

No. 04-93826-A

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS
Plaintiff-Appellee

vs.

JACK HAVERTY
Defendant-Appellant

Brief of Appellee

Appeal from the District Court of Anderson County,
Honorable James J. Smith, Judge,
District Court Case No. 03-CR-56

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Statement of the Issues

Pursuant to Rule 6.03(b), the state does not concur with the defendant's statement of the issues. The defendant states that "the district court erred by classifying manufacture of methamphetamine as a severity level 1 drug offense." To support such an issue, the defendant proceeds with *McAdam* analysis.

However, the *McAdam* holding does not state that the crime must be *reclassified* at a lower severity level, only that the *lesser penalty provision* must be applied. *State v. McAdam*, 277 Kan. 136, Syl. ¶ 3, 83 P.3d 161 (2004).

Issue I: The defendant's appeal was filed more than 10 days following sentencing and is therefore out of time and the Court of Appeals has no jurisdiction.

Issue II: The defendant's appeal was not pending on January 30, 2004 and the defendant is therefore not entitled to application of the decision in *McAdam*.

Issue III: The defendant is not entitled to a writ of habeas corpus under K.S.A. 60-1507.

Statement of the Facts

On May 5, 2003, the defendant was charged with (1) Unlawfully manufacturing methamphetamine as a drug severity level 1 felony in violation of K.S.A. 65-4159(a), (2) Possession of anhydrous ammonia in unapproved container as a drug severity level 4 felony, (3) Felony possession of marijuana as a drug severity level 4 felony, (4) Felony possession of drug paraphernalia as a drug severity level 4 felony, (5) Possession of methamphetamine as a drug severity level 4 felony, (6) Felony possession of drug paraphernalia as a drug severity level 4 felony. (R. 1 at 5.)

On August 18, 2003 the defendant entered a plea of no contest to count one of the complaint. (R. 3 at 3.) In return for the defendant's plea, the state dismissed the balance of the counts in the complaint. (*Id.*) The state also agreed to recommend a downward

durational departure to 90 months. (R. 3 at 8.) Also, should the court not follow the recommended downward departure, the state agreed not to oppose a motion by the defendant to withdraw his plea. (R. 3 at 8-9.) The defendant was informed of his right to appeal the conviction at a trial. (R. 3 at 5.) The defendant was also advised that he had no right to appeal a conviction based upon a plea of no contest. (R. 3 at 7.)

On September 29, 2003, the defendant was sentenced. (R. 4 at 1.) The defendant's motion for downward departure to 90 months was granted by the court. (R. 4 at 7-8.) The state recommended the downward departure. (R. 4 at 5.)

On October 6, 2003, the Kansas Sentencing Guidelines Journal Entry of Judgment was filed with the Court. (R. 1 at 15-17.)

On February 26, 2004, the defendant filed a Motion to Correct Sentence with the court. (R. 1 at 18-24.)

On April 5, 2004, the district court denied the defendant's motion to correct his sentence. (R. 1 at 30.)

On April 12, 2004, the defendant filed a Notice of Appeal. (R. 1 at 29.)

Arguments and Authorities

Issue I: The defendant's appeal was filed more than 10 days following sentencing and is therefore out of time and the Court of Appeals has no jurisdiction.

Standard of Appellate Review

"The interpretation of statutes is a question of law, and, thus, this court's scope of review is unlimited." *State v. Bost*, 21 Kan.App.2d 560, 562, 903 P.2d 160 (1995).

Discussion

The defendant claims that he filed a “timely notice of appeal.” (Def. Brief at 1.) Unfortunately, this statement is not accurate. The defendant did not file a timely notice of appeal.

“The right to appeal is strictly statutory.” *State v. Singleton*, ___ Kan.App. ___, 104 P.3d 424 (2005). “The filing of a timely notice of appeal is jurisdictional.” *State v. McDaniel*, 249 Kan. 341, 819 P.2d 1165 (1991); *State v. Moses*, 227 Kan. 400, 404, 607 P.2d 477 (1980). “This court has only such appellate jurisdiction as is provided by law. Jurisdiction to entertain an appeal is conferred by statute pursuant to article 3, § 3 of the Constitution of Kansas, and when the record discloses a lack of jurisdiction it is the duty of this court to dismiss the appeal.” *State v. Ortiz*, 230 Kan. 733, Syl. ¶ 1, 640 P.2d 1255 (1982); KS CONST Art. 3, Sec. 3.

The judgment of conviction was made on September 29, 2003. The defendant’s notice of appeal was filed on April 12, 2004, 196 days following the pronouncement of sentence. 186 days more than allowed by law.

“A criminal defendant has 10 days from judgment, which is sentencing, to file a notice of appeal.” *State v. Barr*, ___ Kan.App. ___, 96 P.3d 695 (2004); K.S.A. 22-3608. “The time for a notice of appeal commences from the date the sentence is orally pronounced from the bench, not the date of the filing of the journal entry.” *State v. Bost*, 21 Kan.App.2d 560, Syl. ¶ 1, 903 P.2d 160 (1995). As the defendant’s notice of appeal was not filed prior to October 13, 2003, his appeal was not timely filed and the Court has no jurisdiction to consider the appeal. K.S.A. 60-206; K.S.A. 22-3606.

On February 26, 2004, the defendant filed a “Motion For Correction of Sentence

Pursuant to K.S.A. 22-3504.” (R. 1 at 18-24.) K.S.A. 22-3504 states that “the court may correct an illegal sentence at any time.” K.S.A. 22-3504(1). For K.S.A. 22-3504 to apply, the defendant’s sentence must have been “illegal.” It has already been settled “that a sentence for the violation of K.S.A. 65-4159(a), a severity level 1 felony, rather than K.S.A. 65-4161(a), a severity level 3 felony, is not an illegal sentence” *State v. McCain*, 278 Kan. 465, 101 P.3d 1204 (2004); see also: *State v. Barnes*, 278 Kan. 121, 123-24, 92 P.3d 578 (2004); and *State v. Singleton*, ____ Kan.App. ____, 104 P.3d 424 (2005). As the defendant’s sentence was not illegal, the defendant’s argument cannot be reviewed under the “at any time” provision of K.S.A. 22-3504.

“A defendant’s motion to modify a sentence after pronouncement will not extend the time within which to file a notice of appeal.” *State v. McBride*, 23 Kan.App.2d 302, Syl. ¶ 2, 930 P.2d 618 (1996). Because the defendant’s time for appeal cannot be extended and the sentence cannot be reviewed under K.S.A. 2-3504, this Court has no jurisdiction to entertain the appeal.

Issue II: The defendant’s appeal was not pending on January 30, 2004 and the defendant is therefore not entitled to application of the decision in McAdam.

Standard of Appellate Review

The interpretation of the doctrine of stare decisis to the issue of whether prior holdings of this Court and the Kansas Supreme Court apply to the defendant’s factual situation appears to be a question of law over which the Court would have unlimited review.

Discussion

If there is no appeal pending on January 30, 2004, the defendant is not entitled to

application of the *McAdam* decision. It is interesting to note that the defendant's sentencing was only four months prior to the date of the *McAdam* decision. Had the defendant filed a timely notice of appeal, the defendant's direct appeal would undoubtedly have been pending on January 30, 2004. But, the Court has established a "bright line" point of law which eliminates the defendant's argument and precludes the application of the *McAdam* decision to his case.

"It is recognized under the doctrine of stare decisis that, once a point of law has been established by a court, that point of law generally will be followed by the same court and all courts of lower rank in subsequent cases where the same legal issue is raised. Stare decisis operates to promote system-wide stability and continuity by ensuring the survival of decisions that have been previously approved." *State v. Marsh*, ___ Kan. ___, Syl. ¶ 22, 102 P.3d 445 (2004). It has been firmly established since January 30, 2004, that the ruling in *State v. McAdam* only applies to those cases which were on direct appeal at that time. *State v. Barnes*, 278 Kan. 121, 126-27, 92 P.3d 578 (2004); *State v. McAdam*, 277 Kan. 136, 83 P.3d 161 (2004); *State v. Welty*, 33 Kan.App.2d 122, Syl. ¶ 4, 98 P.3d 664 (2004); See also: *Wilson v. State*, 31 Kan.App.2d 728, 71 P.3d 1180, rev. denied 276 Kan. 974 (2003); *Jones v. State*, ___ Kan.App. ___, 105 P.3d 279 (2005); *State v. Brichat*, ___ Kan.App. ___, 104 P.3d 433 (2005); *Hunter v. State*, ___ Kan.App. ___, 105 P.3d 279 (2005); *State v. Fisher*, ___ Kan.App. ___, 105 P.3d 742 (2005).

"Our fidelity to the doctrine of stare decisis need not be absolute, but we should not abandon our prior decisions without a compelling reason to do so." *State v. Marsh*, ___ Kan. ___, 102 P.3d 445 (2004).

Because the defendant did not file an appeal prior to January 30, 2004, the case was not on direct appeal at that time and therefore this Court should follow the prior holdings on this issue and reject the defendant's appeal.

As in *Snyder v. State*, “the [defendant's] sentence was not illegal as he was validly charged ... and duly convicted ... upon entering a favorable plea agreement, resulting in the State's dismissal of several additional charges and the State's recommendation of a substantial downward durational departure sentence.” *Snyder v. State*, ___ Kan.App. ___, 2005 WL 496003 (2005).

Issue III: The defendant is not entitled to a writ of habeas corpus under K.S.A. 60-1507.

Standard of Appellate Review

When interpreting K.S.A. 60-1507, the “standard of review is unlimited.” *Lujan v. State*, 270 Kan. 163, 14 P.3d 424 (2000).

Discussion

Although “[m]islabeled pro se motions ... may be properly viewed as 60-1507 motions,” the defendant's motion does not meet the requirements for relief contained therein. *State v. Randall*, 257 Kan. 482, 894 P.2d 196 (1995). Under K.S.A. 60-1507, the defendant has the burden to “set forth a factual background, names of witnesses, or other sources of evidence demonstrating movant's entitlement to relief.” *State v. Holmes*, ___ Kan. ___, 102 P.3d 406 (2004). The defendant states that the basis for his motion is the illegality of his sentence. (R. 1 at 19.) In stating that his sentence was illegal, the factual basis for the defendant's motion is erroneous. *State v. Barnes*, 278 Kan. 121, 124, 92 P.3d 578 (2004).

Burden of Proof

“In a K.S.A. 60-1507 proceeding ... the plaintiff has the burden of establishing irregularity of his conviction and sentence.” *Gilkey v. State*, 31 Kan.App.2d 84, 87, 60 P.3d 347 (2003). Conclusory contentions without evidentiary basis are not sufficient for relief. *Burns v. State*, 215 Kan. 497, 500, 524 P.2d 737 (1974).

When Remedy May be Invoked

The defendant is not entitled to a remedy under K.S.A. 60-1507. *Maggard v. State*, 27 Kan.App.2d 1060, 11 P.3d 89 (2000). A proceeding under K.S.A. 60-1507 cannot be used as a substitute for a direct appeal absent a showing the trial error affected constitutional rights, and then only “provided there were *exceptional circumstances excusing the failure to appeal*.” Supreme Court Rule 183(c)(3) (emphasis added). *Crease v. State*, 252 Kan. 326, Syl. ¶ 3, 845 P.2d 27 (1993).

First of all, the failure of the court to reduce the defendant’s sentence based on the *McAdam* ruling does not affect the defendant’s constitutional rights. *State v. Barnes*, 278 Kan. 121, 92 P.3d 578 (2004); *State v. McAdam*, 277 Kan. 136, 83 P.3d 161 (2004). Because the defendant’s constitutional rights have not been affected, the defendant is not entitled to relief under K.S.A. 60-1507. K.S.A. 60-1507(c).

Additionally, other than the issue of the application of the *McAdam* ruling, there are no exceptional circumstance in this case which could have excused the defendant’s failure to file a timely appeal. And, since the *McAdam* ruling is not applied retroactively, it cannot serve as a basis for the defendant’s motion. “The holding of *State v. McAdam*, 277 Kan. 136, 83 P.3d 161 (2004), will not be given retroactive effect to cases whose direct criminal

proceedings were final prior to January 30, 2004.” *Snyder v. State*, ____ Kan.App. ____, Syl. ¶ 2, 2005 WL 496003 (2005).

Conclusion

The Court has no jurisdiction to entertain the defendant’s appeal because the appeal was filed out of time. K.S.A. 22-22-3504 cannot be used to allow review by this Court because the defendant’s sentence was not illegal. Should the Court determine that it has jurisdiction to consider the defendant’s appeal, the *McAdam* decision cannot be applied to the defendant’s case because the appeal was not pending on January 30, 2004. Finally, the defendant is not entitled to have his motion considered under K.S.A. 60-1507 because the sentence does not violate the defendant’s constitutional rights and, there are no exceptional circumstances which could excuse the defendant’s failure to appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the _____ day of _____, 200____, I mailed a five (5) copies of the above and foregoing Brief of Appellee, by placing the same in the U.S. Mail, postage prepaid to:

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