are not in dispute. Hillman was indicted for the offenses of attempted murder, first-degree assault, second-degree assault, and first-degree persistent felony offender. The case proceeded to trial.

During the trial it was discovered that two photographs were inadvertently omitted from the discovery materials disclosed by the Commonwealth. Hillman aggressively challenged the discovery violation, arguing that one of the photos was exculpatory. Counsel moved for dismissal or other appropriate sanctions and, in the presence of the jury, so vehemently expressed disapproval at the violation that the trial court cautioned him to calm down.

Outside of the jury's presence, Hillman's counsel stated that because of the present discovery violation, he could not be certain that other exculpatory evidence had not been withheld. He renewed his request for sanctions and again requested a dismissal. The trial court stated that it intended to declare a mistrial and to require the Commonwealth to review all materials in its possession in order to ensure that no other items had been omitted from discovery. Defense counsel did not object to the court's stated intention, but

did offer the court an alternative to the mistrial by asking whether the court would consider admonishing the jury.

However, the trial court accepted defense counsel's representation that the materials were exculpatory and that this necessitated a mistrial. Defense counsel then stated, "I was just trying to offer an alternative, but that's fine." After this discussion ended, the jury was brought back into the courtroom, a mistrial was declared, and the jury was released.

On September 3, 2008, Hillman filed a motion to dismiss the indictment based upon double jeopardy grounds. The court heard the motion on September 26, 2008, and then denied the motion from the bench.²

On October 7, 2008, the date scheduled for a new trial, Hillman entered a guilty plea to the charges of second-degree assault and fourth-degree assault. Under the agreement Hillman was to serve a total of ten years. In so pleading Hillman expressly acknowledged, among other things, that he understood that by entering his plea he was waiving his right to appeal the convictions.

After entry of the guilty plea, but before final sentencing, Hillman filed in the Court of Appeals a petition for writ of prohibition pursuant to CR 76.36 seeking to prohibit the trial court from sentencing him under the plea agreement on double jeopardy grounds. The petition also sought intermediate relief pursuant to CR 76.36(4) staying the pending sentencing, which the Court

² We note that a petition for a writ is a proper device for a defendant to exercise his constitutional right against retrial on double jeopardy grounds. Macklin v. Ryan, 672 S.W.2d 60 (Ky. 1984). If the writ had been sought at this point, the procedural problem which eventually developed would not have occurred.

of Appeals denied on February 3, 2009. On February 9, 2009, the trial court sentenced Hillman in accordance with the plea agreement. The judgment was entered on February 10, 2009.

On April 9, 2009, the Court of Appeals entered an order denying the petition for a writ on the grounds that Hillman's unconditional plea of guilty constituted a waiver of his double jeopardy claim. This appeal followed.

DISCUSSION

A writ of prohibition may be granted by a higher court upon a showing that:

(1) "the lower court is proceeding or is about to proceed outside of its jurisdiction and there is no remedy through an application to an intermediate court; or (2) that the lower court is acting or is about to act erroneously, although within its jurisdiction, and there exists no adequate remedy by appeal or otherwise and great injustice and irreparable injury will result if the petition is not granted."

Hoskins v. Maricle, 150 S.W.3d 1, 10 (Ky. 2004). Hillman asserted in the Court of Appeals that by proceeding to sentencing the trial court would be acting erroneously and in violation of double jeopardy principles. However, before the Court could address the petition, the trial court imposed sentence and entered a final judgment.³ At that point, it was too late to grant the relief requested by Hillman. From a purely technical standpoint, at the time the Court of Appeals made its findings, neither of the two writ categories identified

³ CR 76.36 contains no provision providing that the pendency of the original action in the Court of Appeals would abate or forestall the finality of his case in the trial court, and as previously noted, the Court of Appeals had denied the motion to stay the sentencing.

in Hoskins could be met. First, the trial court clearly had jurisdiction of the criminal case when it imposed the sentence and entered the final judgment. And second, the trial court was neither acting nor about to act erroneously for the simple reason that it had already acted. At that point, the matter was moot.

Even if the Court of Appeals believed Hillman had not waived his double jeopardy claim, it had no means in the original action before it by which to remand the matter to the trial court to set aside the final judgment, as might be done on a direct appeal from a final judgment. When the Court of Appeals rendered its decision, the trial court no longer had jurisdiction over Hillman's case because the final judgment was entered on February 10, 2009, and the trial court lost jurisdiction ten days later. See, e.g., Silverburg v. Commonwealth, 587 S.W.2d 241, 244 (Ky. 1979) (noting that a trial court loses jurisdiction over the defendant's case ten days after the entry of final judgment). Once a court loses jurisdiction after the entry of final judgment, such jurisdiction can only be renewed or extended by statute or rule. Rollins v. Commonwealth, 294 S.W.3d 463, 466 (Ky. App. 2009).

The petition for a writ of prohibition commenced an original action in the Court of Appeals. The action then pending in the trial court was not abated by operation of law or by order of the Court of Appeals. Thus, once the judgment entered in the trial court became final, the only available recourse was by

collateral attack upon the judgment,⁴ because Hillman waived his right to a direct appeal by pleading guilty. Thompson v. Commonwealth, 147 S.W.3d 22, 39 (Ky. 2004) (“[T]he entry of a valid guilty plea effectively waives all defenses other than the indictment charged no offense.”); Sanders v. Commonwealth, 801 S.W.2d 665, 668 fn 1 (Ky. 1990) (Once judgment becomes final remedy is by collateral attack).

It follows for the same reason that we are unable to grant the relief requested by Hillman’s petition for a writ to prohibit sentencing. If Hillman continues to believe that his conviction and sentence was in violation of double jeopardy, he may pursue relief under other procedural devices.

The Court of Appeals’ order, however, decided on the merits that Hillman had, through his guilty plea, waived his right to challenge his conviction on double jeopardy grounds. Because the matter was moot, the decision of the Court of Appeals on the merits of the issue was merely an advisory opinion, which we conclude should not have been issued. See Lewis LP Gas, Inc. v. Lambert, 113 S.W.3d 171,177 (Ky. 2003) (overruled on other grounds by Hoskins, 150 S.W.3d 1). Accordingly, we vacate the portion of its order finding waiver.

CONCLUSION

For the foregoing reasons, the order of the Court of Appeals denying a writ of prohibition is affirmed; however, its order is vacated insofar as it decides

⁴ Although we express no opinion on the merits of this pro se litigant’s arguments, such devices may include RC 11.42 or CR 60.02, or a petition for a writ of habeas corpus under KRS 419.020.

that by pleading guilty, Hillman waived the right to assert his double jeopardy claim.

All sitting. All concur.

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