

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001304-MR

MICHELE CRAWFORD

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE REBECCA M. OVERSTREET, JUDGE
INDICTMENT NO. 04-CR-00069

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: HENRY, TACKETT, AND VANMETER, JUDGES.

HENRY, JUDGE: Michele Crawford appeals from the denial of her Motion for Sentence Modification, filed pursuant to CR¹ 60.02. We affirm.

On January 20, 2004 Crawford was indicted by the Fayette County Grand Jury on one count of violating KRS² 194A.505 by making false statements or misrepresentations in order to receive food stamps in an amount over \$300, and one count of

¹ Kentucky Rules of Civil Procedure.

² Kentucky Revised Statutes.

violating KRS 194B.505 by making false statements or misrepresentations in order to receive medical benefits in an amount over \$300, both Class D Felonies. At the time the indictment was returned, Crawford was already an inmate at the Kentucky Correctional Institute for Women at Pewee Valley, serving a seven-year sentence. The circuit court appointed counsel for Crawford and on February 6, 2004 she entered a plea of guilty to both counts of the indictment. At the sentencing hearing held on February 27, 2004 the court considered the contents of the pre-sentence investigation report and gave Crawford and her counsel an opportunity to show cause why judgment should not be pronounced. No cause being shown, Crawford was sentenced to two years' imprisonment to be served consecutively. She was also ordered to pay court costs, and restitution in the amount of \$15,388.83. The Final Judgment and Sentence of Imprisonment was entered by the Fayette Circuit Clerk on March 3, 2004.

On April 14, 2004, Crawford, acting pro se, filed a "Motion for Sentence Modification Pursuant to CR 60.02(f)". In the motion she requested that her sentence be modified to run concurrently rather than consecutively, noting that she has been rehabilitated in prison, that she works as a Legal Aide Representative, that KRS 533.060 does not prohibit concurrent sentencing in her case, and that her research indicated that the

proper legal avenue for seeking the relief she wanted was CR 60.02 rather than a petition for habeas corpus. This motion was overruled by the circuit court on April 19, 2004. No appeal was filed.

On May 24, 2004, Crawford, again pro se, filed a "Motion for Sentence Modification Pursuant to CR 60.02(c)". She again requested that her sentence be modified to run concurrently with her previous sentence, but this time she alleged that several witnesses had knowingly signed false statements of fact in her welfare fraud case, and she requested an evidentiary hearing. She gave no indication as to when she became aware of this information or why she did not include this ground in the motion filed a month earlier. This second motion was overruled on May 26, 2004. Crawford's appeal from the May 26 order was filed on June 18, 2004. On appeal, Crawford argues that the trial court should have granted her motion for an evidentiary hearing, and that no facts in the record support the order of restitution.

Relief under CR 60.02 is reserved for matters that could not be presented on direct appeal or under RCr³ 11.42. Gross v. Commonwealth, 648 S.W.2d 853, 856 (Ky. 1983). Here, Crawford has not demonstrated why she is entitled to the special, extraordinary relief provided by CR 60.02. Id. Not

³Kentucky Rules of Criminal Procedure.

only has Crawford not shown why she could not have presented these issues by RCr 11.42 motion, she has not shown why she could not have presented the issues in her earlier, unappealed CR 60.02 motion. She simply makes no mention of the earlier motion in her brief. She is required to make an affirmative showing as to why she is entitled to extraordinary relief. See McQueen v. Commonwealth, 948 S.W.2d 415, 416 (Ky. 1997). CR 60.02 relief is not available to re-litigate issues which either were, or could have been raised in an earlier proceeding. Id. "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". Id., citing Gross v. Commonwealth at 856. No such showing has been made here. In addition, Crawford has made no showing that the trial court abused its discretion in denying an evidentiary hearing. The Kentucky Supreme Court has held that "[t]he decision to hold an evidentiary hearing is within the trial court's discretion and we will not disturb such absent any abuse of that discretion." Land v. Commonwealth, 986 S.W.2d 440, 442 (Ky. 1999). Further, as we noted in Taylor v. Commonwealth, 724 S.W.2d 223 (Ky.App. 1986), "[e]ntry of a voluntary, intelligent plea of guilty has long been held by Kentucky Courts to preclude a post-judgment challenge to the sufficiency of the evidence." Id. at 225. There is no

indication here of a lack of voluntariness of the plea, and no such issue was raised or ruled on below.

Finally, it does not appear that the trial court had an opportunity to rule on the issue of restitution. Absent a showing of palpable error, issues presented for the first time on appeal will not be considered. RCr 9.22; Ruppee v Commonwealth, 821 S.W.2d 484, 487 (Ky. 1991).

The Order of the Fayette Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Christopher Lasch
Louisville, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Clint E. Watson
Assistant Attorney General
Frankfort, Kentucky