

RENDERED: SEPTEMBER 6, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2018-CA-000436-MR

CHRISTOPHER BENNETT
AND JOY LAW OFFICE

APPELLANTS

v.

APPEAL FROM BOYD CIRCUIT COURT
HONORABLE JOHN F. VINCENT, JUDGE
ACTION NO. 15-CR-00341

BOYD COUNTY SHERIFF'S
DEPARTMENT AND THE
COMMONWEALTH OF KENTUCKY

APPELLEES

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: CLAYTON, CHIEF JUDGE; SPALDING AND K. THOMPSON,
JUDGES.

CLAYTON, CHIEF JUDGE: Christopher Bennett and Joy Law Office

(“Bennett”) appeals from Boyd Circuit Court order setting aside a nunc pro tunc
forfeiture order pursuant to Kentucky Rules of Civil Procedure (CR) 60.02.

Bennett argues that the trial court was without jurisdiction to set aside the forfeiture order. We agree, and reverse and remand for reinstatement of the original order.

On December 3, 2015, Bennett was charged with two counts of first-degree trafficking in a controlled substance. The indictment alleged that Bennett had transported oxycodone pills from Detroit, Michigan to Ashland, Kentucky with the intent to have his co-defendant Danny Clark sell them. On two occasions, confidential informants working for the Boyd County Sheriff's Department purchased ten oxycodone pills from Clark at Clark's residence. According to the confidential informants and a videotape of the second purchase, Bennett was present in the house on both occasions. The deputies obtained a search warrant for Clark's residence. During the course of their search they found \$13,763 in cash in a rental vehicle driven by Bennett.

Bennett entered into a plea agreement with the Commonwealth pursuant to which he pled guilty to one of the trafficking charges, received a sentence of five years and was placed on supervised probation for five years. The other count of the indictment was dismissed. The plea agreement provided that Bennett was to "forfeit all items seized, including portion of the cash and contraband."

The trial court's final judgment, entered on October 13, 2017, specified "[t]he Defendant shall forfeit all items seized, including cash and contraband." On the same day, the trial court entered a forfeiture order pursuant to Kentucky Revised Statutes (KRS) 218A.420, directing \$3,763 to be forfeited to the Boyd County Sheriff's Department, with fifteen percent of that amount, \$564.45, to be made payable to the Prosecutors' Advisory Counsel for the 32nd Judicial Circuit. These amounts were handwritten on the order, with the original typed amounts crossed out. Another, separate order directed the Boyd County Sheriff's Department to release \$10,000 to Bennett's attorney.

On January 23, 2018, the trial court entered a nunc pro tunc forfeiture order replicating the original order directing \$3,763 to the Boyd County Sheriff's Department and \$564.45 to the Prosecutor's Advisory Counsel for the 32nd Judicial Circuit, but with the numerals typed. No action was taken relating to the order releasing \$10,000 to Bennett's attorney.

On January 29, 2018, the Commonwealth filed a motion to set aside the nunc pro tunc forfeiture order, requesting the entire amount of \$13,763 to be released to the Boyd County Sheriff's Department and the Prosecutors' Advisory Counsel. The Commonwealth argued that KRS 218A.420 required the entire forfeited amount to be divided between the agency which seized the property (eighty-five percent) and the Prosecutors' Advisory Council (fifteen percent) and

did not permit any forfeited funds to be used for attorney fees. Consequently, the Commonwealth argued, the order requiring the sheriff to release \$10,000 to Bennett's attorney had to be declared null and void. Bennett responded by arguing the trial court lacked jurisdiction because the orders at issue had long ago become final.

After holding a hearing and permitting the parties to file briefs, the trial court entered an order treating the Commonwealth's motion as having been made pursuant to Kentucky Rules of Civil Procedure (CR) 60.02. It held that the forfeiture order was void under KRS 218A.420 and KRS 218A.450, which require forfeiture of the entire amount to the parties specified in the statute and further held that the circumstances constituted a reason of an extraordinary nature justifying CR 60.02 relief. This appeal by Bennett followed.

As a preliminary matter, the Commonwealth seeks to strike Bennett's brief for various defects including his failure to designate the video record or to provide a proper statement of preservation. These alleged defects are not serious enough to prevent a review of the arguments raised by Bennett and we decline to strike the brief.

Bennett argues that the trial court was without jurisdiction to set aside the order of October 13, 2017. A trial court loses jurisdiction over a defendant's case ten days after the entry of final judgment. *See Silverburg v. Commonwealth,*

587 S.W.2d 241, 244 (Ky.1979) (citing CR 59.05). The Commonwealth did not file a timely motion to alter, amend or vacate nor did it pursue a direct appeal.

“CR 60.02 is unavailable to correct judicial errors and is unavailable to correct an error that due diligence would have permitted to have been raised on direct appeal.” *Winstead v. Commonwealth*, 327 S.W.3d 479, 489 (Ky. 2010).

There is no indication in this case that the Commonwealth could not, in the exercise of due diligence, have challenged the improper distribution of the forfeiture funds by means of a direct appeal. “[I]f the court misapplied the statute it was an error to be questioned on timely appeal. Judicial error must be corrected seasonably.” *Dix v. Dix*, 310 Ky. 818, 222 S.W.2d 839 (1949). The circumstances of this case are simply not of the “extraordinary nature” justifying relief under CR 60.02(f).

The trial court also relied on CR 60.02(e) which permits the court to grant relief from a judgment which is void. The Commonwealth contends that the court’s order setting aside the nunc pro tunc order was necessary to comply with the law because “[a] void judgment is a legal nullity, and a court has no discretion in determining whether it should be set aside.” *Foremost Insurance Company v. Whitaker*, 892 S.W.2d 607, 610 (Ky. App. 1995) (internal citations omitted).

The Commonwealth contends that the original order was void because the court entered it outside the powers granted to it by law. Specifically, KRS

218A.420 and KRS 218A.450(1) contain mandatory language directing the division of forfeited currency and providing that the Commonwealth has a lien on forfeited property that may not be defeated by any means whatsoever except by a subsequent purchaser without notice. The fact that the forfeiture order and the order directing the payment of \$10,000 to Bennett's counsel do not conform to the statutory directives does not, however, render them void, only voidable. "The generally accepted rule is that where the court has jurisdiction of parties and subject matter, the judgment, if erroneous, is voidable, not void." *Dix v. Dix*, 310 Ky. 818, 821-22, 222 S.W.2d 839, 842 (1949). There is no contention here that the trial court did not have jurisdiction of the parties and subject matter at the time it entered the final judgment and disputed orders.

For the foregoing reasons, the order setting aside the nunc pro tunc order is reversed and the matter is remanded for reinstatement of the original order.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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