

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001489-MR

KENNETH CRIBB

APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE PHILLIP J. SHEPHERD, JUDGE
ACTION NO. 08-CR-00088

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: CAPERTON, LAMBERT AND NICKELL, JUDGES.

NICKELL, JUDGE: Kenneth D. Cribb, *pro se*, appeals from an order of the Franklin Circuit Court denying his motion to set aside, vacate or modify an order correcting a clerical error and denying unsupervised probation following entry of a guilty plea to escape in the second degree¹ and being a persistent felony offender in the second degree (PFO II).² We affirm.

¹ Kentucky Revised Statutes (KRS) 520.030, a Class D felony.

² KRS 532.080.

In April of 2008, Cribb was indicted on a single charge of escape in the second degree and being a PFO II. The escape charge resulted when Cribb walked away from the custody of the Frankfort Career Development Center in 2006 and was ultimately apprehended in North Carolina on March 10, 2008.

On December 18, 2009, Cribb accepted the Commonwealth's offer of one year on the escape charge, enhanced to five years by virtue of his status as a PFO II, and opposition to probation. The following day, the court accepted and entered Cribb's guilty plea. Through counsel, Cribb told the court he was not requesting probation, wanted to waive preparation of a pre-sentence investigation report, and asked that he be sentenced immediately so he could return to prison. The court obliged and sentenced Cribb that day. From the bench the court stated it was accepting the Commonwealth's recommendation and sentencing him to one year on the escape charge, enhanced to five years under the PFO II statute, "for a sentence of five years confinement in the Kentucky state prison system. And that will be the ruling of the court." The court then asked Cribb whether he had any questions, to which Cribb responded, "No."

The court's ruling from the bench was reduced to a written order stating:

[the court] finds that unsupervised probation is appropriate under the circumstances of this case.
Defendant is therefore SENTENCED five (5) years.

That order was entered on December 29, 2008, in tandem with a standard "Judgment and Sentence on Plea of Guilty" that imposed "imprisonment for a

maximum term of five (5) years in Department of Corrections. . . .” There was no mention of probation.

The next item in the appellate record is a “corrected copy” of the “Order on Guilty Plea and Judgment Imposing Sentence” entered on March 16, 2009. The corrected version is identical to the original but without the phrase “[the court] hereby finds that unsupervised probation is appropriate under the circumstances of this case.”

On June 26, 2009, Cribb filed a *pro se* motion to set aside, vacate or modify the corrected order. Although the original order did not expressly grant unsupervised probation, it merely said unsupervised probation was “appropriate under the circumstances[,]” Cribb read this to mean his five-year sentence had been probated. Cribb argued CR³ 60.02 relief was appropriate because the court had not made a clerical error during the sentencing hearing and, therefore, there was no basis for entry of a corrected order.

In urging denial of the CR 60.02 motion in its written response, the Commonwealth cited CR 60.01 which authorizes a court to *sua sponte* correct clerical mistakes in orders and judgments at any time. After recounting Cribb’s criminal history,⁴ the Commonwealth described Cribb as “one of the most undeserving candidates for probation ever to stand before this Court and there is no

³ Kentucky Rules of Civil Procedure.

⁴ According to Cribb’s resident record card, which is contained in the appellate record, in 2003 he was convicted of criminal attempt to commit murder, criminal mischief in the first degree, assault in the third degree, possession of a firearm by a convicted felon, and unlawful transaction with a minor in the second degree.

way this Court would ever make any statements indicating a grant of probation except by clerical error.” A few days later, the trial court denied the CR 60.02 motion stating:

[a] clerical error was committed which resulted in the entry of an Order dated December 29, 2008 containing language with respect to unsupervised probation. The Court sua sponte pursuant to CR 60.01 corrected such clerical error by the Order entered March 16, 2009.

This appeal followed. After reviewing the law, the record and the briefs, we affirm.

We review a trial court's denial of a CR 60.02 motion for post-conviction relief under an abuse of discretion standard. *Parrish v. Commonwealth*, 283 S.W.3d 675, 677 (Ky. 2009). “The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). Absent a “flagrant miscarriage of justice,” the trial court’s decision will be affirmed. *Gross v. Commonwealth*, 648 S.W.2d 853, 858 (Ky. 1983).

A court speaks through its written records. *Allen v. Walter*, 534 S.W.2d 453, 455 (Ky. 1976). When ruling from the bench, the court did not mention probation when it imposed “a sentence of five years confinement in the Kentucky state prison system.” Similarly, the standard Judgment and Sentence on Plea of Guilty entered by the court on December 29, 2008, did not grant probation. Based upon the record before us, which supports a five-year sentence of imprisonment rather than a grant of unsupervised probation, we cannot hold the

trial court abused its discretion in entering a corrected order to fix a clerical error. There has been no “flagrant miscarriage of justice” as required for CR 60.02 relief. *Gross*.

For the foregoing reasons, the judgment of the Franklin Circuit Court is affirmed.

ALL CONCUR.

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