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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000715-MR

JAMES BENJAMIN GARY — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE STEPHEN K. MERSHON, JUDGE
ACTION NO. 03-CR-002433

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
REVERSING

** ** ** ** **

BEFORE: DIXON AND THOMPSON, JUDGES; HENRY,[1] SENIOR JUDGE.

DIXON, JUDGE: Appellant, James Benjamin Gary, appeals from an order of the Jefferson Circuit Court sentencing him to a total of ten years' imprisonment. For the reasons set forth herein, we reverse.

On September 17, 2003, Appellant was indicted for a series of burglaries, robberies and thefts that occurred in the Louisville area between September 2001 and April 2003. The following day, Appellant pled guilty to seven counts of second-degree

[1] Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

burglary and two counts of second-degree robbery. Pursuant to a plea agreement, the Commonwealth recommended a sentence of "six years to serve or twelve years if probated." The agreement further provided:

> The Commonwealth and the defendant agree that the defendant will be sentenced to serve. The defendant may file for shock probation. The Commonwealth will leave the matter of shock probation within the court's sound discretion. If the defendant is shock probated, the sentence shall be twelve years probated for five years.

The record reveals that during the September 18th hearing, the trial court conducted the standard *Boykin* inquiry and was repeatedly assured by Appellant that he understood the terms and conditions of the plea agreement. In fact, the Commonwealth attorney requested that Appellant again consider the ramifications of an increased sentence in the event that Appellant was later probated. The trial court thereafter accepted the plea and entered a Judgment on Guilty Plea and Sentence, which incorporated verbatim the above-quoted language from the plea agreement. Subsequently, on December 22, 2003, the trial court granted Appellant's request for shock probation, and entered an order reflecting the twelve year sentence (probated for a period of five years) as agreed upon in the plea agreement.

However, following repeated probation violations, the Commonwealth moved to revoke Appellant's probation. The trial court held a hearing on the Commonwealth's motion on November 28, 2005. On that same day, Appellant hand delivered a motion requesting the trial court to impose the original six year sentence. The record reflects that during the hearing, Appellant argued that *Galusha v. Commonwealth*,

834 S.W.2d 696 (Ky. App. 1992), prohibited the trial court from granting probation in exchange for a longer sentence in the event of revocation. The Commonwealth, while conceding that *Galusha* did appear to be controlling, requested additional time to research the issue. The trial court thereafter ruled that it would impose the original six year sentence and noted that if the Commonwealth determined that *Galusha* did not apply, it could move to alter or amend the order if filed within ten days of the order entered on November 28, 2005, sentencing Appellant to six years' imprisonment.

On December 7, 2005, the Commonwealth filed a pleading styled, "Commonwealth's Reply to Defendant's Motion To Amend Sentence," wherein it argued that *Galusha* was distinguishable upon the facts from the instant case, and that Appellant should be bound by the original plea agreement. On December 27, 2005, an order was entered denying Appellant's November 28th motion to impose the original six year sentence.

Appellant then filed a motion to set aside the "illegal" December 27th order. Following a February 2006 hearing on the motion, the trial court again rejected Appellant's claim that the trial court only had the authority to impose the original six year sentence:

> Both *Galusha* and [*Stallworth v. Commonwealth*, 102 S.W.3d 918 (Ky. 2003)] stand for the proposition that the court lacks the authority to amend a final sentence in exchange for shock probation. That did not happen in this case. The terms of the agreement were known by everyone from the beginning and those terms included six years to serve; twelve if probated. Moreover, the ten-day limit on the trial court's ability to amend a final judgment as outlined in [*Silverburg v.*

> *Commonwealth*, 587 S.W.2d 241 (Ky. 1979)] was not violated because this court did nothing but enforce the terms of the original judgment entered on September 19, 2003. The original judgment outlines the parties' plea bargain, and plea bargains follow the general laws of contract. Both parties must be bound by the plea bargain. (citations omitted).

However, the trial court amended Appellant's sentence to ten years to reflect the maximum possible penalty available under any one of Appellant's Class C felonies. This appeal ensued.

Relying on this Court's opinion in *Galusha*, Appellant continues to argue that the trial court had no authority or jurisdiction to alter the original judgment at the time it granted shock probation or at the time it revoked probation. Appellant claims that although the plea agreement recommended a sentence of twelve years in the event probation was granted, he was in fact only sentenced to six years and the court subsequently lost the power after ten days to amend the sentence. *See Silverburg, supra*.

We need not reach the *Galusha* issue because we find that the trial court never properly vacated the November 28th order sentencing Appellant to six years' imprisonment. Immediately prior to the November 28th hearing, Appellant tendered his motion to impose the original six year sentence. The trial court did exactly that during the hearing, thus presumably granting the motion. Thereafter, the Commonwealth did not file a CR 59.05 motion to alter amend or vacate the judgment, but rather filed only a response to Appellant's earlier motion. The trial court apparently agreed with the Commonwealth's position and entered the December 27th order denying Appellant's motion. However, it is clear from the record that the trial court had already ruled on the

motion as evidenced by the November 28th order imposing the six year sentence. Further, a review of the December 27th order leads to the inescapable conclusion that the trial court neither vacated the six year sentence nor formally imposed a twelve year sentence. *See Murrell v. City of Hurstborne Acres*, 401 S.W.2d 60 (Ky. 1966).

As a result, we are compelled to conclude that the trial court lost jurisdiction to amend the six year sentence ten days following the entry of the November 28th order imposing such penalty. *See Silverburg, supra*; CR 59.05; CR 52.02. Therefore, the February amended judgment is void and Appellant is bound only by the six year sentence.

The February 28, 2006, order of the Jefferson Circuit Court sentencing Appellant to ten years' imprisonment is vacated and the November 28, 2005 order is hereby reinstated.

ALL CONCUR.

BRIEF FOR APPELLANT:

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