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NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

2003-CA-002253-MR

MARK ALLEN DANIELS

APPELLANT

V. APPEAL FROM METCALFE CIRCUIT COURT
HONORABLE PHILIP R. PATTON, JUDGE
INDICTMENT NO. 88-CR-00007

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * *

BEFORE: BARBER, McANULTY, AND MINTON, JUDGES.

MINTON, JUDGE: Mark Allen Daniels appeals, *pro se*, from an Order of the Metcalfe Circuit Court dismissing his Petition for Declaratory Judgment and Demand for Jury Trial, requesting that his ten year sentence on a guilty plea to first degree robbery¹ be vacated due to a violation of his state and federal constitutional due process and equal protection rights, on the basis

¹ Kentucky Revised Statutes (KRS) 515.020.

that the circuit court lost jurisdiction under KRS 640.030² to sentence him. Because we conclude that Daniels is entitled to an evidentiary hearing, we reverse the circuit court's order dismissing the petition and remand for a hearing.

In May 1988, sixteen-year-old Daniels was charged in the Metcalfe District Court with first-degree robbery. Daniels was appointed counsel and, after a hearing, was transferred to the Metcalfe Circuit Court as a youthful offender. On June 15, 1988, the grand jury indicted Daniels for first-degree robbery "when in the course of committing a theft at Jr. Foods #9, Stockton Street, Edmonton, Kentucky, he used or threatened the immediate use of physical force, a pocket knife being a dangerous instrument, upon Janice Sue Martin." Daniels entered a not guilty plea at arraignment. Later, the Commonwealth recommended a minimum ten-year sentence of imprisonment in exchange for a guilty plea to first-degree robbery. On advice of counsel, Daniels changed his plea to guilty. During the guilty plea colloquy, Daniels admitted taking \$92 from the cash register while brandishing a pocket knife with its blade open. The mask and clothing he wore during the robbery were discovered by the police in his bedroom.

² Youthful Offender sentencing procedures upon a conviction or guilty plea.

At the time of Daniels's sentencing, the Kentucky General Assembly had recently enacted the Unified Juvenile Code which governed Daniels's sentencing. KRS 640.030(2) provided:

[A]ny sentence imposed upon the youthful offender shall be served in a facility or program operated by the cabinet for human resources until the expiration of the sentence, the youthful offender is paroled, the youthful offender is probated, or the youthful offender reaches the age of eighteen (18), whichever first occurs. If an individual sentenced as a youthful offender attains the age of eighteen (18) prior to the expiration of his sentence, and has not been probated or released on parole, that individual shall be returned to the sentencing court. At that time, the sentencing court shall make one (1) of the following determinations:

- (a) Whether the youthful offender shall be placed on probation or conditional discharge;
- (b) Whether the youthful offender shall be returned to the cabinet for human resources to complete a treatment program, which treatment program shall not exceed a period in excess of six (6) months. At the conclusion of the treatment program or at the expiration of six (6) months, whichever first occurs, the individual shall be finally discharged; or
- (c) Whether the youthful offender shall be incarcerated in an institution operated by the corrections cabinet[.]

During entry of the plea, the circuit court read the above statute to Daniels, emphasizing that "(a)fter you reach eighteen, you will in all probability be brought back to this

Court if you are not paroled, probated, or conditionally released prior to that time." Daniels indicated he understood. The court found imprisonment necessary due to Daniels's criminal history, which included "a continuing pattern of anti-social behavior that's occurred over a considerable period of time," including the "beating of an elderly person." Daniels was sentenced to ten years' imprisonment but delivered as a juvenile to the custody of the Cabinet for Human Resources until he turned eighteen. The court reiterated that at that time ". . . you will be returned to this Court for further determination regarding your sentence."

On August 14, 1989, Daniels, now eighteen, was returned to the circuit court from the Central Kentucky Treatment Center for a hearing to determine whether the remainder of his sentence should be imposed pursuant to subsection (a), (b), or (c) of KRS 640.030(2). At that hearing, Daniels's counsel requested ". . . the option of returning him for the six month period of time to the juvenile facility." David Sullivan, an employee of the treatment center, testified that Daniels had been successful in completing some of the programs, had been cooperative, and had gained from his experience; but if Daniels were to be returned for an additional six months, he could continue to work on the remaining two sections of his G. E. D. and with the vocational coordinator in

the areas of cooking and mechanics. With regard to what happened at the end of the six-month period, the following exchange occurred:

MR. SPARKS (prosecutor): Let me ask a couple of questions. Let's assume that the Court does choose this course of action, is it Mr. Sullivan?

MR. SULLIVAN: Yes.

MR. SPARKS: And he does send Mark back up there for six months, at the conclusion of that six-month period, exactly what takes place at that point? Are we talking about an automatic discharge from that facility or does the facility get back in touch with the Court, exactly what course of action do you all take?

MR. SULLIVAN: Well that would be dependent upon the Court; but, normally, how a youthful offender case works is, at the end of the six months, we do involvement; nearing the end of that six months, we do, is the resident is going to stay near the area, which I believe Mark is planning to do, we set up their employment so that they go ahead and get their interviews finished before they are finished with our program, as well as housing, such as an apartment, and all the necessary things so that when they do leave, they have a date set for when they start working, as well as a place to go and people contact, such as NA or AA, whatever the case may be for an individual resident. But, normally, with youthful offenders, Court contact is ended after six months. . . .

THE COURT: I noticed under this 640.030, there is a provision that after six months, or completion of the program, that it does provide that he could be returned to this Court to go through a similar proceeding

that we are having here now; but it's the position of you folks that you all do have the right to release him, are you disregarding that?

MR. SULLIVAN: That's something I'm not sure, sir.

On August 17, 1989, although finding him not suitable for probation or conditional discharge at that time, the court was favorably impressed with Daniels's conduct and the efforts made and entered a post-trial order to give Daniels "one more opportunity to continue these efforts you've started." Without objection from counsel, the court ordered Daniels:

[R]eturned to the custody of the Cabinet for Human Resources to complete his treatment program, which program shall not exceed a period in excess of six (6) months. At the conclusion of the treatment program, or, at most, the expiration of the six (6) months, the Defendant shall be returned to this Court for the purpose of re-evaluation and further orders regarding his sentence. It is further the Order of this Court that the Defendant shall also undergo psychological tests or testing; and the results of those tests shall be furnished by the Cabinet for Human Resources to this Court, along with any other information relating to his condition and any recommendations for future treatment, if any.

In January 1990, Daniels was ordered probated for a period of five years, subject to certain conditions. Five months later, the Commonwealth introduced evidence of a curfew violation, entry of guilty pleas to third-degree criminal trespass, possession of alcoholic beverages by a minor under

age 21, and a criminal complaint charging Daniels with murder in a stabbing death where he was both identified by the victim and admitted guilt. The circuit court revoked probation and sentenced Daniels to the original term of ten years' imprisonment, less credit for time served.

Thirteen years later, on May 22, 2003, Daniels's petition for declaratory judgment and demand for jury trial was filed in the circuit court. Daniels asserted a violation of due process and equal protection by the circuit court's order of probation and revocation, arguing that the circuit court lost jurisdiction to sentence him to probation after committing him for six months to the Cabinet for Human Resources, and asking, alternatively, that the original sentence be vacated or that he be given a jury trial. The Commonwealth responded that Daniels waived his right to a jury trial by pleading guilty. The circuit court agreed with the Commonwealth in dismissing the petition. On appeal, Daniels argues that the circuit court erred by summarily dismissing his petition and requests a remand for an evidentiary hearing or reversal of the circuit court's decision.

Daniels's petition for declaratory judgment was filed pursuant to CR³ 57 (Declaratory Judgment) "and all other

³ Kentucky Rules of Civil Procedure.

Statutory Provisions applicable," thereby referencing KRS 418.040. According to Smith v. O'Dea:⁴

A petition for declaratory judgment pursuant to KRS 418.040 has become the vehicle, whenever Habeas Corpus proceedings are inappropriate, whereby inmates may seek review of their disputes with the Corrections Department.

This action, however, does not involve an action against Daniels by the Corrections Department but, instead, concerns the propriety of Daniels's 1989 sentence of probation imposed by the Metcalfe Circuit Court. A declaratory judgment action will not lie to determine the propriety of a judgment in a prior action between the same parties.⁵ Questions regarding the validity and effect of a prior judgment may not be determined in a declaratory judgment action.⁶ The question to the circuit court in the dismissal of a declaratory judgment is whether the petition states a cause of action or justiciable controversy.⁷ By raising allegations concerning a fifteen year old judgment Daniels has failed to present a cause of action cognizable as a declaratory judgment.

⁴ Ky.App., 939 S.W.2d 353, 355 (1997).

⁵ Back's Guardian v. Bardo, 234 Ky. 211, 27 S.W.2d 960, 962 (1930).

⁶ Lyon's Adm'r v. Greenblatt, 213 Ky. 567, 281 S.W. 487 (1926).

⁷ Curry v. Coyne, Ky.App., 992 S.W.2d 858, 859 (1998).

We are mindful, however, that a *pro se* litigant is afforded more leeway in his pleadings than a party who has retained counsel.⁸ Rules are to be construed liberally in his favor.⁹ We, thus, believe that it is appropriate to consider Daniels's argument on this issue even though it was not raised properly via a CR 60.02(f)¹⁰ motion.

Daniels's case begins similarly to Commonwealth v. Townsend.¹¹ In Townsend, as here, the defendant was under age eighteen at the time of the commission of the offense and at sentencing. He was sentenced to imprisonment for ten years. Thereafter, his sentence was governed by KRS 640.030(2).¹² Both Daniels and Townsend were remanded to a youth facility where they were incarcerated until their eighteenth birthdays. They were, at that time, returned to the circuit court to determine which subsection of KRS 640.030(2) should be utilized in imposing their sentences. Both were sentenced to six months

⁸ Beecham v. Commonwealth, Ky., 657 S.W.2d 234, 236 (1983).

⁹ Case v. Commonwealth, Ky., 467 S.W.2d 367, 368 (1971).

¹⁰ CR 60.02 provides, in pertinent part: 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: . . . (f) any other reason of an extraordinary nature justifying relief. The motion shall be made within a reasonable time

¹¹ Ky., 87 S.W.3d 12, 14-15 (2002).

¹² The only difference in KRS 640.030(2) between Daniels's case and Townsend's is a 1996 amendment which changed the reference from "cabinet for human resources" to "Department of Juvenile Justice."

of treatment under KRS 640.030(2)(b) and ordered returned to court at the conclusion of the treatment for further sentencing under KRS 640.030(2). In Townsend the court found that:

(T)he plain language of KRS 640.030(2)(b) precludes a trial court from conducting yet another sentencing hearing at the conclusion of the six month treatment program. The statute gives the sentencing judge only three options when a youthful offender reaches the age of eighteen. It does not give the sentencing judge a fourth option of sentencing the offender first pursuant to subsection (b) then, later, pursuant to subsection (a) or (c).¹³

The circuit court, therefore, did not have the option of sentencing Daniels to a six-month treatment program and, then, later sentencing him to probation.

In Townsend, however, the defendant waived the right to be "finally discharged" in open court on two occasions by agreeing to a remand for six months' treatment and later being returned to circuit court for sentencing under KRS 640.030(2). The appellate court, in finding that "(t)he waiver was unambiguous and patently voluntary" concluded:

(T)hat the "finally discharged" provision of subsection (b) inures to the benefit of a defendant and, like any other constitutional or statutory right, can be the subject of a valid waiver.¹⁴

¹³ *Id.*, 87 S.W.3d at 14-15.

¹⁴ *Id.*, 87 S.W.3d at 15.

Unlike Townsend, Daniels's record is silent as to a voluntary waiver of the right to be "finally discharged" under KRS 640.030(2)(b) after completing a six month treatment program. Although Mr. Sullivan testified that the circuit court usually had no further contact with the youthful offender after the six month treatment program, transcripts indicate that the circuit court, apparently misreading the recently enacted KRS 640.030(2) and (3), believed that Daniels could be brought back to court for sentencing under subsection (3) of the newly-enacted statute. The prosecutor and defense counsel offered no argument otherwise. Daniels, unlike Townsend, had no way of knowing that the statute was being interpreted incorrectly.

A waiver is the voluntary relinquishment of a known right.¹⁵ In order for there to be a valid waiver of Daniels's right to be sentenced in accordance with the statute, there must be proof that Daniels voluntarily gave up a right that he knew he had. Because children require special considerations due to their intelligence and experience, and the United States Supreme Court has stated that whether a child should be deprived of the special protections of the juvenile justice system is a critically important question, we believe these assurances are

¹⁵ Herndon v. Wingo, Ky., 404 S.W.2d 453, 454 (1966).

necessary to ensure due process and fair treatment of the child.¹⁶

The record is silent, as well, with regard to the sentencing of Daniels upon completion of the six-month treatment program. The only evidence of record is a form order of probation signed by the circuit court but not signed by Daniels or counsel. There is no transcript of the sentencing hearing. As the record is silent as to whether he was aware of the right, there is no basis to conclude that Daniels voluntarily waived his rights under KRS 640.030(2).

According to McIntosh v. Commonwealth,¹⁷ the proper remedial approach to an allegation of an erroneous sentence is a CR 60.02 motion. "It is simply incorrect to say that a court is without jurisdiction to impose an unauthorized sentence. Rather, the imposition of an unauthorized sentence is an error correctable by appeal, by writ, or by motion pursuant to RCr¹⁸ 11.42 or CR 60.02."¹⁹ Pursuant to Ware v. Commonwealth,²⁰ although Daniels has entered an unconditional plea of guilty, he may appeal the sentence imposed on him because he asserts that

¹⁶ Kent v. United States, 383 U.S. 541, 553, 86 S.Ct. 1045, 1053, 16 L.Ed.2d 84, 93 (1966).

¹⁷ Ky., 368 S.W.2d 331, 335 (1963).

¹⁸ Kentucky Rules of Criminal Procedure.

¹⁹ Myers v. Commonwealth, Ky., 42 S.W.3d 594, 596 (2001).

²⁰ Ky.App., 34 S.W.3d 383, 385 (2000).

the circuit court acted without authority in rendering the sentence. Unfortunately, Daniels is too late to prosecute an appeal. And, even if he is still in custody serving this sentence (the record is silent as to this fact), he is too late to bring a motion under RCr 11.42. CR 60.02 is Daniels's only available remedy.

We do not hold, however, that Daniels is entitled to the extraordinary relief he seeks; our ruling merely allows him the benefit of a hearing wherein the Commonwealth must affirmatively prove a voluntary waiver of the right to be sentenced under KRS 640.030(2). We are mindful of the strong and sound policy supporting the doctrine of finality of judgments. Substantive relief under CR 60.02(f) is available "only under most unusual circumstances."²¹ Although Daniels did not file the action until thirteen years after final judgment, this court has held as reasonable a twelve year delay when the movant was unaware of the issue for ten years.²²

The judgment of the Metcalfe Circuit Court is reversed and remanded for the purpose of conducting an evidentiary hearing on the issue of the propriety of Daniels's sentence, pursuant to KRS 640.030(2).

ALL CONCUR.

²¹ Wine v. Commonwealth, Ky.App., 699 S.W.2d 752, 754 (1985).

²² Cain v. Cain, Ky.App., 777 S.W.2d 238, 239 (1989).

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