

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2009-CA-001702-MR

TIMOTHY SMYTH

APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT  
v. HONORABLE STEPHEN P. RYAN, JUDGE  
ACTION NOS. 03-CR-002931, 03-CR-003134, AND 03-CR-003403

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: DIXON AND NICKELL, JUDGES; KNOPF,<sup>1</sup> SENIOR JUDGE.

NICKELL, JUDGE: Timothy Smyth, *pro se*, appeals from an opinion and order of the Jefferson Circuit Court entered on August 17, 2007, denying a CR<sup>2</sup> 60.02 motion to reduce by one-half his ten-year sentence following probation revocation.

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<sup>1</sup> Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

<sup>2</sup> Kentucky Rules of Civil Procedure.

We affirm on the strength of *Howard v. Ingram*, 452 S.W.2d 410, 411 (Ky. 1970) (citing *Hord v. Commonwealth*, 450 S.W.2d 530 (Ky. 1970)) holding that after a probation revocation, a trial court may impose the sentence that was originally fixed but withheld pending successful completion of the period of probation. Here, the trial court was wholly within its authority to impose Smyth's original sentence of ten years as fixed in the judgment.

Smyth was charged with multiple crimes in three separate indictments. After reaching an agreement<sup>3</sup> with the Commonwealth, he pled guilty to seven charges. The videotaped guilty plea colloquy is not part of the appellate record, but three standard written motions to enter guilty plea,<sup>4</sup> one per indictment, are part of the record before us. On May 12, 2004, Smyth was sentenced to a total of ten years, probated for five years.

In October 2004, the Commonwealth moved to revoke Smyth's probation due to drug and alcohol use. Even though Smyth stipulated he had violated the terms of his probation, and the court found he had done so, the court denied the Commonwealth's motion to revoke and instead ordered him to enroll in and complete a substance abuse treatment program. When Smyth's admittance into the program was delayed, the court granted his request for home incarceration.

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<sup>3</sup> According to Smyth's memorandum in support of his CR 60.02 motion, the deal offered by the Commonwealth was "five (5) years felony probation in exchange for ten (10) years imprisonment if revoked."

<sup>4</sup> On appeal, there is no argument about the voluntariness of Smyth's guilty pleas. In hindsight he has recognized it was not in his best interest to accept the Commonwealth's offer because he was unable to comply with the conditions of probation and is now serving his full original sentence.

In February 2005, the Commonwealth filed a second motion to revoke probation alleging Smyth was terminated from, and therefore did not complete, the court-ordered substance abuse program because he repeatedly verbally abused and intimidated program participants. By order entered on June 21, 2006, the court revoked Smyth's probation and sentenced him to serve his original ten-year sentence with credit for time served. A motion for shock probation was denied.

In July 2009, Smyth moved the circuit court to reduce his ten-year sentence by one year. As grounds, he generally alleged he wanted to get out of prison to seek treatment for drug addiction; his public defender and the prosecutor conspired to persuade him to plead guilty knowing he could not abide by the terms of probation for five years; the Commonwealth lacked witnesses to prove its case; counsel was "not proficient" in unspecified ways; and it would have been better for him to "have stayed in jail and opted for 5 or 7 years[.]" Smyth wrote in his motion, "I sadly regret signing the plea deal!" The motion for a reduction in sentence was summarily denied.

Later in July of 2009, Smyth filed a *pro se* motion to correct, alter and amend sentence pursuant to CR 60.02 asking that his sentence of ten years be reduced to five years and ordered to run concurrently under all three indictments. Smyth alleged that at the time of his guilty plea, the prosecutor knew he was addicted to crack-cocaine "and used his release from jail on probation as leverage to enact (sic) an eventual ten (10) year sentence upon revocation." Based primarily on *Commonwealth v. Reed*, 680 S.W.2d 134 (Ky. App. 1984) (addressing

probation eligibility under KRS 533.060(1) when a firearm is used in the commission of certain felonies), but also referencing *Stallworth v. Commonwealth*, 102 S.W.2d 918 (Ky. 2003) (following probation revocation, court doubled sentence from that originally fixed at final sentencing) Smyth argued he had agreed to a probationary period of five years at the time of sentencing and therefore the trial court could not double his sentence in the wake of revocation. On August 17, 2009, the circuit court denied the motion to alter, amend or vacate because *Reed* did not support Smyth's argument and it had been overruled by *Pruitt v. Commonwealth*, 700 S.W.2d 68 (Ky. 1985). The court also noted CR 60.02 is an extraordinary remedy and Smyth had not demonstrated an extraordinary reason justifying relief. This appeal followed.

“The standard of review of an appeal involving a CR 60.02 motion is whether the trial court abused its discretion.” *White v. Commonwealth*, 32 S.W.3d 83, 86 (Ky. App. 2000). To amount to an abuse of discretion, the trial court's decision must be “arbitrary, unreasonable, unfair, or unsupported by sound legal principals.” *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). Absent a “flagrant miscarriage of justice,” the trial court will be affirmed. *Gross v. Commonwealth*, 648 S.W.2d 853, 858 (Ky. 1983).

Both the order on the guilty plea and the judgment with sentence of probation specified in detail how the sentences on the three separate indictments were to run. The judgment further specified execution of the ten year total sentence was being suspended for five years, subject to Smyth's compliance with a

dozen conditions of probation. Despite these facts, Smyth argues the court could not impose the ten-year sentence it originally fixed but withheld for five years because the terms of the potential enhanced sentence were not included in the original judgment. Smyth appears to be confused because the judgment clearly fixed a ten-year sentence and then withheld its imposition for five years. Smyth did not fulfill the terms of probation. Therefore, the court was within its authority to revoke probation and to impose the original sentence. Thus, there was no abuse of discretion.

The Commonwealth argues review is procedurally barred because Smyth waited more than three years after the court had ordered him to serve the original ten-year sentence before seeking relief. The Commonwealth argues a delay of three years in filing was unreasonable under the circumstances. There is merit to the Commonwealth's argument since a CR 60.02 motion must be filed within a reasonable time. Furthermore, Smyth has offered no explanation for the delay although the record shows he did spend a good amount of time seeking additional credit for time served before filing the CR 60.02 motion. While the trial court could have deemed the more than three-year delay unreasonable, it did not. In light of our resolution of this appeal, we will comment no further on the timeliness of the CR 60.02 motion.

For the foregoing reasons, the order of the Jefferson Circuit Court is  
AFFIRMED.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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