RENDERED: January 31, 2003; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-002278-MR

ALONZO CHAPPELL — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JUDITH E. McDONALD-BURKMAN, JUDGE
ACTION NO. 97-CR-001725

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
REVERSING AND REMANDING
** ** ** ** **

BEFORE: GUDGEL[1], JOHNSON AND McANULTY, JUDGES.

JOHNSON, JUDGE: Alonzo Chappell has appealed pro se from an opinion and order entered by the Jefferson Circuit Court on October 2, 2001, that denied his pro se motion to require the Commonwealth to honor its sentencing agreement by requiring the Kentucky Department of Corrections to release him from custody so he could begin serving his federal prison sentence. Having

[1] Judge Gudgel concurred in this opinion prior to his retirement effective November 1, 2002.

concluded that a factual finding relied upon by the trial court is clearly erroneous and that the trial court has incorrectly applied the law, we reverse and remand.

This case involves Chappell=s serving of two prison sentences: one that he received from the Jefferson Circuit Court in a judgment of conviction and sentence entered on June 5, 1998, and a federal prison sentence imposed on July 3, 2000. Chappell was convicted in Jefferson Circuit Court on a plea of guilty to one count of robbery in the first degree,[2] and sentenced to prison for a term of ten years. On November 16, 1998, the Jefferson Circuit Court entered an order granting Chappell=s motion to suspend further execution of sentence under KRS 439.265.[3] Chappell was placed on probation for a period of five years under the strict supervision of the Department of Corrections, Division of Probation and Parole.

On January 5, 2000, the Commonwealth filed a motion to revoke Chappell=s probation on the grounds that he violated the conditions of his probation by Aassociating with a convicted felon@ and for Apossession of a firearm.@ The motion claimed that on July 13 and 14, 1999, Chappell in complicity with another person committed two violations of criminal possession of a

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[2] Kentucky Revised Statutes (KRS) 515.020.

[3] The record includes a separate Aorder on motion for shock probation@ entered by the Jefferson Circuit Court on November 18, 1998, which made no reference to the order entered on November 16, 1998, but which included the additional conditions that Chappell pay restitution of $500.00 each to two victims and that he not possess a firearm or be with any person with a firearm.

forged instrument by depositing two counterfeit checks into a bank account, and that on October 6, 1999, Chappell and another man robbed a bank while armed with a handgun. The motion to revoke probation was considered by the Jefferson Circuit Court on January 10, 2000, and by agreement of counsel a revocation hearing was scheduled for February 21, 2000.

On July 3, 2000, the Jefferson Circuit Court entered an AAgreed Order Revoking Sentence and Running Sentence Concurrently with Sentence to be Imposed in Federal Court on July 3, 2000: USA vs. Alonzo Chappell, Criminal Action Number 3:00 CR-1-J.@ This agreed order, which was signed by Chappell, his counsel and a prosecutor for the Commonwealth, provided for the waiver of a formal probation revocation hearing, a stipulation to the grounds for revocation, and an acknowledgment that Chappell Aremains in custody and will be sentenced on July 3, 2000, before the Honorable Edward Johnstone and the Western District of Kentucky at Louisville pursuant to his pleas of guilty to two counts in Indictment number 3:00 CR-1-J to bank robbery and use of a firearm in bank robbery[.]@ The agreed order then provided Athat the ten year sentence previously imposed by this Court on November 17, 1998,[4] sentencing the Defendant to ten years, be and hereby is revoked; the Defendant is ordered to begin service of the ten year sentence; said state sentence to run concurrently

[4] This date is incorrect.

with the federal sentence imposed on July 3, 2000, one with the other.@

On February 9, 2001, the Jefferson Circuit Court entered an amended order which stated: AThis matter comes before the Court with respect to the Order entered July 3, 2000. The intent of that Order was to revoke the Defendant=s ten year sentence previously imposed by this Court on November 17, 1998,[5] and to have that time run concurrent[ly] with the Federal time imposed upon the Defendant July 3, 2000.@ After noting the appearance of Chappell, his counsel and a prosecutor for the Commonwealth, the agreed order then stated: ABy agreement of the parties, and after a stipulation of the violations of probation and a waiver of a separate hearing, the Court finds that the Defendant has violated the terms of his probation and the Court hereby revokes his probation and the Defendant shall now serve the ten years imposed upon him by this Court on November 17, 1998.[6] This sentence shall run concurrent[ly] with the Federal sentence he is currently serving.@

On August 30, 2001, Chappell filed a pro se motion styled Amotion for transfer of jurisdiction.@ Chappell moved the Jefferson Circuit Court Ato enter an order directing the Kentucky Corrections Cabinet to release jurisdiction of Movant and allow him to be returned to the Federal Authorities to serve his

[5] This date is incorrect.

[6] This date is incorrect.

federal sentence.@ Chappell=s motion and memorandum in support summarized the procedural history of his case and cited KRS 532.115, Gavel v. Commonwealth,[7] Brock v. Sowders,[8] and Hudson v. Commonwealth,[9] as legal authority for his claim of entitlement to a release from state custody.

On September 12, 2001, the Commonwealth filed its response to Chappell=s motion. The Commonwealth argued:

> The power of the court to order that a defendant be placed in a particular institution is severely limited. The only power available is vested in the court by KRS 532.100. This statute provides that when a defendant is sentenced to a set term of imprisonment, he is to be sent to a county jail, city jail, or regional jail for service of his set term sentence. If the defendant is sentenced to an indeterminate term of imprisonment, then he is to be remanded into the custody of the Department of Corrections. The court=s power ends with this commitment. The Separation of Powers prevents the judicial branch from micro-managing the functions of the executive branch. Mr. Chappell received a 10 year sentence, which is classified as an indeterminate term since he may be released early on parole or administrative release. He was properly delivered to the Kentucky Department of Corrections per KRS 532.100. With this, the court has reached the limit of its power. The Federal and State sentences are running concurrently, so he is receiving time on his Federal Sentence while serving in a Kentucky Prison.[10] Whether is [sic] retained in a Kentucky facility or transferred to a Federal

[7] Ky., 674 S.W.2d 953 (1984).

[8] Ky., 610 S.W.2d 591 (1980).

[9] Ky., 932 S.W.2d 371 (1996).

[10] This erroneous statement will be discussed infra.

> Prison is wholly within the executive power of the Department of Corrections and its Federal counterpart. They are bound to follow their regulations and house Mr. Chappell accordingly. His complaint is properly addressed to those agencies not this court [emphasis added].

On September 18, 2001, Chappell filed a reply to the Commonwealth=s response. Chappell reiterated that Ait=s not the federal authorities that ran their time concurrent[ly] with the Movant=s state sentence, thus the state, by law, has forfeited their jurisdiction in this matter. This order MUST be honored by the state corrections!@ [emphasis original].

In the opinion and order entered by the Jefferson Circuit Court on October 2, 2001, the circuit court characterized Chappell=s motion as Aseek[ing] transfer to a federal correctional facility.@ The circuit court denied Chappell=s motion and stated:

> Chappell claims that he should be held in a federal correctional facility, citing Hudson v. Commonwealth, Ky., 932 S.W.2d 371 (1996). However, Hudson does not support Chappell=s argument. There, the defendant was already serving a sentence in Indiana when he was brought before the Hopkins County (Ky.) Circuit Court on a Kentucky charge, for which the court imposed sentence to run concurrently with the Indiana sentence. Id. at 372. The Kentucky Supreme Court stated that the defendant was lawfully in the custody of the Indiana correctional system, and that Kentucky authorities had no jurisdiction over him, until his maximum Indiana sentence expired, at which time the defendant became Alawfully under the jurisdiction of the Kentucky prison system.@ Id. at 373. Here, however, Chappell was already serving a Kentucky sentence when he

> was sentenced on the federal charge.[11] Thus, Chappell is lawfully in the custody of the Kentucky prison system until his maximum Kentucky sentence expires [emphasis added].
>
> Even if the Court believed that the relief sought by Chappell was appropriate, it has no authority to grant it. The Kentucky Penal Code clearly provides that, upon sentencing, the Court shall commit the defendant to the Kentucky Department of Corrections. KRS 532.100. In addition, this Court does not have the constitutional authority to order a federal correctional facility to assume custody, since only a federal court can commit a defendant to a federal prison.

This appeal followed.

We begin our analysis by agreeing with Chappell=s emphasis on the importance of the government honoring its agreement with him. In the context of plea bargain agreements between the Commonwealth and a defendant, it has been stated many times that when an Aoffer is made by the prosecution and accepted by the accused, either by entering a plea or by taking action to his detriment in reliance on the offer, then the agreement becomes binding and enforceable.@[12]

> The question is not whether the Commonwealth=s bargain was wise or foolish. The question is whether the Commonwealth should be permitted to break its word.

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[11] This statement of the procedural history is clearly erroneous and totally contrary to the Jefferson Circuit Court=s amended order entered on February 9, 2001.

[12] Matheny v. Commonwealth, Ky., 37 S.W.3d 756, 758 (2001)(quoting Smith v. Commonwealth, Ky., 845 S.W.2d 534, 537 (1993)(citing Commonwealth v. Reyes, Ky., 764 S.W.2d 62, 65 (1989)).

. . .

> If the government breaks its word, it breeds contempt for integrity and good faith. It destroys the confidence of citizens in the operation of their government and invites them to disregard their obligations. That way lies anarchy.[13]

We have no trouble in holding that Chappell is entitled to relief from his Kentucky prison sentence. There has never been any question that the sentencing agreement entered into by the parties and approved by the Jefferson Circuit Court provided that Chappell would serve his federal sentence and that his Kentucky sentence would run concurrently with his federal sentence. Not only did the Commonwealth agree to this deal initially when it signed the order revoking probation entered on July 3, 2000, but the Commonwealth has continued to acknowledge the terms of the agreement in the amended order entered on February 9, 2001, and even now the Commonwealth acknowledges in its brief that the Kentucky sentence is to run concurrently with the federal sentence.[14] It is troubling, however, that the Commonwealth, when represented by the Assistant Commonwealth=s Attorney in the proceeding before the Jefferson Circuit Court,

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[13] Fraser v. Commonwealth, Ky., 59 S.W.3d 448, 458 (2001) (quoting Workman v. Commonwealth, Ky., 580 S.W.2d 206, 207 (1979), overruled on other grounds, Morton v. Commonwealth, Ky., 817 S.W.2d 218 (1991)).

[14] There is no question that the sentencing arrangement agreed to by the parties is authorized under Kentucky law. In Gavel, supra, at 954 the Supreme Court held Athat the trial court may run the state sentence concurrently with the federal sentence[.]@ ASince movant=s sentencing to the penitentiary by the state court was after the order of probation was revoked, and after the federal conviction, the trial judge is authorized to order the state sentence to run concurrently with the federal sentence.@

was either misinformed or disingenuous when it stated in its response to Chappell=s motion that A[t]he Federal and State sentences are running concurrently, so he is receiving time on his Federal Sentence while serving in a Kentucky Prison.@ In its brief before this Court, the Commonwealth, which is now represented by an Assistant Attorney General, concedes that A[t]he problem is that because appellant commenced his state sentence prior to being sentenced in federal court that the federal authorities have not yet begun to run that sentence and he is not now receiving credit for service on that sentence.@ The Commonwealth then states that A[t]he state court though cannot grant appellant anything more than it has already granted him.@ We disagree.

What the courts can grant Chappell and what the courts are required to grant Chappell is the benefit of his sentencing agreement. This Court envisions at least five different procedures that may be available to Chappell to enable him to obtain the relief to which he is entitled: (1) he could file in Jefferson Circuit Court a RCr[15] 11.42 motion or a CR 60.02 motion to vacate his sentence; (2) he could file in the county where he is confined,[16] a petition for writ of habeas corpus;[17] (3) he could file a lawsuit against the Department of Corrections in

[15] Kentucky Rules of Criminal Procedure.

[16] We assume this would be Mercer County where the Northpoint Training Center is located. See Brock, supra.

Franklin Circuit Court; (4) he could file a lawsuit in the United States District Court for the Eastern District of Kentucky seeking relief through a writ habeas corpus or on due process grounds; or (5) this Court can exercise its inherent power to ensure fair play and substantial justice by enforcing the parties= agreement as approved by the previous orders of the Jefferson Circuit Court.

As our Supreme Court has stated in Potter v. Eli Lilly & Co.:[18]

> We must first note that the trial court has a duty and a right to determine that its judgments are correct and accurately reflect the truth. We agree with the rationale expressed in Montgomery v. Viers, 130 Ky. 694, 114 S.W. 251 (1908) as to the importance placed on the judgment of a court. AThe highest verity, from considerations of public policy, is attributed to the records and judgments of courts as matters of evidence@ and Athey ought to be most carefully preserved and authenticated.@ Viers, supra. In that case, Justice O=Rear, writing for a unanimous court, stated that common law courts from earliest times have exercised the prerogative of correcting their own judgments by their own records so as to make them conform to the original fact. Viers. The judgment is the last word of the law in any judicial controversy. Hornback v. Hornback, Ky.App., 636 S.W.2d 24 (1982), quoting from Irvine Toll Bridge Co. v. Williams, 223 Ky. 141, 3 S.W.2d 193 (1928).
>
> Once the trial judge had reason to believe that there was some absence of accuracy in its judgment so that the judgment

[17] KRS 419.020.

[18] Ky., 926 S.W.2d 449, 453-54 (1996).

did not properly conform to the true facts of the case, the trial judge had a duty, as well as a right, to investigate by means of a hearing to determine that the judgment accurately reflected the truth. The trial judge has inherent power to execute this responsibility.

. . .

We must agree with the principles expressed by the U.S. Supreme Court that equitable relief against fraudulent judgments is not a statutory creation but a judicially devised remedy fashioned so as to relieve hardships which from time to time arise from a literal adherence to the court-made rule that judgments should not be disturbed after a certain time period has expired.

We must agree that as the court stated in Hazel-Atlas:

> This equity rule, which was firmly established in English practice long before the foundation of our Republic, the courts have developed and fashioned to fulfill a universally recognized need for correcting injustices which, in certain instances, are deemed sufficiently gross to demand a departure from rigid adherence to the term rule.

See also Chambers v. NASCO, Inc., 501 U.S. 32, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991); Lake Village Water Assn. v. Sorrell, Ky.App., 815 S.W.2d 418 (1991).

. . .

We are persuaded that there are certain implied powers which are inherent in any Court of Justice in this State which arise from the very nature of their institution. Such authority is required because they are necessary to proper exercise of all other judicial authority. As such, these powers are governed not by statute or rule, but by the control vested in the court to manage its

> own affairs so as to achieve the orderly and expeditious, accurate and truthful disposition of causes and cases. This principle was well expressed in Chambers, supra, which quotes with approval the early case of United States v. Hudson, 7 Cranch 32, 3 L.Ed. 259 (1812); See also Roadway Express, Inc. v. Piper, 447 U.S. 752, 100 S.Ct. 2455, 65 L.Ed.2d 488 (1980). In Kentucky, such authority is vested in the sound discretion of the court in question subject to appropriate appellate review. All such authority must be exercised with great caution even though it is necessarily incidental to the function of all courts. Cf. Ex parte Burr, 9 Wheat 529, 6 L.Ed. 152 (1824).

This Court is not particularly concerned with the bureaucratic procedural obstacles which have impeded the Commonwealth in honoring its word. The bottom line is that the Commonwealth, through it prosecutorial and confinement arms, has failed to honor its agreement with Chappell. The Commonwealth cannot be allowed to rely upon some ACatch-22" to deny Chappell the relief to which he is entitled. Every day that passes is one more day that Chappell is not receiving the benefit of his agreement with the Commonwealth that he would be allowed to serve his federal sentence with his state sentence running concurrently with the federal sentence. In the interest of fundamental fairness, traditional notions of fair play and substantial justice, and judicial economy, we choose to invoke our inherent power to ensure that the Jefferson Circuit Court=s orders are enforced as intended.[19]

[19] It is indeed ironic that the Commonwealth has conceded this injustice, that

Accordingly, the opinion and order of the Jefferson Circuit Court is reversed and this matter is remanded for entry of an order vacating the previous judgments and orders entered by the Jefferson Circuit Court on June 5, 1998, November 16, 1998, November 18, 1998, July 3, 2000, and February 9, 2001. The vacating of Chappell=s judgment of conviction and sentence, the two orders granting shock probation, and the two orders revoking probation will restore Chappell to his status as a defendant under indictment in the Jefferson Circuit Court. The Jefferson Circuit Court can then enter the necessary order to have Chappell released from custody by the Kentucky Department of Corrections and the Commonwealth can then file with the federal authorities the appropriate detainer against Chappell. Once Chappell has been transferred to federal custody and commenced serving his federal sentence, his state charges can then be brought back before the Jefferson Circuit Court for acceptance of his guilty plea and sentencing in accordance with the parties= sentencing agreement.

GUDGEL, JUDGE, CONCURS.

McANULTY, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

McANULTY, JUDGE, DISSENTING: Respectfully, I dissent.

The reliance by the majority on the equitable case of

Chappell has had counsel to represent him on two occasions before the Jefferson Circuit Court, that the Jefferson Circuit Court has entered two orders attempting to resolve this problem, but it has been while Chappell is acting pro se that he has finally obtained the relief to which he is entitled.

Potter v. Eli Lilly & Co., Ky., 926 S.W.2d 449 (1996) is misplaced. In that case, the predicate was fraud. It is inconceivable to impute by implication to the Commonwealth or to the trial court any fraudulent conduct requiring this Court to vacate Chappell=s judgment of conviction. As pointed out below, pursuing this procedural route obviates the agreement to run the sentences concurrently.

If Chappell is returned Ato his status as a defendant under indictment@ approximately 3,010[20] days later, added to the approximately 1,460 days preceding this decision results in a period of twelve (12) years from the date of the offense to his eligibility for retrial. Surely, upon the passage of this amount of time with memories fading and witnesses becoming relocated or deceased the likelihood of a guilty plea would be highly improbable.

Appellant has received the benefit of the deal when he was granted shock probation after his original guilty plea. He received a second benefit upon violating his shock probation by allowing him to serve his state time concurrently with his anticipated federal sentence. To now set up for him to serve only his federal sentence and most likely avoid even a conviction, appears too great a reward considering his conduct.

The Commonwealth did not commit fraud. An ill-conceived agreement is not a fraudulent agreement. The federal

[20]Applying 54 days per year of good time for federal sentence; USCA § 3624(b).

system was under no obligation to accept the state court agreement and to mutually agree without obtaining prior consent of the federal prosecutor is not fraud requiring this Court to invoke Potter, supra. Rather, treating this matter as a motion to correct sentence by remanding the matter to the trial court with direction to release defendant to the federal authorities to begin service of his federal sentence would be the equitable remedy. Upon his release, he would remain convicted and the calculation of his remaining sentence, if any, could be made. To do more, sets the stage for him to receive a greater benefit from his bad bargain than he is entitled to and renders his conviction highly improbable.[21]

No good deed goes unpunished. Trial counsel's failure to obtain an agreement from the federal government and entering into an unenforceable agreement with the state court should not entitle appellant to avoid the conviction. It should permit direct relief from the sentence and RCr 11.42 provides the appropriate remedy.

[21]Principles of justice are not surrendered. Appellant does not claim innocence, nor does he challenge the voluntary nature of his plea. He only challenges the failure of the federal government to honor his state court agreement.

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