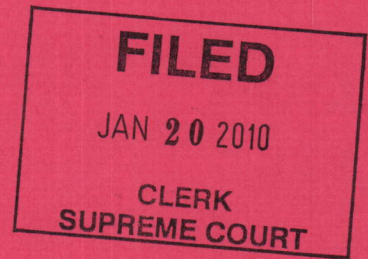


Commonwealth of Kentucky
Supreme Court
2009 – SC –000314 – DG



Brandon Ballard

Appellant

v.

On Review of Court of Appeals
No. 2008-CA-000791-MR

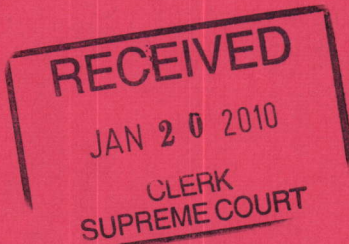
Commonwealth of Kentucky

Appellee

Brief for Appellant , Brandon Ballard

Submitted by

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Certificate of Service

I hereby certify that copies of this Brief were mailed to Mr. Samuel Floyd, Assistant Commonwealth's Attorney, 514 W. Liberty Street, Louisville, Ky. 40202, and to Judge Brian Edwards, Jefferson Circuit Court, Division 11, Jefferson County Judicial Center, 700 W. Jefferson Street, Louisville, Kentucky 40202, on January 19, 2010. A copy was mailed to Hon. Jack Conway, Attorney General, Criminal Appeals, 1024 Capital Center Drive, Frankfort, Ky. 40601, on this same date. The record on appeal was not withdrawn by Appellant.

A handwritten signature in black ink, appearing to read "J. David Niehaus", written over a horizontal line.

J. David Niehaus

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Statement of the Case

By Order entered November 18, 2009, the Court granted Appellant's motion for review of the Opinion and Order entered by the Court of Appeals in an appeal by the Commonwealth from a Circuit Court order denying a motion to revoke diversion. The substantive questions presented for review by this Court are:

- (1) whether the Court of Appeals had jurisdiction to grant relief; and,
- (2) whether a Circuit Judge lacks jurisdiction to revoke diversion after the period stated in the Diversion Order has expired.¹

This Statement will deal with lower court proceedings related the first question. For reasons that will be apparent, the procedural history of the second question is addressed at the beginning of that argument.

Appellant was charged with possession of cocaine and other less serious offenses. The case was disposed of by entry of a plea/diversion agreement. (TR 13-20). The terms were to be a one year sentence "diverted" for three years. The Order Diverting was entered on January 13, 2005. (TR 20). Pursuant to KRS 446.010(37), the diversion period was to end on Sunday, January 13, 2008. By operation of law, KRS 446.030, the period was extended until the next business day, Monday, January 14, 2008. On the latter date, at the regularly scheduled

¹ The second question presented in the Motion for Discretionary Review, whether the Court should, upon granting review, summarily vacate the Court of Appeals Opinion and Order and remand with directions to dismiss, apparently has been considered and rejected and will not be addressed here.

motion hour of Division 11, the Commonwealth appeared and obtained a hearing date of February 14, 2008.

But on February 14th, only Appellant appeared in Circuit Court. There were no attorneys present. The judge advised Appellant that there would be no revocation because the judge believed that he lacked jurisdiction to consider the matter. (TR 36; App 6; VR, 2/14/08, 13:52:40-13:54:18). An order to that effect was entered on February 29, 2008. (TR 36; App 6). The Commonwealth filed a motion to reconsider. This Motion was denied by Opinion and Order entered April 3, 2008. (TR 41; App 11). The April 3d Opinion and Order included language purporting to make it "final and appealable." (TR 41; App 11). On April 23, 2008, the government filed its notice of appeal. (TR 50).

The Notice of Appeal identified the "attached order denying the Commonwealth's motion to revoke defendant's diversion" as the order appealed from. The attached order was the first order entered by the Circuit Court on February 29, 2008. (TR 50).

After the Commonwealth had filed its Appellant's Brief in the Court of Appeals, Mr. Ballard filed a Motion to Dismiss on the ground that

"the government has attempted to appeal from a non-final order of the Circuit Court. The circuit court case is still pending. Because this appeal arises from a criminal prosecution, the Order appealed from cannot be final within the meaning of CR 54.01. The Notice of Appeal is a nullity and cannot be the basis of jurisdiction in this Court."

In the body of the Motion, Appellant noted that the Order appealed from did not recite that it was final and appealable. The order could not be appealed from

until the Circuit Court action was terminated by entry of an "order revoking diversion [KRS 533.256(4)] or dismissing the Indictment as diverted. [KRS 533.258(1)]."

In the Motion to Dismiss, Appellant referred the Court of Appeals to a pending Circuit Court motion for an order "dismissing the Indictment on the ground that the period of diversion had expired with no pending motion by the government seeking termination of the agreement." (TR 51). Pursuant to KRE 201, Appellant asked the Court of Appeals to take notice that the motion had not been ruled on by the Circuit Court. [Motion, p. 2-3].

Appellant urges the Court to do the same. He has, pursuant to KRE 201(b)(2) and KRE 201(d), included in the Appendix a certified printout of the Case History of 04-CR-003183. The Court can see that the Motion for entry of a terminal order, filed on June 5, 2008, has yet to be ruled on. (App 15, first entry on page). Examination of the whole four page printout shows that no final order has been entered as to the Indictment. There is no extant Order or Judgment that revokes the diversion agreement or that terminates the prosecution.

Anticipating that the government might rely on KRS 22A.020(4) to claim that the appeal was instead from an interlocutory order, Appellant, on page 3 of the Motion, addressed the issue. He acknowledged that KRS 22A.020(4), although it violated the final judgment policy announced in KRS 54.01, "is valid" in light of Section 111(2) of the Constitution. Appellant also noted that the

government had available remedies by way of SCR 1.030(3) or certification of law. (Motion, p. 4-5).

In its Response, the Commonwealth affirmed that it sought to appeal only the "order finding that the [circuit] court had no jurisdiction to hear a motion to revoke diversion." [Response to Motion to Dismiss, p. 1]. But in its closing paragraph the Commonwealth asserted that

The order from which the Commonwealth seeks review is a final order which adjudicates all the rights of the parties. There are no issues remaining to be resolved by the trial court, since the trial court has found that it lacks jurisdiction over diversion. If the order is not considered final, then the Commonwealth is entitled to review pursuant to KRS 22A.020 and the Commonwealth is not limited to a new trial as a remedy." [Response, p. 5].

By Order of November 21, 2008, a motion panel of the Court of Appeals passed the Motion to Dismiss to "the panel of this Court that shall consider this appeal on its merits." [Order, p.1].

In his Appellee's Brief, Mr. Ballard "notice pleaded" the argument for dismissal incorporating the arguments made in the Motion to Dismiss. [Appellee's Brief, p. 2]. The government's Reply Brief did not address the question.

In the Opinion and Order disposing of the appeal, the merits panel addressed the issue of finality by noting that

"Ballard argues that the order of the trial court was not final and therefore that this appeal is interlocutory. The trial court has not issued an order that finally disposed of the underlying charge. However, the order of the trial court effectively foreclosed the Commonwealth from revisiting the issue of non-compliance with pre-trial diversion. The order was final and appealable." [Opinion, p. 3; App 3].

Argument

(1). Under the circumstances of this case, did the Court of Appeals ever acquire jurisdiction to deal with the merits of the appeal?

The issue was argued and ruled on in the lower courts as set out in detail in the Statement of the Case. This Court's ruling will be based on the following uncontroverted points:

- (1). The motion to revoke was considered on the very last day of the three year diversion period, January 14, 2008.
- (2). The Commonwealth accepted a hearing date of February 14, 2008.
- (3). That no attorney appeared for the Commonwealth on February 14th.
- (4). That the Circuit Judge entered an order denying the motion to revoke on the ground of lack of jurisdiction. Nothing in this Order purported to make it final and appealable. (App 6).
- (5). That the Commonwealth appealed from this Order.
- (6). That as the appeal developed, the parties and the Court of Appeals considered whether or not an appeal of right or an interlocutory appeal [KRS 22A.020(4)] was possible under these circumstances.
- (7). The Court of Appeals deemed the appealed-from Order final and appealable. (App. 3).

Appellant's position is that it does not matter how the Commonwealth's appeal was characterized. The Court of Appeals never acquired jurisdiction to dispose of the Commonwealth's appeal on its merits. This is easily shown by consideration of the type case from which the appeal arose.

Qualifying defendants who seek diversion of a criminal charge must “enter an Alford plea or a plea of guilty as a condition of pretrial diversion.” [KRS 533.250(1)(f)]. This requirement indicates that the legislature intended diversion to be something other than a deferral of prosecution like the old practice of filing away charges. [e.g., Jones v. Commonwealth, 114 Ky. 599, 71 S. W. 643 (1903)]. Rather, the defendant takes the step of admitting guilt and accepting a punishment that likely will be imposed if the conditions of the diversion agreement are not satisfied.

The validity of the program is not open to question. As this Court held in Gibson v. Commonwealth, 291 S. W. 3d 686 (Ky., 2009), the Legislature has exclusive authority to prescribe criminal penalties. The duty of the Court of Justice is to “impose sentences within the penalty range prescribed by the legislature.” [p. 689-690]. Diversion is a constitutional exercise of the legislative power to determine sentencing alternatives. Where the statutes authorizing a sentence or sentence alternative are unambiguous, the Court of Justice simply applies them as written.

The course of a typical diversion case is easily traced. The defendant enters a plea of guilty or an Alford plea. He agrees to a sentence and agrees to do or refrain from doing certain acts. [KRS 533.251; KRS 533.254]. If the defendant complies with all conditions within the agreed-upon period of time, KRS 533.258(1) mandates that “the charges against the defendant shall be listed as ‘dismissed-diverted’ and shall not constitute a criminal conviction.” But an

unsuccessful diversion case results in a motion to “void” the pretrial diversion agreement. [KRS 533.256(1)]. If the judge determines that diversion is no longer proper, “the court should proceed on the defendant’s plea of guilty in accordance with the law.”

Diversion halts criminal prosecution at a point between the determination of guilt and the imposition of sentence pursuant to KRS 532.050 and RCr 11.02. Although the sentence is tentatively set in diversion cases, it is not imposed until after entry of an order “voiding” the agreement.

Thus, the order “adjudicating all the rights of all the parties” in an unsuccessful diversion case is the one actually imposing a sentence. [CR 54.01; Commonwealth v. Carneal, 274 S. W. 3d 420, 427 (Ky., 2008)]. The Order appealed from by the Commonwealth could not be a final and appealable order by any stretch of the imagination. Because no Judgment imposing a criminal sentence or dismissing the indictment has ever been entered in No. 04-CR-003183, that case is still pending in Division 11 of Jefferson Circuit Court. All orders entered in that case are interlocutory.

It is axiomatic that the Commonwealth does not have a Section 115 appeal of right to the Court of Appeals or any other Court. [Breathitt County Board of Education v. Prater, 292 S. W. 3d 883, 886 (Ky., 2009)]. The Court of Appeals erred when it held the Order to be final and appealable simply because the government could not get a hearing on the motion to void the agreement.

KRS 22A.020(4) thus becomes relevant as the government's remedy in this case.² The statute purports to authorize an interlocutory appeal by the Commonwealth from "an adverse decision or ruling of the Circuit Court . . ." The propriety of this statutory remedy has been upheld repeatedly and is mentioned uncritically in Prater. [p. 886]. But the Court has never been presented with arguments made under Sections 2, 28 and 110 of the Constitution.

KRS 22A.020(4) gives the Commonwealth's Attorneys of Kentucky a remedy that no other litigant or lawyer has. Because the statutory [KRS 22A.020(4)(b)] requirement of Attorney General approval was dispensed with over 25 years ago, [Commonwealth v. Littrell, 677 S. W. 2d 881, 885 (Ky., 1984)], any Commonwealth's Attorney may, if dissatisfied with a pretrial ruling made by a Circuit Court judge, file a notice of appeal. If KRS 22A.020(4) is a valid remedy, the Court of Appeals has no choice but to consider the government's claim on its merits.

A Commonwealth's Attorney is not entitled special privileges. A County Attorney who receives an unfavorable pretrial ruling in District Court must rely on a writ to correct the error. Every defendant in every criminal case must rely on the writ procedure. All must make the "jurisdictional" showing just to have their problems considered by the supervisory court. And even if they satisfy those requirements, they must still convince the supervisory court that it should exercise its discretion to grant relief. It is arbitrary to show favoritism to one

² The fairness of considering this argument in light of the Commonwealth's belated adoption of it and the failure of the Court of Appeals to address it is irrelevant because this Court has a duty to determine questions of jurisdiction even if not raised by the parties. [Prater, p. 886].

group of lawyers for the government, especially when there is an adequate and fair remedy available under SCR 1.030(3).

Section 2 of the Constitution prohibits arbitrary laws. Arbitrariness encompasses unjustified favoritism. [Kentucky Milk Marketing and Antimonopoly Commission v. Kroger Co., 691 S. W. 2d 893, 899 (Ky., 1985)]. Section 26 declares unconstitutional statutes void *ab initio*. [Spanish Cove Sanitation, Inc. v. Metropolitan Sewer District, 72 S. W. 3d 918, 921 (Ky., 2002)]. KRS 22A.020(4) must be declared invalid.

In addition to the problem of arbitrariness, there is no doubt that KRS 22A.020(4) is a legislative intrusion into the constitutional scheme for supervision of the Court of Justice.

The "all writs" language of Constitution Section 110(2) invests this Court with both the authority and the obligation to supervise the Court of Justice. [Abernathy v. Nicholson, 899 S. W. 2d 85, 88 (Ky., 1995)]. Under Section 28 of the Constitution, assignment of a power or duty to one branch of government is exclusive. Section 28 expressly prohibits exercise by one branch of government of a power assigned to another except as "expressly permitted or directed" by another section of the Constitution. There is no language elsewhere in the Constitution permitting legislative oversight of pretrial proceedings in the Circuit Court.

KRS 22A.020(4) undercuts this Court's writ policy by giving one of the government's lawyers, the Commonwealth's Attorney, mandatory review in the

Court of Appeals. If the appeal is timely commenced and prosecuted according to the Rules of Court, KRS 22A.020(4) compels the Court of Appeals to render a decision. The Court of Appeals is denied the discretion otherwise afforded it by SCR 1.030(3). [Hidalgo v. Commonwealth, 290 S. W. 3d 56, 58 (Ky., 2009)].

The question for the Court is this: who should make the decision as to when pre-trial appellate intervention in a Circuit Court criminal prosecution is appropriate?

KRS 22A.020(4) leaves the decision up to the individual Commonwealth's Attorney. And because of case law, that decision can be made without input from the Attorney General, the government's appellate lawyer. [KRS 15.020].

SCR 1.030(3) and the cases construing that Rule say that the decision should be made by the Court of Appeals, exercising sound discretion as to when intervention is justified and when it is not.

The answer is obvious. The statute can no longer be tolerated. It must be declared void as an unacceptable legislative interference with this Court's exclusive obligation to govern the Court of Justice.

The Court of Appeals erred by characterizing the Order of February 29, 2008, as final and appealable. It was not. Necessarily, the Court of Appeals lacked jurisdiction to consider the merits of the government's case. Lack of jurisdiction means lack of authority to do anything but dismiss the appeal. KRS 22A.020(4), if valid, vested jurisdiction to decide the appeal. But the question is whether a statute can be given effect when it violates Section 2 of the

Constitution and clearly conflicts with this Court's unquestioned Section 110 authority to manage the Court of Justice. The statute is void and relief could not be granted in an appeal purportedly brought under its sanction.

(2). The Court of Appeals erred when it held that the Circuit Court retained jurisdiction after the expiration of the three year term agreed to by the parties.

The Circuit Judge held that he lacked jurisdiction to consider the Commonwealth's motion to revoke. (TR 36; App 6). His thinking was explained further in the Opinion and Order Denying Motion to Reconsider where he relied on an unpublished Court of Appeals decision likening the motion to revoke in Appellant's case to a motion to revoke filed in a case of probation. (TR 37-38; App 7-8). The appeal was prosecuted on the basis of unpublished opinions.

But the unpublished opinions on this subject have been superseded by rendition of Tucker v. Commonwealth, 295 S. W. 3d 455 (Ky. App., 2009; final: 11/5/09). [CR 76.28(4)(c)]. Tucker held that the government's failure to file a motion to revoke a diversion agreement before expiration of the agreed-upon time period divested the circuit court of jurisdiction to consider the issue. [p. 456]. Its reasoning is compelling and suggests the outcome in this appeal.

It is important to note that the Commonwealth's motion was filed on January 3, 2008, 11 days before the last day of the three year diversion period. (TR 21). But it did not file in time to conduct a hearing on the motion before the diversion period expired. The motion was scheduled to "motion hour" at which it

was assigned to February 14th for disposition. And even then, the attorney for the government failed to appear. (TR 36; App 6).

Tucker notes the "unique nature of Class D Felony Pretrial Diversion, and the profound significance to a defendant . . . of possibly losing his opportunity to avoid a felony conviction." [p. 458]. From this premise, the Court of Appeals concluded that "it is not illogical that the General Assembly opted to provide a specific method by which the Commonwealth can seek to have Class D Felony Pretrial Diversion voided. Nor is it illogical that any such effort made by the Commonwealth be required to be made before expiration of the pretrial diversion period." [p. 458]. The same principles must be carried over to this case.

KRS 533.254(1) requires application of KRS 533.020 to the calculation of the period of diversion, "in so far as possible." KRS 533.020(1) authorizes revocation of probation "at any time prior to the expiration or termination of the period of probation." KRS 533.020(4) provides that "upon completion of the probationary period, . . ., the defendant shall be deemed finally discharged, provided no warrant . . . is pending against him, and probation . . . has not been revoked."

KRS 533.256(1) permits an application to the court for a hearing to determine whether or not the agreement should be voided. This statute contains no indication of when such applications might be made. In the absence of a specific reference in KRS 533.256(1), the more general time provisions of KRS 533.254(1) necessarily apply. This statute incorporates KRS 533.020 which

permits revocation "at any time prior to the expiration" of the stated period. In this instance, revocation could not be accomplished before the expiration of the three year diversion period on January 14, 2008. KRS 533.020(1) denied Judge Morris the jurisdiction to consider the question of revocation at any point after January 14th. The Circuit Judge correctly recognized this limitation. The Court of Appeal incorrectly disregarded it. The Opinion must be reversed and the case remanded for entry of an order of "dismissed-diverted."

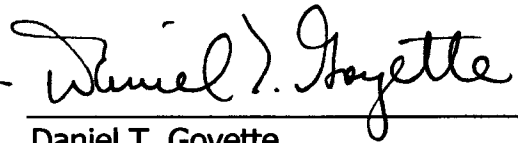
Conclusion

For the reasons set out in Appellant's first argument, the Court must reverse the Opinion and Order of the Court of Appeals. The Court of Appeals lacked jurisdiction to consider any appeal by the Commonwealth. The matter must be remanded to the Circuit Court with directions to enter a final order of "dismissed-diverted."

Alternatively, if the Court reaches the merits of the appeal, the Court must reverse and remand because the applicable statutes clearly indicate that the Circuit Court was correct in its conclusion that it lacked jurisdiction to consider voiding of the agreement. Appellant is entitled to entry of a dismissed-diverted order concluding the prosecution.



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