

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000488-MR

MARK MORRIS

APPELLANT

v. APPEAL FROM BOYLE CIRCUIT COURT
HONORABLE DARREN W. PECKLER, JUDGE
ACTION NO. 00-CR-00028

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

VACATING AND REMANDING

** ** * * *

BEFORE: McANULTY, AND MINTON JUDGES; AND EMBERTON, SENIOR
JUDGE.¹

McANULTY, JUDGE. Mark Morris (Morris) appeals from a conviction in the Boyle Circuit Court of one count of indecent exposure, a misdemeanor, for which he received a sentence of 90 days in jail and a \$250 fine. Morris claims numerous errors at trial resulting in a deprivation of his right to a fair trial. Among his claims, Morris did not raise the issue of the circuit

¹ Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky constitution and KRS 21.580.

court's power to hear this misdemeanor case. However, upon reviewing the record, there can be no other conclusion but that the circuit court lacked subject matter jurisdiction. Consequently, the judgment in the circuit court is void.

We begin by briefly setting out the underlying facts, then move to a discussion of the jurisdictional defect. In the summer and fall of 1999, three young girls ranging in age from six to eight at the time were frequent visitors in Mark Morris's home. The girls came to the Morris home to play with Morris's daughter who was around the same age. In addition, Morris's wife frequently provided childcare for one of the little girls.

In early 2000, one of the girl's mothers called the local sheriff's department after she "saw some things" and learned some things from Mark Morris's wife. After an investigation by the Kentucky State Police and the Cabinet for Children and Families, on May 5, 2000, the Boyle County Grand Jury returned two separate indictments against Morris.

The first indictment, indictment number 00-CR-00028(1), charged Morris as follows in violation of KRS 510.110, a class D felony:

On or about the fall of 1999 in Boyle County, Kentucky, the above named defendant, Mark Morris, committed the offense of First Degree Sexual Abuse by subjecting a female child, Autumn Voorhies, of less than 12 years of age, to sexual contact, against the

peace and dignity of the Commonwealth of Kentucky.

The second indictment, indictment number 00-CR-00028(2), charged Morris as follows in violation of KRS 510.150, a class B misdemeanor:

Between the Summer of 1999 and the Fall of 1999 as a continuing course of conduct, in Boyle County Kentucky, the above named defendant, Mark Morris, committed the offense of Indecent Exposure when he exposed his genitals in the presence of Marquie Cassidy, Diamond Voorhies & Autumn Voorhies against the peace and dignity of the Commonwealth of Kentucky.

The two offenses were not joined in the same indictment as authorized by RCr 6.18. Nor did the trial judge issue an order of consolidation of offenses for trial, as authorized by RCr 9.12. Apparently, defendant's counsel, the trial judge and the Commonwealth's attorney all believed that such a joinder or consolidation had occurred because on January 22, 2002, Morris's counsel made a motion under RCr 9.16 for separate trials on the misdemeanor exposure charge and the felony sexual abuse charge.

After hearing the issue, the trial judge granted Morris's motion for separate trials. Upon granting the motion, the trial judge noted that it needed to resolve the matter of whether he was required to remand the misdemeanor exposure charge to the district court. To assist the court, Morris's

counsel submitted a brief memorandum in which she cited the case of Commonwealth v. Adkins, Ky., 29 S.W.3d 793, 795 (2000) for its holding: "We are of the opinion that whether a felony charge is dismissed or reduced prior to trial, or during such, has no bearing on whether the circuit court can dispose of the remaining misdemeanor(s), *so long as the charges were joined in the same indictment.*" (emphasis ours). Later in the memorandum, Morris's counsel stated that it was unclear why the Adkins court made a distinction between a single indictment in which a felony offense was joined with a misdemeanor offense and separate indictments as in the instant case. Morris's counsel advised the court in this memorandum that the Boyle Circuit Court had jurisdiction of the misdemeanor upon indictment, and the trial court had discretion to remand the misdemeanor.

Although the record does not contain an order disposing of the issue of jurisdiction, it is clear the circuit court decided that it had jurisdiction as the trial commenced on January 30, 2002. Unfortunately, the felony and misdemeanor offenses were never properly joined; therefore, the reliance on Adkins was misplaced. See Adkins, 29 S.W.2d at 795 (The presumption against divesting a court of jurisdiction is dependent on jurisdiction having properly attached.)

KRS 24A.110 deals with the criminal jurisdiction of the district court. Subsection 2 of that statute provides:

The district court has exclusive jurisdiction to make a final disposition of any charge or a public offense denominated as a misdemeanor or violation, except where the charge is joined with an indictment for a felony . . .

In this case, the misdemeanor charge was not joined with an indictment for a felony, although all parties assumed that it was. The facts of this case are on all fours with Jackson v. Commonwealth, Ky., 806 S.W.2d 643, 645-46 (1991). As in Jackson, all parties treated the felony and misdemeanor charges as though they were joined in a single indictment. However, in Jackson as in this case, there were two separate indictments, one for a felony and one for a misdemeanor. Indeed, for the very reason that the trial court mistakenly granted Morris's motion for separate trials -- the offenses were not of the same or similar character nor were they based on the same acts or transactions connected together or constituting parts of a common scheme or plan -- these offenses could not have been joined in the same indictment in the first place. See RCr 6.18; Sebastian v. Commonwealth, Ky., 623 S.W.2d 880, 881 (1981) ("RCr 9.16, which requires a showing of prejudice, applies only when the requirements of RCr 6.18 are satisfied -- that is, when technically a joinder is proper but as a matter of fact will be prejudicial.")

The jurisdictional question we have found to be decisive on this appeal was not raised by Morris. See Commonwealth Dept. of Highways v. Berryman, Ky., 363 S.W.2d 525, 526 (1963).

However, it is disclosed by the record, and we are bound to take cognizance of any defect that may invalidate the judgment under review. "On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first of the reviewing court, and then of the court from which the record comes. This question cannot, so far as jurisdiction of the subject-matter is concerned, be waived by the parties or overlooked by the court. It is, therefore, open for the consideration of the reviewing court whenever it is raised by any party, or it may even be raised by the court of its own motion."

Id. at 526-27, quoting 3 Am.Jur. 383, Appeal and Error § 839.

Without jurisdiction, the judgment entered at trial was void. See Jackson, 806 S.W.2d at 646. Accordingly, we vacate and remand to the Boyle District Court for further proceedings. Further, having concluded the circuit court lacked subject matter jurisdiction, this Court is without jurisdiction to review the merits of the claims raised by Morris in this appeal.

ALL CONCUR.

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