RENDERED: APRIL 19, 2013; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000644-MR

ANTONIO CLAY — APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NO. 11-CI-00668

TODD MAGGARD; TODD MAGGARD IN HIS OFFICIAL CAPACITY AS KENTUCKY STATE POLICE OFFICER; RYAN GOSSER; RYAN GOSSER IN HIS OFFICIAL CAPACITY AS KENTUCKY STATE POLICE OFFICER; RODNEY BREWER, AS COMMISSIONER OF THE KENTUCKY STATE POLICE; COMMONWEALTH OF KENTUCKY; AND THE KENTUCKY STATE POLICE — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: MOORE, NICKELL, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Antonio Clay brings this appeal from a January 27, 2012, Opinion and Order of the Franklin Circuit Court granting Todd Maggard, Todd

Maggard in his official capacity as Kentucky State Police Officer; Ryan Gosser, Ryan Gosser in his official capacity as Kentucky State Police Officer, Rodney Brewer, as Commissioner of the Kentucky State Police, Commonwealth of Kentucky, and the Kentucky State Police's motion for summary judgment and dismissing Clay's complaint in its entirety. We affirm.

The underlying facts indicate that Clay was driving a motor vehicle in Franklin County on April 28, 2009. A Kentucky State Trooper[1] observed the vehicle being operated in a careless manner and initiated a traffic stop. After the traffic stop, a narcotics detection canine alerted for the possible presence of controlled substances in the trunk of the vehicle. Although no controlled substances were located, the state police seized $130,230 in cash from the trunk.

Apparently, the United States Drug Enforcement Agency (DEA) had been investigating appellant. A confidential informant for the DEA had arranged for appellant to purchase 5 kilograms of cocaine on April 28, 2009, the same day the traffic stop took place. The Kentucky State Police ultimately surrendered the $130,230 in cash seized from appellant's truck to the DEA.

Appellant was subsequently indicted on October 3, 2011, for conspiracy to possess with intent to distribute cocaine and attempt to possess with intent to distribute cocaine in the United States District Court, Western District of Kentucky. On June 5, 2012, a plea agreement was reached in the federal district court action, and relevant to this appeal, appellant agreed to forfeiture of the

[1] Ryan Gosser was the Kentucky State Trooper who effectuated the traffic stop of Antonio Clay's motor vehicle on April 28, 2009.

$130,230 originally seized by the Kentucky State Police and delivered to the DEA. It is uncontroverted that appellant later received notice of the forfeiture of said sum in his federal district court action and failed to take any action in federal court to prevent forfeiture.

Appellant filed the instant action in the Franklin Circuit Court on April 27, 2011, as amended May 18, 2011, against Todd Maggard, Todd Maggard in his official capacity as Kentucky State Police Officer, Ryan Gosser, Ryan Gosser in his official capacity as Kentucky State Police Officer, Rodney Brewer, as Commissioner of the Kentucky State Police, Commonwealth of Kentucky, and the Kentucky State Police (hereinafter collectively referred to as appellees). Therein, appellant argued that appellees wrongfully failed to return approximately $130,000 seized from his motor vehicle and improperly surrendered same to the DEA. He sought recoupment of approximately $130,000 and injunctive relief.[2]

By Opinion and Order entered January 27, 2012, the circuit court rendered summary judgment dismissing appellant's action against appellees in its entirety. Appellant's motion to alter, amend, or vacate was denied by order entered March 5, 2012. The circuit court concluded that appellees were immune from suit and that appellant failed to exhaust his administrative remedies in federal court and thus was prohibited by the election of remedy doctrine to initiate this action. This appeal follows.

[2] The actual amount seized by the Kentucky State Police from Antonio Clay's vehicle was $130,230, which was turned over to the United States Drug Enforcement Agency.

Appellant contends that the circuit court erroneously rendered summary judgment dismissing his complaint. He alleges entitlement to $130,230 from appellees for their wrongful retention and transfer of said money to the DEA. For the following reasons, we disagree.

To begin, summary judgment is proper where there exists no material issue of fact and movant is entitled to judgment as a matter of law. Kentucky Rules of Civil Procedure (CR) 56; *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476 (Ky. 1991). Our review of the circuit court's granting of summary judgment proceeds *de novo*.

Judicial estoppel generally operates to "preclude[ ] a party from assuming a position in a legal proceeding which is inconsistent with one previously asserted where the inconsistency would allow a party to benefit from deliberate manipulation of the courts." 28 Am. Jur. 2d *Estoppel and Waiver* § 34 (2004). And, a corollary rule specifically recognizes that "parties to . . . agreements entered into in the course of judicial proceedings are estopped from taking positions inconsistent therewith, in the absence of fraud, inadvertence, or mistake." 31 C.J.S. *Estoppel and Waiver* § 200 (2008).

In this case, the record clearly establishes that the Kentucky State Police surrendered $130,230 to the DEA and that appellant was subsequently indicted upon federal drug trafficking charges. It is equally clear that appellant entered into a plea agreement in the United States District Court for the Western District of Kentucky and specifically agreed to federal forfeiture of the "$130,230

. . . seized on April 28, 2009, which was the buy money for the cocaine."[3] Moreover, Antonio Clay has not sought to set aside the plea agreement in the United States District Court. Appellant cannot now in this Court allege that forfeiture was improper when he agreed to same in federal court in order to benefit from the plea agreement. Essentially, appellant seeks to reap the advantages of the plea agreement and, at the same time, escape the disadvantages of the agreement. Under these unique circumstances, we believe that appellant is judicially estopped from seeking recoupment of the forfeited $130,230 notwithstanding that the forfeiture occurred after the summary judgment was entered in this action. *See Com. v. Griffin*, 942 S.W.2d 289 (Ky. 1997). Accordingly, we affirm the circuit court's dismissal of appellant's complaint, albeit upon different grounds. *See O'Neal v. O'Neal*, 122 S.W.3d 588 (Ky. App. 2002).

We view appellant's remaining contentions as moot or without merit.

For the foregoing reasons, the Opinion and Order of the Franklin Circuit Court is affirmed.

ALL CONCUR.

[3] We note that the plea agreement, which included forfeiture of the money which is the subject matter in this appeal, was entered into by Antonio Clay in federal court on June 5, 2012, after entry of the circuit court's judgment on January 27, 2012. Thus, the circuit court was not aware of the forfeiture at the time of entry of the summary judgment in this action. This Court may take judicial notice of adjudicative facts from the federal action (Criminal No. 3:11CR-125-S) in this appeal. Kentucky Rules of Evidence 201; *Doe v. Golden & Walters, PLLC*, 173 S.W.3d 260 (Ky. App. 2005).

BRIEF AND ORAL ARGUMENT FOR APPELLANT:

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