

RENDERED: August 7, 1998; 2:00 p.m.  
NOT TO BE PUBLISHED

NO. 97-CA-1942-MR

RAY ASHCRAFT

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE MARY C. NOBLE, JUDGE  
ACTION NO. 86-CR-00527

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

\* \* \* \* \*

BEFORE: ABRAMSON, GARDNER, and GUIDUGLI, JUDGES.

GUIDUGLI, JUDGE. Ray Ashcraft (Ashcraft) appeals pro se from an order of the Fayette Circuit Court entered on July 15, 1997, denying his motion to amend the judgment brought pursuant to Kentucky Rule of Civil Procedure (CR) 60.02. We affirm.

In November 1986, the Fayette County Grand Jury indicted Ashcraft on one count of murder (KRS 507.020), and one count of being a persistent felony offender in the second degree (PFO II) (KRS 532.080). The trial court separated the trial proceeding with respect to the murder charge and the PFO II

charge. Consistent with the Truth In Sentencing Statute, KRS 532.055, the trial judge also separated the guilt phase and the sentencing phase of the murder prosecution. As a result, the prosecution was divided into a tripartite procedure. During the initial phase, the jury found Ashcraft guilty of first-degree manslaughter, and during the second phase the jury recommended a sentence of twenty years in prison on the manslaughter conviction. After the jury rendered these verdicts, Ashcraft made a motion to enter a guilty plea on the PFO II charge, pursuant to a plea agreement with the Commonwealth, which recommended an enhanced sentence of thirty-four years in prison. On April 1, 1987, after conducting a guilty plea hearing, the trial court accepted the guilty plea finding it was entered knowingly and voluntarily. The court postponed final sentencing pending review of a presentence investigation report. In May 1987, the trial judge sentenced Ashcraft to serve twenty years on the murder conviction enhanced to thirty-four years on the PFO II conviction. Ashcraft filed a direct appeal of the judgment of conviction. In February 1988, the Kentucky Supreme Court affirmed the judgment in an unpublished opinion. Ashcraft v. Commonwealth, 87-SC-467-MR (rendered Feb. 11, 1988).

On June 16, 1997, Ashcraft filed a pro se "Motion to Amend or Correct Sentence Pursuant to CR 60.02(f) and CR 60.03." He argued that the PFO II conviction was void ab initio because it was not rendered by a jury. He also requested an evidentiary hearing on the motion. The Commonwealth filed a response

contending that Ashcraft waived the right to a jury decision on the PFO II charge. In an opinion and order, the trial court denied the motion. This appeal followed.

First, we note that Ashcraft's complaint should have been raised by way of a motion pursuant to RCr 11.42, rather than CR 60.02. A defendant must utilize RCr 11.42 prior to bringing a CR 60.02 motion while he is in custody under sentence, probation or parole. See Gross v. Commonwealth, Ky., 648 S.W.2d 853 (1983). CR 60.02 "is for relief that is not available by direct appeal and not available under RCr 11.42." Id. at 856. See also Commonwealth v. Gross, Ky., 936 S.W.2d 85, 88 (1997) (CR 60.02 is intended to correct errors in judgments "not available by appeal or otherwise, which were discovered after rendition of judgment without fault of the party seeking relief."). Nevertheless, we will address the merits of appellant's complaint. See, e.g., Case v. Commonwealth, Ky., 467 S.W.2d 367 (1971); Beecham v. Commonwealth, 657 S.W.2d 234, 236 (1983). In addition, because Ashcraft has failed to demonstrate a material factual issue that cannot be determined on the face of the record, he was not entitled to a hearing on the motion, whether it is treated under RCr 11.42 or CR 60.02. See Stanford v. Commonwealth, Ky., 854 S.W.2d 742, (1993).

Ashcraft maintains that the PFO II conviction is void because his criminal liability on the PFO charge was not presented to a jury. His argument relies primarily on interpretation of KRS 532.080(1), which provides:

When a defendant is found to be a persistent felony offender, the jury, in lieu of the sentence of imprisonment assessed under KRS 532.060 for the crime of which such person presently stands convicted, shall fix a sentence of imprisonment as authorized by subsection (5) or (6) of this section. When a defendant is charged with being a persistent felony offender, the determination of whether or not he is such an offender and the punishment to be imposed pursuant to subsection (5) or (6) of this section shall be determined in a separate proceeding from that proceeding which resulted in his last conviction. Such proceeding shall be conducted before the court sitting with the jury that found the defendant guilty of his most recent offense unless the court for good cause discharges that jury and impanels a new jury for that purpose.

Ashcraft contends that the general rule of statutory construction requires a court to determine legislative intent from the clear language of the statute. See, e.g., Flying J. Travel Plaza v. Commissioner, Transportation Cabinet, Ky., 928 S.W.2d 344, 347 (1996); Beckham v. Board of Educ. of Jefferson County, Ky., 873 S.W.2d 575, 577 (1994). He argues that KRS 532.080(1) requires that a jury determine guilt and fix the penalty on a PFO charge, and that he could not legally plead guilty to the offense.

While we agree with Ashcraft's statement of statutory construction, we disagree with his conclusion. A court should not interpret a statute in a manner that will result in an absurd result. Layne v. Newberg, Ky., 841 S.W.2d 181, 183 (1992); Williams v. Commonwealth, Ky. App., 829 S.W.2d 942, 944 (1992). In construing a statute, the words employed should be given their ordinary meaning. Lynch v. Commonwealth, Ky., 902 S.W.2d 813, 814 (1995); Commonwealth v. Shivley, Ky., 814 S.W.2d 572, 573 (1991); Mercer v. Commonwealth, Ky. App., 880 S.W.2d 899, 901 (1994). A court should not interpret a statute beyond the text or words used in an attempt to surmise the intent of the

legislature. See George v. Commonwealth, Ky., 885 S.W.2d 938, 940 (1994); Owensboro Cablevision, Inc. v. Libs, Ky. App., 863 S.W.2d 331, 333 (1993).

Accepting Ashcraft's interpretation of KRS 532.080(1) would lead to an absurd result. The purpose of this provision is to ensure that the same jury that determines the defendant's guilt on the initial felony conviction supporting the PFO charge also determines guilt and the punishment on the PFO charge absent "good cause." Ashcraft's argument that the statute precluded a guilty plea because he could not waive a jury decision on the PFO charge is without merit. Although a criminal defendant has no federal or state constitutional right to jury sentencing, KRS 532.080 creates a state statutory right to jury sentencing for a PFO charge. White v. Commonwealth, Ky., 770 S.W.2d 222, 224 (1989); Commonwealth v. Johnson, Ky., 910 S.W.2d 229 (1995). However, a defendant may waive even constitutional rights, as long as he does so knowingly, intentionally and voluntarily. See, e.g., North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970); Tollett v. Henderson, 411 U.S. 258, 93 S. Ct. 1602, 36 L. Ed. 2d 235 (1973); Similarly, a defendant may waive any state constitutional right to a jury trial on guilt or innocence. Short v. Commonwealth, Ky., 519 S.W.2d 828, 831 (1975). RCr 9.26(1). Thus, there is no constitutional prohibition, and absent some other specific source of preclusion, a defendant should be able to waive jury participation in determining guilt and fixing a sentence for a PFO conviction.

As for the statute itself, the language of the KRS 532.080(1) does not necessarily preclude a guilty plea to a PFO charge. The ability of a defendant to plead guilty and waive both constitutional and statutory rights such as a jury trial was well established by the time KRS 532.080(1) was enacted.

The principal rule of statutory construction is that the applicability and scope of a statute may be determined by ascertaining the intended purpose of the legislature and by considering the evil which the law intended to remedy as well as other prior and contemporaneous facts and circumstances which shed intelligible light on the intention of the General Assembly. In enacting any law, the legislature is presumed to take cognizance of the existing statutes and conditions of the law so that when the statute under consideration is ambiguous, the new enactment is to be construed in connection and in harmony with the existing law as part of the general and uniform system of jurisprudence.

Mitchell v. Kentucky Farm Bureau Mut. Ins., Ky., 927 S.W.2d 343, 346 (1996), overruled on other grounds, Nantz v. Lexington Lincoln Mercury Subaru, Ky., 947 S.W.2d 36 (1997). Giving the words of the statute their ordinary meaning and interpreting the statute to avoid an absurd result, we believe KRS 532.080(1) does not mandate jury participation in determining guilt and the sentence for a PFO charge under all circumstances. While the statute may create an initial affirmative right to jury participation, it does not preclude a knowing and intentional waiver of that right by the defendant. The primary purpose of KRS 532.080(1) was to create a separate or bifurcated proceeding in prosecuting PFO cases and to have the same jury involved in

the two stages. It would be unreasonable and illogical to construe KRS 532.080(1) as prohibiting waiver while allowing waiver of jury participation in other areas including capital murder. See, e.g., Bevins v. Commonwealth, Ky., 712 S.W.2d 932 (1986), cert denied, 479 U.S. 1070, 107 S. Ct. 963, 93 L. Ed. 2d 1010 (1987). Therefore, we interpret KRS 532.080(1) as not prohibiting a valid guilty plea in a prosecution for being a persistent felony offender.

Ashcraft also implicitly raises the issue of the validity of the guilty plea. He contends that he was illiterate, an alcoholic, and uneducated. In order to be valid, a guilty plea must be made knowingly, intelligently and voluntarily by a competent defendant. Brady v. United States, 397 U.S. 742, 90 S. Ct. 1463, 25 L. Ed. 2d 747 (1970); Centers v. Commonwealth, Ky. App., 799 S.W.2d 51, 54 (1990). The test for determining the validity of a guilty plea is whether it represents a voluntary and intelligent choice among alternative courses of action open to the defendant. North Carolina v. Alford, 400 U.S. 25, 31, 91 S. Ct. 160, 164, 27 L. Ed. 2d 163 (1970); Kiser v. Commonwealth, Ky. App., 829 S.W.2d 432, 434 (1992). The validity of a guilty plea is determined from the totality of the circumstances surrounding it, rather than from reference to some specific key words recited at the time it is entered. Kotas v. Commonwealth, Ky., 565 S.W.2d 445, 447 (1978); Sparks v. Commonwealth, Ky. App., 721 S.W.2d 726, 727 (1987).

A review of the record and the videotape of the PFO guilty plea hearing reveals that the guilty plea was entered knowingly, intelligently and voluntarily. During the hearing, the trial court informed Ashcraft of his right to call witnesses, the right to cross-examine witnesses, the right not to testify himself, the burden on the Commonwealth to prove guilt, and the right to have an attorney represent him. The trial court informed Ashcraft that the maximum penalty for conviction as a PFO I with the underlying first-degree manslaughter conviction (Class B felony) was twenty years to life. Ashcraft indicated that he understood the charges, that he wished to plead guilty to the PFO charge, and that he was giving up his constitutional rights. In open court, Ashcraft signed the "Waiver of Further Proceedings and Petition to Enter Plea of Guilty" form, which explicitly described his various rights. Ashcraft stated that he had discussed the guilty plea with his attorney and was satisfied with her advise. Ashcraft's attorney told the trial judge that she had discussed with Ashcraft his rights and the consequences of the guilty plea, which included waiver of those rights. Ashcraft indicated that he was not under the influence of any drugs or alcohol, and that he understood the proceeding. More importantly, on two occasions during the guilty plea proceeding, the trial judge specifically told Ashcraft that he had a right to have the jury determine his guilt on the PFO charge and to recommend a sentence. The trial court informed Ashcraft that by pleading guilty, he was giving up that right and the trial court



would fix the punishment. Ashcraft responded affirmatively and indicated that he understood he was waiving further participation by the jury. The record refutes any claim that Ashcraft did not enter his guilty plea to the PFO charge knowingly, intelligently and voluntarily. See Hulett v. Commonwealth, Ky. App., 834 S.W.2d 688 (1992) (finding guilty plea to PFO charge following jury conviction on underlying felony was entered knowingly and voluntarily); Commonwealth v. Crawford, Ky., 789 S.W.2d 779 (1990) (guilty plea proceeding sufficient to demonstrate entry of valid guilty plea). Consequently, the trial court did not err in ruling that KRS 532.080(1) did not preclude Ashcraft from entering a guilty plea to the PFO charge and that his guilty plea was valid because it was entered voluntarily, intelligently and knowingly. The trial court properly dismissed the motion to amend the judgment.

For the foregoing reasons, we affirm the order of the Fayette Circuit Court.

ALL CONCUR.

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