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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000117-MR

LARRY ROTHFUSS — APPELLANT

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE MARTIN J. SHEEHAN, JUDGE
ACTION NO. 00-CR-00444

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE AND NICKELL, JUDGES; HARRIS,[1] SENIOR JUDGE.

NICKELL, JUDGE: Larry Rothfuss, *pro se*, has appealed from the Kenton Circuit Court's denial of his *pro se* motion for post-conviction relief pursuant to CR[2] 60.02(e) and (f). We affirm.

[1] Senior Judge William R. Harris sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

[2] Kentucky Rules of Civil Procedure.

Rothfuss was indicted by a Kenton County grand jury on two counts of sodomy in the first degree.[3] He was also charged by information on one count of sexual abuse in the first degree.[4] Following plea negotiations, the Commonwealth agreed to amend the indicted charges to two counts of sodomy in the second-degree,[5] and recommend a sentence of ten years on each sodomy count, recommend a five-year sentence on the sexual abuse count, and recommend all of the sentences be run consecutively for a total sentence of twenty-five years' imprisonment. Rothfuss voluntarily entered a plea of guilty to the amended charges based on the Commonwealth's recommendation. A final judgment sentencing him to twenty-five years' imprisonment was entered on November 14, 2001.

On November 13, 2009, Rothfuss filed the instant CR 60.02 motion seeking post-conviction relief. He alleged his twenty-five year sentence violated the maximum aggregate sentence limitation contained in KRS 532.110(1)(c), and requested that the trial court modify his sentence from twenty-five to twenty years' imprisonment. Relying on *Meyers v. Commonwealth*, 42 S.W.3d 594 (Ky. 2001), and *Johnson v. Commonwealth*, 90 S.W.3d 39 (Ky. 2003), the trial court denied Rothfuss's motion, finding he had "waived his statutory right to a maximum aggregate sentence of twenty (20) years." The trial court found the plea agreement

[3] KRS 510.070, a Class A felony as the victim was less than twelve years old.

[4] KRS 510.110, a Class C felony as the victim was less than twelve years old.

[5] KRS 510.080, a Class C felony.

specifically set out the amended charges and the reasoning behind such amendment. The trial court found the plea agreement set forth the parole eligibility advantages of the amended charges versus the original charges and consideration of these factors was a reason in reaching the agreement. Finally, the trial court concluded the plea agreement was negotiated with the assistance of counsel. This appeal followed.

We review the denial of a CR 60.02 motion for an abuse of discretion. *White v. Commonwealth,* 32 S.W.3d 83, 86 (Ky. App. 2000). To warrant relief, the trial court's decision must have been "arbitrary, unreasonable, unfair, or unsupported by sound legal principals." *Clark v. Commonwealth,* 223 S.W.3d 90, 95 (Ky. 2007). A trial court may grant relief under CR 60.02 only if a movant demonstrates "he is entitled to this special, extraordinary relief." *Gross v. Commonwealth,* 648 S.W.2d 853, 856 (Ky. 1983). We will affirm the trial court's decision absent a "flagrant miscarriage of justice." *Id.* at 858.

Before this Court, Rothfuss contends the trial court abused its discretion in denying his CR 60.02 motion because the sentence imposed violates the maximum aggregate sentence limitation contained in KRS 532.110(1)(c). Although we agree that the sentence violated the statutory language, we perceive no abuse of discretion.

KRS 532.110(1)(c) provides that when consecutive indeterminate sentences are imposed on a criminal defendant, the aggregate of the terms may not exceed the longest extended term authorized for the highest class of crime for

which any of the sentences is imposed, with the absolute maximum term being set at seventy years. It is undisputed that the maximum aggregate term that could be imposed could not exceed twenty years, as that is the longest extended term that may statutorily be imposed for a Class C felony. *See* KRS 532.080(6)(b).

However, as noted by the trial court, in *Myers* our Supreme Court held "a defendant may validly waive the maximum aggregate sentence limitation in KRS 532.110(1)(c)." 42 S.W.3d at 597. Our Supreme Court went on to hold that such a waiver is presumed valid if there is a "knowing and voluntary waiver by a person in whose favor the limitation operates." *Id*. at 598. This holding was reaffirmed in *Johnson* wherein the Supreme Court held "there are no constitutional prohibitions against presuming that [a defendant's] waiver was valid." *Johnson*, 90 S.W.3d at 45.

Here, the trial court determined Rothfuss's voluntary entry of a guilty plea operated as a valid waiver to his statutory right to a maximum aggregate term of twenty years' imprisonment. After a careful review of the record, we agree. The trial court properly followed the guidance set forth in the binding precedents that existed at the time of Rothfuss's sentencing. There was no abuse of discretion.

We are aware that *Myers* and *Johnson* were recently overruled by our Supreme Court in *McClanahan v. Commonwealth*, 308 S.W.3d 694 (Ky. 2010), wherein the Court held any sentence imposed in excess of that allowed by KRS 532.110(1)(c) is void and unenforceable, regardless of whether the defendant had consented to such a sentence. However, the holding in *McClanahan* cannot be

applied retroactively to justify the relief Rothfuss seeks. *See Leonard v. Commonwealth*, 279 S.W.3d 151, 160-61 (Ky. 2009) (generally, decisions are not applied retroactively). Further, CR 60.02 relief cannot be granted because of a change in the law except in "aggravated cases where there are strong equities." *Reed v. Reed*, 484 S.W.2d 844, 847 (Ky. 1972) (citing *City-County Planning Commission v. Fayette County Fiscal Court*, 449 S.W.2d 766 (Ky. 1970); 46 Am.Jur.2d, Judgments, Sec. 768, p. 930)). This is not such a case. The instant judgment was nearly eight years old before the Supreme Court announced its decision in *McClanahan*. Rothfuss has pointed us to no facts allowing us to conclude there are strong equities requiring a departure from the proscription against retroactive application of new decisions. To the contrary, Rothfuss has enjoyed a reduction in his charges from Class A felonies carrying the potential for a seventy-year term of imprisonment to Class C felonies carrying an actual sentence of only twenty-five years. In addition, Rothfuss is parole-eligible after serving twenty percent of his sentence rather than the eighty-five percent he would have been required to serve had he been convicted of the higher offenses. Finally, we note that although his conviction is nearly a decade old and he has had ample opportunity to do so, Rothfuss has not previously attacked his conviction and sentence on any ground. Thus, we conclude equity does not demand retroactive application of *McClanahan*.

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

ALL CONCUR.

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