

Commonwealth of Kentucky
Court of Appeals

NO. 2008-CA-002137-MR

THOMAS NEAL

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE IRV MAZE, JUDGE
ACTION NO. 91-CR-000252

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: DIXON AND NICKELL, JUDGES; KNOPF,¹ SENIOR JUDGE.

NICKELL, JUDGE: Thomas Neal, *pro se*, appeals from an order of the Jefferson Circuit Court denying his motion for CR² 60.02 relief based on his claim that the

¹ 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.

² Kentucky Rules of Civil Procedure.

Commonwealth, through the Parole Board, changed the terms of the plea bargain he accepted in 1991. He claims that in return for his guilty plea he was promised he would not have to participate in the sex offender treatment program (SOTP). Now, however, the Parole Board is requiring him to complete the program before it will deem him to be parole eligible. The trial court denied Neal's motion. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In 1991, Neal was indicted with three others on multiple counts of sex crimes, two counts of robbery in the first degree,³ and being a persistent felony offender in the second degree.⁴ Neal struck a deal with the Commonwealth whereby he would plead guilty to a variety of amended charges in return for a recommended sentence of life imprisonment.

During a hearing before his final sentencing,⁵ defense counsel, the prosecutor and the trial court were all in agreement that Neal would be eligible for parole in eight years, but they also acknowledged, in Neal's presence, that they had no control over the Parole Board. Defense counsel stated for the record that part of the plea agreement was that Neal should not be considered a sex offender and would not have to participate in SOTP. However, defense counsel again acknowledged the plea agreement reached between Neal and the Commonwealth's

³ KRS 515.020.

⁴ KRS 532.080.

⁵ The guilty plea colloquy is not part of the record provided to us for review.

Attorney, and accepted by the trial court, did not bind the Parole Board. Neither the court nor the prosecutor commented on this statement, but the prosecutor did note that the Commonwealth viewed Neal differently than his co-indictees because when Neal realized the home invasion was taking a turn for the worse he attempted to stop the rape and sodomy of the female victim. Nevertheless, the prosecutor went on to say Neal's conduct could not be minimized because he is a persistent felon and his actions did enable another to commit a series of brutal sex acts.

In 1994, Neal filed an RCr⁶ 11.42 motion alleging ineffective assistance of counsel. The trial court denied relief and we affirmed that result in an unpublished opinion, *Neal v. Commonwealth*, 1994-CA-002704, rendered on December 6, 1996.⁷

In April of 2008, Neal filed a CR 60.02 motion alleging he plead guilty with the understanding that he would not have to participate in SOTP but the Parole Board was requiring him to go through the program before it would consider him to be eligible for parole. Neal asked that he be permitted to withdraw his guilty plea because the Parole Board was changing the terms of his plea bargain. Alternatively, he asked that the trial court convene an evidentiary hearing. The trial court denied Neal's motions without making findings of fact or

⁶ Kentucky Rules of Criminal Procedure.

⁷ Originally, the panel rendered an opinion on July 12, 1996, vacating the trial court's order and remanding it for a hearing. Judge Knopf, who also sits on this panel, was the lone dissenter from that opinion which was subsequently withdrawn and replaced by an unanimous opinion affirming the trial court's denial of RCr 11.42 relief on December 6, 1996. Both opinions bear the same case number.

conclusions of law. A motion filed by Neal to clarify the court's ruling was also denied. This appeal followed. After considering the law and the briefs, we affirm.

LEGAL ANALYSIS

“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).

Neal reached a plea agreement with the prosecutor in 1991. There is no indication from the record, and indeed no allegation from Neal, that the prosecutor did not live up to the Commonwealth's end of the bargain. The prosecutor noted in a written addendum to its offer, signed by both the Commonwealth's Attorney and defense counsel, that “[b]ased on the evidence the Commonwealth does not feel [Neal] should be required to complete the Sexual Offender Program.” At an in-court hearing on October 17, 1991, attended by Neal and his attorney, as well as the prosecutor and the judge, it was made clear that any decisions made in the courtroom did not bind the Parole Board, and while everyone present believed Neal would become eligible for parole in eight years, the Parole Board could require Neal to participate in the SOTP.

In his dissent in *Huff v. Commonwealth*, 763 S.W.2d 106, 110 (Ky.

1988), the late Justice Charles Leibson explained:

[p]arole is not a judicial function but an executive function. It is administered by the Parole Board, an autonomous body appointed as directed in KRS 439.320. Parole is nothing more than post-conviction clemency, a matter of grace. The Parole Board has promulgated various administrative regulations establishing rules and a schedule for parole eligibility, but the Parole Board is free to revise these rules and schedule at any time, and, further, to “review the case of any inmate for parole consideration prior to his eligibility date if it appears advisable to do so.” Kentucky Parole Board Reg. DC-RG6(8). As stated in the Commentary to KRS 532.060, Sentence of Imprisonment for felony, “The actual length of his imprisonment is to be determined by the parole board.”

On the matter of requiring completion of the SOTP, our Supreme Court has stated:

[u]tilization of the Sex Offender Treatment Program by the Parole Board is one of the options available to the Board in determining the conditions of parole. The pertinent information required by statute is not limited to the individual facts of a particular crime, but rather encompasses matters that are relevant to the question of a determination that parole would be in the best interests of society. The Sexual Offender Treatment Program is required for sex offenders, but that does not mean that it cannot be a condition of parole for other offenders on a case-by-case basis.

Stewart v. Commonwealth, 153 S.W.3d 789, 793-94 (Ky. 2005). For reasons known only to the Parole Board, it has determined, as is its prerogative, that society would benefit from Neal’s completion of the SOTP. Neal knew this was a possibility based on the courtroom discussion that occurred on October 17, 1991. Thus, the record shows no arbitrariness by the trial court and nothing from which

we could conclude the trial court abused its discretion in denying Neal's CR 60.02 motion without a hearing.

For the foregoing reasons, the decision of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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