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# Commonwealth of Kentucky

## Court of Appeals

NO. 2015-CA-000654-MR

LAYW THOMAS

APPELLANT

v. APPEAL FROM CHRISTIAN CIRCUIT COURT  
HONORABLE JOHN L. ATKINS, JUDGE  
ACTION NO. 06-CR-00110 & 06-CR-00142

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
REVERSING AND REMANDING

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

THOMPSON, JUDGE: Layw Thomas appeals from an order of the Christian Circuit Court denying his motion filed pursuant to Kentucky Rules of Civil Procedure (CR) 60.02 alleging that his sentence was illegally imposed pursuant to a hammer clause and, therefore, unauthorized under Kentucky law. We conclude that relief is available to Thomas under CR 60.02 because of the extraordinary

circumstances presented and he is entitled to be sentenced as provided for in Kentucky's statutory law and rules of criminal procedure.

Thomas was born on May 2, 1988. In 2006, Thomas, then a juvenile, was charged with various crimes in two separate indictments. In 2006-CR-00110, Thomas was indicted for the murder of Ronnie Franks on January 17, 2006. In 2006-CR-00142, Thomas was indicted for robbery in the first degree, assault in the first degree, assault in the second degree and wanton endangerment in the first degree for crimes against victims other than Franks committed on January 5, 2006.

Pursuant to a plea agreement, on May 3, 2007, Thomas entered a guilty plea to first-degree robbery, first-degree assault, second-degree assault and first-degree wanton endangerment in exchange for a recommended sentence of twelve years. As part of the plea agreement, Thomas was released pending sentencing in his mother's custody and agreed that if he failed to appear at sentencing, the Commonwealth would move the trial court to impose the maximum sentence.

On October 3, 2007, again pursuant to a plea agreement, Thomas pled guilty to murder in 2006-CR-00110, in exchange for a recommended sentence of twenty years to run concurrently with his sentence in 2006-CR-00142. As in the earlier plea agreement, Thomas agreed that if he failed to appear at sentencing, the Commonwealth would move the trial court to impose the maximum sentence.

Thomas failed to appear at sentencing on December 6, 2007. His counsel asked for leniency and explained that Thomas removed his ankle bracelet

and fled only after his mother's landlord threatened eviction if Thomas did not leave the residence. An arrest warrant was issued.

Thomas appeared for sentencing on April 2, 2008. At that time, his counsel again made a plea for leniency and Thomas's mother testified about the threatened eviction that caused Thomas to leave the residence. The trial court found no reason to grant leniency and reiterated the terms of the plea agreement that Thomas would be sentenced to the maximum sentence if he failed to appear for sentencing. In accordance with that agreement, the trial court stated Thomas would be sentenced to the maximum sentences on each count. The trial court made no reference to the presentencing report or circumstances of Thomas's crimes but only referenced the plea agreement and Thomas's violation of that agreement. In its docket order the court stated:

[Defendant] having failed to appear as ordered for previous sentencing hearing in violation of the plea agreement, he is sentenced to the maximum on his sentences. The sentences shall run consecutively to the extent allowed by statute.

On April 18, 2008, a combined judgment and sentence of conviction was entered. Instead of the combined sentence of twenty-years' imprisonment, Thomas was sentenced to life for the murder conviction to run consecutive with the charges in 06-CR-00142. For robbery first-degree, he was sentenced to twenty years; assault first-degree, twenty years; wanton endangerment, first degree, five years; and assault second-degree, five years, to run consecutive to the life sentence. In total, he was sentenced to a total of life imprisonment plus fifty years. In

accordance with its sentencing ruling, the sentencing judgment repeated the reasoning for imposing the maximum sentence in bold as follows:

DEFENDANT HAVING FAILED TO APPEAR AS ORDERED FOR PREVIOUS SENTENCING HEARING IN VIOLATION OF THE PLEA AGREEMENT, HE IS SENTENCED TO THE MAXIMUM ON HIS SENTENCES. THE SENTENCES SHALL RUN CONSECUTIVELY TO THE EXTENT ALLOWED BY STATUTE.

On February 22, 2011, Thomas, *pro se*, filed a combined CR 60.02 and Kentucky Rules of Criminal Procedure (RCr) 11.42 motion arguing his counsel was ineffective by allowing him to enter into a plea agreement containing a hammer clause and that the trial court illegally committed to enforcing a hammer clause in imposing the maximum sentences for his crimes. He filed a motion to proceed *in forma pauperis* and requested the appointment of counsel and an evidentiary hearing. He attached his six-month inmate account statement showing a balance of \$360 and an affidavit of indigency.

After three months passed, Thomas's motion had not been ruled upon and he had not been appointed counsel. He filed a petition for writ of mandamus in this Court. This Court issued an administrative order granting in part and denying in part his motion to proceed *in forma pauperis*. Thomas was directed to pay an \$18 filing fee within sixty days. The remainder of the required fee was waived. After Thomas failed to pay the partial fee, his writ was dismissed.

On August 11, 2011, without ruling on Thomas's request for appointment of counsel, the trial court denied Thomas's motion filed pursuant to RCr 11.42 and

CR 60.02. The court noted that Thomas “was made aware of the consequences of not appearing at his sentencing hearing.” The trial court concluded by stating: “Mr. Thomas has no one to blame but himself for the predicament he finds himself in.”

Thomas tendered a timely notice of appeal. However, on August 29, 2011, the circuit clerk returned the notice of appeal to Thomas and, in an attached letter from the clerk, Thomas was informed as follows:

*Please find enclosed, all documents received by this office in regards to an appeal. For each case, you must provide:*

*Motion to proceed In forma Pauperis  
Order to proceed In forma Pauperis  
Affidavit of Indigency  
Notice of Appeal  
Designation of Record  
Copy of Order being Appealed*

*If you would like to file an appeal in more than one case-each case must have its own set of documents. Do not list multiple case numbers on a document.*

On September 12, 2011, a motion to proceed *in forma pauperis*, and “financial statement, affidavit of indigency, request for counsel and order” and designation of record tendered by Thomas were filed. Although there is not a certification of mailing included on the documents, necessarily, the additional documents were mailed from the prison before the expiration of thirty days from entry of the order denying his combined RCr 11.42 and CR 60.02 motion.

On September 23, 2011, the trial court denied Thomas's motion to proceed *in forma pauperis*. The trial court docket ordered stated: "[T]homas has funds to pay court of appeals filing fee." No ruling was made on his request for appointment of counsel. Thomas did not appeal from that order and did not tender a filing fee with a notice of appeal from the denial of his combined RCr 11.42 and CR 60.02 motion.

On January 21, 2015, Thomas filed a CR 60.02 motion, motion to proceed *in forma pauperis* and requested assistance of counsel. He again asserted his sentence was illegally imposed pursuant to a hammer clause. On March 14, 2015, the circuit court granted Thomas's motion to proceed *in forma pauperis*. However, it denied his CR 60.02 motion without an evidentiary hearing.

The trial court found that the sentencing trial court appropriately enforced the hammer clause. Specifically, it found as follows:

The record shows that the trial judge reviewed the Notice of Extenuating Factors filed by Thomas's counsel in attempt to provide the court with mitigating circumstances and to inform the court that all efforts were being made to persuade Thomas to turn himself in to the Christian County Jail. The court was also aware of the fact that Thomas tampered with his monitoring device and that he was finally apprehended in Tennessee.

The trial court further found that Thomas previously raised the same issue in his combined RCr 11.42 and Cr 60.02 motion, which was not appealed. After his motion was denied, Thomas filed this *pro se* appeal.

Thomas first alleges that the trial court imposed an illegal sentence when it ran his fifty-year sentence consecutive to his life sentence. He relies on Kentucky Revised Statutes (KRS) 532.110(1), which provides:

When multiple sentences of imprisonment are imposed on a defendant for more than one (1) crime, including a crime for which a previous sentence of probation or conditional discharge has been revoked, the multiple sentences shall run concurrently or consecutively as the court shall determine at the time of sentence, except that:

(a) A definite and an indeterminate term shall run concurrently and both sentences shall be satisfied by service of the indeterminate term;

(b) The aggregate of consecutive definite terms shall not exceed one (1) year;

(c) The aggregate of consecutive indeterminate terms shall not exceed in maximum length the longest extended term which would be authorized by KRS 532.080 for the highest class of crime for which any of the sentences is imposed. In no event shall the aggregate of consecutive indeterminate terms exceed seventy (70) years[.]

Two unpublished cases by our Supreme Court specifically address the meaning of KRS 532.110.<sup>1</sup>

In *Clay v. Commonwealth*, 2009-SC-000012-MR, 2010 WL 2471862 (Ky. 2010), Clay was convicted of rape and sodomy and sentenced to thirty-years' imprisonment after he was convicted for rape and murder in an unrelated case and

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<sup>1</sup> Pursuant to CR 76.28(4)(c), we may cite an unpublished case, rendered after January 1, 2003, if there is no published opinion that would adequately address the issue before the court. In *Higgins v. Commonwealth*, 2014-SC-000466-MR, 2016 WL 671150, 7 (Ky. 2016), the Court noted there are no published case addressing the issue.

sentenced to life imprisonment. *Id.* His thirty-year sentence was run consecutively to his previously imposed life sentence. *Id.* The Court held that when read together, KRS 532.080 (dealing with sentence enhancements for a persistent felony offender) and KRS 532.110, preclude a life sentence consecutively to a sentence for a term of years, when both sentences arise out of the same action. *Id.* at 4. However, because Clay's life sentence predated his term-of-years sentence and that sentence arose from separate cases, the sentences were permitted to run consecutively. *Id.* The same reasoning was applied and same result reached in *Higgins v. Commonwealth*, No. 2014-SC-000466-MR, 2016 WL 671150 (Ky. 2016). Likewise, in Thomas's case, his sentences arose from different criminal acts on different dates and committed against different victims and, therefore, could be run consecutively to one another.

The second issue raised by Thomas concerns the hammer clause imposed at his sentencing. At his plea, Thomas was given an ultimatum by the trial court: Either appear at the sentencing hearing or the maximum sentence would be imposed. After Thomas failed to appear for sentencing, the trial court adhered to its statement and enforced the hammer clause.

A hammer clause is a plea negotiation tool used by prosecutors, which is defined as follows:

[It is] a provision in a plea agreement which, in lieu of bail, allows the defendant, after entry of his guilty plea, to remain out of jail pending final sentencing. Generally, a hammer clause provides that if the defendant complies with all the conditions of his release and



appears for the sentencing hearing, the Commonwealth will recommend a certain sentence. But, if he fails to appear as scheduled or violates any of the conditions of his release, a specific and substantially greater sentence will be sought.

*Knox v. Commonwealth*, 361 S.W.3d 891, 893–94 (Ky. 2012). Although hammer clauses are not *per se* void, our Supreme Court has, on two occasions, been highly critical of such clauses.

In *McClanahan v. Commonwealth*, 308 S.W.3d 694 (Ky. 2010), the Court observed that our rules and statutes governing sentencing of criminal defendants set forth the duties of a trial court in directory language:

KRS 532.050(1) states that “[n]o court shall impose a sentence for conviction of a felony, other than a capital offense, without first ordering a presentence investigation after conviction and giving due consideration to a written report of the investigation.” RCr 11.02 requires “[b]efore imposing sentence the court shall ... examine and consider the (presentence) report ... [.]” KRS 533.010(1) provides “[b]efore imposition of a sentence of imprisonment, the court shall consider probation, probation with an alternative sentencing plan, or conditional discharge.” The trial court may impose a sentence of imprisonment (with exceptions not applicable here) only “after due consideration of the nature and circumstances of the crime and the history, character and condition of the defendant.” KRS 533.010(2).

*Id.* at 702. Quoting *Edmonson v. Commonwealth*, 725 S.W.2d 595 (Ky. 1987), the Court explained the limitations on the trial court’s sentencing discretion:

KRS 532.110(1) grants the trial court discretion to impose concurrent or consecutive sentences. However, such discretion must be exercised only after the defendant has had a fair opportunity to present evidence at a meaningful hearing in favor of having the sentences

run concurrently or present other matters in mitigation of punishment. The statutes and rule [RCr 11.02] are not mere procedural formalities, but are substantive and may not be ignored.

*McClanahan*, 308 S.W.3d at 703. The Court held that by “assuring Appellant upon acceptance of his guilty plea that should he violate the terms of his release, the full force of the ‘hammer clause’ would be dropped upon him, the judge committed to the imposition of a specific sentence in a way that precluded true compliance with KRS 532.050(1), KRS 532.110(1), KRS 533.010(1) and (2), and RCr 11.02.” *Id.* at 704.

In *Knox*, the Court further explained that hammer clauses and our sentencing procedures are diametrically opposed. The Court stressed that when considering sentencing, the sentencing court is required to exercise its independent discretion.

*Knox*, 361 S.W.3d at 897-98. The Court continued noting the conflict between enforcement of a hammer clause and the trial court’s sentencing duties:

[T]he judge who warns the defendant entering a guilty plea that specific future conduct will result in a specific sentence has drawn a line in the sand and dared the defendant not to cross it. That judge has invested his or her credibility in the outcome at final sentencing. The judge must either follow through as forewarned, regardless of what sentencing information may be presented at the sentencing hearing, or acknowledge that the threat to impose the hammer provision was hollow.

*Id.* at 899.

Aside from the inherent conflict between hammer clauses and the trial court’s duties to consider all relevant factors prior to sentencing a defendant, the

*Knox* Court found hammer clauses were conceptually irreconcilable with basic principles of our criminal justice system. Noting that such clauses serve as a “poor man’s bail” because it is often included as a substitute for bail for those financially unable to pay, the Court observed that release pending sentencing is a matter of statutory law which provides penalties for violation of the terms of that release.

The Court reasoned:

If a “poor man” cannot be trusted upon any of the conventional statutory forms of release, he should not be released. If he can be trusted, then the trial judge should accept the responsibility of allowing the release in accordance with the applicable statutes and rules. We cannot approve judicial participation in the use of a hammer clause that evades the legislative policies embodied in the statutory forms of presentence release and the authorized punishments for violations of those forms of release.

*Id.* at 900.

Additionally, in *Knox*’s case, the hammer clause, which doubled his sentence bargained for, was offensive to the concept of fairness and justice. The Court was unable to reconcile the result with the principle that “the punishment should fit the crime and the criminal[.]” *Id.*

[I]t defies reason ... to say that a ten-year sentence for [*Knox*’s] crimes of robbery was appropriate, so long as he stayed in the house and did not drink pending sentencing; but, if he left the house for a few minutes and had a drink, he deserved the twenty-year sentence. If, upon proper consideration of all the relevant facts and circumstances, one of those sentences fits his crimes, the other could not.

*Id.*

Despite its strong critical language of hammer clauses, the Court concluded that because the Commonwealth's power to negotiate a plea agreement is a power of the executive branch, the judiciary cannot bar the use of such clauses in the plea negotiating process. *Id.* at 899. However, the Court held that "a judge's commitment to impose a sentence based upon a defendant's breach of a hammer clause condition, coupled with the imposition of that sentence without proper consideration of the other relevant factors, is an abuse of judicial discretion." *Id.* Therefore, "[w]hen presented with a plea agreement with a hammer clause, the trial judge should accord it no special deference, and shall make no commitment that compromises the court's independence or impairs the proper exercise of judicial discretion." *Id.* at 900. In Knox's case, the sentence was set aside and the matter remanded for a new sentencing hearing.

Applying the substantive law as set forth in *McClanahan* and *Knox* to this case and after review of the record, including the trial court's affirmative statements that it was sentencing Thomas pursuant to the hammer clause, we conclude that the sentencing court did not exercise the independent judgment as to the proper sentence to be imposed under the applicable statutory law and rules of criminal procedure. Although the sentencing court considered the circumstances of Thomas's violations of the conditions of his release, it did not consider whether the sentences imposed for the underlying crimes were appropriate considering the relevant factors, including the presentencing report. The only factor considered

during sentencing was the violation of the plea agreement and the agreed upon punishment for that violation.

The sentencing trial court erroneously sentenced Thomas as punishment for his failure to appear, rather than his underlying crimes. Thomas's crimes, including murder, were heinous and punishable by the sentences imposed. However, because Thomas entered guilty pleas and the full factual record was not developed, this Court is unaware of the circumstances of Thomas's crime. This Court does know that despite the seriousness of Thomas's crimes, the Commonwealth believed a twenty-year concurrent sentence was appropriate under the facts and was agreeable to his release pending sentencing. As in *Knox*, the difference between a twenty-year and a life sentence plus fifty years, particularly considering Thomas's young age, is so "widely disparate" that it cannot be "interchangeably just." *Id.*

The Commonwealth argues that even if Thomas was improperly sentenced, we must affirm because he has not followed the proper procedures to raise the issue of his unauthorized sentence. Therefore, we address whether Thomas could seek relief pursuant to CR 60.02, which provides:

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: (a) mistake, inadvertence, surprise or excusable neglect; (b) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59.02; (c) perjury or falsified evidence; (d) fraud affecting the proceedings, other than perjury or falsified evidence; (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.

The rule further provides that any motion on grounds (a), (b), and (c) must be filed “not more than one year after the judgment, order, or proceeding was entered or taken” and under (e) and (f) must be filed within a reasonable time. *Id.* If Thomas is entitled to relief, it must be under (e) or (f).

While CR 60.02(f) must be applied “only with extreme caution, and only under most unusual circumstances[,]” *Cawood v. Cawood*, 329 S.W.2d 569, 571 (Ky. 1959), it is a tool available to the courts as a last resort to cure a substantial injustice when other avenues of relief are foreclosed. Thomas’s case presents circumstances of such an extraordinary nature, that we are compelled to invoke that provision.

The importance of a sentencing court’s adherence to the applicable statutes and rules cannot be overstated and was artfully stated in *McClanahan*:

*The statutes and RCr 11.02 are not mere procedural formalities, but are substantive and may not be ignored.* The imposition of a sentence in a criminal case is one of a trial judge’s most solemn responsibilities. In felony cases, it is the circuit court judge who shoulders the awesome weight of striking the balance between doing justice for the accused and vindicating the peace and dignity of the Commonwealth. It is the faithful adherence to the policies of justice embodied in our sentencing statutes and rules that preserves the great respect and high regard most citizens of this Commonwealth have for our trial court judges.

*McClanahan*, 308 S.W.3d at 703-04. Here, the sentencing trial court failed to carry out its solemn duty to sentence Thomas in accordance with the statutes and rule.

As the Commonwealth points out, Thomas did not directly appeal his sentence and, even in the context of a guilty plea, sentencing issues may be raised by direct appeal. *Windsor v. Commonwealth*, 250 S.W.3d 306, 307 (Ky. 2008). The Commonwealth urges we apply the general rule that issues which could have or should have been raised on direct appeal are not properly raised in a CR 60.02 motion. *Stoker v. Commonwealth*, 289 S.W.3d 592, 597 (Ky.App. 2009).

We refrain from deciding today whether a sentence imposed without regard to RCr 11.02 and the relevant statutory sentencing factors must be directly appealed or may properly be considered by way of CR 60.02. *See Jones v. Commonwealth*, 382 S.W.3d 22, 27 (Ky. 2011) (holding that an appellate court has “inherent jurisdiction to correct an illegal sentence” and is “correctable by appeal, by writ, or by motion pursuant to RCr 11.42 or CR 60.02.”). There are other reasons why the extraordinary relief afforded by CR 60.02 is available. Most glaring is that Thomas was denied counsel in his post-conviction proceedings.

Thomas has persistently requested assistance of counsel and been consistently denied counsel. Although not a constitutional requirement, under RCr 11.42(5), Thomas was entitled to appointment of counsel if he was entitled to an evidentiary hearing. *Fraser v. Commonwealth*, 59 S.W.3d 448, 452 (Ky. 2001). An RCr 11.42 hearing “is required if there is a material issue of fact that cannot be

conclusively resolved, *i.e.*, conclusively proved or disproved, by an examination of the record.” *Id.*

In his original RCr 11.42 motion, Thomas alleged his counsel was ineffective for advising him to enter into the plea agreement containing a hammer clause. The record does not refute this allegation and we cannot conclusively say that such advice did not amount to ineffective assistance of counsel.

The reasonableness of advising Thomas to enter into such an agreement when he received a favorable agreement of twenty-years’ imprisonment contrasted with the possibility of life imprisonment plus fifty years was not only in hindsight an ill-advised decision, but was arguably flawed from inception. It could be anticipated that Thomas, a juvenile who had already demonstrated his poor judgment by commission of serious crimes, may not fully appreciate the consequences of the hammer clause. There is a question of fact as to whether counsel’s advice to agree to the hammer clause for a brief respite from incarceration was sound in light of the risk of having a lengthy prison term imposed.

Moreover, Thomas’s attorney did not move to withdraw the guilty plea after Thomas failed to appear. Finally, counsel did not appeal the sentence which imposed the hammer clause.

The denial of counsel in Thomas’s post-conviction proceeding left him without counsel in his attempt to appeal the denial of his combined RCr 11.42 and CR 60.02 motion, which was unsuccessful. Although many of the documents



listed by the clerk were not required to be tendered with the notice of appeal and their omission not a basis to refuse to carry out the ministerial duty of filing the notice of appeal, the omission of a motion to proceed *in forma pauperis* or pay the filing fee was a basis for the clerk's refusal to file the notice. *Excel Energy, Inc. v. Commonwealth Inst. Sec., Inc.*, 37 S.W.3d 713, 716 (Ky. 2000). Thomas corrected this error when he tendered his motion to proceed *in forma pauperis* and accompanying documents. However, without making findings and although Thomas had been incarcerated since the age of eighteen, the trial court denied Thomas's motion to proceed *in forma pauperis*. Without counsel, Thomas did not appeal that order.

We believe CR 60.02 is the proper avenue to correct the injustices in this case. The sentencing court's failure to follow the substantive sentencing laws, the failure to appoint counsel and conduct an evidentiary hearing in the first post-conviction proceeding, and the original denial of Thomas's *in forma pauperis* motion amount to reasons of an extraordinary nature justifying relief under CR 60.02(f). While perhaps no single error is extraordinary, the combined errors are sufficient to constitute a manifest injustice.

The Commonwealth argues that even if CR 60.02 affords relief to Thomas, the rule does not permit successive CR 60.02 motions and, therefore, his second post-conviction motion was procedurally barred. It points that successive CR 60.02 motions are not permitted. As stated in *Stoker*, 289 S.W.3d at 597 (citation omitted): "Our rules of civil procedure do not permit successive motions

or the relitigation of issues which could have been raised in prior proceedings. Our courts do not favor successive collateral challenges to a final judgment of conviction which attempt to relitigate issues properly presented in a prior proceeding.”

We might agree with the Commonwealth but for the fact that Thomas was denied counsel to which he was entitled in his first post-conviction proceeding. In instances where an RCr 11.42 movant has been wrongfully denied an evidentiary hearing and, therefore, the appointment of counsel, our Supreme Court has held that a movant is entitled to file a belated appeal. *Moore v. Commonwealth*, 199 S.W.3d 132 (Ky. 2006). In that case, the wrongful denial of counsel was sufficient reason to depart from strict adherence to procedural rules. We believe the same result is warranted in Thomas’s case.

Although Thomas has raised the issue in a successive CR 60.02 motion, we conclude that under the extraordinary circumstances where the right to counsel has been denied, whether that right arises from the constitution, rule, or statute, the rule precluding successive CR 60.02 motions does not apply. Our ruling is consistent with the approach to procedural rules adopted in *Ready v. Jamison*, 705 S.W.2d 479, 482 (Ky. 1986). Such rules are to be interpreted consistent with “achieving an orderly appellate process, deciding cases on the merits, and seeing to it that litigants do not needlessly suffer the loss of their constitutional right to appeal.” *Id.*

Finally, we conclude Thomas's motion was filed within a reasonable time. Again, the circumstances, including his unsuccessful attempt to appeal the denial of his first post-conviction motion and that he is *pro se*, compel this Court to reverse and remand. *See Commonwealth v. Miller*, 416 S.W.2d 358, 360 (Ky. 1967) (holding *pro se* prisoners are not held to the same standard as legal counsel). Moreover, because we are remanding only for a new sentencing hearing, Thomas's guilt or innocence is not at issue. The prejudices caused by the lapse of time such as the fading memories of witnesses are not present.

Having concluded that Thomas's motion was proper pursuant to CR 60.02, the ultimate question is whether the trial court abused its discretion in denying CR 60.02 relief. *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). Applying our reasoning expressed in this opinion, we conclude the trial court abused its discretion in denying Thomas's CR 60.02 motion.

For the reason stated, the sentencing judgment of the Christian Circuit Court is set aside and the case remanded for a new sentencing hearing.

LAMBERT, J., JUDGE, CONCURS.

TAYLOR, JUDGE, CONCURS IN RESULT ONLY.

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