COMMONWEALTH OF KENTUCKY
KENTUCKY SUPREME COURT
CASE NOS. 2008-SC-352, 2009-SC-317 & 2009-SC-342

JOSHUA MACHNIAK — APPELLANT

v.

APPEAL FROM LETCHER CIRCUIT COURT
HONARABLE SAMUEL T. WRIGHT, JUDGE
INDICTMENT NO. 05-CR-00098

COMMONWEALTH OF KENTUCKY — APPELLEE

BRIEF FOR APPELLANT, JOSHUA MACHNIAK

Submitted by

J. BRANDON PIGG
ASSISTANT PUBLIC ADVOCATE
DEPARTMENT OF PUBLIC ADVOCACY
100 FAIR OAKS LANE, SUITE 302
FRANKFORT, KENTUCKY 40601
(502) 564-8006

COUNSEL FOR APPELLANT

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief for Appellant has been served by first-class mail upon Hon. Samuel T. Wright, 205 Courthouse, 156 Main St., Whitesburg, KY; Hon. Edison G. Banks II, Commonwealth's Attorney, 48 East Main St., Whitesburg, KY; Hon. Peyton Reynolds, 470 Main St., Hazard, KY 41840; and messenger mailed to Hon. Susan Roncarti Lenz, Assistant Attorney General, Office of Criminal Appeals, Office of the Attorney General, 1024 Capital Center Drive, Frankfort, Kentucky 40601 on this _____ day of August, 2009. The record on appeal has been returned to the Kentucky Supreme Court.

_____
J. BRANDON PIGG

INTRODUCTION

Joshua Machniak appeals a Letcher Circuit Court's order revoking his probation and sentencing him to twenty (20) years in prison. He is specifically appealing the portion of his sentence condemning him to twenty (20) years imprisonment. The Court of Appeals affirmed on April 18, 2008. This Court granted discretionary review.

STATEMENT CONCERNING ORAL ARGUMENT

Joshua Machniak respectfully requests oral argument.

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

On May 19, 2005, Joshua Machniak was indicted on several counts of varying offenses. (Transcript of Record "TR", p. 1-9). Included in that indictment were twelve Class D felony charges. (Id.). Before a trial was held, Mr. Machniak pled guilty to all counts. (VR. No. 1, 4/12/06; 15:23:56). As a result of the plea, the trial court orally sentenced him to three years probated for three years. (VR. No. 1, 5/24/06; 10:46:47). However, the trial court made a comment to Mr. Machniak that, if his probation was revoked, then "the felony charges will run consecutive to one another. That means one to begin after the other." (VR. No. 1, 5/24/06; 10:46:51). However, the trial court made no mention of the statutory limit of twenty years in commenting on a potential sentence for Mr. Machniak. (VR. No. 1, 5/24/06; 10:46:47).

The trial court entered a formal and written Judgment and Sentence on June 12, 2006. (TR, pp. 115-116). The written judgment and sentence clearly and plainly states that Mr. Machniak was to be sentenced to a maximum term of "3 YEARS PROBATED FOR 3." (TR, pp. 115-116). It contained no language at all about the potential sentence if Mr. Machniak's probation was revoked. (Id.) It merely sentenced him to three years, probated for three. (Id.)

On October 5, 2006, the Commonwealth filed a motion to revoke Mr. Machniak's probation. (TR, p. 128-129). The sole ground for the revocation listed by the Commonwealth in its motion was that Mr. Machniak had "plead guilty in Letcher District Court on September 18, 2006, for the charges of AI and possession of a controlled substance." (TR, p. 128). The Commonwealth subsequently entered a second motion to revoke Mr. Machniak's probation based on his failure of a drug test. (TR, p. 133).

Prior to the revocation hearing, defense counsel for Mr. Machniak argued that the county attorney involved in his district court charges had promised him, as a condition of his plea, that he would not be revoked on the circuit court charges involved in this case. (VR. No. 1, 12/19/06; 11:32:22). The hearing was postponed to allow time for the trial court to determine if the county attorney had made the promise to Mr. Machniak. (VR. No. 1, 10/11/06; 11:34:48).

After some dispute, the Commonwealth, at the probation revocation hearing, ultimately stipulated that the promise had in fact been made to Mr. Machniak that his probation would not be revoked if he pled guilty to the misdemeanor charges in district court. (VR. No. 1, 12/19/06; 1:41:28). However, there were also allegations that Machniak had failed a drug test. During the revocation hearing, these allegations that he had failed a drug test were confirmed. (VR. No. 1, 12/19/06; 1:32:49).

The trial court stated that the promise only covered the charges from district court and not the other issues regarding Mr. Machniak failing a drug test. (VR. No. 1, 12/19/06; 1:40:56). The trial court then found that Mr. Machniak had violated the conditions of his probation by testing positive for drugs and, therefore, revoked his probation. (VR. No. 1, 12/19/06; 1:46:22). The trial court issued a written order revoking Mr. Machniak's probation which stated that it was revoking Machniak's probation because he had failed the drug test administered after his arrest on the misdemeanor charges. (TR, pp. 138-139). Mr. Machniak's probation was revoked and he was sentenced to twenty (20) years imprisonment. (Id.)

Machniak then appealed to the Kentucky Court of Appeals. The Court of Appeals in an April 18, 2008 opinion affirmed the trial court. Machniak then requested and this Court granted discretionary review.

Appellant will state further facts as necessary in the body of the Brief.

ARGUMENT

I. THE TRIAL COURT ERRED TO MR. MACHNIAK'S SUBSTANTIAL DETRIMENT WHEN IT INCORRECTLY SENTENCED HIM TO TWENTY YEARS FOLLOWING THE REVOCATION OF HIS PROBATION INSTEAD OF THE SPECIFIC SENTENCE OF THREE YEARS CONTAINED IN HIS WRITTEN JUDGMENT AND SENTENCE IN VIOLATION OF HIS RIGHTS UNDER THE 14TH AMENDMENT TO THE UNITED STATES CONSTITUTION AND §2 OF THE KENTUCKY CONSTITUTION.

Preservation

The focus of this appeal is that the trial court did not have the authority to impose the sentence it did following the revocation. "Sentencing is jurisdictional." Gaither v. Commonwealth, 963 S.W.2d 621, 622 (Ky. 1998). Subject matter jurisdiction may be raised at any time and cannot be consented to, agreed to, or waived by the parties. *See* Thompson v. Commowealth, 266 Ky. 529, 99 S.W.2d 705, 706 (1936); Commonwealth Health Corporation v. Croslin, 920 S.W.2d 46, 47 (Ky. 1996).

Therefore, despite trial counsel's failure to object, since sentencing is jurisdictional, it cannot be waived by failure to object. Ware v. Commonwealth, 34 S.W.3d 383, 385 (Ky. App. 2001) *citing* Wellman v. Commonwealth, 694 S.W.2d 696, 698 (Ky. 1985).

Relief Requested

After the trial court revoked Mr. Machniak's probation, it erroneously sentenced him to twenty (20) years when his written judgment and sentence stated that his sentence was "3 YEARS PROBATED 3 YEARS." He requests this court to vacate the trial court's order imposing sentence and remand the case with instructions to sentence Mr. Machniak to three (3) years.

Grounds

In orally sentencing Mr. Machniak from the bench, the trial court stated that his sentence was "probated for three years" but that if his probation was revoked, "the felony charges will run consecutive to one another. That means one to begin after the other." (VR. No. 1, 5/24//06; 10:46:51). However, the written judgment entered at the time of his guilty plea only stated that Mr. Machniak's sentence was "3 YEARS PROBATED FOR 3." The written judgment and sentence made absolutely no mention that his sentence would be elevated to twenty (20) years if he were to violate his probation.

The rule in Kentucky is that when there is an inconsistency between oral statements of the presiding judge and an order or judgment reduced to writing, the written order or judgment prevails. RCr 13.04; CR 54.01; Commonwealth v. Taber, 941 S.W.2d 463, 464 (Ky. 1997); Commonwealth v. Hicks, 869 S.W.2d 35, 37-38 (Ky. 1994).

Hicks involved an individual arrested for suspicion of driving under the influence. When the Commonwealth requested a continuance on the day of trial, the trial judge, frustrated by the failure of certain prosecution witnesses to appear, dismissed the action. In doing so, the court entered a written order that simply said that "[t]he Commonwealth's motion to continue is overruled and the defense the motion to continue is overruled and the defense motion to dismiss is sustained." Hicks, at 36. The

Commonwealth failed to appeal the ruling and, instead, refilled the same charges against the defendant. The defendant then moved to dismiss the action on double jeopardy grounds. After the circuit court declined to dismiss the charges, the defendant brought an action for prohibition, which the circuit court also denied. Id., at 36-37.

The Court of Appeals reversed and this Court granted discretionary review and affirmed the reversal. In doing so, this Court concentrated not on Hicks' double jeopardy claim, but, instead, on CR 41.02, which governs involuntary dismissals for a failure to prosecute or to comply with an order of the court. This Court stated that under CR 41.02, unless the court in its order for dismissal otherwise specifies, the dismissal was to be treated as an adjudication on the merits.

The significance of Hicks, is that the Commonwealth in Hicks argued, just as they do in this case, that the trial judge made oral statements which contradicted the written judgment. In addressing when oral statements and written judgments differ, this Court stated:

> "...where there is an inconsistency between the oral statements of a court and that which is reduced to writing as the court's final judgment, the latter shall prevail and the former shall be disregarded. Such a construction is essential to the operation of the Court of Justice for judges often voice views and opinions which may be inconsistent with their final judgments. **If this Court should announce a rule whereby the comments of a trial judge could be used to impeach the effect of a court's final judgment, the result would be the destruction of any certainty as to the effect of judgments and a state of chaos in judicial proceedings."**[1] (Emphasis added).

Id, at 37.

In this case, the written judgment plainly states that Mr. Machniak's sentence is "3 YEARS PROBATED FOR 3." (TR, 115-116). While the trial court did briefly

[1] This exact principle was affirmed in Commonwealth v. Taber, 941 S.W.2d 463 (Ky. 1997).

discuss with Mr. Machniak after he entered his plea that, if he were to violate his probation that the felonies he was pleading guilty to would be run consecutive, it is important to look at exactly what the trial court said from the bench. The trial court said "the felony charges will run consecutive to one another. That means one to begin after the other." (VR. No. 1, 5/24/06; 10:46:51). The trial court did not inform Mr. Machniak that such a sentence would be capped at twenty years under KRS 532.080 (6) (b). Mr. Machniak had pled guilty to twelve Class D felonies. Essentially, without explaining further, the oral sentence imposed by the trial court from the bench three years, probated for three, but if probation was revoked, thirty-six years.

Regardless of the fact that the oral sentence imposed was counter KRS 532.080 (6) (b), the Kentucky Supreme Court, in an unpublished opinion, has faced a situation similar to this, but with the respective roles reversed. In Craven v. Commonwealth[2], 2006 WL 1650968, citing Hord v. Commonwealth, 450 S.W.2d 530 (1970)., this Court found that court costs and attorney fees, though not included in the plea or in the oral sentence from the bench, could be included in the written final judgment. Id. In doing so, the Court stated that was "simply **not reasonable** to rely on a trial court's oral sentencing as a final pronouncement of all possible conditions that may be imposed within the written final judgment. Id. (Emphasis added). The Court then went on to cite CR 54.01 and Viers v. Commonwealth, 52 S.W.2d 527 (Ky. 2001) for the proposition that the "written order" was the final judgment. Id. In short, faced with a situation where the sentence the trial court orally imposed from the bench and the written judgment and

[2] This is an unpublished opinion. Appellant cites to this case under CR 76.28 (4) (c). For the Court's and Appellee's convenience, and in compliance with that rule, Appellant has attached a copy of the entire decision along with this brief.

sentence differed, the Court held that that it was "not reasonable" to rely on the oral sentence.

The same must be true here. The oral sentence imposed in this case, like that in Craven, differs from the written judgment imposed pursuant to Mr. Machniak's April 12, 2006 guilty plea. Under RCr 13.04; CR 54.01; Taber; Hicks and Craven, the written judgment must prevail. The written judgment sentences Mr. Machniak to "3 YEARS PROBATED FOR 3." That is his sentence. It was therefore improper for the trial court to, upon revocation, impose the much harsher sentence of twenty years when such a sentence was not included in the written judgment. Hord.

Yet the Court of Appeals, in defiance of Craven, Hord, Tabor and Hicks, affirmed the trial court. Under this Court's holdings in Craven, Hord, Tabor and Hicks, Mr. Machniak's sentence is the sentence contained in his written judgment of "3 YEARS PROBATED FOR 3."

Conclusion

The trial court, following the revocation of Mr. Machniak's probation, erroneously sentenced him to twenty (20) years when his written judgment and sentence stated that his sentence was "3 YEARS PROBATED 3 YEARS." Therefore, Mr. Machniak requests this court to vacate the trial court's order imposing sentence and remand this case to the Letcher Circuit Court with instructions that Mr. Machniak be sentenced to three (3) years in accordance with the written judgment and sentence entered June 12, 2006.

II. MR. MACHNIAK'S SENTENCE OF THREE YEARS PROBATED FOR THREE YEARS, BUT IF PROBATION IS REVOKED, THEN TWENTY YEARS VIOLATED HIS PROTECTION AGAINST DOUBLE JEOPARDY

GUARANTEED IN THE 5TH AMENDMENT TO THE UNITED STATES CONSTITUTION AND § 13 OF THE KENTUCKY CONSTITUTION AND WAS AN IMPROPER SENTENCE.

Preservation

This issue is not preserved for appeal by defense counsel objection but is palpable error under RCr 10.26 based on the double jeopardy violation. *See* Baker v. v. Commonwealth , 922 S.W.2d 371 (Ky. 1996); Jones v. Commonwealth, 756 S.W.2d 462 (Ky. 1988); Phillips v. Commonwealth, 679 S.W.2d 235 (Ky. 1984); Sherley v. Commonwealth, Ky., 558 S.W.2d 615 (Ky. 1977).

Relief Requested

Because the imposition of the twenty year sentence violated Mr. Machniak's protection against double jeopardy and was an improper sentence, that sentence must be vacated and the case remanded to the Letcher Circuit Court with instructions that Mr. Machniak be sentenced to three (3) years imprisonment.

Grounds

If this Court were to find, contrary to Appellant's "ARGUMENT I," that Mr. Machniak's sentence was in fact three years probated for three years, but if you are revoked, twenty years, such a sentence still violates double jeopardy.[3] In Hord v. Commonwealth, 450 S.W.2d 530 (1970), this Court concluded that a sentence similar to the one in this case did in fact violate double jeopardy.

Hord was arraigned on a charge of breaking and entering a storehouse, at which time he entered a guilty plea. The Court, on that date, entered a judgment finding him guilty as charged and fixed his punishment at one year in prison. He was subsequently

[3] The arguments in ARGUMENT I are ARGUMENT II are distinct alternative arguments. Neither argument should in any way be perceived as a waiver of the other argument.

put on probation. Ultimately, the court found that he had violated his probation and sentenced him again. However, this time the trial court, based on the probation revocation, increased his sentence from one year to two years. Id. at 531.

This Court found that once Hord was tried and "judgment entered fixing his punishment at one year he had been once placed in jeopardy for the offense charged. He cannot be again placed in jeopardy for the same offense." Id. *citing* Constitution of Kentucky, § 13. The Hord Court stated that increasing punishment based on a revocation of probation was "repugnant to the spirit, if not the letter, of the Federal and State Constitutions on former jeopardy, speedy trials, and due process.

Other cases have also discussed the problems with courts increasing underlying sentences upon revocation of probation. In Tiryung v. Commonwealth, this Court again commented on such situations by saying;

> Whether an order of probation is considered only as an order tentatively suspending the underlying punishment or whether it is considered as a sentence in addition to the underlying offense makes no substantive difference. Either way it is inappropriate as an alternative in lieu of the mandatory sentence required by KRS 532.040. The reason is obvious. To hold otherwise openly invites the trial court to impose a punishment greater than that appropriate for the initial offense because of the subsequent offense which precipitates the revocation of probation. Although the offense which constitutes violation of probation and grounds for revocation may be a new criminal offense calling for punishment in its own right, **it is not grounds for providing a greater punishment for the original offense which was probated.**

709 S.W.2d 454 (1986). (Emphasis added). What Hord and Tiryung warned against is exactly what happened in this case.

Mr. Machniak's punishment was three years probated for three years. It was **only** if he were to violate his probation that his punishment would be escalated to twenty years. This created a situation where, either the sentence flatly violates double jeopardy,

or is contrary to Tiryung. There are only two ways this could occur and both are impermissible.

One possible explanation is that Machniak's escalated sentence of twenty years, following his initial sentence of three years probated for three years, was a second and more severe punishment for the original conduct. Under Hord, this is a violation of double jeopardy because the trial court increased the punishment initially imposed because of the revocation though both the original and increased sentences were for the same conduct. Therefore, by increasing the sentence because of the probation revocation, the trial court placed Mr. Machniak twice in jeopardy for the same offense.

The other possibility is that, by increasing the sentence to twenty years based on the revocation, the trial court was trying to punish the conduct causing the revocation. This is clearly impermissible under Tiryung, which states that the grounds for the revocation are not grounds for providing a greater punishment for the original, probated offense. Here, Machniak's sentence would only be increased if he violated his probation. The sentence for the original conduct was three years probated for three years. The increase to twenty years only occurred if he engaged in conduct that violated his probation. If the trial court's concern was to punish the underlying conduct, it could have simply sentenced him to twenty years and probated that sentence for three years.

The sentence imposed clearly demonstrates that it was the trial court's intent to exact a much more severe punishment on Mr. Machniak if he were to violate his probation. Such a sentence cannot survive the limitations created by Hord and Tiryung. Either the sentence was a second and more severe punishment for the original conduct and a violation of double jeopardy or it was an attempt by the trial court to punish the

conduct causing the revocation and contrary to Tiryung. Either way, the sentence of twenty years cannot be imposed. Only the sentence of three years probated for three years is proper.

With respect to the double jeopardy claim, the Court of Appeals determined that, though Machniak faced multiple sentences for the same offense, it was not double jeopardy because "Machniak had no legitimate expectation in the finality" in the sentence contained in his **written judgement**. (Opinion, p. 6) (Emphasis added). In support of this claim, the Court of Appeals cited to a twenty-two year old case from United States Court of Appeals, District of Columbia Circuit, United States v. Fogel, 829 F.2d 77 (D.C. Cir. 1987).

Fogel did state that if a defendant has a legitimate expectation of finality, then an increase in a sentence is prohibited by the double jeopardy clause. Id., at 87. However, under Kentucky law, the idea that Machniak had no legitimate expectation in the finality of his **written judgment** is not only illogical, but also is counter to clear precedent from this Court. Not only has this Court in Hord, Taber, and Hicks, stated that a written judgment prevails over any oral statements, that position is also supported by both Kentucky rules civil and criminal procedure. RCr 13.04; CR 54.01. It cannot, therefore, be said that Machniak did not have a legitimate expectation of finality in his written judgment.

Conclusion

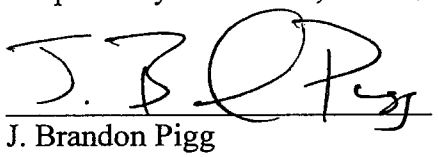
The trial court's imposition of the twenty year sentence violated Mr. Machniak's protection against double jeopardy and was an improper sentence. Therefore, that portion

of the sentence must be vacated and the case remanded to the Letcher Circuit Court with instructions that Mr. Machniak be sentenced to three (3) years imprisonment.

CONCLUSION

For the foregoing reasons, Joshua Machniak requests that his sentence be vacated and remanded to the Letcher Circuit Court with instructions that he be sentenced to three (3) years imprisonment.

Respectfully Submitted,



J. Brandon Pigg
Assistant Public Advocate
100 Fair Oak Lane, Suite 302
Frankfort, KY 40601
502-564-8006
COUNSEL FOR APPELLANT