

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000564-MR

MICHAEL L. BLACK

APPELLANT

v. APPEAL FROM MASON CIRCUIT COURT
HONORABLE JOHN W. MCNEILL III, JUDGE
ACTION NO. 03-CR-00025

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: TACKETT AND VANMETER, JUDGES; MILLER, SENIOR JUDGE.¹

TACKETT, JUDGE: Michael Black appeals from a judgment of the Mason Circuit Court finding him guilty of possession of a controlled substance in the first degree, possession of marijuana, driving under the influence, and tampering with physical evidence. He was originally indicted on charges of first-degree trafficking, possession of marijuana, and DUI.

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

Then the grand jury issued a superceding indictment which added the tampering charge. On appeal, he claims that the trial court erroneously denied his motion to quash the new indictment and failed to allow him to withdraw his guilty plea when the sentence was going to be different than the recommendation contained in the plea bargain. Finding no merit to these contentions, we affirm the trial court.

The original indictment, charging Black with first-degree trafficking, possession of marijuana, and DUI, was returned on February 7, 2003. The officer who testified before the grand jury included statements to the effect that Black was asked to provide a second urine sample because the technician who collected the first one suspected it had been diluted with water. Nevertheless, the grand jury did not charge him with tampering at this time. Three weeks later, the prosecutor represented the evidence to the same grand jury and obtained a superceding indictment which contained all of the original charges, plus an additional charge of tampering with physical evidence. The trial court denied Black's motion to quash the superceding indictment.

Initially, the Commonwealth offered to amend the trafficking charge to first-degree possession and recommend a sentence on all charges of three years with no probation. Black refused this offer. Subsequently, the Commonwealth offered

Black five years on the same amended indictment, but agreed not to oppose shock probation in ninety days provided Black's conduct prior to sentencing merited it. Black accepted this offer; however, between the plea date and the date of his final sentencing, Black was arrested in New York and charged with possession of marijuana and possession of a firearm. He posted bond in order to return to Kentucky for his next court date where he requested a continuance on his final sentencing. Black maintained that he was innocent of the charges and expected to be able to resolve the matter favorably, but the trial court refused to postpone his sentencing. He then moved to withdraw his guilty plea and substitute the original offer of a three-year sentence to serve. The trial court also refused this request and sentenced him to five years' imprisonment. This appeal followed.

Black argues that the trial court erred by refusing to quash the superceding indictment, issued by the same grand jury and based on no additional inculpatory evidence. He quotes the following language in Bishop v. Caudill, 87 S.W.3d 1 (Ky. 2002) as the basis of his argument:

A grand jury is charged "to inquire into every offense for which any person has been held to answer *and for which an indictment or information has not been filed*, or other offenses which come to their attention or of which any of them has knowledge." RCr 5.02 (emphasis added); *Bowling v. Sinnette*, Ky., 666 S.W.2d 743, 745 (1984). It follows that,

after an indictment or information has been filed, the grand jury's function with respect to that particular indictment is concluded. On the basis of additional *inculpatory* evidence, the grand jury can issue a new, superseding indictment charging the defendant with additional offenses. . .

Id. at 3. Black contends that, since no additional evidence was presented, the grand jury should not have been allowed to issue a superceding indictment. Essentially, he claims that the grand jury's failure to indict him on tampering constituted a "no true bill" on that charge, requiring the prosecutor to present the evidence to another grand jury in order to obtain an indictment on that charge. We disagree with this contention; moreover, it is unnecessary to further consider the issue because Black waived his right to appeal the trial court's decision when he entered an unconditional guilty plea.

A guilty plea waives all defenses except that the indictment failed to charge a crime. Centers v. Commonwealth, 799 S.W.2d 51 (Ky. App. 1990). Black recognizes this doctrine and attempts to circumvent it by arguing that subject matter jurisdiction, which cannot be waived, is involved. We disagree.

In Kentucky, subject matter jurisdiction over a felony offense may be invoked either by a grand jury indictment or by information in cases where the individual consents. . . The right to waive a particular form, mode, or kind of accusation in a particular instance is an individual right of the accused.

Malone v. Commonwealth, 30 S.W.3d 180, 183 (Ky. 2000). Thus, if an individual can waive his right to be indicted and allow the Commonwealth to proceed against him by indictment, it stands to reason that that he may also waive any defects in the form of the indictment. By pleading guilty, Black waived his argument that the indictment against him was defective.

Black's second argument is that the trial court erred by refusing to allow him to withdraw his guilty plea at his sentencing. Kentucky Rule of Criminal Procedure 8.10 requires a trial court to allow a defendant to withdraw his guilty plea if the trial court is not going to sentence him in accordance with the plea bargain. Black claims that the trial court's refusal to state whether it would grant him shock probation in ninety days deviated from the sentence he had bargained for. He further contends that, if it decided not to allow him to withdraw his plea, the trial court should have substituted the original offer of a three-year sentence. Black cites no authority supporting the proposition that he should have been allowed to accept an offer that no longer existed.

The plea bargain was never an either/or situation: the initial offer was three years to serve, which he rejected. Only after that rejection did the second offer come into existence. Furthermore, the trial court's refusal to state whether it would later grant shock probation did not violate the terms of the

plea agreement. The plea agreement bound the Commonwealth not to oppose shock probation after ninety days if Black's pre-sentence conduct so merited. While one could make a good argument that Black's conduct in getting arrested in New York would have allowed the Commonwealth to oppose shock probation, that issue is irrelevant. The trial court was not bound by the terms of the plea agreement to actually grant the motion for shock probation. Black's attempt to argue that the plea agreement guaranteed shock is not supported by its language. Thus, the trial did not reject the agreement and was not required by RCr 8.10 to allow him to withdraw his plea.

For the foregoing reasons, the judgment of the Mason Circuit Court is affirmed.

ALL CONCUR.

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