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Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000614-MR
AND
NO. 2002-CA-000834-MR
AND
NO. 2002-CA-000850-MR

COMMONWEALTH OF KENTUCKY — APPELLANT

v.

APPEAL FROM GREENUP CIRCUIT COURT
HONORABLE LEWIS D. NICHOLLS, JUDGE
ACTION NO. 96-CR-00005; 01-CR-00056 AND
00-CR-00085

TIMOTHY J. SCOTT;
SHANNON G. SCARBERRY
and DAVID RAY SPRADLIN — APPELLEES

OPINION

REVERSING and REMANDING

** ** ** ** **

BEFORE: EMBERTON, CHIEF JUDGE; BUCKINGHAM AND PAISLEY, JUDGES.

EMBERTON, CHIEF JUDGE. The Commonwealth of Kentucky appeals from three judgments of the Greenup Circuit Court in three separate cases which, for appeal, have been consolidated. The issue presented is whether the circuit court has jurisdiction to

enter a "Modified Judgment and Sentence" more than ten days after the entry of the original judgment and sentence.

Timothy Scott pleaded guilty to assault in the first degree on January 23, 1997, and was sentenced to ten years' imprisonment. On December 14, 2002, David Spradlin pleaded guilty to trafficking in a controlled substance, first, second, and third degree and was sentenced to five years' imprisonment. Shannon Scarberry pleaded guilty to robbery, first degree, by complicity on November 20, 2001; she was not sentenced, however, until February 14, 2002, when she was sentenced to five years' imprisonment.

On March 5, 2002, citing KRS[1] 533.010(6)(e), Judge Nicholls in each case entered judgment designated as "Modified Judgment and Alternative Sentence." In each case the appellee was placed on probation ranging from five to ten years and directed to enroll in vocational training. Additionally, each appellee was ordered to serve a period of time, not to exceed twelve months, in the Greenup County Detention Center. Subsequently, Spradlin and Scott were ordered released from the detention center and place on supervised probation.

The Commonwealth maintains that the trial court lacked jurisdiction to enter orders modifying the original judgments.

[1] Kentucky Revised Statutes.

In Silverburg v. Commonwealth,[2] the court held that a judgment could not be modified under the authority of KRS 532.070 after ten days from entry of the sentencing judgment:

> The judgment and sentence on the perjury conviction was entered by the trial judge on May 14, 1976. Purporting to act under the authority of KRS 532.070, the trial judge on June 21, 1976, entered an order modifying the perjury sentence. KRS 532.070 does not define the time within which the judgment complained of may be set aside or modified. Where the Criminal Rules do not provide a time, the Civil Rules shall apply. RCr 1.10. CR 59.05 provides that a judgment may be altered, amended or vacated within ten days after the entry of the final judgment. The order of June 21, 1976, was entered 38 days subsequent to the May 14, 1976, judgment. The court had lost jurisdiction of the case and the entry of the order modifying the sentence is void.[3]

KRS 533.010 deals with probation at the time of sentencing, and like KRS 532.070, is subject to the time limitation imposed by CR[4] 59.05.[5] In each of the cases now considered, the modification of the original judgment occurred well beyond the ten day period.

Commonwealth v. Tiryung,[6] is not, as suggested by the appellees, contrary to the holding in Silverburg. In Tiryung,

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[2] Ky., 587 S.W.2d 241 (1979).

[3] Id. at 244.

[4] Kentucky Rules of Civil Procedure.

[5] Commonwealth v. Gross, Ky., 936 S.W.2d 85 (1996).

[6] Ky., 709 S.W.2d 454 (1986).

the court failed to impose a sentence of imprisonment or fine upon conviction as required by KRS 532.070, but imposed only a sentence of probation. Subsequently, when the terms of probation were violated, the court imposed a sentence of imprisonment. In that case, there was no jurisdictional issue because the court was merely following a statutory mandate to impose a sentence of imprisonment of fine. In these cases, the court followed all statutory mandates at the time of sentencing and could not, more than ten days later, modify its earlier order.

Beyond the ten-day period provided in CR 59.05, CR 60.02 permits a trial court to modify its judgment in limited circumstances. However, in Gross, supra, the court found that rule inapplicable where the trial court did not cite any provision of CR 60.02 nor make any finding to justify relief under the rule. Additionally, the court held that CR 60.02 was not available to correct errors of law, but is limited to errors not appearing on the face of the record and not available by appeal. Otherwise, a motion for relief must be brought within one year under CR 60.02(a) (b), or (c), or within a reasonable time under the remaining provisions. The motion to place him on probation two years after the original judgment was untimely.[7] Appellees' contention that the trial court erred in not

[7] Id. at 88-89.

considering probation at the time of sentencing as grounds for relief under CR 60.02 is precluded by the same obstacles noted by the court in Gross, supra. Most glaring, and sufficient to discard appellees' arguments, is that the trial court did not rely on the rule nor make findings on which to base CR 60.02 relief.

Finally, we note the modified judgments in these cases are not proper pursuant to KRS 439.265(1), which provides:

> Subject to the provisions of KRS Chapter 439 and Chapters 500 to 534, any Circuit Court may, upon motion of the defendant made not earlier than thirty (30) days nor later than one hundred eighty (180) days after the defendant has been incarcerated in a county jail following his conviction and sentencing pending delivery to the institution to which he has been sentenced, or delivered to the keeper of the institution to which he has been sentenced, suspend the further execution of the sentence and place the defendant on probation upon terms the court determines. Time spent on any form of release following conviction shall not count toward time required under this section.

In Gross, supra, the court rejected the notion that the statute grants the trial court continuing jurisdiction to modify sentences:

> We do not view the limited jurisdiction authorized a trial court in KRS 439.265 to be as expansive as argued by Gross and adopted by the court below. It first should be noted that at no time has Gross sought relief under the shock probation statue nor could he have at the time under the language

> of KRS 439.256(1) which prevents the running of the 30-day period until after incarceration "following his conviction and sentencing. . . ." Despite this fact, the trial court maintained that the effect of this statute worked to grant the trial court "continuing jurisdiction" to modify sentences until the 180-day period had run. Such an interpretation goes against the clear wording of the statute. This statute only establishes a trial court's jurisdiction after the passage of 30 days imprisonment upon conviction and motion of the defendant. This jurisdiction is granted for the limited purpose of considering shock probation. Nowhere in the statute does it authorize "continuing jurisdiction" or any other type of change in the original sentence. All other types of amendments or modifications are subject to the limitations of CR 59.05 and CR 60.02.[8]

Clearly, the modifications of Spradlin's and Scott's sentences cannot be characterized as orders granting "shock probation." Both were done well beyond the 180-day limitation specified in the statute. Although Scarberry had pending at the time of the modification of her sentence a motion for shock probation, such motion was invalid since it was filed on January 30, 2002, before her final sentencing.

The trial court acted beyond its jurisdictional authority in modifying the sentences imposed by its original judgments. All three cases are remanded to the trial court for entry of orders reinstating the original judgments and entry of any other necessary orders consistent with this opinion.

[8] Id. at 87.

ALL CONCUR.

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