RENDERED: March 4, 2005; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002630-MR

J.T. OATES — APPELLANT

v.

APPEAL FROM SIMPSON CIRCUIT COURT
HONORABLE WILLIAM R. HARRIS, JUDGE
ACTION NO. 03-CR-00023 & NO. 03-CR-00036

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: GUIDUGLI AND TAYLOR, JUDGES; EMBERTON, SENIOR JUDGE.[1]

GUIDUGLI, JUDGE: James Thomas Oates appeals from an amended judgment of conviction on a conditional plea of guilty to two counts of operating a motor vehicle on a suspended license and one count of driving under the influence of intoxicants. He contends that the trial court improperly failed to advise him of the possible penalty enhancement consequences for future violations. For the reasons stated herein, we must affirm.

[1] Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 100(5)(b) of the Kentucky Constitution and KRS 21.580.

On March 3, 2003, and March 17, 2003, the Simpson County grand jury returned separate indictments against Oates charging him with two counts each of driving under the influence of intoxicants, operating on a suspended license, and first degree persistent felony offender. Thereafter, Oates entered into a plea agreement with the Commonwealth, the terms of which provided that Oates would enter a condition guilty plea to two counts of operating on a DUI suspended license, 3rd offense, and one count of driving under the influence of intoxicants, 3rd offense. In exchange, Oates would avoid a trial and receive a sentence of six years in prison, plus license suspension, a $500 fine, and alcohol counseling.

On July 17, 2003, Oates, through counsel, filed a motion in the instant case seeking to have two *prior* criminal judgments (No. 98-CR-00146 rendered on March 29, 1999, and No. 00-CR-00073 rendered on August 21, 2000) set aside.[2] As a basis for the motion, Oates argued that the trial court failed in 1999 and 2000 to advise him of possible penalty enhancements for future DUI violations. In the same motion, Oates moved to dismiss the March, 2000 charges. Without leave of court, and

[2] It is not clear from the record upon what authority Oates sought to have these three- and four-year-old convictions set aside, since a trial court loses jurisdiction over a criminal proceeding ten days after the judgment. CR 59.05; McMurry v. Commonwealth, 682 S.W.2d 794 (Ky.App. 1985). The motion, which addresses both the 1999 and 2000 convictions, as well as the then-pending March 2003 charges, did not cite a civil or criminal rule of procedure and was merely styled "Motion to Dismiss."

without any apparent objection by the circuit judge or the Commonwealth, Oates began styling his pleadings to include the case numbers of the 1999 and 2000 convictions. The motion was denied by way of an order rendered on October 23, 2003.

On December 2, 2003, the trial court rendered a final judgment of conviction accepting the plea and sentencing Oates in accordance with the agreement. On February 2, 2004, it rendered an amended judgment for the purpose of changing the terms of the license suspension and amending the Uniform Offense Report. This appeal followed.

Oates now argues that the trial court was duty-bound to advise him of possible penalty enhancements for future DUI violations. It is unclear from his appellate brief whether he is referring to the 1999 and 2000 judgments (which were the subject matter of his arguments in the July 17, 2000, motion), or his 2003 conviction (which is how the instant appeal is styled). He cites Boykin v. Alabama[3] for the proposition that the defendant must be made aware of all of the consequences of his plea, and maintains that he is now entitled to have this conviction (or his prior convictions) reversed because the court failed to so advise him when it accepted his plea agreement. He seeks a reversal of "the Order", presumably referring to the order denying the July 17, 2003, motion.

[3] 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969).

We have closely examined the record, the law, and the written arguments, and find no basis for tampering with the judgment on appeal. We must note from the outset that Oates has improperly introduced the 1999 and 2000 judgments into the instant proceeding. Instead of filing a CR 60.02 motion styled with the case numbers of the 1999 and 2000 judgments (No. 98-CR-00146 and No. 00-CR-00073), Oates began spontaneously making those arguments in the middle of the instant proceeding.

Further exacerbating the matter is the circuit court's failure to curtail Oates' introduction of the 1999 and 2000 judgments into the instant case, and its ruling on the July 17, 2003, motion even though no civil rule was cited as a basis for the motion. Similarly, the Commonwealth stood by idly while Oates amended the proceeding to his liking. The Commonwealth's appellate brief makes no mention of the 1999 and 2000 judgments despite that fact that they form the basis of Oates' July 17, 2003, motion and the instant appeal.

Rather than summarily dismiss the appeal, we will treat Oates' July 17, 2003, motion as a CR 60.02 motion seeking extraordinary relief from the 1999 and 2000 judgments. CR 60.02 states in relevant part that,

> On motion a court may, upon such terms as are just, relieve a party or his legal representative from its final judgment, order, or proceeding upon the following grounds: (a) mistake, inadvertence, surprise

> or excusable neglect; (b) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59.02; (c) perjury or falsified evidence; (d) fraud affecting the proceedings, other than perjury or falsified evidence; (e) the judgment is void, or has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (f) any other reason of an extraordinary nature justifying relief.

CR 60.02 allows a judgment to be corrected or vacated based "upon facts or grounds, not appearing on the face of the record and not available by appeal or otherwise, which were not discovered until after rendition of judgment without fault of the parties seeking relief."[4] It is meant to provide relief which is not available by direct appeal or under RCr 11.42.[5] In order to be eligible for CR 60.02 relief, the movant must demonstrate why he is entitled to extraordinary relief.[6]

In the matter at bar, the claim of error which Oates now raises should have been brought, if at all, by way of a direct appeal. It was not, and this fact taken alone forms a proper basis for affirming the order denying the July 17, 2003, motion.

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[4] Barnett v. Commonwealth, 979 S.W.2d 98, 101 (Ky. 1998), citing Davis v. Home Indemnity Co., 659 S.W.2d 185 (Ky. 1983).

[5] Gross v. Commonwealth, 648 S.W.2d 853 (Ky. 1983); McQueen v. Commonwealth, 948 S.W.2d 415 (Ky. 1997).

[6] Barnett, 979 S.W.2d at 101.

Arguendo, even if the matter were properly before us, we would find no error on the question of whether the trial courts in 1999 and 2000 improperly failed to advise Oates of the consequences of future criminal conduct. Contrary to his assertion that Boykin supports his argument, Boykin actually holds that a knowing, voluntary and intelligent waiver does not necessarily include a requirement that the defendant be informed of every possible consequence of a guilty plea.[7] "A guilty plea that is brought about by a person's free will is not less valid because he did not know all possible consequences of the plea and all possible alternative courses of action."[8]

On appeal, the burden rests with the Oates to overcome the strong presumption that the trial court's rulings are correct.[9] Oates has failed in his burden of persuasion as his argument was practiced outside the scope of the civil rules and is not supported by the case law. Accordingly, we find no basis for tampering with the judgment on appeal.

For the foregoing reasons, we affirm the judgment of the Simpson Circuit Court.

ALL CONCUR.

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[7] Turner v. Commonwealth, 647 S.W.2d 500 (Ky.App. 1992), citing Boykin.

[8] Id. at 501.

[9] City of Louisville v. Allen, 385 S.W.2d 179 (Ky. 1964).

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