

RENDERED: DECEMBER 3, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-001397-MR

BOBBY WARREN

APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE GEOFFREY P. MORRIS, JUDGE
ACTION NO. 03-CR-001739

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE AND STUMBO, JUDGES; LAMBERT, SENIOR JUDGE.

ACREE, JUDGE: The appellant, Bobby Warren, seeks reversal of the Jefferson Circuit Court's denial of his motion pursuant to Kentucky Rule of Civil Procedure (CR) 60.02 for relief from his judgment of conviction. Not only was his motion untimely, the arguments asserted therein have no merit. Therefore, the decision of the circuit court is affirmed.

On January 28, 2004, Warren entered into a plea agreement whereby he would serve a ten-year sentence for first-degree robbery. The agreement stated Warren would be released on his own recognizance, but if he failed to appear for sentencing on March 12, 2004, he would receive a sentence of fifteen years for the first degree robbery charge and would also face bail-jumping charges. The trial court advised Warren of his rights, accepted the guilty plea, and released Warren explaining that he must appear or else be subject to the extended sentence to which he agreed in his plea bargain. Warren was released the same day.

Warren failed to appear on March 12, 2004, so the circuit court issued a bench warrant for Warren's arrest. Warren was finally apprehended on September 7, 2004. On October 7, 2004, Warren appeared with his counsel for sentencing. On his conviction of first degree robbery and in accordance with his plea agreement, he was sentenced to fifteen years. Almost five years later, on July 10, 2009, Warren filed his CR 60.02 motion which was summarily denied.

Warren presents an explanation of how he was sentenced that differs from the facts supported by the record. Warren claims that subsequent to his arrest on the bench warrant, his attorney advised him to accept a plea for five years for bail jumping with parole eligibility after serving 20 percent of his sentence. However, he claims to have subsequently come to the belief that he unknowingly entered into a second plea for a fifteen-year sentence for first degree robbery and would have to serve 85% of that sentence. Warren alleges he would not have accepted the plea if he knew he would receive fifteen years for the first degree robbery charge. Warren

claims his understanding was that he was agreeing to ten years for the robbery charge and five years for the bail jumping charge.

On appeal, Warren argues the circuit court erred by declining his CR 60.02 motion and failing to conduct an evidentiary hearing on that motion. He also argues that he received ineffective assistance of counsel because his lawyer failed to properly advise him regarding the second plea. Finally, he asserts without further elaboration that the fifteen-year sentence is void and illegal.

CR 60.02 identifies six grounds for relief. Of these only three have any potential applicability in this case: mistake, inadvertence, surprise or excusable neglect (CR 60.02(a)); the judgment is void (CR 60.02(e)); and (f) any other reason of an extraordinary nature justifying relief (CR 60.02(f)).

Motions based upon CR 60.02(a) must be brought within one year. To the extent Warren relies on CR 60.02(a) for relief, he brought his motion four years too late.

Motions based on CR 60.02(e) or (f) must be brought within a reasonable time. “What constitutes a reasonable time in which to move to vacate a judgment under CR 60.02 is a matter that addresses itself to the discretion of the trial court.” *Gross v. Commonwealth*, 648 S.W.2d 853, 858 (Ky. 1983). Our review of the record, and the trial court’s summary denial of the motion, leads us to conclude that the trial court determined Warren’s motion was not brought within a reasonable time. Warren acknowledged that he was aware of the facts underlying

his motion as soon as he went to prison in 2004. Yet he waited almost five years to seek CR 60.02 relief. Clearly, this was not a reasonable time.

Furthermore, Warren's objection that the trial court failed to conduct a hearing on his CR 60.02 motion is without merit. "The 'reasonable time' requirement is a factor for the trial court to take into consideration . . . based on the record in the case. It is not required to hold a hearing to decide whether the 'reasonable time' restriction should apply." *Id.*

However, even if we considered the motion timely, Warren's arguments have no merit.

To begin, Warren's mischaracterization of the facts is not supported by the record. Warren was sentenced in accordance with his original 2003 plea agreement. Despite his claim now, he did not agree to a second plea for a fifteen-year sentence in October 2004. The judge was simply entering sentence under the plea previously accepted by the court. Therefore, his argument lacks all merit that but-for the ineffective assistance of his counsel he would not have agreed to the fifteen-year sentence in 2004. No quantity or quality of advice in 2004 could have undone the fifteen-year sentence to which Warren himself agreed in 2003.

In addition, his sentence is not illegal or void under CR 60.02(e); the sentence falls within the guidelines set forth in KRS 532.060(2). *See Jones v. Commonwealth*, 995 S.W.2d 363, 366 (Ky. 1999) (upholding extended sentence because defendant agreed to additional time if he jumped bail and sentence was within range established by the legislature). Robbery is a class B felony. KRS

515.020(2). Class B felons are subject to a minimum ten years' sentence and a maximum twenty years' sentence. KRS 532.060(2). The sentence to which Warren agreed before he failed to appear for sentencing clearly falls within those guidelines and, therefore, is not void.

“Relief under CR 60.02(f) is available where a clear showing of extraordinary and compelling equities is made.” *Commonwealth v. Bustamonte*, 140 S.W.3d 581, 583 (Ky. App. 2004) (internal quotation marks and citation omitted). Like the trial court, we see no reason of an extraordinary reason for setting aside the judgment under CR 60.02(f). Therefore, we cannot say the trial court abused its discretion in denying Warren's motion.

For the foregoing reasons the decision of the circuit court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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