

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002061-MR

COMMONWEALTH OF KENTUCKY

APPELLANT

v.

APPEAL FROM WARREN CIRCUIT COURT
HONORABLE THOMAS R. LEWIS, JUDGE
ACTION NO. 02-CR-00637

GARY KENNETH ELLIS

APPELLEE

OPINION AND ORDER
DISMISSING

** ** *

BEFORE: GUIDUGLI, TACKETT, AND VANMETER, JUDGES.

GUIDUGLI, JUDGE: The Commonwealth of Kentucky has appealed from the Warren Circuit Court's September 3, 2003, final judgment entered following Gary Kenneth Ellis's entry of a guilty plea to an amended charge of Driving Under the Influence of Intoxicants, Third Offense Within 5 Years,¹ with aggravated circumstances; Speeding;² and Operating on Suspended Operator's License.³ Ellis received a six-month sentence for the DUI conviction, which the

¹ KRS 189A.010(5)(c).

² KRS 189.390.

³ KRS 186.620(2).

circuit court probated for twenty-four months. The Commonwealth argued below, and before this Court, that because the DUI offense included aggravating circumstances, the circuit court was required to sentence Ellis to a mandatory minimum term of sixty days imprisonment. Although we are inclined to agree with this argument, we have determined that this appeal was prematurely taken and must therefore dismiss the Commonwealth's appeal for a ruling on its motion to reconsider.

On October 5, 2002, Ellis, a Tennessee resident, was indicted by the Warren County Grand Jury on five charges, namely DUI Fourth Offense or More;⁴ Speeding; Giving a Peace Officer a False Name or Address;⁵ No Insurance;⁶ and Operating on Suspended Operator's License. In exchange for Ellis agreeing to plead guilty, the Commonwealth moved to dismiss the giving a false name and no insurance charges, and amended the DUI Fourth Offense or More charge to a DUI Third Offense charge. The circuit court held a guilty plea hearing on September 2, 2003, at which time counsel for Ellis and the Commonwealth agreed that because aggravating circumstances (the breathalyzer test measured an alcohol level of 0.202 according to the Uniform Citation) were present, Ellis was required by statute to serve a

⁴ KRS 189A.010(5)(d).

⁵ KRS 523.110.

⁶ KRS 304.39-080.

mandatory sixty-day sentence.⁷ The circuit court imposed a six-month sentence, but despite the statutory requirement, probated the sentence for two years. The Commonwealth filed a motion to reconsider due to the circuit court's failure to impose the mandatory minimum sentence, citing KRS 189A.010(5)(c). The statute provides that the "term shall not be suspended, probated, conditionally discharged, or subject to any other form of early release." The motion was noticed to be heard on October 6, 2003. Prior to the hearing date, the Commonwealth filed its notice of appeal of the final judgment. The record does not reflect that the circuit court ever heard arguments or ruled on the pending motion to reconsider. The following November, the parties entered into an Agreed Order by which Ellis was to voluntarily turn himself in on January 19, 2004, to dispose of his sentence. It is not clear whether the Agreed Order acted to amend the final judgment to impose a sixty-day sentence. Regardless, in its brief, the Commonwealth indicated that Ellis has never complied with the terms of the Agreed Order, and the Commonwealth has apparently not moved to enforce it by requesting a bench warrant.

Upon submission, this Court entered a show cause order, requesting the Commonwealth to show cause why the appeal should not be dismissed as moot due to the entry of the Agreed

⁷ KRS 189A.010(5)(c) and KRS 189A.010(11)(d).

Order or as prematurely taken. The Commonwealth filed a response, limiting the response to the effect of the Agreed Order on the present appeal. The Commonwealth indicated that Ellis still had not submitted himself to the custody of the Warren County jail and that it would be requesting a bench warrant in the near future to secure his custody and allow for the imposition of the agreed sentence. Although it would prefer the current appeal to proceed, the Commonwealth requested that any dismissal be without prejudice. The response contained no argument as to the premature nature of the appeal, which we hold is determinative in this case.

Nine days after the entry of the final judgment, the Commonwealth filed a motion to reconsider, presumably pursuant to CR 59.05. A timely motion under this rule operates to stay the running of time for an appeal.⁸ Therefore, the Commonwealth's time for filing a notice of appeal was stayed pending the entry of a ruling by the circuit court on its motion to reconsider. Because the circuit court had not had an opportunity to even hear the motion, let alone correct the final judgment, prior to the filing of the notice of appeal, we hold that the appeal was prematurely taken and must be dismissed to allow for a ruling on the pending motion to reconsider. As an aside, we note that KRS 189A.010(5)(c) is clear that Ellis

⁸ CR 73.02(e).

should have been sentenced to a mandatory minimum sentence of sixty days as he entered a guilty plea to DUI Third Offense with aggravating circumstances. Should the motion to reconsider be denied and the Agreed Order not be enforced, the Commonwealth would not be precluded from perfecting a future appeal on the same issue.

For the foregoing reasons, we hold that the Commonwealth has not shown sufficient cause why its appeal should not be dismissed as prematurely taken. Therefore, the above-styled appeal is ORDERED DISMISSED this date.

ALL CONCUR.

ENTERED: October 8, 2004

/s/ Daniel T. Guidugli
JUDGE, COURT OF APPEALS

BRIEF FOR APPELLANT:

No appellee brief.

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