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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001707-MR

STEVEN STEWART

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE GREGORY M. BARTLETT, JUDGE
ACTION NO. 05-CR-00027

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** *

BEFORE: DIXON, LAMBERT AND VANMETER, JUDGES.

DIXON, JUDGE: Steven Stewart, *pro se*, appeals an order of the Kenton Circuit Court denying his CR 60.02 motion to vacate sentence. We affirm.

In its order, the circuit court summarized the relevant historical facts as follows:

The Defendant, Steven Stewart, was indicted by the Kenton County Grand Jury on two Counts of First

Degree Rape and two Counts of First Degree Sodomy. On April 29, 2005, the Defendant entered a guilty plea to one Count of First Degree Rape, a Class B Felony. On Motion of the Commonwealth, the remaining three felony charges were dismissed.

In return for his plea of guilty, the Commonwealth was recommending a sentence of 15 years conditioned upon the Defendant identifying another participant in the crime. Prior to sentencing, the Commonwealth moved to withdraw its offer and to reinstate the previously dismissed three felony counts. The Commonwealth claimed the Defendant breached his agreement.

On June 24, 2005, a sentencing hearing was held at which this Court denied the Commonwealth's Motion to withdraw its recommendation and to reinstate the remaining felony counts. This Court ruled the Defendant had not breached his agreement with the Commonwealth.

Prior to sentencing on one Count of First Degree Rape to which the Defendant had previously pled guilty, this Court informed the Defendant that it was not satisfied with the recommendation of 15 years to serve. The Court, in accordance with RCr 8.10, further advised the Defendant in open court that he had a right to withdraw his guilty plea and proceed to trial. The Defendant acknowledged his right to withdraw his plea of guilty but stated to the Court that he wished to persist with his previous guilty plea. Thereafter, the Court sentenced the Defendant to 20 years with the Department of Corrections based upon his plea of guilty to one Count of First Degree Rape.

In February 2008, Stewart filed a motion to vacate his sentence pursuant to RCr 11.42, alleging he received ineffective assistance of counsel and that his plea was involuntary because he was not given the opportunity to withdraw his plea after the court rejected the recommended fifteen-year sentence. The Kenton

Circuit Court denied RCr 11.42 relief, which this Court affirmed in an unpublished opinion. *Stewart v. Commonwealth*, 2008-CA-001327 (May 8, 2009).

In May 2010, Stewart filed a motion to set aside his sentence pursuant to CR 60.02(e)-(f), alleging the trial court was obligated to sentence Stewart according to the plea agreement because Stewart relied on the agreement to his detriment. The trial court summarily denied Stewart's CR 60.02 motion by written order rendered August 26, 2010. This appeal followed.

“The standard of review of an appeal involving a CR 60.02 motion is whether the trial court abused its discretion.” *White v. Commonwealth*, 32 S.W.3d 83, 86 (Ky. App. 2000). “CR 60.02 is not a separate avenue of appeal to be pursued in addition to other remedies, but is available only to raise issues which cannot be raised in other proceedings.” *McQueen v. Commonwealth*, 948 S.W.2d 415, 416 (Ky. 1997).

Stewart asserts that his guilty plea was rendered involuntary by the trial court's refusal to sentence him to fifteen years' imprisonment pursuant to the plea bargain after Stewart detrimentally relied on the plea agreement by cooperating with the Commonwealth's investigation of Stewart's accomplice.

The Commonwealth correctly points out that Stewart should have raised these claims in a prior proceeding. Nevertheless, it is evident the merits of Stewart's contentions are easily resolved by the record in this case.

This Court has previously reviewed the voluntariness of Stewart's guilty plea and found no error. Indeed, a review of the plea colloquy reveals the

court informed Stewart it reserved the right to reject the Commonwealth's recommended sentence and impose a sentence up to the maximum penalty of twenty years' imprisonment. Furthermore, at the sentencing hearing, the court advised Stewart that it was not going to follow the fifteen-year recommendation due to the heinous nature of the crimes. Stewart declined the court's offer to withdraw his plea, and he chose to accept a sentence set by the court.

In *Haight v. Commonwealth*, 760 S.W.2d 84, 88 (Ky. 1988), the Kentucky Supreme Court explained as follows:

In a very significant case, *Couch v. Commonwealth*, 528 S.W.2d 712 (Ky. 1975), this Court settled the question of whether failure of the trial court to follow the recommendation of the Commonwealth's Attorney rendered the guilty plea involuntary. We held that it did not, but gave notice that if the defendant was misled by the action of the trial court, refusal to allow withdrawal of his guilty plea would amount to an abuse of discretion.

Despite Stewart's argument to the contrary, the trial court was clearly vested with the discretion to reject the sentence recommended in the plea agreement. *Id.*

Likewise, the record does not indicate that Stewart was misled by the trial court, as the court informed him in advance that it retained discretion in sentencing and subsequently gave him the opportunity to withdraw his plea. Finally, although Stewart contends he was denied the benefit of his bargain with the Commonwealth (a fifteen-year sentence), we must point out he still received some benefit from his plea agreement since the additional charges of rape and sodomy were dismissed,

which greatly reduced the potential aggregate sentence Stewart faced had he withdrawn his plea and stood trial on the original indictment.

We find no abuse of discretion; accordingly, we conclude the trial court properly denied Stewart's motion for CR 60.02 post-conviction relief.

For the reasons stated herein, the order of the Kenton Circuit Court is affirmed.

ALL CONCUR.

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