

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001016-MR

JIMMY GILLUM

APPELLANT

v. APPEAL FROM GREENUP CIRCUIT COURT
HONORABLE LEWIS D. NICHOLLS, JUDGE
ACTION NO. 95-CR-00037

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: TAYLOR AND VANMETER, JUDGES; POTTER, SENIOR JUDGE.¹

VANMETER, JUDGE: Jimmy Gillum appeals pro se from an order entered by the Greenup Circuit Court denying his motion seeking CR 60.02 relief. For the reasons stated hereafter, we affirm.

On October 17, 1996, Gillum appeared in court with counsel and entered a negotiated guilty plea to fourth-offense DUI, third or subsequent offense of driving while his license was suspended for DUI, and possession of marijuana. On December

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

19, 1996, he was sentenced to concurrent two-year terms on each of the first two counts, and ninety days on the marijuana charge, for a total of two years. No appeal or motion for RCr 11.42 relief followed.

More than six years later, Gillum filed this action seeking to vacate the judgment pursuant to CR 60.02(e) or (f). He asserted that Ohio convictions mistakenly were relied upon for purposes of enhancing his October 1996 convictions to fourth-offense DUI and third-offense driving while his license was suspended for DUI. As the trial court agreed that an Ohio conviction mistakenly was used to enhance the DUI conviction, the court amended Gillum's judgment and sentence to reflect that the DUI conviction in fact should have been for the class A misdemeanor of third-offense DUI. However, the court rejected the allegation as to the suspended license charge, finding that

the record contains sufficient proof of two prior driving on DUI suspended license convictions within the state of Kentucky to support the charge of Driving While License Suspended for DUI, Third or Subsequent Offense, a Class D Felony (12/16/94 Greenup District Court, occurrence 11/26/94 and 1/4/95 Greenup Circuit Court, occurrence 6/18/94). The Court finds no error in the sentence of two years on that charge.

As the two two-year sentences had been ordered to run concurrent with one another, the court declined to vacate the December 1996 judgment and sentence, but instead amended that judgment and

sentence "only to the extent necessary to correct the error concerning the DUI charge and subsequent sentence." The court denied Gillum's subsequent motion to reconsider pursuant to CR 59.05. This appeal followed.

Gillum contends on appeal that the trial court erred by failing to set aside his conviction of third-offense driving while his license was suspended for DUI. However, this argument clearly lacks merit since Gillum's criminal record, as included in the circuit court record, specifically shows that Gillum was convicted in Greenup County, Kentucky, on both January 4, 1995 and December 16, 1994, of driving while his license was suspended. Hence, his October 1996 conviction of the same offense was correctly classified as a third offense, and the trial court did not err by failing to amend the judgment and sentence in regard to that offense.

Gillum attempts on appeal to raise other issues including a challenge to the accuracy of one of the underlying suspended license convictions. However, those issues were not properly raised below and will not be considered by this court on appeal. In any event, Gillum's entry of a guilty plea both waived all defenses other than that the indictment did not

charge a public offense,² and precluded any postjudgment challenge to the sufficiency of the evidence.³

The court's judgment is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Jimmy Gillum, pro se
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Carlton S. Shier, IV
Assistant Attorney General
Frankfort, Kentucky

² *Bush v. Commonwealth*, 702 S.W.2d 46, 48 (Ky. 1986).

³ *Thompson v. Commonwealth*, 147 S.W.3d 22 (Ky. 2004); *Taylor v. Commonwealth*, 724 S.W.2d 223 (Ky.App. 1987).