

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-001064-MR

COMMONWEALTH OF KENTUCKY

APPELLANT

V. APPEAL FROM BATH CIRCUIT COURT
HONORABLE BETH LEWIS MAZE, JUDGE
ACTION NO. 03-CR-00039

ABDAL-AZEEZ JALAL HAKIM

APPELLEE

OPINION
AFFIRMING

** ** *

BEFORE: BARBER, KNOFF, AND MINTON, JUDGES.

BARBER, JUDGE: Appellant, the Commonwealth of Kentucky, appeals the Bath Circuit Court's grant of shock probation to the Appellee, Abdal-Azeez Jalal Hakim. We affirm.

Hakim entered a guilty plea to charges of DUI fourth offense, driving while license suspended for DUI, third offense, and theft of motor vehicle plates. He was sentenced to three years imprisonment on January 12, 2004. On February 25, 2004, Hakim made a motion for shock probation or work release. The

court granted the motion placing restrictions on Hakim including avoiding committing another offense, avoid persons of disrepute, undergo treatment, and maintain employment.

On June 18, 2004, Hakim was arrested for DUI. The Commonwealth moved to revoke his shock probation on September 2, 2004. The circuit court revoked probation and reinstated Hakim's three year sentence. On February 23, 2005, Hakim filed a motion for shock probation which was denied. Hakim filed a motion for reconsideration of that denial on April 6, 2005. Hakim asserted that he had been found not guilty of the charges brought against him, which were the reason his shock probation had been revoked. Hakim provided the court with proof that he had been found not guilty at trial of the charges stemming from the June 18, 2004 arrest. The Commonwealth objected to the motion, claiming that time had expired for the motion to be heard, pursuant to KRS 439.265(1). Hakim asserted that CR 60.02 permitted the court to reconsider its order, and to reinstate the earlier grant of shock probation. On April 22, 2005, the circuit court reinstated the shock probation.

The circuit court, in a separate order, stated that it had retained jurisdiction over the matter under KRS 439.265, and for this reason, the order was timely. KRS 439.265 permits a defendant up to 180 days after sentencing to file a motion for shock probation. KRS 439.265(1). The court must then consider

the motion within sixty days of its filing, and make a ruling within ten days of that consideration. KRS 439.265(2).

The trial court's Supplemental Order of April 28, 2005, stated:

This Court is reconsidering the original motion filed on February 22, 2005, which is still within the sixty (60) day period for the Court's consideration, and the ten (10) days beyond that, as it was always the Court's intention to entertain a motion for shock, once the trial in the Montgomery County action had been concluded.

Sister states have held that a reconsideration of a ruling on a motion for shock probation must be made within time limits equal to those applicable to the original motion. State ex rel. Corrigan v. White, 378 N.E.2d 743 (Oh.App. 1976).

The Commonwealth alleges that the circuit court overstepped its jurisdiction in granting Hakim shock probation. The Commonwealth claims that the law requires the court to use the date of the original sentencing, January 12, 2004, as the sentencing date. The Commonwealth further argues that the court lost jurisdiction over the matter 180 days after that date.

After revocation of an initial probation, the defendant may file a new motion for shock probation, which can properly be reviewed by the court. Stallworth v. Commonwealth, 102 S.W.3d 918, 925 (Ky. 2003). Time for review on such a motion will run after the statutory limits have expired. The

trial court's ruling was within the applicable time limits provided by law.

Hakim argues that the Commonwealth did not preserve this issue for appeal. The Commonwealth contends the issue is preserved by virtue of the filing of a notice of appeal. As the Appellee correctly notes, filing of a notice of appeal does not preserve the issue for appellate review. A party is required to make an objection specific enough to show both the circuit court and the reviewing court the matter being objected to. Bell v. Commonwealth, 473 S.W.2d 820 (Ky. 1971). A party may not properly raise an issue on appeal unless the trial court was timely notified of the objection, and had opportunity to review and rule thereon. West v. Commonwealth, 780 S.W.2d 600 (Ky. 1989). As the Commonwealth notes in its Reply brief, however, the issue was briefly raised before the trial court on June 2, 2005. Under the circumstances of this case, we believe that review is appropriate.

Hakim argues that CR 60.02 permitted the trial court to review the denial of the motion for shock probation. Hakim asserts that being found not guilty of the charges which resulted in the revocation of shock probation was a change in circumstances sufficient to bring the case within the ambit of CR 60.02.

As stated in previous opinions of this Court, the purpose of CR 60.02 is to allow the trial court a method to correct errors in judgments upon a showing of "facts or grounds, not appearing on the face of the record and not available by appeal or otherwise, which were discovered after rendition of judgment without fault of the party seeking relief." Harris v. Commonwealth, 296 S.W.2d 700, 701 (Ky. 1956); see also Gross v. Commonwealth, 648 S.W.2d 853, 856 (Ky. 1983) and Commonwealth v. Gross, 936 S.W.2d 85, 88 (Ky. 1996). CR 60.02 permitted the trial court to entertain Hakim's motion, whether or not the motion was made within the time limits provided by the shock probation statute. The unusual circumstances presented in this case, *i.e.* a defendant whose probation was revoked for an offense he was acquitted on; permit the trial court to review and rule on the motion at its discretion. The Commonwealth's assertion on appeal, that probation was revoked for reasons other than Hakim's arrest, is not supported by the record, or by the pleadings filed by the Commonwealth in opposition to the grant of shock probation. Therefore, that contention is without merit.

The standard of review on appeal of the grant or denial of a motion for CR 60.02 relief is whether the trial court abused its discretion. Brown v. Commonwealth, 932 S.W.2d 358, 361 (Ky. 1996). The Commonwealth has shown no abuse of

discretion by the trial court. For this reason, the ruling is affirmed.

KNOPF, JUDGE, CONCURS.

MINTON, JUDGE, CONCURS IN RESULT.

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