

RENDERED: November 26, 1997; 2:00 p.m.
NOT TO BE PUBLISHED

NO. 96-CA-2636-MR

DEWEY GODBY

APPELLANT

v. APPEAL FROM GRANT CIRCUIT COURT
HONORABLE RAYMOND E. LAPE, JR., JUDGE
ACTION NO. 93-CR-45

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

* * * * *

BEFORE: JOHNSON, KNOPF, and MILLER, JUDGES.

KNOPF, JUDGE. This is an appeal from a denial of a motion to alter, amend, or vacate judgment of conviction pursuant to RCr 11.42 and CR 60.02. Finding no error, we affirm.

Dewey Godby (Godby) was found guilty by a jury of driving under the influence (DUI), fourth offense. Godby was sentenced to five (5) years and fined \$5,000.00. Godby timely filed an appeal with this Court. On June 23, 1994, Godby entered a document into the record styled "Proposal for Probation Terms." The proposal stated in part:

Should the Defendant's Motion be sustained, this defendant is obviously willing to dismiss the appeal pending in this matter.

On July 14, 1994, the trial court granted shock probation. On July 18, 1994, Godby and the Commonwealth filed a joint motion to dismiss appeal, 94-CA-212-MR. On September 21, 1994, this Court granted the joint motion to dismiss. On March 3, 1995, Godby was arrested for DUI in Indiana. On March 27, 1995, the Commonwealth filed a motion to revoke Godby's probation. Godby's probation was revoked on April 15, 1996. On January 26, 1996, Godby filed a pro se motion with this Court styled "Motion of Appellant that Court Permit Untimely Appeal." On March 27, 1996, this Court denied the motion for belated appeal. The order stated in part:

[t]he Court ORDERS the motion be DENIED as movant has waived his right to the appeal when he voluntarily dismissed his appeal.

On August, 27, 1996, Godby filed a RCr 11.42 and CR 60.02 motion to set aside or correct judgment. The trial court denied the motion on September 10, 1996. This appeal followed.

On appeal, Godby argues three (3) issues: 1) the trial court abused its discretion and committed prejudicial error by introduction of previous convictions during the guilt phase; 2) the Commonwealth has failed to prove the essential elements of the offense and has constitutionally shifted the burden of proof by presumption; and 3) the trial court abused its discretion and violated appellant's constitutional right to a fair trial, by introduction of inadmissible prior DUI convictions that were not properly authenticated. All of these issues were required to be brought on direct appeal. See Gross v. Commonwealth, Ky., 648 S.W.2d 853, 857 (1983).

The only question remaining is whether the nature of the agreement (Godby to dismiss his appeal in return for the Commonwealth not opposing shock probation) somehow changes Godby's position, allowing him to proceed. These arguments were rejected by this Court previously in 94-CA-212-MR, by denying the motion for belated appeal. We will not disturb that ruling now.

The order of the Grant Circuit Court is affirmed.

ALL CONCUR.

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BRIEF FOR APPELLEE:

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