

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-001446-MR

JASON LEE AVIS

APPELLANT

v. APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE KELLY MARK EASTON, JUDGE
ACTION NO. 10-CR-00080

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: LAMBERT, J., MAZE, AND TAYLOR, JUDGES.

J. LAMBERT, JUDGE: Jason Avis appeals from the Hardin Circuit Court's order denying his Kentucky Rules of Civil Procedure (CR) 60.02 motion for relief from his entry of a guilty plea to the charge of intimidating a witness and for being a persistent felony offender in the second degree. After careful review, we affirm.

Avis was indicted on February 25, 2010, for intimidating a witness and for being a persistent felony offender in the second degree. Prior to this

indictment, Avis' wife had filed a police report indicating that Avis had abused her physically. At his arraignment, Avis' attorney noted that Avis' wife had expressed that she had lied to the police originally and wanted to retract her previous statements that Avis had abused her. After some discussion, Avis' defense counsel contended that the wife's statements did not amount to perjury, because she was not sworn under oath. The Commonwealth responded that she did make a police report. Avis' attorney then argued that this would be considered making a false police report and did not amount to perjury.

Avis filed a *pro se* motion for bond reduction or dismissal of the charges on April 12, 2010. In support of his motion, Avis argued that because his wife admitted to making a false police report, the charges should be dismissed. The trial court held a hearing on Avis' *pro se* motion on April 27, 2010. At the hearing, the trial court noted on the record that it had received a letter from Avis stating that his wife had admitted to filing a false police report. The court made the statement that an investigation would need to be done to determine whether Avis' wife should be arrested for filing a false report. In response to Avis' argument that his charges should be dismissed, the trial court found that the wife coming forward and claiming she had lied could show that Avis had been successful in his intimidation.

After all of these discussions, Avis and the Commonwealth entered into a plea agreement. Avis agreed to plead guilty to the charged crimes, and the Commonwealth agreed to recommend a seven-year sentence and probation. The

plea agreement stated as follows: “This is a joint plea with Kathryn F. Avis [appellant’s wife] and is conditioned upon her entering a guilty plea and being sentenced in Hardin District Court Case 10-M-00909.” At the guilty plea hearing, Avis acknowledged discussing his case with his defense counsel and that they talked about how he might defend against the charges. Avis stated that he was not threatened, coerced, or forced to enter a guilty plea, and acknowledged on the record that this was a joint plea with his wife. Avis also admitted the facts surrounding the charge of intimidating a witness. The parties had a discussion about whether a waiver of conflict was necessary, and Avis’ counsel stated to the court that Avis’ wife had already pled guilty in District Court.

Avis was ultimately convicted in September 2010 of intimidating a witness and persistent felony offender in the second degree. He was sentenced to seven-years’ imprisonment, which was probated for five years. On December 3, 2012, Avis’ probation was revoked for failure to complete an ordered anger management training course and because other charges were pending against him.

On August 4, 2014, Avis filed the instant CR 60.02 motion. In support of his motion, Avis argued that his conviction should be vacated because the Commonwealth should not have offered a plea, and the trial court should not have accepted his plea, after Avis’ wife admitted to making a false police report related to this case. The trial court denied Avis’ CR 60.02 motion. This appeal now follows.

This Court's standard of review concerning a trial court's denial of a CR 60.02 motion is whether the trial court abused its discretion. *Brown v. Commonwealth*, 932 S.W.2d 359, 362 (Ky. 1996); *Gross v. Commonwealth*, 648 S.W.2d 853, 858 (Ky. 1983). "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). CR 60.02 is an extraordinary remedy that is "available only when a substantial miscarriage of justice will result from the effect of the final judgment." *Wilson v. Commonwealth*, 403 S.W.2d 710, 712 (Ky. 1966).

Avis argues that he was denied due process and equal protection of the law when the trial court committed an abuse of discretion. Initially, Avis urges this Court to hold him to a lesser standard with regard to his pleadings because he is proceeding *pro se*, citing to *Moore v. Commonwealth*, 199 S.W.3d 132 (Ky. 2006). We find no support for Avis' argument in *Moore*. "While *pro se* litigants are sometimes held to less stringent standards than lawyers in drafting formal pleadings, see *Haines v. Kerner*, 404 U.S. 519, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972), Kentucky courts still require *pro se* litigants to follow the Kentucky Rules of Civil Procedure." *Watkins v. Fannin*, 278 S.W.3d 637 (Ky. App. 2009). This Court has always held *pro se* litigants to a reasonable standard. To do otherwise would give *pro se* litigants an advantage over litigants who are represented by counsel.

Avis next argues that the judgment is no longer equitable due to the extraordinary nature of this case. He further asserts that there was an extraordinary level of prosecutorial misconduct by the Commonwealth and that the trial court abused its discretion. In support of this, Avis contends that he was offered and permitted to plead guilty to an offense that was adjudicated as a false accusation due to his wife recanting her statement and pleading guilty to the offense of falsely reporting an incident.

A review of the record indicates that Avis waived his right to a direct appeal by pleading guilty and did not raise his current arguments in a Kentucky Rules of Criminal Procedure (RCr) 11.42 motion, thus essentially forfeiting his right to raise the claims which he is arguing now. Failure to raise an issue which could have and should have been raised on direct appeal or in an RCr 11.42 motion precludes that issue from being raised in a CR 60.02 motion. *Gross, supra*; *McQueen v. Commonwealth*, 948 S.W.2d 415, 416 (Ky. 1997).

Further, a guilty plea waives all defenses to a crime other than that the indictment failed to charge an offense. *Corbett v. Commonwealth*, 717 S.W.2d 831, 832 (Ky. 1986). Avis raised the claims he is making now several times *before* entering his guilty plea. Thus, he knew when he made his guilty plea that his wife had recanted and stated that she filed a false police report, and he entered the plea anyway. “A guilty plea constitutes a break in the chain of events, and the defendant therefore may not raise independent claims related to the deprivation of constitutional rights occurring before entry of the guilty plea.” *Centers v.*

Commonwealth, 799 S.W.2d 51, 55 (Ky. App. 1990) (citing *White v. Sowders*, 644 F.2d 1177 (6th Cir. 1980)). By pleading guilty, Avis waived his previously made claim that these charges should be dismissed due to his wife's recantation.

Avis also waited four years after his conviction before filing his CR 60.02 motion. The trial court recognized the delay and found that Avis' motion was not timely filed, given that Avis was aware of his current arguments at the time he made his guilty plea and swore before the Court that it was a voluntary plea. Avis was released on probation, and then his probation was revoked due to pending charges against him in another matter. He was returned to jail on November 27, 2012, and was sentenced to serve his original seven-year sentence while fighting the then pending charges. He argues that this should not be considered when evaluating the timeliness of his CR 60.02 motion. He concedes that *Gross, supra*, holds that probation time counts toward the time limitations of post-conviction appeals, but argues that no reasonable person released back into society would pursue post-conviction claims against a court who had released them on probation.

The record reflects that the trial court considered the timeliness of Avis' motion and found it to be unreasonable that he waited four years before filing the motion for relief. The trial court specifically noted that when his probation was revoked on November 27, 2012, Avis did not assert the complaints about the circumstances of his plea deal and that no appeal was taken from the

probation revocation. We find no abuse of discretion in the trial court's conclusion that Avis' CR 60.02 motion was not timely.

Although neither party addresses this directly in their briefs, the trial court specifically found that Avis' complaint that his wife filed a false police report was irrelevant, because the crime of intimidating a witness is complete when the intimidation is attempted. The court noted, and we agree, that the fact that his wife recanted could be considered proof that the intimidation was successful. The trial court found that in cases where the intimidation was successful and the underlying charge was dismissed, it would often be impossible to prove intimidation. We find this to be most persuasive, and we find no abuse of discretion in this regard.

Absent any showing of an abuse of discretion, we cannot reverse the trial court's order. Therefore, we affirm the August 11, 2014, order of the Hardin Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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