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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-002243-MR

PHILLIP DEAN

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE PATRICIA M. SUMME, JUDGE
ACTION NO. 07-CR-00121 AND 07-CR-00121-001

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: TAYLOR, CHIEF JUDGE; LAMBERT AND THOMPSON, JUDGES.

LAMBERT, JUDGE: Phillip Dean appeals the trial court's order denying him post conviction relief under Kentucky Rules of Civil Procedure (CR) 60.02. After careful review, we affirm.

On August 20, 2007, Dean entered guilty pleas to the charges of assault in the first degree and intimidating a witness in the legal process. The

police report in this matter indicated that, in conjunction with two other individuals, Dean forcibly detained the victim, beat her with his hands and feet, held her at knife point, threatened her with a gun, threatened to sodomize her, and attempted to force her into the trunk of a car. The victim escaped and required hospitalization for her injuries. A grand jury indicted Dean on charges of kidnapping, assault in the first degree, intimidating a witness in the legal process, and persistent felony offender in the second degree.

In exchange for his plea of guilty, the Commonwealth dismissed the kidnapping and persistent felony offender charges. The Commonwealth's written offer on the guilty plea indicates that Dean severely beat the victim with his hands and feet and struck her with a gun. The victim suffered a fractured pelvis and clavicle as a result of the assault. Dean's motivation to beat the victim came from her statements to police that Dean, a convicted felon, was in possession of a hand gun. During the beating, Dean told the victim that she would not testify at trial. Although Dean signed the offer of a guilty plea document detailing the above facts, he denied striking the victim with a weapon. However, both the victim and a codefendant were prepared to testify that Dean did strike the victim with a gun.

Dean was represented by counsel throughout the above proceedings and received a sentence of thirteen years of imprisonment. On October 30, 2008, Dean filed a motion to vacate his sentence under Kentucky Rules of Criminal Procedure (RCr) 11.42. The trial court denied that motion, finding that Dean was

represented by competent counsel and that his guilty plea was properly entered.

Dean did not appeal the trial court's ruling.

On January 10, 2010, Dean filed a motion to set aside the judgment pursuant to CR 60.02. In that motion, he again argued that his guilty plea was not voluntary and further alleged that his plea to the charge of assault in the first degree should have been rejected by the trial court because his acts did not constitute assault in the first degree, but rather were more aligned with assault in the second degree. The trial court denied the CR 60.02 motion by order dated August 17, 2010. In that order, the trial court held that by nature of Dean's untimely filing and inapplicable provisions, the court was only permitted to review Dean's claims under CR 60.02(f). The trial court concluded that Dean's guilty plea was knowingly and voluntarily entered and found that because the victim suffered broken bones as a result of Dean's assault, such injuries constituted serious physical injuries under both Kentucky Revised Statutes (KRS) 500.080(15) and *Clift v. Commonwealth*, 105 S.W.3d 467 (Ky. App. 2003).

Dean claims to have never received the trial court's August 17, 2010, order, and he therefore filed a supplemental motion to his original CR 60.02 motion on October 7, 2010. Thereafter, the trial court entered a November 10, 2010, order informing Dean that it had in fact ruled on his motion on August 17, 2010, and that he was included in the trial court's distribution list. However, the trial court entered another order along with the first order denying Dean's CR 60.02 claims.

On December 10, 2010, Dean's notice of appeal was filed from the November 10, 2010, order. On this same date, the trial court acknowledged Dean as indigent and appointed him counsel through the Department of Public Advocacy (DPA). However, the DPA filed for leave to withdraw as counsel on April 20, 2011, and this Court granted the DPA's motion on May 17, 2011. This *pro se* appeal now follows.

On appeal, Dean has withdrawn his argument before the trial court below that his guilty plea was not entered knowingly and voluntarily. Therefore, his sole argument on appeal to this Court is that the trial court erred when it did not reject his plea to assault in the first degree. The Commonwealth counters that Dean's appeal is not timely because it was taken more than thirty days after the trial court entered judgment on August 17, 2010. However, given the trial court's subsequent November 10, 2010, order addressing Dean's supplemental CR 60.02 motion, we conclude that his appeal is timely and is therefore properly before this Court. Accordingly, we will proceed to the merits of Dean's argument.

We review a trial court's denial of a CR 60.02 motion for an abuse of discretion. *White v. Commonwealth*, 32 S.W.3d 83, 86 (Ky. App. 2000). "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).

Dean argues that the trial court abused its discretion when it accepted his guilty plea to assault in the first degree, rather than rejecting the plea in favor of a plea to assault in the second degree. KRS 508.010 provides:

(1) A person is guilty of assault in the first degree when:

- (a) He intentionally causes serious physical injury to another person by means of a deadly weapon or a dangerous instrument; or
- (b) Under circumstances manifesting extreme indifference to the value of human life he wantonly engages in conduct which creates a grave risk of death to another and thereby causes serious physical injury to another person.

We agree with the Commonwealth that Dean's argument that he did not cause serious physical injury to the victim by means of a deadly weapon is without merit. The testimony of both the victim and codefendant indicated that Dean struck the victim with a gun. Dean also signed the offer of guilty plea, which indicated that he struck the victim with a gun. Finally, Dean knowingly and voluntarily admitted to the crimes charged in the indictment during his plea colloquy. Thus, his arguments before this court that he only beat the victim with his hands and feet are not persuasive.

Furthermore, use of a gun is not necessary for a person to be found guilty of assault in the first degree. Per the language of the statute, Dean was guilty of first-degree assault if he demonstrated "extreme indifference to human life" and thereby caused serious physical injury to another person. Given the evidence that the

victim suffered broken bones and required hospitalization, the evidence clearly supported a conviction of assault in the first degree.

Accordingly, we find the trial court's denial of Dean's CR 60.02 motion to be supported by sound legal principles. As such, it was not an abuse of discretion, and we affirm the August 17, 2010, and the November 10, 2010, orders of the Kenton Circuit Court.

ALL CONCUR.

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