

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2002-CA-002617-MR

COMMONWEALTH OF KENTUCKY

APPELLANT

v. APPEAL FROM PULASKI CIRCUIT COURT  
HONORABLE WILLIAM T. CAIN, JUDGE  
ACTION NO. 92-CR-00184

WILLIAM STRINGER

APPELLEE

OPINION  
REVERSING

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BEFORE: COMBS, DYCHE AND JOHNSON, JUDGES.

JOHNSON, JUDGE: The Commonwealth has appealed from the amended final judgment and sentence of probation entered by the Pulaski Circuit Court on December 20, 2002, which granted William Stringer's CR<sup>1</sup> 60.02 motion to modify his sentence. Having concluded that the trial court abused its discretion by improperly applying the law to the facts of the case sub judice, we reverse.

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<sup>1</sup> Kentucky Rules of Civil Procedure.

This case presents a rather unique and unfortunate set of circumstances. In 1994 Stringer was tried and convicted in the Pulaski Circuit Court of three counts of sodomy in the first degree<sup>2</sup> and two counts of sexual abuse in the first degree.<sup>3</sup> Stringer was sentenced to 20 years' imprisonment on each conviction of sodomy in the first degree and one year on each conviction of sexual abuse in the first degree.<sup>4</sup> The trial court ordered the sentences to be served concurrently, as recommended by the jury, for a total of 20 years. On November 20, 1997, the Supreme Court of Kentucky rendered a published opinion affirming Stringer's convictions.<sup>5</sup>

On August 8, 1998, Stringer filed a pro se CR 60.02 motion to modify or amend his sentence. Stringer contended that the admission of certain expert testimony at his trial had resulted in a "manifest injustice" and that his imprisonment had resulted in an undue hardship on his wife and the taxpayers of

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<sup>2</sup> Kentucky Revised Statutes (KRS) 510.070.

<sup>3</sup> KRS 510.110. Each act involved the same victim, J.V., a student enrolled at a daycare center owned and operated by Stringer's daughter. Stringer resided in close proximity to the daycare center and he ran errands for his daughter on a semi-regular basis. On certain occasions, Stringer was responsible for transporting children in his van. J.V. testified at trial that she was subjected to several acts of sexual conduct and oral sodomy during her interactions with Stringer.

<sup>4</sup> The trial court found that Stringer was not eligible for probation due to the fact he "occupied a position of special trust" and "committed substantial sexual conduct with [a] minor under the age of 14[.]" See KRS 532.045.

<sup>5</sup> See Stringer v. Commonwealth, Ky., 956 S.W.2d 883 (1997), cert. denied, 523 U.S. 1052, 118 S.Ct. 1374, 140 L.Ed.2d 522 (1998).

the Commonwealth.<sup>6</sup> The trial court entered an order summarily denying Stringer's CR 60.02 motion on September 8, 1998.

Shortly thereafter, Stringer sent the trial court a letter dated September 29, 1998, asking the court to "please help [him] get home to [his] loved ones."<sup>7</sup> The trial court treated the letter as an RCr<sup>8</sup> 11.42 motion and entered an order summarily denying the purported motion on October 12, 1998.

On August 11, 1999, Stringer filed a motion for a full evidentiary hearing, a motion for appointment of counsel, and a motion to vacate and set aside his sentence pursuant to RCr 11.42. The trial court subsequently entered an order appointing a public defender to represent Stringer, and on July 31, 2000, Stringer's court-appointed attorney filed a supplemental report regarding Stringer's RCr 11.42 motion and a supplemental motion pursuant to CR 60.02(f) requesting the trial court to alter, amend, or vacate his convictions and final sentence. In his CR 60.02 motion, Stringer raised several issues concerning his mental state at the time of his interrogation, trial, and sentencing. Stringer was subsequently evaluated by Dr. Eric Drogin, after which he filed a motion requesting the trial court

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<sup>6</sup> Stringer also claimed that he had been "rehabilitated." Interestingly, however, Stringer insisted that he was innocent of the crimes for which he was convicted.

<sup>7</sup> In his letter, Stringer claimed, inter alia, that he suffered from brain damage as a result of an automobile accident that took place in 1960. Stringer suffered a closed-head injury in the accident.

<sup>8</sup> Kentucky Rules of Criminal Procedure.

to suspend the remainder of his sentence and to enter an order granting probation. In support of his motion, Stringer claimed he was unable to participate in the sex offender treatment program administered by the Department of Corrections due to his deteriorating mental state. Consequently, Stringer asserted that he would be required to serve out his entire sentence unless the trial court entered an alternative sentencing plan.<sup>9</sup>

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<sup>9</sup> The trial court entered its final judgment and sentence of imprisonment in the case sub judice on September 23, 1994. As of that date, KRS 439.340(10) provided that, "[n]o eligible sexual offender within the meaning of KRS 197.400 to 197.440 shall be granted parole unless he has successfully completed the Sexual Offender Treatment Program." See 1994 Ky. Acts. ch. 179, § 2, eff. 4-4-1994. At the time of Stringer's conviction, a "sexual offender" was defined by KRS 197.410(1) as any person who "[h]as been adjudicated guilty of any felony described in KRS Chapter 510[.]" See 1992 Ky. Acts. ch. 211, § 64, eff. 7-14-1992. The statute, however, exempted offenders who suffer from active psychosis or mental retardation. Pursuant to KRS 510.010(4), a "[m]entally retarded person" means a person with significant subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period[.]" As previously discussed, Stringer's alleged mental disabilities are the product of a closed-head injury that he suffered in 1960. Stringer was born on October 27, 1935. Thus, Stringer's brain damage did not "manifest[ ] during the developmental period[.]" Consequently, he is not exempt from the sex offender treatment program and he is only eligible for parole upon completion of the program, which he is allegedly unable to complete. Notwithstanding, Stringer may still receive good time credit pursuant to KRS 197.045, as it existed prior to July 15, 1998. See 1992 Ky. Acts. Ch. 445, § 7, eff. 7-14-1992. In 1998 the Legislature added the following language to KRS 197.045:

Any sex offender, as defined in KRS 197.410, who has not successfully completed the sex offender treatment program as determined by the program director shall not be entitled to the benefit of any credit on his sentence. A sex offender who does not complete the sex offender treatment program for any reason shall serve his entire sentence without benefit of good time, parole, or other form of early release. The provisions of this section shall not apply to any sex offender convicted before [July 15, 1998,] or to any mentally retarded sex offender.

See 1998 Ky. Acts. Ch. 606, § 24, eff. 7-15-1998. As previously discussed, Stringer was convicted in 1994. Thus, the above quoted language does not apply to him.

Stringer contented that it would be inequitable to require him to serve out the remainder of his sentence given his age and mental condition.<sup>10</sup>

An evidentiary hearing was held on November 22, 2002. At the hearing, Dr. Drogin opined that Stringer suffers from "clear cognitive deficits" which "reflect an organic brain disorder." Dr. Drogin testified that Stringer did not meet the criteria for mental retardation contained in KRS 510.010(4) due to the fact his condition did not manifest itself prior to his eighteenth birthday. Dr. Drogin opined that Stringer would face several problems as a result of his cognitive deficits if he were required to participate in the sex offender treatment program administered by the Department of Corrections. Dr. Drogin testified that he believed Stringer would benefit from participating in an outpatient treatment program that was geared towards his disability.

On December 20, 2002, the trial court entered an amended final judgment and sentence of probation. The order states, in relevant part, as follows:

IT IS HEREBY ORDERED that the Defendant's request for an amended sentencing plan is granted. The Defendant's conviction for Sodomy First Degree three (3) counts shall remain as previously ordered. The Defendant's 20-year sentence however shall be amended to grant probation pursuant

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<sup>10</sup> Stringer cited CR 60.02(e) and (f) as authority for his motion.

to CR 60.02. During this period of probation for five (5) years to commence from the date of this order, the Defendant shall abide by the following conditions.

1. He shall enroll with . . . the Discovery Center . . . and with . . . [the] Department of Corrections, Division of Mental Health . . . for Coordinated Treatment, or other recommended treatment programs[.]
2. He shall enroll in and continue with independent living or other similar and appropriate classes or one on one counseling services and with an appropriate sexual counseling group until such time as his counselor's determine that such counseling is no longer necessary or beneficial at which time his counselor shall report that treatment has been completed to his probation office, and to this Court.
3. He shall take up residence with his spouse in Somerset, Kentucky [o]r another approved setting where he will reside with at least one other adult.
4. He shall avoid any situations in which the Defendant would be alone with children, any visitation with his grandchildren or other children at family functions shall occur only when another responsible adult is present at all times.
5. He shall avoid any contact with the victim and her family.
6. He shall refrain from the use of alcohol or controlled substances unless obtained by prescription from his physician.

7. He shall (a) possess no firearms, (b) commit no offenses, (c) avoid persons and places of harmful or disreputable character.

8. He shall refrain from frequenting places where children congregate such as playgrounds, schools and parks and shall [avoid] any contact with minor children except when fully supervised by a responsible adult.

Upon completion of the aforesaid period of probation, Mr. Stringer shall be fully discharged provided that he has abided by the above conditions and provided no further warrant issued by this Court is pending against him at that time or that his probation has [not] been revoked.

This appeal followed.

The Commonwealth argues on appeal that the trial court lacked the authority to grant probation in the case sub judice.<sup>11</sup>

We agree.

CR 60.02 provides, in relevant part, as follows:

On motion a court may, upon such terms as are just, relieve a party or his legal representative from its final judgment, order, or proceeding upon the following grounds: . . . (e) the judgment is void, or has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or

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<sup>11</sup> The Commonwealth also contends that the trial court lost jurisdiction to amend Stringer's sentence pursuant to CR 59.05, which provides that: "[a] motion to alter or amend a judgment, or to vacate a judgment and enter a new one, shall be served not later than 10 days after entry of the final judgment." We cannot agree with this contention as we are of the opinion that the 10-day time limit contained in CR 59.05 was not meant to prescribe or regulate the extraordinary relief available under CR 60.02. See Granville & Nutter Shoe Co., Inc. v. Florsheim Shoe Co., Ky.App., 569 S.W.2d 721, 723 (1978). See also Sleek v. J.C. Penney Co., Inc., 292 F.2d 256, 258 (3d Cir. 1961).

it is no longer equitable that the judgment should have prospective application; or (f) any other reason of an extraordinary nature justifying relief.

It is well established that a trial court's ruling on a CR 60.02 motion will not be overturned on appeal absent an abuse of discretion.<sup>12</sup> "An abuse of discretion exists when the reviewing court is firmly convinced that a mistake has been made."<sup>13</sup> "A [ ] court abuses its discretion when it relies on clearly erroneous findings of fact, or when it improperly applies the law or uses an[ ] erroneous legal standard."<sup>14</sup> That is to say, "[t]he exercise of [judicial] discretion must be legally sound."<sup>15</sup>

KRS 532.045 prohibits the granting of probation to certain classes of offenders. The statute provides, in relevant part, as follows:

- (2) Notwithstanding other provisions of applicable law, probation shall not be granted to, nor shall the execution or imposition of sentence be suspended for, nor shall a finding bringing the defendant within the provision of this section be stricken for a person convicted of violating KRS 510.050, 510.080, 529.030 to 529.050, 529.070,

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<sup>12</sup> See, e.g., Barnett v. Commonwealth, Ky., 979 S.W.2d 98, 102 (1998).

<sup>13</sup> Romstadt v. Allstate Insurance Co., 59 F.3d 608, 615 (6th Cir. 1995) (citing Southward v. South Central Ready Mix Supply Corp., 7 F.3d 487, 492 (6th Cir. 1993)).

<sup>14</sup> Romstadt, 59 F.3d at 615 (quoting Southward, 7 F.3d at 492).

<sup>15</sup> Kuprion v. Fitzgerald, Ky., 888 S.W.2d 679, 684 (1994) (citing 5 Am.Jur.2d Appeal and Error § 774 (1962)).

530.020, 531.310, 531.320, 531.370, or criminal attempt to commit any of these offenses under KRS 506.010, and, who meets one (1) or more of the following criteria:

. . .

(h) A person who in committing any of the offenses enumerated in this subsection has substantial sexual conduct with a minor under the age of fourteen (14) years; or

(i) A person who occupies a position of special trust and commits an act of substantial sexual conduct.

As previously discussed, Stringer was convicted of three counts of sodomy in the first degree (KRS 510.070) and two counts of sexual abuse in the first degree (KRS 510.110). At his sentencing hearing, which was held on September 20, 1994, the trial court found that Stringer was not eligible for probation due to the fact he "occupied a position of special trust" and "committed substantial sexual conduct with [a] minor under the age of 14[.]"<sup>16</sup> These findings were supported by substantial evidence. Thus, Stringer is barred from

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<sup>16</sup> "Position of special trust" is defined in KRS 532.045(1)(b) as a position occupied by a person in a "position of authority" which is defined in KRS 532.045(1)(a) as, inter alia, a staff member or volunteer with a youth services organization. "Substantial sexual conduct" is defined in KRS 532.045(1)(c) as "penetration of the vagina or rectum by the penis of the offender or the victim, by any foreign object; oral copulation; or masturbation of either the minor or the offender."

consideration for probation pursuant to KRS 532.045(2),<sup>17</sup> and the trial court lacked the authority to grant his probation.<sup>18</sup>

Based on the foregoing reasons, the amended final judgment and sentence of probation entered by the Pulaski Circuit Court is reversed.

DYCHE, JUDGE, CONCURS.

COMBS, JUDGE, CONCURS IN RESULT ONLY AND FILES SEPARATE OPINION.

COMBS, JUDGE, CONCURRING IN RESULT: It is a lamentable reality that the remedy carefully crafted by Judge Cain cannot stand in this case. I sincerely hope that the Legislature will address the gap in the law that this case illustrates.

BRIEF FOR APPELLANT:

Albert B. Chandler III  
Attorney General

Janine Coy Bowden  
Assistant Attorney General  
Frankfort, Kentucky

BRIEF AND ORAL ARGUMENT FOR APPELLEE:

Brian Thomas Ruff  
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<sup>17</sup> See Porter v. Commonwealth, Ky., 841 S.W.2d 166 (1992); and Commonwealth v. Taylor, Ky., 945 S.W.2d 420 (1997).

<sup>18</sup> We are of the opinion that KRS 532.045 reflects a policy decision exclusively within the ambit of Legislative authority. Absent the denial of a constitutional right, which has not been alleged herein, it is not our role to second guess the Legislature in this respect. While Stringer has attempted in this appeal to make an argument raising equal protection concepts, he failed to challenge the constitutionality of the statute as it applied to him.

ORAL ARGUMENT FOR APPELLANT:

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