

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000996-MR

BOBBY JACK LEWIS

APPELLANT

v. APPEAL FROM HENDERSON CIRCUIT COURT
HONORABLE STEPHEN A. HAYDEN, JUDGE
ACTION NOS. 05-CR-00173 & 05-CR-00231

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: STUMBO, JUDGE; BUCKINGHAM AND HENRY, SENIOR JUDGES.¹

STUMBO, JUDGE: This appeal comes from an order entered March 28, 2006, by the Henderson Circuit Court. This order required Bobby Jack Lewis (Lewis) to reimburse the county for expenses incurred by his incarceration in the county jail as is authorized by KRS 441.265. A prisoner may be exempt from said payment if good cause can be shown. KRS 441.265(1). Lewis, who brings this appeal *pro se*, presents the following arguments: that this statute is unconstitutional as it constitutes a Bill of Attainder; it is

¹ Senior Judges David C. Buckingham and Michael L. Henry, sitting as Special Judges by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

being unconstitutionally applied to him because it forces prisoners who have not been convicted to pay for their incarceration expenses; that it unconstitutionally singles out indigent individuals for harsher treatment; and that the trial judge abused his discretion in ordering Lewis to pay the expenses. After reviewing the arguments set forth by Lewis and the Commonwealth, we affirm the Henderson Circuit Court order.

Lewis was incarcerated due to two cases from Henderson County. In case 05-CR-00173, Lewis pled guilty to twenty-three counts of second-degree possession of a forged document. He was sentenced to serve five years imprisonment on each count, with terms to be served concurrently, for a total of five years. In case 05-CR-00231, Lewis pled guilty to one count of possession of a forged instrument, one count of theft by deception over three-hundred dollars, and three counts of theft by deception under three-hundred dollars. Lewis was sentenced to a total term of five years imprisonment for these crimes. Lewis was ordered to serve the sentences for each case concurrently, for a total of five years imprisonment.

Before we begin our analysis of the issues in this case, we must deal with a preliminary matter raised by Lewis's reply brief. Therein, Lewis argues that the Commonwealth filed its brief in an untimely manner. Lewis filed his brief September 13, 2006, and argues that the Commonwealth's brief was due 60 days after that date. Lewis requests judgment in his favor according to Kentucky Rule of Procedure 76.12(8)(c)(iii). Civil Rule 76.12(2)(b)(ii) sets forth the time requirement for filing a brief. This rule states:

If counsel for the appellant is someone other than the Public Advocate of the Commonwealth or the Attorney General of the Commonwealth, or designee, the appellee's brief shall be filed within 60 days after the date on which [Lewis's] brief was filed or within 60 days after the date on which the record on appeal was received by the clerk of the appellate court, whichever is the later.

Since Lewis is representing himself *pro se*, the Commonwealth could have filed its brief either 60 days after Lewis's brief is filed or 60 days after the record was received by the clerk of the Court of Appeals, whichever is later. The record in this case was filed with the clerk of this Court on October 11, 2006. The Commonwealth's brief was filed on December 4, 2006, well within the sixty-day window if counted from the date the record was filed. Thus, the Commonwealth's brief was filed within the 60-day time limit set forth by rule 76.12.

The first three arguments set forth by Lewis can be easily dismissed by this Court as none were presented to the circuit court. The Appellate courts of the Commonwealth have repeatedly declared that “[w]hen a trial court has not had the opportunity to rule, the appellate court is unable to review the alleged error.” *Sherley v. Commonwealth*, 889 S.W.2d 794, 799 (Ky. 1994); *see also Shelton v. Commonwealth*, 992 S.W.2d 849 (Ky. App. 1998); *West v. Commonwealth*, 780 S.W.2d 600 (Ky. 1989).

The only issue ripe for review is Lewis's final argument that the judge abused his discretion by ordering the payment. “The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by

sound legal principles.” *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

The relevant part of the trial court’s order directing the payment states as follows:

Under KRS 441.265, the sentencing court shall require a prisoner in the county jail to reimburse the county for the expenses incurred by his incarceration, “except for good cause.” The Court has reviewed the record and believes that good cause has not been shown. Mr. Lewis is eligible for parole in May 2006. Therefore, the Court hereby ORDERS that the defendant reimburse the Henderson County Detention Center for his incarceration by June 5, 2006. If he does not pay by this date, he must appear in court to show cause why he cannot pay. If he does not appear, the Court will issue a warrant for his arrest.

Lewis apparently took umbrage with the last line stating that a warrant would be issued for his arrest. Lewis took it to mean that if he did not pay, then he would be arrested.

This is not what the order says. The order says if he did not pay then he would have to appear before the court to show cause why he could not pay. Only if he did not appear in court to show cause would there be a warrant issued.

The order does, however, state that no good cause was shown as to why Lewis was unable to reimburse the detention center. An oral motion was made during Lewis’s trial proceeding requesting that Lewis not be ordered to pay the county jail fees due to his poverty. The Court indicated that it would take this motion under consideration, but did not address the issue in the final judgment. After Lewis was incarcerated, the detention center began removing money from his jail canteen account in order to help pay the costs of his incarceration. The county jail authorities apparently

advised Lewis that an order was necessary to stop the deductions. Lewis moved for an order specifically addressing the issue. The Court then entered the order quoted *infra*.

In order to review the order of a lower court for an abuse of that court's discretion, there must be sufficient findings to permit that review. CR 52.01 addresses when a court is required to make findings of fact. It provides as follows:

In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specifically and state separately its conclusions of law thereon and render an appropriate judgment; and in granting or refusing temporary injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review except as provided in Rule 52.04. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. The findings of a commissioner, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41.02. (emphasis added)

The motion submitted by Lewis which led to the order appealed from falls into the "other motion" category and not one which requires a finding of fact. CR 52.04 also has some bearing on our decision. That rule states:

A final judgment shall not be reversed or remanded because of the failure of the trial court to make a finding of fact on an issue essential to the judgment unless such failure is brought to the attention of the trial court by a written request for a finding on that issue or by a motion pursuant to Rule 52.02.

In order to provide this Court with the findings necessary to permit a review for abuse of discretion, Lewis should have requested findings of fact from the trial court as required by CR 52.04 before bringing this appeal.

As the order stands, we cannot find an abuse of discretion that would necessitate our reversing it. We, therefore, hold that Lewis's first three arguments are improperly before this Court as they were not first raised at the trial court and that there was no abuse of discretion in ordering Lewis to reimburse the Henderson County detention center. Accordingly, the order of the Henderson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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