IMPORTANT NOTICE

NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

RENDERED: MARCH 18, 2004
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

DATE 4-8-04 ELAGRAUM D.C.

2003-SC-0165-MR

PAUL WILLIAM LEWIS — APPELLANT

V.

APPEAL FROM ORIGINAL ACTION IN COURT OF APPEALS
2002-CA-2443
HARLAN CIRCUIT COURT NO. 89-CR-96

JAMES L. BOWLING, JR., JUDGE, HARLAN CIRCUIT COURT — APPELLEE

AND

COMMONWEALTH OF KENTUCKY (REAL PARTY IN INTEREST) — APPELLEE

AND

2003-SC-0238-MR

PAUL WILLIAM LEWIS — APPELLANT

V.

APPEAL FROM ORIGINAL ACTION IN COURT OF APPEALS
2003-CA-169
HARLAN CIRCUIT COURT NO. 89-CR-73

JAMES L. BOWLING, JR., SPECIAL JUDGE, HARLAN CIRCUIT COURT — APPELLEE

AND

COMMONWEALTH OF KENTUCKY (REAL PARTY IN INTEREST) — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING 2003-SC-0238-MR
AND
AFFIRMING IN PART AND REVERSING AND REMANDING IN PART
2003-SC-0165-MR

I. TRANSCRIPTS.

In 2003-SC-0238-MR, Appellant, Paul William Lewis, appeals from the Court of Appeals' denial of his petition for a writ of mandamus requiring Appellee, Judge Bowling, special judge of the Harlan Circuit Court, to furnish him with transcripts of a 1989 trial that resulted in his conviction of robbery in the first degree and sentence of seventeen years in prison. Appellant filed the motion for transcripts on December 23, 2002. The special judge had not yet ruled on the motion when the petition for a writ of mandamus was filed on January 27, 2003. Although the Court of Appeals gave no reason for denying the petition, we assume it was because the judge had not ruled on the motion and insufficient time had expired to conclude that he was neglecting it or refusing to act on it. Cf. Shelton v. Simpson, Ky., 441 S.W.2d 421, 423 (1969) ("Mandamus is a proper remedy to compel an inferior court to adjudicate on a subject within its jurisdiction, where it neglects or refuses to do so, but will not lie to revise or correct the decision or control discretion.") (emphasis added). We agree with this reasoning and affirm the Court of Appeals.

II. SPEEDY TRIAL.

In 2003-SC-0165-MR, Appellant appeals from the Court of Appeals' denial of his petition for a writ to prohibit his trial on charges of attempted escape, possession of dangerous contraband, and being a persistent felony offender in the first degree (PFO

1st). He was indicted for these offenses in November 1989 and filed a motion for a speedy trial on these charges on July 27, 1990. He filed a motion to dismiss "for failure to prosecute" on November 25, 1991, which has not yet been heard. The reason no hearing was held on the motion is that Appellant was mistakenly released from custody by the Department of Corrections on February 1, 1992, and remained free without bond until July 28, 2002. On August 21, 2002, he renewed his motion for a speedy trial on both statutory, KRS 500.110, and constitutional grounds. The petition for a writ was filed on November 27, 2002. Again, the Court of Appeals did not state a reason for denying the petition. According to the Commonwealth, the motion to dismiss on speedy trial grounds was scheduled to be heard on December 12, 2002. However, according to Appellant, the case was scheduled for trial on that date. We cannot discern from the record which assertion is correct. Regardless, the Court of Appeals should have issued a writ requiring the special judge to rule on the motion to dismiss before allowing the case to be tried. Cf. Schroering v. McKinney, Ky., 906 S.W.2d 349 (1995) (mandamus may compel a lower court to act but not to direct what decision should be reached); Spivey v. Commonwealth, Ky., 602 S.W.2d 158, 159 (1980) (circuit court does not have jurisdiction to try defendant where speedy trial denied). Because it does not appear that a detainer was ever issued on the November 1989 indictment, the outcome of the motion to dismiss for violation of Appellant's right to a speedy trial will depend upon proper application of the factors set forth in Barker v. Wingo, 407 U.S. 514, 530, 92 S.Ct. 2182, 2192, 33 L.Ed.2d 101 (1972).

III. WAIVER OF SENTENCE.

Appellant also appeals in 2003-SC-0165-MR from the Court of Appeals' denial of his petition for a writ prohibiting the special judge from enforcing the seventeen-year

sentence imposed for the 1989 robbery conviction. However, that conviction was affirmed by the Court of Appeals on February 7, 1992, and became final thirty-one days thereafter. CR 76.30(2)(a). Again, the Court of Appeals did not state a reason for denying the petition; but we assume it was because the special judge lacks jurisdiction to alter or terminate Appellant's sentence. Ringo v. Pound, Ky., 436 S.W.2d 264 (1969). If Appellant believes he is being unlawfully incarcerated, his remedy is a petition for a writ directed to the person by whom he claims to be unlawfully detained, i.e., the prison warden. See, e.g., Kassulke v. Briscoe-Wade, Ky., 105 S.W.3d 403 (2003). Because Appellant undoubtedly will refile his petition against the proper party, we will briefly review the facts and law pertinent to this issue.

Appellant was arrested for robbery on August 8, 1989. At that time, he was on parole of a twenty-six-year sentence for seven previous convictions in Jefferson and Hardin counties which occurred in 1975 and 1980, respectively. On August 24, 1989, the Department of Corrections revoked Appellant's parole and ordered him to serve the remainder of the twenty-six-year sentence. He remained in the Harlan County Detention Center awaiting trial on the 1989 robbery charge. While there, he was charged with attempted escape, possession of dangerous contraband, and PFO 1st, the offenses that are the subject of his speedy trial claim, discussed supra.

Following his October 11, 1989, robbery conviction, Appellant remained incarcerated in the Harlan County Detention Center awaiting trial on the escape, contraband, and PFO charges. Trial was ultimately scheduled for August 16, 1990. On July 27, 1990, Appellant moved for a competency evaluation, claiming he was insane when he committed those offenses. According to Appellant, the trial court ordered a competency evaluation and continued the trial date indefinitely. Of course, a new trial

date could not be set until the competency evaluation was completed. Appellant claims the competency evaluation was never scheduled.

In late 1990, Appellant was transferred from the Harlan County Detention Center to the Luther Luckett Correctional Complex to serve the remainder of the twenty-six-year sentence imposed for the 1975 and 1980 convictions. However, the Harlan Circuit Court failed to forward to Luckett a certified copy of the judgment imposing the seventeen-year sentence for the 1989 robbery conviction.[1] Significantly (with respect to his statutory speedy trial claim under KRS 500.110), Appellant also asserts that no detainers were lodged against him with respect to the 1989 indictment for attempted escape and contraband. He is no doubt correct considering the following chain of events.

On February 1, 1992, Appellant completed service of his twenty-six-year sentence for the 1975 and 1980 convictions and was released. Of course, he had not completed his seventeen-year sentence for the 1989 robbery conviction. In fact, he probably had not served any of that sentence, as it could not be served concurrently with the 1975 and 1980 sentences. KRS 533.060(2). Additionally, Luckett officials were unaware of the robbery conviction.[2] After his release, Appellant moved to Huntsville, Tennessee, where on March 16, 1992, he was arrested on a fugitive warrant pertaining to the pending 1989 indictment for escape, contraband, and PFO 1st. Obviously, Kentucky officials were aware of their mistake within a month of Appellant's release. Although the Tennessee court granted two continuances, Kentucky authorities

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[1] Under KRS 431.215(1), two certified copies of the judgment imposing sentencing must be furnished to the sheriff for delivery to the penitentiary or institute of confinement.
[2] The penitentiary records attached to Appellant's brief do not show the 1989 conviction.

never appeared to establish probable cause for extradition. As a result, the Tennessee court dismissed the fugitive charges.

On July 28, 2002, more than ten years later, Appellant was again arrested in Huntsville, Tennessee, on a fugitive warrant. He was extradited to Kentucky on August 1, 2002, and has been imprisoned in the Green River Correctional Complex since that time. It is unclear whether he is imprisoned on the robbery conviction, or the pending indictment for escape, contraband, and PFO 1st. Regardless, the Commonwealth intends to enforce the entire seventeen-year sentence imposed for the 1989 robbery conviction.

While the common law required a person to serve his/her sentence in its entirety, regardless of whether the sentence was served continuously or in installments, the current trend has moved toward examining the totality of the circumstances surrounding the delay in executing the sentence. United States v. Martinez, 837 F.2d 861, 864 (9th Cir. 1988) (citations omitted). Absent extraordinary circumstances, a defendant can be required to serve the remainder of the sentence. "There is no doubt of the power of the government to recommit a prisoner who is released or discharged by mistake, where his sentence would not have expired if he had remained in confinement." White v. Pearlman, 42 F.2d 788, 789 (10th Cir. 1930) (citations omitted) (emphasis added). The two circumstances in which the defendant will not be required to serve any portion of the remainder of the sentence are waiver and estoppel. Green v. Christiansen, 732 F.2d 1397, 1399 (9th Cir. 1984).

A. Estoppel.

Estoppel requires a showing of four elements:

(1) The party to be estopped must know the facts;

(2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended;
(3) the latter must be ignorant of the facts; and
(4) he must rely on the former's conduct to his injury.

Johnson v. Williford, 682 F.2d 868, 872 (9th Cir. 1982) (citations omitted). In Johnson, the defendant was released on parole even though he was convicted under a statute that the government knew did not provide for it; the government was estopped from revoking parole as it released him after reviewing his parole eligibility eight times. Id. at 872-73. The estoppel issue cannot be decided without an evidentiary hearing.

B. Waiver.

If the government's behavior in reincarcerating the defendant after erroneously releasing him/her rises to the level of a due process violation, the government is deemed to have waived its right to enforce the remainder of the sentence. This occurs when "its agents' actions are so affirmatively improper or grossly negligent that it would be unequivocally inconsistent with 'fundamental principles of liberty and justice' to require a legal sentence to be served in its aftermath." Green, supra, at 1399 (citations omitted). Courts have found waiver when the government allowed an extended period of time to expire before attempting to reincarcerate the defendant. Such was the case in Derrer v. Anthony, 463 S.E.2d 690 (Ga. 1995), where the defendant was mistakenly released on parole after serving only twelve days of his sentence, never violated the terms of his parole, and the government did not seek to reacquire custody of him for seven years. Id. at 693-94. Waiver was also found in Lanier v. Williams, 361 F.Supp. 944 (E.D.N.C. 1973), where the defendant was erroneously released without serving his full sentence and the government waited five years before seeking to enforce the remainder of his sentence. Id. at 947-48. Due process is also denied when the government repeatedly represents to the defendant that it will not seek enforcement of

the sentence, but later does so. United States v. Merritt, 478 F.Supp. 804, 807-09 (D.D.C. 1979) (detainer cannot be enforced when government informed defendant several times that it would not seek its imposition). In Appellant's case, more than ten years expired between his erroneous release and the Commonwealth's attempt to reincarcerate him.

The issue then becomes whether the government's behavior amounts to simple negligence or gross negligence. If only simple negligence, a complete waiver of the sentence is inappropriate. Under the "installment" theory, the prisoner is entitled to credit against his sentence for the time he was erroneously at liberty. Martinez, supra, at 865 (citations omitted). This theory is based on the notion that, "A prisoner has some rights. A sentence . . . means a continuous sentence, unless interrupted by escape, violation of parole, or some fault of the prisoner, and he cannot be required to serve it in installments." White, supra, at 789. The key test in the "installment" theory is that the defendant must have been released due to government negligence and not due to any fault of the defendant. Id. The "installment" theory also requires that the defendant must have served at least part of the sentence, even if only one day. Martinez, supra, at 865. The majority of states that have considered this issue have adopted the "installment" theory and granted credit to defendants who the government erroneously released. See Giles v. State, 462 So.2d 1063, 1064 (Ala. Crim. App. 1985); McKellar v. Ariz. State Dep't of Corr., 566 P.2d 1337, 1340 (Ariz. 1977); Carson v. State, 489 So.2d 1236, 1238 (Fla. Dist. Ct. App. 1986); People v. Cavelli, 409 N.E.2d 924, 925 (N.Y. 1980); Ex parte Esquivel, 531 S.W.2d 339, 342 (Tex. Crim. App. 1976), overruled on other grounds by Ex parte Hale, 117 S.W.3d 866, 872 n.26 (Tex. Crim. App. 2003) (a person who is free on conditional release and then reincarcerated for violating the

conditions of that release is not being forced to serve sentence in installments); In re Roach, 74 P.3d 134, 136-39 (Wash. 2003).

In Commonwealth v. Blair, 699 A.2d 738 (Pa. Super. Ct. 1997), the Pennsylvania Superior Court refused to follow the "installment" theory and denied the defendant good time credit for the period of time when he was improperly free on bond. (Appellant was not free on bond but had been unconditionally released.)

> We will not allow the court system's inadvertent error to cancel any part of Blair's punishment for the crimes for which he was justly convicted and sentenced. Society has an interest in knowing that its criminals are serving the punishment to which they have been sentenced, regardless of an unintended delay or negligent error attributable to the government. The fact remains that, regardless of the delay, Blair has not served the time he was so ordered to serve.

Id. at 743.[3]

The Kentucky Court of Appeals commented favorably on Blair when deciding that a defendant who experienced a seven-year delay between the time his sentence was imposed and the time the government sought to incarcerate him was not entitled to credit for those seven years. Richardson v. Commonwealth, Ky. App., 56 S.W.3d 460, 463 (2001). However, unlike in Blair, the Court of Appeals in Richardson did not indicate an unwillingness to adopt the "installment" theory at all; rather, it indicated that it was not unjust in that particular case to require the defendant to serve his sentence. Id. The Court of Appeals may have reached this conclusion because in Richardson, as in Blair, the defendant had not been exposed to the rehabilitative aspects of prison then mistakenly released, but merely experienced a delay between the time of sentencing and incarceration. Lending support to this interpretation is the court's statement that

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[3] The Tennessee Court of Appeals also declined to grant credit for time at liberty based on a Tennessee sentencing statute that only allows good time credit under a specific list of circumstances. State v. Chapman, 977 S.W.2d 122, 127 (Tenn. Crim. App. 1997).

credit for time served is generally only awarded when the defendant has served part of the sentence before being erroneously released. Id. at 462 (citing Martinez, supra, at 865). It is unclear from the record whether Appellant served any part of his seventeen-year sentence before his release but, unlike in Richardson, this was a mistaken release from incarceration as opposed to a mistaken failure to incarcerate.

The act of negligence in this case was the failure of Harlan County officials to mail a certified copy of the 1989 judgment to officials at Luckett. The government's loss of a judgment or failure to mail it to the correctional facility has been deemed mere negligence. Jackson v. Stalder, 772 So.2d 380, 384 (La. Ct. App. 2000). However, an additional factor present here is that although the actual release may constitute simple negligence, the failure to reacquire custody until ten years after learning of the mistake could be found to have been gross negligence.

In determining whether credit should be granted or denied, some courts consider the defendant's behavior during the period of freedom. See Crater v. Furlong, 884 P.2d 1127, 1129 (Colo. 1994) (en banc) (citing Brown v. Brittain, 773 P.2d 570, 570 (Colo. 1989)); Roach, supra, at 138. See also Martinez, supra, at 865 (defendant should be given credit as he had not attempted to flee and had lived at same address since release); In re Messerschmidt, 163 Cal. Rptr. 580, 581 (Cal. Ct. App. 1980) (declining to adopt a "blanket rule" granting credit for time spent at liberty and instead considering the equity of granting credit in each circumstance based on prisoner's behavior while free); State v. Roberts, 568 So.2d 1017, 1019 (La. 1990) (extending the concept to consider defendant's conduct while free, as well as other factors such as the nature of the offense, the sentence imposed, and the lapse of time without imposition of the sentence). But see Green, supra, in which the court found that the defendant's behavior

while free was irrelevant to the decision of whether he should receive good time credit. Id. at 1400. Green distinguished between defendants who were released on parole and those who were unconditionally released from custody. Those who are on parole know they are subject to behavioral limitations and conditions but those who are released unconditionally have no such notice.

> Under those circumstances, neither regulations nor simple fairness justify the imposition of a penalty to which Green never knew he was subject. He remains, of course, subject to any independent criminal penalties that may attach to his behavior while at liberty, and that is enough.

Id. Here, Appellant asserts that he was on good behavior during his ten years of freedom.

While we have set forth factors relevant to this inquiry for the purpose of guidance, we are unable to address the issue head on because (1) Appellant brought his petition for a writ against the wrong party and in the wrong court, and (2) there has been no evidentiary hearing at which the facts necessary for proper application of those factors could be developed. If Appellant brings this petition against the Department of Corrections, he will do so in a circuit court, an appropriate forum for an evidentiary hearing. Our only recourse under the present state of the record is to affirm the dismissal of this aspect of the petition.

Accordingly, in 2003-SC-0238-MR, we affirm the dismissal of the petition for a writ of mandamus; and in 2003-SC-0165-MR, we affirm the dismissal of the portion of the petition that seeks to prohibit the imposition of the seventeen-year sentence for Appellant's 1989 robbery conviction. However, we reverse the dismissal of the portion of his petition that pertains to his claim of a speedy trial violation and remand this case to the Court of Appeals with direction to issue a writ requiring the special judge of the

Harlan Circuit Court to rule on the speedy trial claim before proceeding to trial on the 1989 indictment for attempted escape, possession of contraband, and PFO 1st.

All concur.

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