

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 2002-CA-000144-MR

PAMELA BRAVO-FLINT

APPELLANT

v. APPEAL FROM MEADE CIRCUIT COURT  
HONORABLE SAM MONARCH, JUDGE  
ACTION NO. 00-CR-00136

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING  
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BEFORE: JOHNSON, KNOPF, AND McANULTY, JUDGES.

KNOPF, JUDGE: In December 2001, Pamela Bravo-Flint pled guilty in the Meade Circuit Court to four counts of first-degree sexual abuse, a class-D felony as defined in KRS 510.110, and one count of distributing obscene matter to a minor, a class-A misdemeanor.<sup>1</sup> By judgment entered December 28, 2001, the court sentenced her to concurrent terms of imprisonment totaling one year and, pursuant to KRS 532.043, to a three-year period of

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<sup>1</sup> KRS 531.030.

conditional discharge following her release from incarceration or parole. Bravo-Flint contends that KRS 532.043 amounts to an unconstitutional usurpation of the judicial function and thus that the conditional-discharge portion of her sentence is unlawful. Because Bravo-Flint did not notify the Attorney General of her constitutional challenge or otherwise raise it before the trial court, we affirm the trial court's judgment without reaching the merits of Bravo-Flint's appeal.

KRS 532.043 provides in pertinent part that,

[i]n addition to the penalties authorized by law, any person . . . pleading guilty to . . . a felony offense under KRS Chapter 510 . . . shall be subject to a [three-year] period of conditional discharge following release from: (a) Incarceration upon expiration of sentence; or (b) Completion of parole.

Bravo-Flint assumes, and the trial court evidently did too, that the phrase "shall be subject to" in this statute means "shall be sentenced to"; that is, that the conditional-discharge period is a mandatory addition to any felony sentence under KRS Chapter 510. By imposing this mandatory sentence, the General Assembly, Bravo-Flint maintains, has encroached upon the judiciary's traditional sentencing discretion. That discretion, she contends, is so fundamental as to form a part of the judicial function, as provided for in Section 27 of Kentucky's Constitution, and thus derives protection from legislative

encroachment under the Constitution's Section 28.<sup>2</sup> Bravo-Flint concedes that she pled guilty without raising this issue in the trial court, but she maintains that she is nevertheless entitled to challenge the conditional-discharge statute by way of appeal. We must disagree.

Bravo-Flint correctly notes that our Supreme Court has recognized the viability of an appeal, even following an unconditional guilty plea, from an allegedly illegal sentence.<sup>3</sup> Recently, however, in Myers v. Commonwealth,<sup>4</sup> the Court was careful to disavow any suggestion in earlier cases that an illegal sentence rendered the judgment in which it was embodied void, even in part. The Court noted that trial courts are not "without jurisdiction to impose an unauthorized sentence," but that such a sentence, or portion of a sentence, is broadly voidable and may be corrected "by appeal, by writ, or by motion pursuant to RCr 11.42 or CR 60.02."<sup>5</sup> In other words, even an

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<sup>2</sup> "No person or collection of persons, being of one of those departments [legislative, executive, or judicial], shall exercise any power properly belonging to either of the others, except in the instances hereinafter expressly directed or permitted."

<sup>3</sup> Gaither v. Commonwealth, Ky., 963 S.W.2d 621 (1997); Hughes v. Commonwealth, Ky., 875 S.W.2d 99 (1994).

<sup>4</sup> Myers v. Commonwealth, Ky., 42 S.W.3d 594 (2001).

<sup>5</sup> *Id.* at 596.

illegal sentence is binding and entitled to respect until duly overturned.<sup>6</sup>

It follows that a defendant may waive her right to object to an unauthorized sentence, either expressly, as part of a plea agreement, (for example, Myers v. Commonwealth, *supra.*) or impliedly by failing to raise the objection in an authorized manner. That at least seems to be the lesson of Brashars v. Commonwealth.<sup>7</sup> In that case the defendant pled guilty to a qualifying sex offense and thus became subject to the Sex Offender Registration Act.<sup>8</sup> At his sentencing hearing he moved orally for a declaration that portions of that act were unconstitutional. Because he had not given notice of his constitutional challenge to the Attorney General, however, as

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<sup>6</sup> Cf. Adams Express Company v. Bradley, 179 Ky. 238, 200 S.W. 340, 341 (1918) ("If a judgment is void, it must be from one or more of the following causes: (1) Want of jurisdiction over the subject matter; (2) want of jurisdiction over the parties to the action or some of them; or (3) want of power to grant the relief granted in the judgment. . . .Judgments of courts of general or competent jurisdiction are not considered under any circumstances as mere nullities but as records importing absolute verity and of binding efficacy, until reversed by a competent appellate tribunal. They are voidable, not void. . . .But the word 'void' can with no propriety be applied to a thing which appears to be sound, and which while in existence, can command and enforce respect, and whose infirmity cannot be made manifest. If a judgment rendered, without in fact bringing the defendant to the court, cannot be attacked collaterally on this ground, unless the want of authority over them appears in the record, it is no more void than if it were founded upon a mere misconception of some matter of law or of fact occurring in the exercise of an unquestionable jurisdiction. In either case, the judgment can be avoided and made functus officio by some appellate proceeding instituted for that purpose, but if not so avoided must be respected and enforced." Citation omitted.).

<sup>7</sup> Ky., 25 S.W.3d 58 (2000).

<sup>8</sup> KRS 17.500 *et seq.*

generally mandated by CR 24.03,<sup>9</sup> the trial court denied the motion without addressing its merits. Our Supreme Court likewise refused to reach the merits of the defendant's claim and held, in effect, that a sentence allegedly illegal because based on an unconstitutional statute may not be avoided on that ground unless the constitutional issue has been properly raised in the trial court.<sup>10</sup>

Here, Bravo-Flint did not even voice her constitutional challenge in the trial court, much less give notice of it to the Attorney General. Under Brashers, therefore, we are precluded from addressing the merits of Bravo-Flint's appeal and accordingly affirm the December 28, 2001, judgment of the Meade Circuit Court.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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<sup>9</sup> See also Maney v. Mary Chiles Hospital, Ky., 785 S.W.2d 480 (1990).

<sup>10</sup> Brashers v. Commonwealth, 25 S.W.3d at 66 ("[W]e hold that the appellants' failure to notify the Attorney General of their constitutional challenges alone provided the trial court with a sufficient basis to overrule the motions.").