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**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2011-CA-000956-MR

MICHAEL YOUNG

APPELLANT

v. APPEAL FROM LAWRENCE CIRCUIT COURT  
HONORABLE JOHN DAVID PRESTON, JUDGE  
ACTION NO. 10-CR-00111

COMMONWEALTH OF KENTUCKY

APPELLEE

AND

NO. 2011-CA-000957-MR

JANIE YOUNG

APPELLANT

v. APPEAL FROM LAWRENCE CIRCUIT COURT  
HONORABLE JOHN DAVID PRESTON, JUDGE  
ACTION NO. 10-CR-00113

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
VACATING

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BEFORE: CAPERTON, DIXON AND STUMBO, JUDGES.

STUMBO, JUDGE: Michael and Janie Young appeal from a judgment and sentence on a conditional plea of guilty where they both plead guilty to theft by deception over \$10,000. They each reserved the right to appeal the denial of their motions to dismiss the indictment. We find no crime occurred and that the appellants' motions to dismiss should have been granted. We therefore vacate the Youngs' convictions.

The facts were stipulated by the parties and that stipulation serves as a basis for our review. Michael and Janie Young contacted Tracy and Jeff Scholan to adopt a yet unborn child from the Youngs. The Scholans had previously adopted a child from the Youngs. The Scholans began sending money to the Youngs to help pay for pregnancy expenses and general living expenses. Unbeknownst to the Scholans, the Youngs had also contacted Act of Love Adoptions in Boston, Massachusetts to place the child for adoption through the agency. The agency also began sending the Youngs money for pregnancy and living expenses.

When the child was born, the Youngs decided to keep her because the new child was a girl and, up until that point, they had only had male children. In

the end, the Youngs received \$7,976.99 from the Scholans and \$4,000 from Act of Love Adoptions.

When the Scholans discovered the Youngs had also contacted the Boston agency, they contacted the Kentucky State Police (KSP). KSP investigated the matter. The Youngs were later indicted for theft by deception over \$10,000 and for being persistent felony offenders. Both moved to dismiss the indictment, arguing that the money received was a gift. The court denied the motions. The Youngs then entered into a conditional guilty plea which reserved the right to appeal the denial of their motions to dismiss. This appeal followed.

Kentucky Revised Statute (KRS) 514.040(1) states:

A person is guilty of theft by deception when the person obtains property or services of another by deception with intent to deprive the person thereof. A person deceives when the person intentionally:

- (a) Creates or reinforces a false impression, including false impressions as to law, value, intention, or other state of mind;
- (b) Prevents another from acquiring information which would affect judgment of a transaction;
- (c) Fails to correct a false impression which the deceiver previously created or reinforced or which the deceiver knows to be influencing another to whom the person stands in a fiduciary or confidential relationship;
- (d) Fails to disclose a known lien, adverse claim, or other legal impediment to the enjoyment of property which the person transfers or encumbers in consideration for the property obtained, whether the impediment is or is not valid or is or is not a matter of official record; or

(e) Issues or passes a check or similar sight order for the payment of money, knowing that it will not be honored by the drawee.

The indictment against the appellants stated that the Youngs committed the offense by:

knowingly and unlawfully engaging in a scheme to defraud Tracy and Jeff Scholan of money in excess of \$10,000, by placing their unborn child for adoption to the Scholan Family and receiving from the Scholan family money for the upkeep of the mother during her pregnancy, without disclosing that they had placed the child for adoption through a second agency to another couple.

Presumably, this indictment alleges a violation of KRS 514.040(1)(a) or (b). The argument on appeal is that the trial court should have granted the motion to dismiss.

KRS 199.590(2) states in pertinent part that “[a] person, agency, institution, or intermediary shall not sell or purchase or procure for sale or purchase any child for the purpose of adoption or any other purpose, including termination of parental rights.” In essence, this statute makes it illegal to sell or purchase a child or to pay money for the promise of being able to adopt a child, as was stipulated to by the parties along with the fact that the court cannot enforce an illegal contract.

Also of import is the fact that the Appellants and Commonwealth both stipulated that the Youngs were under no obligation to allow anyone to adopt the child. *See* KRS 199.500(1) (adoption shall not be granted without the “voluntary and informed” consent of the parents); KRS 199.011(14) (voluntary and informed

consent must be in writing and can be withdrawn within 20 days). Also stipulated by the parties is the fact that neither the Scholans nor the agency told the Youngs they could not accept money from anyone else. While the stipulations before us include one that the Youngs did not disclose the fact that they were receiving expense money from two sources, it was also agreed that Janie Young did inform the Scholans that she had previously accepted money from the agency during the pregnancy. There is no stipulation that there was an agreement by the Youngs to return the agency's money.

Here, the indictment specifically stated that the Youngs were charged with theft by deception for not disclosing to the Scholans that they had accepted money from Act of Love Adoptions. We find no crime occurred here. To find that the money received by the Youngs was accepted as part of an agreement between the parties would be to recognize an illegal contract was entered into, which the Commonwealth stipulated was not the case. The Courts cannot "clothe with legality a contract that is absolutely illegal and void[.]" *Tobacco By-Products & Chemical Corp. v. Western Dark Fired Tobacco Growers Ass'n*, 280 Ky. 469, 133 S.W.2d 723, 726 (Ky. 1939).

First, the Scholans knew that money had already exchanged hands between the agency and the Youngs when they provided them with support. Second, the Scholans were never guaranteed to be able to adopt the Youngs' child; therefore, there was no deception as to purpose of the funds. Furthermore, there is no law or agreement that required the Youngs to inform the Scholans of other adoptive

parents they were considering and receiving money from. Finally, the Scholans did not make the monetary gifts contingent on the Youngs not contacting other potential adoptive parents or adoption agencies. Each and every one of these facts were stipulated to by the Commonwealth and result in the conclusion that there was no theft by deception or otherwise.

Michael Young makes another argument on appeal, but because we are vacating his conviction, it is moot.

Based on the foregoing, we vacate the convictions of Michael and Janie Young.

CAPERTON, JUDGE, CONCURS.

DIXON, JUDGE, DISSENTS.

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