COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
CASE NO. 2006-SC-0575

COMMONWEALTH OF KENTUCKY, APPELLANT

V.

APPEAL FROM THE COURT OF APPEALS
CASE NO. 2006-CA-1074

HARDIN CIRCUIT COURT
CASE NO. 06-CI-0189

AMANDA R. GADDIE, APPELLEE

BRIEF FOR THE APPELLEE, AMANDA GADDIE

Submitted by:

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CERTIFICATE OF SERVICE

I hereby certify that true and accurate copies of this brief for the appellee were delivered this 25th day of May 2007 to the Honorable Jenny Pitts, First Assistant Hardin County Attorney, P.O. Box 884, Elizabethtown, Kentucky 42702; Honorable Chris Shaw, Hardin County Commonwealth's Attorney, P.O. Box 127, Elizabethtown, Kentucky 42702; Honorable Kelly Easton, Hardin County Circuit court Judge, 120 East Dixie Avenue, Elizabethtown, Kentucky 42701; Honorable Kimberly Winkenhofer Shumate, Hardin County District Court Judge, 120 East Dixie Avenue, Elizabethtown, Kentucky 42701; Louis Lawson, Hardin County Jailer, Hardin County Detention Center, 100 Lawson Blvd., Elizabethtown, Kentucky 42701; Samuel Givens, Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601. I further certify that the record was not withdrawn for the purpose of this brief.

Shane A. Young

INTRODUCTION

This is a case in which the court granted discretionary review in order to consider whether a defendant could be forced to agree to increase her sentence in order to gain entry into drug court, after the sentence became final by operation of CR 59.05.

For the Purposes of this Brief the Appendix
is Referenced as App.

STATEMENT CONCERNING ORAL ARGUMENT

The appellee requests oral argument in order to argue this important issue of law and the policies behind drug court.

STATEMENT OF POINTS AND AUTHORITIES

COURTERSTATEMENT OF THE CASE

Ms. Gaddie was arrested by the Elizabethtown Police Department on July 31, 2003 for Prescription Drugs Not in Original Container and Possession of Marijuana. On September 12, 2003, Ms. Gaddie entered a guilty plea to Prescription Drugs Not in Original Container and Possession of Marijuana and received a sentence of one-hundred-eighty (180) days in jail suspended for two years. (App. 2). Ms. Gaddie was referred to the K.A.P.S. program for random urinalysis screening, where she was compliant until November 18, 2003 when she tested positive for marijuana. On March 2, 2004, Hardin County Attorney's Office filed a motion to revoke Ms. Gaddie's one-hundred-eighty (180) day sentence. On May 17, 2004, Ms. Gaddie appeared before Hardin Dsitrict court for the purpose of a revocation hearing. At that time the County Attorney offered her an opportunity to avoid revocation, by agreeing to be referred to the Hardin County Drug Court Program and by being resentenced so as to increase her sentence to the maximum term of twelve (12) months to serve and her probationary period to two years. (App. 3). In order to avoid revocation, Ms. Gaddie agreed.

On May 18, 2004, Hardin District Court issued a warrant for Ms. Gaddie's arrest for failure to attend the Hardin County Drug Court Program. On August 25, 2004, Hardin District Court terminated Ms. Gaddie from the drug court program and revoked Ms. Gaddie's probation sua sponte and without her present. On August 1, 2005, the outstanding Hardin County District Court warrant was served on Ms Gaddie. On August 2, 2005, Ms. Gaddie was ordered to serve the twelve (12) month sentence.

On February 2, 2006, Ms. Gaddied filed a petition for writ of habeas corpus in the Hardin Circuit Court. Ms. Gaddie argued that pursuant to CR 59.05, the Hardin District

Court lost jurisdiction to amend the September 12, 2003 judgment ten (10) days after it was entered. The circuit court rejected this argument and an appeal to the Kentucky Court of Appeals followed.

Upon review, the Court of Appeals in a unanimous decision reversed the circuit court and granted the petition for writ of habeas corpus. (App. 1). The appellate court found that the district court had lost jurisdiction to alter or amend the underlying 180-day sentence 10 days after it was entered. (Id). Further, the court concluded that Ms. Gaddie could not agree to the extended sentence in order to reinvest jurisdiction in the district court. (Id). Finally, the Court of Appeals stated that CR 60.02 did not support the amendment of the judgment in the manner undertaken by the district court. (Id). Since, Ms. Gaddie had completed the 180-day jail sentence which was the sentence originally imposed, the Court of Appeals granted the petition for writ of habeas corpus. (Id). The case is now before this court on discretionary review.

ARGUMENT

Preliminary Issues

The case in front of the court does not involve issues of fact, but pure questions of law as to the finality of a judgment and jurisdiction of the court. Therefore, the standard of review is de novo. The appellant has failed to provide citation to preservation of the issue in front of the court. In the motion for discretionary review, the appellant phrased the question for review as the following: "Can a drug court referral, particularly in a misdemeanor drug court scenario, provide grounds of an extraordinary nature justifying relief pursuant to CR 60.02 which would allow a Defendant to agree to modification of their original sentence?" Although the Commonwealth phrased the question in that

manner, the brief tendered by the Commonwealth does not mention CR 60.02 or the standard for CR 60.02 relief. Therefore, since the argument regarding CR 60.02 has not been addressed, Ms. Gaddie will not address the argument in her brief, but will direct the Court to the case of Commonwealth v. Bustamonte, 140 S.W.3d 581 (Ky.App. 2004) and the Court of Appeals opinion on the issue of CR 60.02.

I.
THE DISTRICT COURT LOST JURISDICTION TO AMEND THE JUDGMENT OF IMPRISONMENT 10 DAYS AFTER THE JUDGMENT WAS ENTERED, AND THERE IS NO RULE OR STATUTE WHICH WOULD ALLOW THE COURT TO REACQUIRE JURISDICTION FOR THAT PURPOSE

The issue in this case is not one of first impression, but involves issues of finality of judgments and jurisdiction which have been determined by this court. In Galusha the defendant entered a guilty plea and was sentenced to eight years in the penitentiary. Galusha v. Commonwealth, 834 S.W.2d 696 (Ky.App. 1992). Galusha then requested shock probation. Id. The court allowed Galusha to receive shock probation, but Galusha had to agree that his sentence would increase to a total of twenty years. Id. After Galusha was probated, Galusha violated his probation, the court revoked the probation and sent Galusha to serve the twenty year sentence. Id. In vacating the second sentence and reinstating the sentence provided in the original judgment, the appellate court relied upon a series of cases regarding enhancement of sentence and jurisdiction. Id.

The Galusha court reached the result through the analysis of cases like McMurray v. Commonwealth, 682 S.W.2d 794 (Ky. 1985). In McMurray, the trial court initially imposed a one year sentence which was withheld for five. After imposition of the sentence, the court learned that the defendant had misrepresented his prior criminal record, and following probation violations, the court vacated the original judgment and

entered a judgment imposing a five-year sentence. Id. The appellate court stated on review that the trial court had erred in ignoring that CR 59.05 applied to criminal proceedings by operation of RCr 13.04, and therefore the trial court did not have jurisdiction to amend the original judgment after 10 days. Id. The McMurray court did acknowledge that a CR 60.02 motion could allow the court to obtain jurisdiction if fraud were shown in the initial judgment. Id.

Following the decision in Galusha, the Supreme Court again reviewed a case in which the defendant agreed to an increased sentence in order to obtain probation. Stallworth v. Commonwealth, 102 S.W.3d 918 (Ky. 2003). In Stallworth, the defendant's sentence was fixed at ten years. Id. However, following finality of the sentence, the defendant filed a motion for shock probation and agreed that the trial court could amend the final judgment to a twenty year sentence. Id. This Court vacated that sentence and issued an order to reinstate the previous 10 year sentence imposed. Id. The appellate court was clear that the reason the increased sentence was invalid went far beyond KRS 439.265, and implicated matters of much greater concern. Id. As stated by that court:

> A longer sentence may not supply the quid pro quo for probationary release. A rule which would allow a prisoner to obtain probation in exchange for a longer sentence in the event of revocation would in our opinion not only result in chaos but invite intrusion of arbitrary power, something foreign to our system of government. Id at 923.

The court specifically found that such a practice would offend due process and the double jeopardy clauses of both the federal and state constitutions. Id.

Ms. Gaddie could no more confer jurisdiction on this court by agreement than could the defendant in Stallworth. Further, the fact that Ms. Gaddie agreed to the

maximum sentence in order to remain out of jail and to enter drug court is no less repugnant than the defendant who agrees to increase a sentence in order to get out jail. The coercive nature of either situation is apparent on its face.

Double jeopardy is equally offended when a final judgment has been entered in a case setting the term of imprisonment, and then that term of imprisonment is increased in order to remain on probation and obtain entry into drug court. The Commonwealth seems to believe there is a fundamental difference between the finality of a sentence when someone is probated, as opposed to when someone receives shock probation. In essence the Commonwealth has argued that while the trial court in Stallworth could not have increased the defendant's sentence in order for the defendant to be released on shock probation, once the defendant received shock probation and a motion to revoke was filed, the court could have increased the sentence as a condition of allowing the defendant to remain on probation. In other words, the Stallworth court's objectionable modification of the sentence becomes less so if the court just waits until its time to revoke the defendant. Such a scheme of never ending increases in sentences in order to allow someone to stay on probation would invite the very type of power and chaos which this Court wisely cautioned against in Stallworth.

The potential abuses of such a system are easy to understand. A defendant who has entered a guilty plea has already given up her right to be tried by a jury and to have the jury recommend her punishment. In order to revoke her probation the standard of proof is simply a preponderance of he evidence, it is no longer beyond a reasonable doubt. As such she is not in the same bargaining position as she was when the initial plea was entered. In addition, most defendants are willing to enter any kind of agreement which

would allow them to forego a sentence of incarceration and remain on probation. If this type of sentencing scheme is approved by the court, it would place additional powers in the hands of prosecutors and courts. Such a system would allow prosecutors to negotiate an initial sentence in exchange for a guilty plea and to recommend probation with the belief that the defendant will eventually violate the conditions of probation.[1] The prosecutor would then only allow entrance into drug court or the right to remain on probation in exchange for an agreement to a maximum sentence. While the potential for abuse from prosecutors is present, this resentencing also presents difficulties for the court. Imposing an increased sentence of time to serve would allow the court to set penalties not based upon the initial crime, but based upon behaviors following the crime. The basis of the increased sentence could also be subject to separate criminal penalties. This scheme would certainly be adverse to the Double Jeopardy Clause of the State and Federal Constitutions.

A sentencing scheme operating in this manner creates procedural implications as well as the practical implications previously mentioned. Presumably this ever changing and increasing sentencing scheme would allow for multiple appeals from a sentence. Thus, each time the term to serve is increased, the defendant should be entitled to a new appeal. Further, the finality of a judgment for post-conviction relief would also be ever changing. RCr 11.42(10) requires a defendant to file a motion to vacate or correct a sentence within three years after the judgment becomes final. If the court is allowed to revisit the judgment anytime during the period of probation in order to set a new term of incarceration, it would seem that the three year clock would be reset each time the court

[1] The probability that someone will violate the conditions of her probation greatly increases when she suffers from a substance abuse problem.

chose to do so. This court has made it clear that judgments in criminal cases, as in civil cases, must by necessity have some finality. Hord v. Commonwealth. 450 S.W.2d 530, 532 (Ky. 1970).

Like the judgments entered in the previous cases, the judgment in the present case could not be amended 10 days after the judgment was entered. CR 59.05. Absent court rule or statute allowing the court to reacquire jurisdiction for that purpose, the court lacked such jurisdiction and could not revisit the judgment. While the court continues to retain jurisdiction over probation, this jurisdiction is limited to probation and does not give the court the ability to revisit the final sentence of imprisonment. There is nothing in KRS 533 or KRS 532 which would allow the court to revisit the term of imprisonment as part of continuing jurisdiction over probation.

In an effort to find statutory authority for the court's continued jurisdiction over the term of imprisonment, the Commonwealth cites KRS 533.020(1) which provides that the court may modify or enlarge the conditions of probation. The problem with the argument is that a sentence to a term of imprisonment is not a condition of probation nor is it part of probation. Repeatedly throughout Chapter 533 the distinction between probation and a sentence of imprisonment are noted. [2] Further, under KRS 533.020(4) the legislature provides that a period of probation may at any time during the probation period be extended or shortened by court order. Certainly worth noting is the fact that

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[2] See for example:
KRS 533.010(2) stating that before imposition of a sentence of imprisonment the court shall consider probation; and KRS 533.010(3) providing that probation with alternative sentencing should be granted unless the court if of opinion that imprisonment is necessary for the protection of the public. Both sections recognize the difference between probation and a sentence of imprisonment.

there is no similar rule allowing the court during the probation period to increase a sentence of imprisonment. KRS 533.030(6) allows the court as a condition of probation to require a defendant to submit to a period of imprisonment in the county jail, which period may not exceed 12 months or the maximum term of imprisonment assessed pursuant to KRS Chapter 532. The statute provides two notable ideas. First, it makes clear that any time given under KRS 533 and the time imposed under KRS 532 are not the same. Second, the statute provides that the court may only assess time up to the maximum sentence provided in KRS 532 when the court wishes to include time to serve as a condition of probation. In this case the maximum time would have been the 180 days including in the judgment of conviction. There is simply no continuing jurisdiction over the term of imprisonment once probation is imposed.

It is the finality of that portion of the judgment regarding the sentence of imprisonment which violates double jeopardy. The United States Supreme Court has been clear that although double jeopardy concerns are not always implicated in sentencing, the analysis changes once a defendant has an expectation of finality in that sentence. United States v. DiFrancesco, 449 U.S. 1171, 101 S.Ct. 426, 66 L.Ed.2d 328 (1980). Ten days after the judgment was entered in this case, Ms. Gaddie had an expectation of finality as to the term of imprisonment imposed. Barring a statute or court rule such as CR 60.02 allowing the court to reacquire jurisdiction, there is simply nothing which would allow the court to revisit the issue and double jeopardy would bar an increase in the sentence.

The current statues regarding sentencing do not allow the court to increase the time to serve in order to remain on probation or gain entry into drug court. It is difficult

to say whether statutory language which explicitly allowed the court to increase a sentence upon revocation of probation would withstand scrutiny in this court. In Hord, the defendant entered a guilty plea and the court fixed his punishment at one year. Hord, supra. The court then placed him on probation. Id. After Hord violated the conditions of probation, the trial court revoked his probation and increased his term to serve to two years in prison. Id. The Supreme Court stated that although the literal language of the revocation statute would seem to allow the circuit judge to increase the punishment on revocation, any statute so providing would violate the double jeopardy clause. Id.

Ms. Gaddie had an expectation of finality over the term of imprisonment imposed by the court in the judgment. There was no statutory or rule based authority for the court the reacquire jurisdiction of the matter in order the increase the judgment. Ms. Gaddie could not by consent give the court jurisdiction to revisit the original sentence. Although the court retained jurisdiction over probation, that jurisdiction did not include increasing the sentence of incarceration in order to gain entry into drug court. The Court of Appeals decision granting the writ of habeas corpus should be affirmed.

II.

REQUIRING A DEFENDANT TO TAKE A GREATER SENTENCE AFTER FINAL JUDGMENT IN ORDER TO GAIN ENTRANCE INTO DRUG COURT DOES NOT MEET THE POLICIES OF THAT PROGRAM

The Commonwealth has argued throughout this process, that the ability to enlarge the sentence of imprisonment is necessary in order to increase the probability that someone will succeed in drug court. It is the Commonwealth's theory that only a huge penalty could act as an incentive for the completion of drug court. The Commonwealth

has failed to cite any data, authority, or policy within the drug court program which would support this assertion.

In the present case, the 180 days of imprisonment which Ms. Gaddie faced was enough of a punishment to get Ms. Gaddie to agree to increase her sentence in order to avoid being removed from probation. Certainly it would seem that Ms. Gaddie was already seeking to avoid serving that punishment and the sentence was acting as an incentive at the time she made the agreement. While the Commonwealth asserts that the agreement would serve the purpose of motivating Ms. Gaddie to success, it certainly did not do that in this case and only served the purpose of a hammer punishing Ms. Gaddie. If six months to serve was not enough to ensure compliance with the drug court requirements, it is hard to understand how twelve months would ensure the compliance.

The Administrative Procedures of the Court of Justice Part I, AP XIII, Sec. 4 provides the procedure for referral to drug court. There is nothing in that section allowing the court to increase the sentence to serve in order for someone to be referred to drug court. Under AP XIII, Sec. 10 various sanctions are provided that may be given for non-compliance with drug court. These sanctions do not include an agreement to serve the maximum term if the person is terminated. In fact that particular rule of procedure states that graduated sanctions may be utilized for continuous noncompliance. In allowing for the graduated system, the rule implies that the purpose of the rule is to get compliance, not to punish the person. Further, drug courts already have incentives in place in order to promote success. (See AP XIII, Sec. 9).

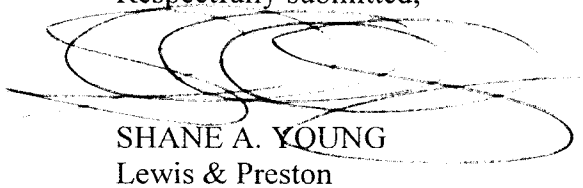
Finally, the drug court system is set up to be a nonadversarial approach, in which prosecutors and defense counsel work together. AP XIII, Sec 1. It would seem

ultimately the goal is to help people overcome substance abuse problems which are causing them to encounter the criminal justice system. (See AP XIII, Sec. 2). Requiring an agreement to a maximum sentence in order to gain entry into the drug court program makes the system not only adversarial but punitive in nature. The ultimate goal is not compliance, but punishment.

CONCLUSION

Wherefore, for the foregoing reasons the Appellee, Amanda Gaddie, requests this Court affirm the Court of Appeals decision granting the petition for writ of habeas corpus.

Respectfully submitted,



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