

Commonwealth of Kentucky
Court of Appeals

NO. 2010-CA-000098-MR

JASON RAY ISON

APPELLANT

v. APPEAL FROM LETCHER CIRCUIT COURT
HONORABLE SAMUEL WRIGHT, JUDGE
ACTION NO. 05-CR-00317

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: CLAYTON AND NICKELL, JUDGES; ISAAC,¹ SENIOR JUDGE.

ISAAC, SENIOR JUDGE: Jason Ray Ison appeals from a Letcher Circuit Court order which denied a motion to vacate his conviction for criminal mischief. He argues that the circuit court failed to follow the mandate given by this Court in its opinion resolving his direct appeal.

¹ Senior Judge Sheila R. Isaac sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

In 2005, Ison was the driver of a vehicle involved in a fatal traffic accident. His three passengers were killed and the driver of the vehicle which he struck was injured. A jury convicted Ison of reckless homicide (3 counts), first-degree assault, first-degree wanton endangerment (two counts), criminal mischief, having defective equipment on his car, and failing to have automotive insurance and proper registration. In his prior appeal, Ison argued that there was insufficient proof of the necessary mental states to sustain his convictions. In its opinion, this Court provided the following summary of his argument:

In essence, Ison argues that because there was insufficient proof of the necessary mental states for the offenses of **first-degree assault**, **first-degree wanton endangerment**, and **reckless homicide**, the trial court erred in overruling his motions for a directed verdict and judgment notwithstanding the verdict (n.o.v.) as to those charges.

Ison v. Commonwealth, 271 S.W.3d 533, 535 (Ky.App. 2008) (emphasis supplied).

The opinion held that there was insufficient evidence of elevated wanton behavior to support the charge of first-degree assault and first-degree wanton endangerment. It also held that there was insufficient evidence of recklessness to support Ison's convictions for reckless homicide.

The opinion concluded with the following directions:

For the foregoing reasons, the Letcher Circuit Court's judgment is reversed and remanded for dismissal of the charges of **first-degree assault**, **first-degree wanton endangerment** (two counts), and **reckless homicide** (three counts), and for any proceedings consistent therewith. The judgment is affirmed in all other respects.

Id. at 538 (emphasis supplied).

The opinion gave no specific directive regarding Ison's conviction for first-degree criminal mischief.

Ison did not file a petition for rehearing. The Court of Appeals opinion became final on January 14, 2009, when the Supreme Court declined discretionary review. The final Court of Appeals opinion was filed in the Letcher Circuit Court on January 22, 2009.

Ison was released and then indicted on new charges, which included being a second-degree persistent felony offender on the basis of his conviction for first-degree criminal mischief. On September 17, 2009, Ison filed a motion to vacate his criminal mischief conviction and to dismiss the PFO charges. Because the Court of Appeals had held that there was no evidence that Ison's conduct was reckless or wanton, Ison argued that it had by implication also reversed his conviction for criminal mischief. Kentucky Revised Statutes (KRS) 512.020 states in pertinent part that a person may be convicted of criminal mischief in the first degree when "he intentionally or wantonly defaces, destroys or damages any property causing pecuniary loss of \$1,000 or more." In his motion, Ison conceded that the Court of Appeals opinion had not specifically addressed the first-degree criminal mischief conviction, but argued that the language of the opinion which directed the trial court to conduct "any proceedings consistent therewith" included the dismissal or vacation of any conviction contrary to the logic of the Court of Appeals' decision.

The trial court denied his motion, holding that it was without jurisdiction to amend the judgment and that even if it had jurisdiction under Kentucky Rules of Civil Procedure (CR) 60.02, Ison's arguments could and should have been raised in the earlier appellate proceedings. This appeal followed.

Ison contends that the appellate panel intended all charges requiring a finding of wantonness or recklessness to be dismissed, not merely those specifically cited in the opinion.

It is fundamental that when an issue is finally determined by an appellate court, the trial court must comply with such determination. The court to which the case is remanded is without power to entertain objections or make modifications in the appellate court decision.

Williamson v. Commonwealth, 767 S.W.2d 323, 325 (Ky.1989) (citations omitted).

Ison argues that the trial court's interpretation of the Court of Appeals' opinion is erroneous and consequently its refusal to dismiss his conviction for criminal mischief was contrary to the appellate mandate. We disagree. The plain language of the opinion simply does not include criminal mischief in the detailed list of convictions which the trial court is directed to dismiss. Even if the Court had intended to include criminal mischief in the list of convictions to be dismissed but by some oversight neglected to add it, we are nonetheless bound by what has become the law of the case.

[I]f an appellate court has passed on a legal question and remanded the cause to the court below for further proceedings, the legal questions thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case. Thus, if, on a retrial

after remand, there was no change in the issues or evidence, on a new appeal the questions are limited to whether the trial court properly construed and applied the mandate.

Inman v. Inman, 648 S.W.2d 847, 849 (Ky.1982).

In this instance, the trial court properly construed and applied the mandate when it dismissed only those charges specified in the appellate court's directions. We agree with the trial court's conclusion that to do otherwise would be to engage in "speculation and guesses" as to what the Court of Appeals intended. The trial court was without jurisdiction to go beyond the mandate of the Court of Appeals, although we note that a "trial court, in interpreting an appellate court's decision, is not acting outside its jurisdiction even if its interpretation is erroneous." *Buckley v. Wilson*, 177 S.W.3d 778, 781 (Ky. 2005).

Furthermore, Ison was not without remedy or recourse in this matter.

For litigation to proceed in an orderly manner and finally settle the rights of the parties, it is necessary for parties to timely assert the rights they claim to a court with power to grant the relief sought. . . . Upon receipt of an appellate court opinion, a party must determine whether he objects to any part of it and if he does, petition for rehearing or modification or move for discretionary review.

Williamson, 767 S.W.2d at 325-326.

Ison did not file a petition for rehearing nor did he raise the issue in his motion for discretionary review. "Upon failure to take such procedural steps, a party will thereafter be bound by the entire opinion." *Id.*

The Letcher Circuit Court order denying Ison's motion to vacate his criminal mischief conviction and to dismiss the PFO counts is affirmed.

ALL CONCUR.

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