

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-002572-MR

TERRY LAKES

APPELLANT

v.

APPEAL FROM MADISON CIRCUIT COURT
HONORABLE WILLIAM JENNINGS, JUDGE
INDICTMENT NO. 96-CR-00060

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * **

BEFORE: GUDGEL, CHIEF JUDGE; COMBS and GARDNER, JUDGES.

GARDNER, JUDGE. Terry Lakes (Lakes) appeals pro se from an order of the Madison Circuit Court denying his motion for relief from judgment brought pursuant to Kentucky Rules of Civil Procedure (CR) 60.01 and 60.02, his motion for appointment of counsel brought pursuant to Kentucky Revised Statute (KRS) 31.110, and his motion for an evidentiary hearing. We affirm.

In July 1996, Lakes and another person severely beat and kicked Bryan Willis during an altercation and then left him lying helplessly overnight at a residence. The next morning, Lakes called 911, and Willis was taken to the hospital. Willis died later from the injuries suffered during the beating. Lakes

notified the police of his involvement in the incident and cooperated somewhat with the police in their investigation. In August 1996, the Madison County Grand Jury indicted Lakes on one felony count of capital murder. In March 1997, Lakes also was charged with tampering with physical evidence by way of a Criminal Information filed by the Madison County Commonwealth's Attorney. See Kentucky Rule of Criminal Procedure (RCr) 6.02.

On March 7, 1997, Lakes entered a guilty plea pursuant to a plea agreement with the Commonwealth to an amended charge of manslaughter in the first degree and to tampering with physical evidence. Under the plea agreement, the Commonwealth recommended sentences of ten years for manslaughter in the first degree and two years for tampering with physical evidence. At the guilty plea hearing, the Commonwealth's Attorney specifically opposed concurrent sentencing, but he acknowledged Lakes's right to ask the trial court for concurrent sentences.

Prior to sentencing, Lakes filed a written motion requesting concurrent sentences pursuant to KRS 532.110. In the motion, Lakes acknowledged guilt, but he asked the court to consider the following factors: 1) his actions were all the part of the same course of conduct; 2) he notified emergency medical personnel about Willis; 3) he cooperated with the police; 4) he saved the Commonwealth time and expense by pleading guilty; 5) he was remorseful for his actions; and 6) he had attended AA and GED classes while in jail. After conducting a sentencing hearing, the trial court denied the motion for concurrent sentencing, and

sentenced Lakes consistent with the Commonwealth's recommendation to twelve years in prison.

On September 15, 1997, Lakes filed a motion for relief pursuant to CR 60.01 and CR 60.02 seeking concurrent sentencing. He also filed a motion for appointment of counsel, and a motion for a full evidentiary hearing. The Commonwealth filed a response. The trial court denied all of the motions. This appeal followed.

First, Lakes argues that the judgment contained a "clerical mistake" because the trial court sentenced him to consecutive, rather than concurrent terms. While Lakes filed his motion pursuant to CR 60.01, the more applicable rule is RCr 10.10, which deals with clerical mistakes in criminal cases. Given the exact similarity of these two rules, we shall look to case law dealing with both rules.

As the language in RCr 10.10 indicates, clerical mistakes involve errors of "oversight or omission," rather than judicial errors of law or attempts to relitigate a case. See McMillen v. Commonwealth, Ky. App., 717 S.W.2d 508, 509 (1986) (involving CR 10.10); Prichard v. Bank Josephine, Ky. App., 723 S.W.2d 883, 885 (1987) (involving CR 60.01). "Clerical mistakes" may be corrected at any phase of a proceeding when the original judgment does not reflect the true intent of the judge, but rather contains an error because of inadvertence, mistake, oversight, omission or neglect. See Kurt A. Phillips, Jr., Kentucky Practice, Civil Rule 60.01, cmt. 2, at 417 (5th ed. 1995); See also Allied Materials Corp. v. Superior Products, Co.,

620 F.2d 224, 225-26 (10th Cir. 1980) (construing Federal Rule of Civil Procedure 60(a) on which Kentucky rule is modeled).

In the case at bar, there is no clerical mistake in the judgment. The trial court considered Lakes's motion for concurrent sentences and rejected the request. In the order denying the CR 60.01 motion, the trial judge stated,

"It was the Court's opinion that movant committed a despicable act and to grant his motion would belie the seriousness and brutality of this crime. The Court concluded that concurrent sentences were not appropriate and denied his motion. And it is still the Court's conclusion and decision that concurrent sentences in this matter are not appropriate.

Lakes has failed to establish an error in the judgment by oversight or omission.

Lakes also argues that his guilty plea was entered on the belief that the two sentences would be run concurrently. This allegation is completely refuted by the record. At the guilty plea hearing, the Commonwealth stated that it opposed concurrent sentencing. Lakes's attorney stated that he and Lakes understood that the Commonwealth opposed concurrent sentences. Lakes stated at the hearing that he understood the Commonwealth's recommendation. Lakes responded negatively when the trial judge specifically asked him if he was entering the guilty plea based on any promises that the court would run the sentences concurrently. Lakes responded affirmatively when the trial judge asked him if he understood that nobody could make promises on sentencing that would be binding on the court. During the sentencing hearing, defense counsel argued extensively for

concurrent sentences and the Commonwealth argued against concurrent sentences. Lakes's mere hopeful subjective expectation that he would receive concurrent sentences does not render the guilty plea involuntary or unintelligent. See Spinelli v. Collins, 992 F.2d 559 (5th Cir. 1993); Tahamtani v. Lankford, 846 F.2d 712 (11th Cir. 1988).

Finally, the trial court properly denied the motions without an evidentiary hearing or appointment of counsel. "Before the movant is entitled to an evidentiary hearing, he must affirmatively allege facts, which, if true, justify vacating the judgment and further allege special circumstances that justify CR 60.02 relief." Gross v. Commonwealth, Ky., 648 S.W.2d 853, 856 (1983). Moreover, a movant is not entitled to appointment of counsel for CR 60.02 proceedings. Id. at 857-58 (1983). The trial court is not required to appoint counsel or hold a hearing on a collateral post-judgment motion where the record clearly refutes the movant's substantive claims or would be futile. See generally Commonwealth v. Stamps, Ky., 672 S.W.2d 336 (1984) (involving RCr 11.42 and KRS 31.110); Hopewell v. Commonwealth, Ky. App., 687 S.W.2d 153 (1985) (same).

For the foregoing reasons, we affirm the order of the Madison Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Terry Lakes, Pro Se
LaGrange, Kentucky

BRIEF FOR APPELLEE:

A. B. Chandler III
Attorney General

Joseph R. Johnson
Assistant Attorney General
Frankfort, Kentucky

