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**

REPLY 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 Reply 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 26 day of October, 2009. The record on appeal was not checked out for the purpose of this Reply Brief.

J. B. Pigg

J. BRANDON PIGG

PURPOSE OF REPLY BRIEF

The purpose of this Reply Brief is to clarify where there are discrepancies as to law or fact between Appellant's and Appellee's briefs.

STATEMENT OF POINTS AND AUTHORITIES

ARGUMENT

I. APPELLEE'S ARGUMENT THAT ORAL SENTENCES ARE BINDING AND ANY PRONOUNCEMENT CONTRARY IS INVALID IS COMPLETELY CONTRARY TO THIS COURT'S ESTABLISHED PRECEDENT.

In its brief, Appellee argues that the sentence orally pronounced by the trial court is the legally binding sentence and any pronouncement of judgment contrary to the oral pronouncement is invalid. (Appellee's brief, p. 5). Appellee's argument is, in every respect, completely against well-settled precedent.

The rule in Kentucky on this issue is simple. This Court has repeatedly held 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 over the oral statements. 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). Appellee apparently suggests this Court should simply ignore precedent.

Appellee cites to several cases from other jurisdictions that have, to varying degrees, adopted policies where oral statements either prevail or are considered when there are discrepancies between the two. However, glaringly absent from Appellee's brief is any citation to any case decided by this Court or the Kentucky Court of Appeals holding, as Appellee contends, that oral statements by the trial court supersede and prevail over the trial court's written

judgment. The reason for this omission is simple-Kentucky caselaw directly contradicts Appellee's position.

The fact that Appellee has cited to a few other jurisdictions where oral statements prevail should in no way give the impression that Kentucky stands alone in holding that written judgments prevail when there are inconsistencies between oral statements by the trial court and the written judgment. Other jurisdictions have, like Kentucky, held that written judgments prevail over oral statements made by the trial court.

Specifically, in Gasperson v. Madill Nat. Bank, 455 S.W.2d 381 (Tex.Civ.App., 1970), a case where a trial court made some oral findings at the bench that were not included in the written judgment, the Court stated the rule as it exists in Texas:

> Any time there is a conflict between oral pronouncements made by a trial judge and his written findings of fact, conclusions of law, and signed court judgments that are provided for by rules of trial, then the matters set forth in such written instruments control.

Id., 387. In Pitard v. Schmittzehe, 679 So.2d 515 (La.App. 2 Cir., 1996), a case involving the allocation of assets following the dissolution of a partnership, the Court stated the rule as it exists in Louisiana:

> [w]hen the substance of the trial court's written judgment differs from its oral or written reasons for judgment, the written judgment controls...

Id., at 517. Finally, in Fenner v. U.S. Parole Commission, 251 F.3d 782 (9th Cir. 2001), a case involving conflicting oral and written statements concerning the

defendant's parole, the Ninth Circuit held under United States v. Garcia, 37 F.3d 1359 (9th Cir. 1994), that:

> where there is an ambiguity in the oral pronouncement of a sentence, an unambiguous written judgment controls. In other words, where a defendant is unambiguously told one thing in the written judgment, the trial judge may not later go back and change it: a clear written judgment must control over any subsequent clarification or correction.

Id., at 788 *citing* Garcia, 37 F.3d at 1369.

What these cases demonstrate is that, while Appellee has managed to find some jurisdictions that will allow oral statements to prevail over written judgments, there are others that have held that written judgments prevail over oral statements. More importantly, it cannot be overstated that the rule in Kentucky has long been that a written judgment prevails over a oral statement by a trial court. RCr 13.04; CR 54.01; Taber; Hicks and Craven.

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 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).

Mr. Machniak pled guilty to twelve Class D felonies. The trial court did not inform Mr. Machniak that such a sentence would be capped at twenty years under KRS 532.080 (6) (b). Essentially, without explaining further, the oral sentence imposed by the trial court meant that Mr. Machniak would serve three years, probated for three, but if probation was revoked, he would serve thirty-six years, which would be an improper sentence under KRS 532.080 (6) (b).

Regardless of the fact that the oral sentence imposed by the trial court was counter to KRS 532.080 (6) (b), this Court, in an unpublished opinion, has faced a similar situation, but with the respective roles reversed. In Craven v. Commonwealth[1], 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

[1] 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.

and 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. 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."

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

Appellee argues, as the Court of Appeals found, that Machniak's double sentencing in this case does not violate double jeopardy because Machniak did not have a "legitimate expectation of finality" when he received his written judgment and sentencing that sentenced him to 3 YEARS PROBATED FOR 3. (Appellee's brief, p. 16). However, this is clearly contrary to this Court's holding in Craven, *see supra*. In Craven, this 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.3d 527 (Ky. 2001) for the proposition that the "written order" was the final judgment. Id. In short, faced with an identical situation to that in this case where the sentence orally imposed from the bench by the trial court and the written judgment and sentence differed, this Court held that that it was "not reasonable" to rely on the oral sentence.

Applying this to the case at hand, if it was "simply not reasonable" for the defendant to rely or consider the oral judgment in Craven, it was likewise "simply not reasonable" for Machniak to concern himself with the oral judgment in this case. That leaves only the written judgment or "3 years probated for 3." More importantly, if it was not reasonable for Machniak to consider the oral judgment to the contrary, Machniak **did** have a legitimate expectation of finality in his written judgment and sentencing. Once that expectation materialized and jeopardy had attached, the increase of his sentence to twenty (20) years violated double jeopardy. Cardwell v. Commonwealth, 12 S.W.3d 672 (Ky. 2000).

Appellee's argument centers around two cases that are both easily distinguishable. The first case cited by Appellee is State v. Rodrigues, 2009 WL 3048413.[2] Rodrigues is a case from Utah involving a dispute over the amount

[2] CR 76.28 (4) (c) requires that if a party wishes to cite to an unpublished opinion, two basic steps must be followed. The case shall first be set out as an unpublished decision and then a copy of the entire opinion shall be tendered along with the document. Appellee has failed follow either of these simple requirements. Appellee's brief makes repeated citations to State v. Rodrigues, 2009 WL 3048413 without designating it an unpublished case. More troubling, Appellee has failed to include a copy of the opinion in the appendix

owed in unpaid child support. In Rodrigues, a specific rule of criminal procedure in Utah permitted the amending of a judgment at any time for any reason.

The second case primarily relied on by Appellee is United States v. DiFrancesco, 101 S.Ct. 426 (1980). DiFrancesco is a case centering on a specific provision of the Organized Crime Control Act of 1970 which gave the government the right, under specific conditions, to appeal the sentence imposed upon a "dangerous special offender." Id., at 426-427.

While Appellee cites to several quotes from DiFrancesco, the issue in that case was entirely different. The issue was simply if the government appealing a sentence constituted double jeopardy. This case involves two differing sentences for the same offense. Therefore, the language in DiFrancesco is simply not applicable to this case. More importantly, it does nothing to disturb this Court's prior findings with respect to multiple sentences for the same conduct.

In Hord, *supra*, 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 plea of guilty. On that date, the trial court entered a judgment finding him guilty as charged and fixed his punishment at one year in prison. He was subsequently put on probation. Ultimately, the court found that he had violated his probation and

---

of their brief. Rather than delay the proceedings by filing motions asking this Court to strike Appellee's brief and order Appellee to file a brief that is in compliance with the rules of civil procedure, Appellant notes that Rodrigues is an unpublished case and has, by rule and for the convenience of the Court, attached a copy of the entire opinion to this brief.

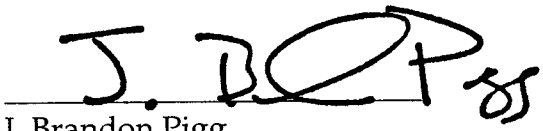
sentenced him again. However, this time, based on the probation revocation, the trial court increased his sentence from one year to two years. Id. at 531.

The Hord 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. Other cases have also discussed the problems with courts increasing underlying sentences upon revocation of probation.

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