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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001166-MR

CALVIN ANDREW MCKINNEY — APPELLANT

v.

APPEAL FROM WARREN CIRCUIT COURT
HONORABLE JOHN R. GRISE, JUDGE
ACTION NO. 85-CR-00768

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, DIXON, AND WINE, JUDGES.

CLAYTON, JUDGE: Calvin Andrew McKinney appeals from an order of the Warren Circuit Court denying his motion for relief pursuant to Kentucky Rules of Civil Procedure (CR) 60.02 and Kentucky Rules of Criminal Procedure (RCr) 11.42. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On August 31, 1985, Estelle Dixon, an 86-year-old widow, was found by her son lying on her kitchen floor, unresponsive. She had been severely beaten and partially disrobed. When her son attempted to call the ambulance, he was unable to do so because her phone lines had been cut. In addition to the beating, she had been robbed of $125 and her 1986 Buick had been taken. She died from her injuries on September 1, 1985.

McKinney was implicated in the crime and was found in Tennessee at his grandmother's home. Witnesses had observed him in Dixon's car. He was indicted on October 15, 1985, for intentional murder, robbery first degree, burglary first degree, and theft by unlawful taking over $100. The Commonwealth sought the death penalty. On December 26, 1985, McKinney pled guilty to the charges of intentional murder, first-degree robbery, first-degree burglary, and theft by unlawful taking over $100. He was sentenced to a term of life on the murder charge and a total of 35 years on the others, all to run consecutively. Judgment became final on January 17, 1986.

In 1989, three years after the conviction, McKinney filed a motion to vacate his judgment and sentence pursuant to RCr 11.42. In the motion, he argued that he did not plead guilty knowingly and voluntarily because he received ineffective assistance of counsel. Following an evidentiary hearing, the motion was denied by the trial court. Subsequently, McKinney appealed the decision. The Kentucky Court of Appeals affirmed the trial court. The Court noted in its

opinion that "McKinney's case is a disturbing one and perhaps for that reason, the circuit court has taken pains to carefully observe the appellant's rights and consider his arguments." Ultimately, the Court of Appeals concluded that his claim of ineffective assistance of counsel was "meritless."

Some twenty years after the plea was entered, on January 27, 2006, McKinney filed a CR 60.02(e) and (f) motion raising issues based on new evidence and new law. With the assistance of a resident legal aide, he filed a supplemental motion. As grounds for the motion, McKinney claimed that a fellow inmate, Travis Suggs, told McKinney that he was represented by an attorney who had prosecuted McKinney's original case. According to Suggs, the former prosecutor informed him that an offer on a plea of guilty, which would have resulted in a twenty-year sentence, was extended to McKinney but never accepted. McKinney claims that he never received this offer and, therefore, his sentence should be vacated. In addition, shortly after Suggs' proffered information, the United States Supreme Court decided *Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005). In that decision, the Supreme Court held that the death penalty for juveniles was unconstitutional.

Thereafter the trial court entered an order appointing the Department of Public Advocacy (hereinafter "DPA") to represent McKinney. The DPA then filed another supplemental motion to vacate the judgment and sentence pursuant to CR 60.02(e) and (f) and RCr 11.42 or in the alternative to reform the judgment. The Commonwealth also filed its response. Since neither party requested an

evidentiary hearing, the trial court decided the issue on the pleadings and denied McKinney's motion. This appeal follows. Additional facts will be provided as necessary.

ISSUE

McKinney presents three arguments for vacating his sentence. First, he maintains that, based on new evidence, the Commonwealth had made an offer of twenty years on the murder charges but this offer was never communicated to him. Second, his plea was not knowingly, intelligently, and voluntarily made because of his illiteracy, age, and inexperience with the court system. Finally, his sentence should be set aside in light of evolving standards of decency regarding juvenile offenses as elucidated in *Roper*. The Commonwealth counters that credible evidence has not been provided that a twenty-year sentence was ever offered to McKinney, that McKinney's claim that his plea was not voluntary has already been litigated and ruled upon, and that his sentence should not be set aside under *Roper*.

STANDARD OF REVIEW

We review the denial of a CR 60.02 motion under an abuse of discretion standard. *White v. Com.*, 32 S.W.3d 83, 86 (Ky. App. 2000); *Brown v. Com.*, 932 S.W.2d 359, 361 (Ky. 1996); *Stoker v. Com.*, 289 S.W.3d 592, 596 (Ky. App. 2009), *review denied* (Aug. 19, 2009). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Com. v. English*, 993 S.W.2d 941, 945

(Ky. 1999) (citing 5 Am. Jur. 2d *Appellate Review* § 695 (1995)). Hence, we will affirm the lower court's decision unless there is a showing of some "flagrant miscarriage of justice." *Gross v. Com.*, 648 S.W.2d 853, 858 (Ky. 1983).

ANALYSIS

While McKinney has framed his reasons for the appeal as threefold, the gist of his claim is based on two issues. First, McKinney maintains that his plea was not knowingly, intelligently, and voluntarily made because of his illiteracy, age, and inexperience with the court system. Buttressing this contention is McKinney's assertion, based on a fellow inmate's report, that in 1985 the Commonwealth had made an offer of twenty years on the murder charges, but the offer was never communicated to him. Second, McKinney contends that the court should reconsider his sentence and set it aside in light of evolving standards of decency regarding juvenile offenses as elucidated in *Roper*, 543 U.S. 551, 125 S. Ct. 1183. The two issues are discussed sequentially.

Based on a combined CR 60.02 and RCr 11.42 motion, McKinney's opening contention is that his plea, made in 1985, was not knowing or voluntary and that a competency evaluation should have been undertaken. Therefore, he maintains that his sentence should be vacated, set aside, or corrected. To avail himself of this relief, McKinney must demonstrate the reasons he is entitled to special, extraordinary relief. In fact, the burden of proof falls squarely on McKinney to "affirmatively allege facts which, if true, justify vacating the judgment and further allege special circumstances that justify CR 60.02 relief."

McQueen v. Com., 948 S.W.2d 415, 416 (Ky. 1997), citing *Gross v. Com.*, 648 S.W.2d 853, 856 (Ky. 1983).

As an aside, McKinney proposes, in order to present the issues regarding his pleas adequately, that he must have access to his juvenile records. Based upon Court of Justice requirements, these records have been destroyed. But, as pointed out by the Commonwealth, nothing in McKinney's original motion mentions the necessity of juvenile records. Therefore, because this issue was not raised before the trial court, an appellate court will not consider it on review. *Com. v. Maricle*, 15 S.W.3d 376, 379 (Ky. 2000). McKinney has raised this issue for the first time on appeal in this Court and, thus, he has failed to properly preserve the issue for appellate review. But, even so, we note that at the time of his original RCr 11.42 motion in 1989, the juvenile records were available. Since the voluntariness of his plea has already been adjudicated and found valid, and the records were available at that time, McKinney's rights have been preserved.

Additionally, any argument that McKinney may have regarding the voluntary and intelligent nature of his guilty pleas is not properly brought under CR 60.02(e) and (f). The pertinent sections state:

> On motion a court may, upon such terms as are just, relieve a party or his legal representative from its final judgment, order, or proceeding upon the following grounds: . . . (e) the judgment is void, or has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (f) any other reason of an extraordinary nature justifying relief.

So CR 60.02(e) permits an attack on a judgment that is void, satisfied, released, or discharged. Although McKinney made his motions pursuant to CR 60.02(e) and (f), his claims are not cognizable under CR 60.02(e) because he raised no issues that meet its requirement with regard to the involuntariness of his plea.

First, we note that because McKinney in 1989 already challenged the nature of his guilty plea in an RCr 11.42 motion and was denied relief at that time both by the trial court and our Court, he is precluded from challenging it in a CR 60.02 motion. "CR 60.02 is not intended merely as an additional opportunity to raise *Boykin* defenses. It is for relief that is not available by direct appeal and not available under RCr 11.42." *Gross*, 648 S.W.2d at 856; *McQueen v. Com.*, 948 S.W.2d 415 (Ky. 1997). Post-conviction proceedings are not an occasion for appellate courts to reconsider cases reviewed, considered, and decided on appeal. *Hicks v. Com.*, 825 S.W.2d 280 (Ky. 1992).

Next, with regard to McKinney's CR 60.02(f) motion, McKinney maintains that he initially learned of the alleged twenty-year plea offer in summer 2005.

The new information, which was contained in an affidavit dated November 2, 2005, was regarding an alleged plea offer that was supposedly never discussed with McKinney. In that affidavit, Suggs, the previously mentioned inmate who was participating in the Department of Corrections' substance abuse program with McKinney, averred that Suggs' attorney, Morris Lowe, told Suggs

that in 1985 Lowe had made a plea offer of twenty years to Kelly Thompson, McKinney's defense attorney.

To counter this evidence, the Commonwealth provided the trial court with three affidavits. The first affidavit, dated September 17, 2007, from Lowe, stated that he had "no memory of a twenty (20) year offer ever being extended to movant in this case," but his office did extend an offer if McKinney pled guilty. The second affidavit, dated September 17, 2007, from Thompson, stated that Lowe always intended to seek the death penalty because he was upset about the nature of Dixon's death. Further, Thompson did not believe any offer of twenty years was ever made. Finally, in an affidavit, dated September 19, 2007, Assistant Commonwealth's Attorney Joseph Kirwin, stated that:

> The movant entered a plea of guilty in this case without a plea agreement in place. Thus, the plea of guilt was without a sentencing recommendation from the Commonwealth.

and

> At the movant's final sentencing hearing in 85-CR-00768, I argued for the imposition of Life without Parole for Twenty-Five (25) Years. There was never a twenty (20) year offer extended to Calvin McKinney in this case.

The trial court found that a twenty-year deal was never made. Based on our standard of review, which requires us to find an abuse of discretion, we are unable to determine that the trial court abused its discretion in this case. Hence, we conclude that the trial judge's decision about the efficacy of the evidence was not arbitrary, unreasonable, unfair, or unsupported by sound legal principles.

McKinney's second major contention regarding the 1986 judgment is that that the trial court reconsider his sentence in light of the 2005 U.S. Supreme Court decision, *Roper*, 543 U.S. 551, 125 S. Ct. 1183. *Roper* upheld a decision of the Missouri Supreme Court that found it unconstitutional to impose a sentence of capital punishment on juveniles (those under the age of 18). McKinney asserts, based on this decision and its reasoning, that his sentence should be set aside in light of evolving standards of decency regarding juveniles. And McKinney suggests that *Roper* provided a new understanding about adolescent brain development that was not recognized at the time of his sentencing hearing.

The trial court disputed this reasoning. In its decision, it highlighted the fact that at the time of McKinney's sentencing eighteen states had already eliminated the death penalty for persons under the age of eighteen. The trial court maintained that the impact of *Roper* was that the U.S. Supreme Court held that the imposition of the death penalty on persons under the age of eighteen violated the 8th and 14th Amendments of the U.S. Constitution. But the decision did not extend itself to the issue of life imprisonment or even life without the possibility of parole. In fact, notwithstanding the Supreme Court decision, Roper was given a harsher sentence than McKinney, that is, life without the possibility of parole.

In its opinion, the trial court also opines that the trial judge, who presided at McKinney's sentencing hearing in 1985, perhaps mindful of the McKinney's age and lack of maturity, rejected the death penalty and imposed a less onerous sentence than the one imposed in *Roper*. Additionally, the trial court

in its findings of fact highlighted Kentucky Revised Statutes (KRS) 532.025(2)(b)(8), which explicitly allows consideration of the defendant's young age as a mitigating factor in the determining whether to impose the death penalty. Recognizing the standard of review, abuse of discretion, we conclude that the trial court's decision was not arbitrary, unreasonable, unfair, or unsupported by sound legal principles and, therefore, not an abuse of discretion.

It is necessary again to review the appropriateness of the CR 60.02(f) motion with reference to the impact of *Roper* on McKinney's sentencing. Essentially, CR 60.02 replaced the common-law writ of *coram nobis*. That writ, however, was aimed at correcting factual errors, not legal errors. *Barnett v. Com.*, 979 S.W.2d 98 (Ky. 1998). McKinney's reliance on *Roper* to provide a rationale to reconsider his sentence does not, however, seek a remediation of a factual error. Rather, McKinney is asking us to apply a legal decision, rendered many years after his judgment, to review his sentence. He bases this request on evolving standards of decency regarding juvenile offenders, which, according to his reasoning, require his sentence to be set aside. As noted above, the sentence was allowable under the law in existence at the time and, further, the trial court found it allowable under the law now. We concur. Anyway, a change in the law simply is not grounds for CR 60.02 relief except in "aggravated cases where there are strong equities." *Reed v. Reed*, 484 S.W.2d 844, 847 (Ky. 1972).

We have cautioned regarding motions under CR 60.02(f) that "[b]ecause of the desirability of according finality to judgments, this clause (CR

60.02(f)) must be invoked with extreme caution, and only under most unusual circumstances." *Wine v. Com.*, 699 S.W.2d 752, 754 (Ky. App. 1985). And "CR 60.02 is an extraordinary remedy and is available only when a substantial miscarriage of justice will result from the effect of the final judgment." *Wilson v. Com.*, 403 S.W.2d 710, 712 (Ky. 1966). The trial court determined that the *Roper* case does not justify a new sentencing hearing, and we do not deem that a substantial miscarriage of justice will result from this decision.

CONCLUSION

McKinney has failed to establish that the plea he made over twenty years ago was not made knowingly or that his life sentence should be set aside because of the *Roper* decision and evolving standards of decency. Thus, we are unable to determine that "it is no longer equitable that the judgment should have prospective application" (CR 60.02(e)), or that it constitutes "any other reason of an extraordinary nature justifying relief" (CR 60.02(f)). Accordingly, we find that the trial court did not abuse its discretion. For the foregoing reasons, we affirm the Warren Circuit Court's order denying defendant's motion to vacate judgment and sentence.

ALL CONCUR.

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