

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2003-CA-001015-MR

KENNETH BUTTS

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE REBECCA M. OVERSTREET, JUDGE  
ACTION NOS. 02-CR-00411 & 02-CR-01004

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
REVERSING AND REMANDING

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BEFORE: COMBS, KNOPF, and McANULTY, Judges.

COMBS, JUDGE. Kenneth Butts appeals from an order of the Fayette Circuit Court of April 30, 2003, which denied his motion pursuant to CR<sup>1</sup> 60.02. Having concluded that the trial court erred as a matter of law in denying his motion, we reverse and remand.

On April 9, 2002, Butts was indicted on charges of trafficking in a controlled substance, first degree, with a firearm; trafficking in a controlled substance within 1,000

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

yards of a school; and possession of drug paraphernalia, second offense. On July 29, 2002, while awaiting trial on these charges, Butts was arrested for trafficking in cocaine. A second indictment was issued charging Butts with trafficking in a controlled substance, first degree, and possession of drug paraphernalia, second or subsequent offense. The two indictments were ultimately consolidated for disposition in the trial court.

On October 18, 2002, Butts entered a guilty plea to the charges (as amended) in both indictments. Pursuant to the recommendation of the Commonwealth, he was sentenced to five years on each of the trafficking offenses (amended to possession of a controlled substance, first degree, and/or possession of marijuana) and to one year on each of the two paraphernalia charges. At the sentencing hearing (conducted on November 15, 2002) and in the written judgments (entered on November 22, 2002), all of the sentences were ordered to run concurrently for a total of five years.

On December 11, 2002, the Commonwealth moved to amend the judgment pursuant to CR 60.01 and 60.02. Relying on KRS<sup>2</sup> 533.060(3), it argued that the trial court did not have authority to order the sentences to run concurrently. It argued that the court's failure to sentence Butts in accordance with

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<sup>2</sup> Kentucky Revised Statutes.

the statute resulted in a clerical or judicial error that could be cured pursuant to CR 60.01, which provides in relevant part as follows:

Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. (Emphasis added.)

Butts contended that the mistake was not a clerical error and that the court had already lost jurisdiction to alter his sentence. At the hearing on the motion, the trial court observed pointedly that the Commonwealth had not alerted it to the statutory requirements concerning consecutive rather than concurrent sentencing. Nevertheless, it concluded that its error was amenable to correction under CR 60.02. Accordingly, on December 22, 2002, the trial court corrected its original judgment and entered an amended judgment running the sentences consecutively for a total of ten years.

On April 4, 2003, Butts, *pro se*, moved the trial court pursuant to CR 60.02 (e) to modify his amended sentence to five years as had been originally imposed. He argued that the court had lost jurisdiction to amend the sentences and that its attempted or putative amended judgment resulted in a void judgment. The motion was denied without explanation or elaboration on April 15, 2003. This appeal followed.

Butts contends that after the original judgment providing for a five-year term of imprisonment became final, the trial court did not retain jurisdiction to increase his sentence by an additional term of five years because of judicial error in the original sentencing. We agree. CR 52.02 provides in pertinent part as follows:

Not later than 10 days after entry of judgment the court of its own initiative, or on the motion of a party made not later than 10 days after entry of judgment, may amend its findings or make additional findings and may amend the judgment accordingly.  
(Emphases added.)

The Commonwealth's motion was filed beyond the ten-day limit, and more than ten days had elapsed between the (November 22, 2002) final judgment of conviction and the amended judgment increasing the sentence (December 22, 2002).

There is no question that the trial court had originally intended to sentence Butts to a total of five years. Although KRS 533.060(3) deprived the court of any discretion in that regard, the Commonwealth failed to object to the concurrent sentencing in timely fashion. It omitted to advise the trial court as to the statutory prohibition against concurrent sentencing under the circumstances present in this case until long after the judgment had become final. In Viers v. Commonwealth, Ky., 52 S.W.3d 527, 529 (2001), the Supreme Court observed: "Rendering a judgment based on incomplete or false

information is not a clerical error." (Emphasis added.) As the circuit court had lost jurisdiction to enter the order of December 22, 2002, that order is void. See, Silverburg v. Commonwealth, Ky., 587 S.W.2d 241 (1979); Commonwealth v. Gross, Ky., 936 S.w.2d 85 (1996).

The Commonwealth urges us to determine that the trial court did not abuse its discretion in denying Butts's CR 60.02 motion and that Butts's only remedy was to appeal from the amended judgment. We disagree. Whether a judgment is void is a question of law subject to our review *de novo*; it is not a matter to be referred for resolution to the discretion of the court where it originated. Although Butts could have elected to appeal from the void judgment, CR 60.02(e) provides an alternate, viable, and readily accessible remedy for attacking a void judgment.

The judgment of the Fayette Circuit Court is reversed and remanded for entry of an order consistent with this opinion.

ALL CONCUR.

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