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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001802-MR

GERALD JONES — APPELLANT

v.

APPEAL FROM MADISON CIRCUIT COURT
HONORABLE JEAN CHENAULT LOGUE, JUDGE
ACTION NOS. 09-CR-00248 AND 09-CR-00314

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KRAMER, CHIEF JUDGE; CLAYTON AND THOMPSON, JUDGES.

KRAMER, CHIEF JUDGE: Gerald Jones, proceeding *pro se*, appeals the Madison Circuit Court's order denying his motion to amend his sentence. After a careful review of the record, we affirm because his claims are unpreserved for our review.

I. FACTUAL AND PROCEDURAL BACKGROUND

Gerald Jones was indicted in Madison Circuit Court case number 09-CR-00248 on one count of first-degree rape, one count of first-degree sodomy, one count of video voyeurism, and one count of first-degree sexual abuse. The charges of first-degree rape, first-degree sodomy and video voyeurism were each amended to first-degree sexual abuse. Jones moved to enter a guilty plea to the one original count of first-degree sexual abuse, and to the three amended counts of first-degree sexual abuse. The circuit court accepted his guilty plea to all four counts, and sentenced him to five years of imprisonment on each count, to be served consecutively, for a total of twenty years of imprisonment. This sentence was ordered to be served concurrently with Jones's sentence in Madison Circuit Court case number 09-CR-00314, discussed *infra*. In case number 09-CR-00248, Jones was also sentenced to an additional five-year period of conditional discharge for each count.

Regarding Jones's other case, *i.e.*, Madison Circuit Court case number 09-CR-00314, a jury trial was held. Jones was convicted of 143 counts of possession of matter portraying a sexual performance by a minor; one count of the cultivation of marijuana, five or more plants; and one count of possession of drug paraphernalia. He was sentenced to serve five years of imprisonment for each of the 143 counts of possession of matter portraying a sexual performance by a minor;

five years of imprisonment for the one count of cultivation of marijuana, five or more plants; and twelve months of imprisonment for the one count of possession of drug paraphernalia. His sentences for the possession of matter portraying a sexual performance by a minor and for the cultivation of marijuana were ordered to be served consecutively "for a total sentence of twenty (20) years" and were ordered to run concurrently with Jones's sentence in case number 09-CR-00248. Jones was also sentenced to an additional five-year period of conditional discharge in case number 09-CR-00314.

Jones moved to amend the judgment in case number 09-CR-00248, claiming:

> [defense counsel] reached an agreement with the Commonwealth Attorney that the sentence in [case number 09-CR-00248] would run concurrent with the sentence Defendant received [in] the other case and that the amended charges in the plea agreement would carry a 20% parole eligibility. [The] Department of Corrections has calculated Defendant's time on the charges in this proceeding at the 85% parole eligibility despite the agreement of the parties and the instruction of [the circuit court]. Defendant wishes for an amendment to the charges in the plea agreement or an amendment to the judgment and clarification of his sentence to allow the Department of Corrections to properly calculate his jail credit, parole eligibility date, and release date.

The circuit court entered an order amending the judgment and sentence in case number 09-CR-00248 so that Jones's sentence would be five years of

imprisonment for each of the four charges of first-degree sexual abuse, to be served concurrently with each other for a total of five years of imprisonment. The court also ordered that "[a]ll prior terms and conditions of the Final Judgment remain in full force and effect."

Jones then moved to amend his sentence,[1, 2] contending that the sentence of conditional discharge following his release from imprisonment "has been declared unconstitutional" because it is an enhancement to the statutory length of the sentence, so it "must be presented in an indictment, tried by a jury, and the enhancement must be levied by the jury after finding guilt beyond a reasonable doubt." The circuit court denied Jones's motion to amend his sentence without explanation.[3]

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[1] Jones's motion to amend his sentence was filed regarding both cases from the Madison Circuit Court, *i.e.*, 09-CR-00248 and 09-CR-00314.

[2] Although a motion to amend a defendant's sentence is often brought pursuant to Kentucky Rule of Criminal Procedure (RCr) 11.42, Jones did not bring his motion to amend pursuant to that rule, and the circuit court did not recharacterize the motion as one brought pursuant to that rule. According to *McDaniel v. Commonwealth*, 495 S.W.3d 115, 124-25 (Ky. 2016), the circuit court was not obligated to recharacterize the motion. If it had done so, it would have been required to notify Jones that it was characterizing it as brought under RCr 11.42, to warn him of "the possible subsequent-motion consequences, and . . . [to] give [Jones] an opportunity to withdraw or to amend his . . . motion." *McDaniel*, 495 S.W.3d at 124. However, because it was not required to recharacterize the motion, the circuit court properly treated the motion simply as a motion to amend the sentence, rather than as a motion under RCr 11.42.

[3] The circuit court's order specified in the caption that it likewise pertained to both cases, *i.e.*, 09-CR-00248 and 09-CR-00314.

Jones now appeals,[4] contending that: (a) his constitutional rights were violated when he was convicted under KRS[5] 532.043 without fair notice; and (b) he was "sentenced to punishment that can only be applied in an *ex post facto* manner."[6]

II. ANALYSIS

A. SENTENCE OF CONDITIONAL DISCHARGE

Jones first alleges that his constitutional rights were violated in the circuit court case in which he entered a guilty plea when he was convicted under KRS 532.043 without fair notice. Specifically, he contends that his rights under the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution and Sections Seven and Eleven of the Kentucky Constitution were violated when he

[4] Jones also filed one notice of appeal regarding the circuit court's denial of his motion to amend his sentence in the two circuit court cases, *i.e.*, 09-CR-00248 and 09-CR-00314. Therefore, although his appellate brief only raises claims pertaining to the case in which he entered a guilty plea (case number 09-CR-00248) and we only address the claims as they pertain to that case, this appeal is from the circuit court's order denying the motion to amend his sentence in both of those circuit court cases.

[5] Kentucky Revised Statute.

[6] Jones's appeal was held in abeyance pending finality in *Martin v. Commonwealth*, No. 2012-CA-001172 (2014-SC-000243); *McDaniel v. Commonwealth*, No. 2012-CA-001299 (2014-SC-000241); and *DeShields v. Commonwealth*, No. 2012-CA-001513 (2014-SC-000242). Those cases became final on September 15, 2016. Therefore, Jones's appeal was returned to this Court's active docket and is ready for our review.

was sentenced to conditional discharge without notice.[7] Jones also asserts that the sentence of conditional discharge was not included in his plea agreement, and that under *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), it was required to be charged in the indictment.

The Commonwealth alleges that we should not review Jones's claims because they are constitutional claims and he was required to notify the Attorney General of his claims before the judgment was entered, which he failed to do. It is true that Jones did not notify the Attorney General of his constitutional claim that the conditional discharge statute (KRS 532.043) was applied to his case without notice. Jones alleges that the conditional discharge statute should have been charged in the indictment in order to give him proper notice. Pursuant to KRS 418.075(1), "[i]n any proceeding which involves the validity of a statute, the Attorney General of the state shall, before judgment is entered, be served with a

[7] Although Jones was sentenced to conditional discharge under the version of KRS 532.043 in effect at the time of his sentencing, the statute was subsequently changed by the General Assembly in response to the Kentucky Supreme Court's holding in *Jones v. Commonwealth*, 319 S.W.3d 295 (Ky. 2010). In *Jones*, the Supreme Court held that under the Kentucky Constitution's separation of powers provisions, although the General Assembly can "create a form of conditional release with terms and supervision by the executive branch[,] . . . the statutory scheme runs afoul of the separation of powers doctrine when *revocation* is the responsibility of the judiciary." *McDaniel*, 495 S.W.3d at 120 (internal quotation marks and citation omitted). Therefore, in response to *Jones*, the General Assembly "changed the name from 'conditional discharge' to 'postincarceration supervision,' and amended subsection 5 of KRS 532.043 to provide for Parole Board, rather than judicial, oversight of revocations." *McDaniel*, 495 S.W.3d at 120. This change to the statute was procedural in nature, so it can be applied retroactively to Jones's sentence in the present case. *See Melcher v. Commonwealth*, 471 S.W.3d 699, 701-02 (Ky. App. 2015) (citation omitted).

copy of the petition, and shall be entitled to be heard. . . ." The Kentucky Supreme Court has held that "strict compliance with the notification provisions of KRS 418.075 is mandatory[.]" *Benet v. Commonwealth*, 253 S.W.3d 528, 532 (Ky. 2008). The Supreme Court has even held that the Attorney General must be notified when a claimant is raising an "as applied" constitutional challenge to a statute. *Id*. at 532-33. Because Jones failed to comply with the notification requirement, his claims challenging the constitutionality of the statute wherein he alleges that he should have been put on notice that it would be applied to him are unpreserved for our review. *See Benet*, 253 S.W.3d at 532.

Alternatively, even if these claims were preserved for our review, they lack merit. Jones asserts that he was sentenced to conditional discharge under KRS 532.043 without notice. At the time he was sentenced, KRS 532.043(1) provided:

> In addition to the penalties authorized by law, any person convicted of, pleading guilty to, or entering an *Alford*[8] plea to a felony offense under KRS Chapter 510 . . . shall be subject to a period of conditional discharge following release from:
>
> > (a) Incarceration upon expiration of sentence; or

[8] A defendant entering a plea of guilty under *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970) refuses to admit guilt but acknowledges that the Commonwealth can present sufficient evidence to support a conviction.

(b) Completion of parole.

At the time he was sentenced in October 2010, KRS 532.043(2) required the period of conditional discharge to be five years.[9] Contrary to Jones's allegation that he was sentenced to conditional discharge without notice, a review of the recorded video of his plea colloquy shows that the circuit court specifically asked him if he understood that he would have to serve five years of conditional discharge pertaining to this case, and Jones responded in the affirmative. Therefore, this claim lacks merit.

As mentioned previously, Jones also contends that his sentence of conditional discharge was not included in his plea agreement, and that under *Apprendi*, 530 U.S. at 466, 120 S.Ct. at 2348, it was required to be charged in the indictment. In *Apprendi*, the United States Supreme Court held as follows:

> Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. With that exception, . . . [i]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt.

[9] A prior version of the statute required only three years of conditional discharge.

Apprendi, 530 U.S. at 490, 120 S.Ct. at 2362-63 (internal quotation marks and citations omitted).

In *McDaniel v. Commonwealth*, 495 S.W.3d 115 (Ky. 2016), the appellants made a similar *Apprendi* claim in their original motions filed in the circuit court. In *McDaniel*, the appellants

> challenged the conditional discharge requirement on a number of grounds . . ., [including] as a sentence "enhancement" imposed on the basis of judicial fact-finding in violation of *Apprendi* . . ., which generally requires the jury to find any fact that will allow an "enhanced" or "aggravated" sentence[.]

McDaniel, 495 S.W.3d at 118-19. The Kentucky Supreme Court stated, however, that the *McDaniel* appellants' claims changed on appeal, and that the *Apprendi* claim was not raised on appeal. *See McDaniel*, 495 S.W.3d at 122. Regardless, concerning the *Apprendi* claim the appellants had raised in the circuit court, the Supreme Court noted in *McDaniel*: "the defendants waived jury fact-finding by pleading guilty, and each of them, by pleading guilty to a felony offense within KRS Chapter 510, admitted the fact (no judicial fact-finding required) that subjected them to the conditional discharge 'enhancement.'" *McDaniel*, 495 S.W.3d at 119 n.1.

The same reasoning applies to Jones's *Apprendi* claim—because he entered a guilty plea to four felony offenses within KRS Chapter 510, he admitted the fact that required him to be subjected to the conditional discharge

"enhancement" under KRS 532.043 and, by admitting that fact, there was no judicial fact-finding necessary. Consequently, Jones's *Apprendi* claim lacks merit, and he was required under KRS 532.043 to be sentenced to a period of conditional discharge.

B. *EX POST FACTO* CLAIM

Jones also contends that the conditional discharge part of his sentence is unconstitutional because the conditional discharge "can only be applied in an *ex post facto* manner." However, Jones did not notify the Attorney General of this constitutional challenge to the validity of the conditional discharge statute (KRS 532.043) before the circuit court denied his motion to amend his sentence, as he was required to do under KRS 418.075(1). *See also Benet*, 253 S.W.3d at 532. Because Jones failed to comply with the notification requirement, his *ex post facto* challenge to the statute is unpreserved for our review. *See Benet*, 253 S.W.3d at 532-33.

Accordingly, the order of the Madison Circuit Court is affirmed.

CLAYTON, JUDGE, CONCURS IN RESULT ONLY.

THOMPSON, JUDGE, CONCURS AND FILES SEPARATE OPINION.

THOMPSON, JUDGE, CONCURRING: Respectfully, I concur with the majority, however, I take issue with the majority's ruling that the failure to

notify the Attorney General precludes an argument that Jones's sentence is unconstitutional.

Kentucky Revised Statutes (KRS) 418.075(1), "appears in an awkward place in the civil rules and in a statute concerning declaratory judgments[.]" *Brashars v. Commonwealth*, 25 S.W.3d 58, 65 (Ky. 2000). The application of the notification rule in criminal cases is particularly troublesome not only because of its obscure location but also because many of the incarcerated defendants raising constitutional challenges to statutes are proceeding *pro se* and unaware of the rule. Nevertheless, it has been applied in civil and criminal cases based on a "strong public policy in favor of notification to the Attorney General whenever the constitutionality of a statute is placed in issue[.]" *Id*. (quoting *Maney v. Mary Chiles Hospital*, 785 S.W.2d 480, 481 (Ky. 1990)). Although this Court questioned the soundness of that reasoning in *Prickett v. Commonwealth*, 427 S.W.3d 812, 814 (Ky.App. 2013), in cases where the Attorney General is a party on appeal, we recognized our lack of authority to deviate from the rule pronounced by our Supreme Court in *Benet v. Commonwealth*, 253 S.W.3d 528, 532-33 (Ky. 2008), that strict compliance with the statute is mandatory. I make that same recognition today.

Regardless of whether I agree with the wisdom of the rule in *Benet* in criminal cases, it was never intended to apply to cases where the constitutional

validity of the statute itself is not questioned. KRS 418.075(1) only comes into play when the proceeding "involves the validity of a statute[.]" It does not apply to all constitutional challenges.

Jones contends that he was not given notice that KRS 532.043 would be applied to his case. This is not facial or an "as applied" constitutional challenge to the statute but a constitutional challenge to the *notice* he was given that the statute would be applied. However, the majority ultimately decides the issue on its merits and I agree with its decision. Therefore, I concur in result only regarding this issue.

The majority does not address the merits of Jones's *ex post facto* argument because of his failure to notify the Attorney General. I reluctantly agree that *Benet* demands that result. However, I point out that there is a conflict between this Court's inherent power to set aside an illegal sentence and affirming an alleged unconstitutional sentence based on the failure to comply with KRS 418.075(1).

Our Supreme Court has instructed that even unpreserved sentencing issues may be reviewed by an appellate court because of its "inherent jurisdiction to correct an illegal sentence." *Jones v. Commonwealth*, 382 S.W.3d 22, 27 (Ky. 2011). As the Court phrased the rule, it is a "non-controversial precept that an

appellate court is not bound to affirm an illegal sentence just because the issue of the illegality was not presented to the trial court." *Id.*

Jones's *ex post facto* argument is a sentencing issue. If his sentence is unconstitutional, the failure to notify the Attorney General does not make it valid. For the reasons stated, I urge our Supreme Court to revisit *Benet* as it applies to sentencing issues.

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