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

Reply Brief for Appellant , Brandon Ballard

Submitted by

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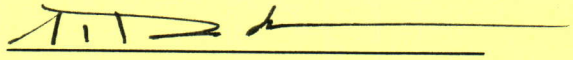
Certificate of Service

I hereby certify that copies of this Brief were delivered to Mr. Samuel Floyd, Assistant Commonwealth's Attorney/Special Assistant Attorney General, 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 March 29, 2010. A copy was mailed to Attorney General, Criminal Appeals, 1024 Capital Center Drive, Frankfort, Ky. 40601, on this same date. The record on appeal was not withdrawn by Appellant.



J. David Niehaus

Reply Brief: Subjects Addressed

This Brief is filed to reply to matters raised by Arguments I-A and I-B of the Appellee's Brief. The remaining issues, including the propriety of relying on unpublished opinions, have already been adequately briefed by the parties.

Argument I-A: Claim That the Order is Final

This argument, spread over pages 5-8 or the Appellee's Brief, is tenable only if the Court agrees that denial of a motion to revoke is the equivalent of an order meeting the definition of CR 54.01.

On page 5 of its Brief, the government identifies the order appealed from as the "order holding that it[1] did not have jurisdiction over diversion to consider the Commonwealth's motion to remove Appellant from diversion." The Commonwealth correctly admits that the order appealed from "did not contain language indicating it was final and appealable." But its contention that "that language is not necessary" is wrong.

In Kentucky, an order becomes final enough to appeal in one of two ways. If the order determines every claim of every party to an action, it is final within the definition of CR 54.01. If an order adjudicates less than all claims, it may be declared final as to some claims upon a determination by the trial-level judge that there is no just reason to delay entry of a final order as to those claims. But the judge's intent must be stated clearly. "The judgment shall recite such

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determination and shall recite that the judgment is final." In the absence of the recital, the order is interlocutory. [CR 54.02(1)].

There is no CR 54.02 determination in the order appealed from. Nor could there be. The government, through inaction, lost its chance to have diversion revoked. Judge Morris said that he lost jurisdiction to decide the motion. He did not, and could not, lose jurisdiction to enter a final order disposing of the criminal prosecution.

Recently, in Prather v. Commonwealth, 301 S. W. 3d 20 (Ky., 2009), the Court characterized diversion as "an interruption of prosecution prior to the final disposition of the case." [p. 22]. A successful motion to void a diversion agreement does not result in a final order. According to Prather, the defendant is still entitled to a hearing before being sentenced. [p. 22]. And if diversion is successfully completed, a final order of "dismissed-diverted" must be entered. Judge Morris lost jurisdiction to revoke the diversion agreement. He did not lose jurisdiction to enter a final order terminating the prosecution.

The government's argument attempts to evade this uncomplicated analysis by a lengthy rehearsal of general jurisdictional rules, culminating on page 7 of the Appellee's Brief with the conclusion that when the judge held that he lacked jurisdiction to "hear the Commonwealth's motion to remove" he was actually declaring that he "lacked authority to hear the particular facts of the case before" him, and that he lacked "authority to entertain any further motions, claims or remedies for the parties." Thus, the complained-of Order "adjudicates

all the rights of the parties in this action . . . because the parties have no further available remedies in a court lacking jurisdiction *over their case*. (emphasis added).

This reasoning is patently false. A criminal case terminates by entry of a final judgment that settles finally all issues in the case. There is no final judgment yet. There is no valid CR 54.02 judgment. The complained-of order is interlocutory and thus not appealable of right.

Argument I-B: Interlocutory Appeal

Unwilling to take at face value Appellant's admission that his argument is novel, [Appellant's Brief, p. 8], the Commonwealth devotes pages 8-13 of its Brief to bolstering the legitimacy of KRS 22.020(4) . It does so by tracing the history of favorable judicial comment as to KRS 22A.020(4) and its legislative predecessors. The government finally addresses the issues of arbitrary favoritism and interference with judicial discretion in one paragraph on page 13 of the Appellee's Brief.

And it does so by misunderstanding the purpose for which Hidalgo v. Commonwealth, 290 S. W. 3d 56 (Ky., 2009), was cited. Hidalgo was cited simply for the point that the Court of Appeals has considerable discretion in writ cases as to whether or not it will grant relief. Nothing more was intended. The Commonwealth's single paragraph answer to Appellant's contentions ends with the argument that because Hidalgo does not mention KRS 22A.020(4), the statute "does not deny the Court of Appeals any discretion afforded by SCR

1.030(3)." [Appellee's Brief, p. 13]. Appellant is unable to find in KRS 22A.020(4) any language that could be stretched to support a conclusion that the Court of Appeals may refuse to render an opinion in an interlocutory appeal. This part of the government's argument must be ignored.

The Court has demonstrated its willingness to re-examine long established practices and to discard them when they can no longer be justified. In Elk Horn Coal Corporation v. Cheyenne Resources, 163 S. W. 3d 408 (Ky., 2005), the Court abrogated KRS 26A.300. On page 421 of that opinion, the Court noted that one of its Civil Rules enforced the same policy as the policy underlying the statute. The Court rejected the statute because CR 73.02(4) provides a "sufficient" alternate means of discouraging frivolous appeal that does not discriminate unfairly among litigants. [p. 421-422]. The same principle applies here.

Relief available to the Commonwealth under KRS 22A.020(4) is available under SCR 1.030(3). The only differences are that under the writ rule the Commonwealth must make the standard "jurisdictional" showing and the Court of Appeals is allowed to exercise discretion as to whether or not the claimed error really needs to be addressed before trial. It is hard to think of a rational objection to the proposal to abandon mandatory appeal in favor of writ actions under SCR 1.030(3).

Conclusion

Appellant urges the Court to reverse the Opinion of the Court of Appeals and to remand with directions to dismiss the Commonwealth's appeal. Because of the passage of time and because the Commonwealth can no longer seek to have Appellant's diversion agreement voided, there is nothing to do in this case except to order a remand to the Circuit Court with directions to enter a final order disposing of the circuit court prosecution. Necessarily, that must be an order stating "dismissed-diverted."

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