

Commonwealth Of Kentucky

Court of Appeals

NO. 2001-CA-000616-DG

ROBERT SOWELL

APPELLANT

ON DISCRETIONARY REVIEW FROM JEFFERSON CIRCUIT COURT
v. HONORABLE GEOFFREY P. MORRIS, JUDGE
ACTION NO. 00-XX-000124

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * *

BEFORE: BUCKINGHAM, McANULTY, AND TACKETT, JUDGES.

BUCKINGHAM, JUDGE: This case is before the court on discretionary review of an opinion and order by the Jefferson Circuit Court reversing an order by the Jefferson District Court. We reverse the Jefferson Circuit Court.

As a result of an incident which occurred on August 2, 1999, misdemeanor assault and criminal mischief charges were brought in the Jefferson District Court against Robert Sowell. A warrant was issued for Sowell's arrest, and he was eventually apprehended on May 17, 2000. Due to the inability of the

Commonwealth to locate the complaining witness, the case against Sowell was dismissed without prejudice on June 9, 2000. See RCr¹ 9.64.

On July 12, 2000, the Commonwealth moved the Jefferson District Court to "re-docket" the case. On August 7, 2000, the motion to re-docket was granted by the court. Sowell subsequently moved the district court for dismissal of the charges on the ground that the applicable statute of limitation, KRS² 500.050(2), had run. The trial court granted the motion and dismissed the case.

The Commonwealth appealed the dismissal to the Jefferson Circuit Court. That court reversed the dismissal order of the district court and remanded the case to allow further prosecution. In support of its ruling, the court held that it could "find no significant difference in bringing a new action versus moving the court to re-docket the case." This court then granted discretionary review pursuant to a petition filed by Sowell.

Sowell argues that the district court correctly dismissed the charges because it had no authority to act on its prior order of dismissal once the ten-day period allowed by CR³

¹ Kentucky Rules of Criminal Procedure.

² Kentucky Revised Statutes.

³ Kentucky Rules of Civil Procedure.

59.05 to file a motion to alter, amend, or vacate had expired. See Silverburg v. Commonwealth, Ky., 587 S.W.2d 241, 244 (1979). Sowell further argues that the district court could only allow the charges to go forward by signing a new warrant or summons within one year of the date of the offense. See KRS 500.050(2). As this was not done, Sowell asserts that the circuit court erred in reversing the district court's dismissal of the charges.

On the other hand, the Commonwealth argues that CR 59.05 was not applicable because the charges were initially dismissed without prejudice by the district court. Further, the Commonwealth argues that an order dismissing a criminal case without prejudice is not a final order since the use of the words "without prejudice" obviously allows the charges to be reinstated at a later date. Thus, the Commonwealth contends that the district court did not lose jurisdiction over the case and the Commonwealth's continued prosecution of Sowell on the assault and criminal mischief charges.

In C.I.T. Corp. v. Teague, 293 Ky. 521, 169 S.W.2d 593 (1943), the court held that "a dismissal without prejudice is a final and appealable order." In Wood v. Downing's Admr., 110 Ky. 656, 62 S.W. 487, 488 (1901), the court held that a dismissal without prejudice "fixed absolutely and finally the rights of the parties in this suit in relation to the subject-

matter of the litigation, and put an end to the suit. It was a final appealable order." Further, the court in Grubbs v. Slater & Gilroy, Inc., Ky., 267 S.W.2d 754 (1954), stated that a dismissal without prejudice to the filing of another suit was an appealable order.

Black's Law Dictionary (7th ed. 1999) defines "dismissed without prejudice" as "removed from the court's docket in such a way that the plaintiff may refile the same suit on the same claim." Further, the U.S. Supreme Court has discussed the meaning of "dismissal without prejudice" and cited with approval the definition of the term as defined in Black's Law Dictionary. See Semtek International Inc. v. Lockheed Martin Corp., 531 U.S. 497, 505, 121 S.Ct. 1021, 1027, 149 L.Ed.2d 32, 41 (2001).

Based on the foregoing authorities, it is clear that a dismissal without prejudice is a final and appealable order. As such, it may only be altered, amended, or vacated in accordance with the ten-day rule of CR 59.05. After ten days had passed, the court lost jurisdiction of the case. See Silverburg, supra.

Because the Commonwealth's attempt to vacate the district court's order of dismissal occurred more than ten days after its entry, the Commonwealth was precluded from having the case "re-docketed." Rather, the Commonwealth could have pursued prosecution of Sowell on the charges by filing a new criminal

complaint and obtaining a summons or warrant for Sowell's arrest. It did not, and the district court correctly ordered the charges dismissed.

The Commonwealth relies on Combs v. Commonwealth, 119 Ky. 836, 84 S.W. 753 (1905). The facts in that case are distinguishable from the facts in the case *sub judice* since prosecution was reinstated by a second indictment in that case rather than by a re-docketing of the charges as in this case.

We reverse the order of the Jefferson Circuit Court and remand the case for the entry of an order affirming the order of the Jefferson District Court dismissing the charges.

TACKETT, JUDGE, CONCURS.

McANULTY, JUDGE, DISSENTS BY SEPARATE OPINION.

McANULTY, JUDGE, DISSENTING: Respectfully, I dissent. The threshold determination is whether the dismissal without prejudice is a final judgment under the Rule. "Judgment" is defined in CR 54.01, made applicable to criminal cases by RCr 13.04, as "a written order of a court adjudicating a claim or claims in an action or proceeding." Commonwealth v. Hicks, Ky., 869 S.W.2d 35 (1994). A "final judgment" is "such a judgment as puts an end to the action. A judgment to be final must not merely decide that a party is entitled to relief, but must give that relief by its own force, or be enforceable by the court

without further action." Johnson v. Commonwealth, 269 Ky. 77, 106 S.W.2d 121, 122 (1937).

In my opinion, a dismissal without prejudice is not a "final judgment" so as to invoke the finality rule of CR 59.05. A dismissal without prejudice does not adjudicate the claims, but reserves them for later adjudication. In Commonwealth v. Hicks, supra, the Kentucky Supreme Court stated that any dismissal results in an adjudication upon the merits under CR 41.02(3) unless there is a "notation to the contrary, i.e. 'without prejudice' or 'with leave to refile.'" Id. at 38. Therefore, a dismissal without prejudice is not an adjudication upon the merits and is not considered final. Thus, it cannot be said that the trial court loses jurisdiction within ten days of a dismissal without prejudice, as there is no final judgment under CR 59.05.

Furthermore, I do not agree that the cases appellant cites run counter to our opinion herein. For one thing, those cases predate the promulgation of the Criminal Rules of Procedure herein. Additionally, Van Arsdale v. Caswell, Ky., 311 S.W.2d 404 (1958), relied on by appellant, does not address the term "without prejudice." That opinion also approved a form of "indefinite continuance" employed at that time, wherein a case could be "filed away" from the active docket and later reinstated without a loss of jurisdiction. Id.

For the foregoing reasons, I would affirm the order of the Jefferson Circuit Court.

BRIEF FOR APPELLANT:

J. David Niehaus
Louisville, Kentucky

BRIEF FOR APPELLEE:

Karl Price
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