

Commonwealth Of Kentucky

Court Of Appeals

No. 1997-CA-000292-MR

ROBERT H. BUCK, JR.

APPELLANT

V.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES E. KELLER, JUDGE
ACTION NO. 88-CR-0130

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: ABRAMSON, GARDNER and GUIDUGLI, JUDGES.

GARDNER, JUDGE. Robert Buck (Buck) appeals from an opinion and order of the Fayette Circuit Court entered on January 28, 1997, denying his motion to correct the final judgment. Finding no error, we affirm.

In March, 1988, the Fayette County Grand Jury indicted Buck on one count of first-degree robbery, and one count of being a persistent felony offender in the second degree (PFO II). On March 16, 1988, the parties attended a pretrial conference at which

the Commonwealth extended a plea offer. According to the offer, in return for a guilty plea, the Commonwealth would dismiss the PFO II count, dismiss another indictment plus an unindicted charge of second-degree burglary, and recommend a sentence of fifteen years on the first-degree robbery count. On March 17, 1988, the pretrial order signed by the circuit court judge was entered. At the bottom of the pretrial order, the Commonwealth's plea offer was set out.

On March 18, 1988, Buck entered a guilty plea to first-degree robbery pursuant to the plea agreement with the Commonwealth. Consistent with the plea agreement, the Commonwealth moved to dismiss the PFO II count, agreed to dismiss another indictment and another unindicted charge, and recommended a sentence of fifteen years for the first-degree robbery offense. At that time, the trial judge accepted the guilty plea but withheld sentencing pending preparation and review of a presentence investigation report. On April 15, 1988, Buck appeared before the court with his attorney for sentencing. The trial judge granted the motion to dismiss the PFO II count but did not follow the Commonwealth's recommendation on the sentencing term and instead sentenced Buck to serve twenty years in prison for first-degree robbery.

In June 1989, Buck filed a "Motion to Correct Final Judgment" asking the court to "correct" the final judgment by reducing the sentence from twenty years to fifteen years based on the terms of the plea agreement. The trial court appointed an attorney to represent Buck on the motion. In July 1989, the trial court denied Buck's motion noting that Buck was advised at the guilty plea hearing both orally and in writing that the trial court

was not bound by the Commonwealth's recommended fifteen-year sentence, and that the court could impose a twenty-year sentence. On July 20, 1989, counsel filed a notice of appeal challenging the denial of the motion, and a motion to withdraw as counsel, which was granted. In October 1989, the Fayette Circuit Court Clerk mailed to Buck a copy of the notice of certification of record on appeal that also noted that appointment of counsel on appeal had been denied. This appeal was not perfected.

In January 1990, Buck filed a motion to vacate, set aside or correct judgment of sentence pursuant to Kentucky Rule of Criminal Procedure (RCr) 11.42. Buck again asked the trial court to amend the judgment to a fifteen-year sentence based on the plea agreement with the Commonwealth. Buck argued that the pretrial order of March 16, 1988, constituted an acceptance of the plea agreement by the court, which required the trial judge to impose the fifteen-year sentence. The trial court appointed an attorney to represent Buck in the RCr 11.42 proceeding. The Commonwealth filed a response arguing that Buck had exhausted his opportunity for post-conviction relief through his first motion. The Commonwealth indicated that the new motion was merely a duplicate RCr 11.42 motion. In February 1990, the trial court denied the second motion as a successive RCr 11.42 motion prohibited by RCr 11.42(3). The court noted that the second motion raised no new issues that could not have been raised in the first motion. Counsel filed a notice of appeal in July 1989, but the appeal was dismissed in August 1990 for failure to perfect the appeal.

In December 1990, Buck filed a third motion entitled "Motion to Correct Judgment," again asking the trial judge to

reduce his sentence to fifteen years based on the plea agreement with the Commonwealth. On December 19, 1990, the trial court summarily dismissed the motion.

In April 1995, Buck filed a motion asking the trial court to amend the judgment to have his twenty-year prison sentence run concurrently with a previous five year sentence from another conviction in Anderson County. The court summarily denied this motion.

In September 1995, Buck filed an extensive "Motion to Correct and Modify Judgment and Sentence." Buck again asked the trial judge to amend the judgment by reducing the sentence to fifteen years. Buck argued that the pretrial conference order constituted a binding agreement with the court to comply with the terms of the plea agreement. He maintained that the court's failure to comply with the sentencing term of the plea agreement violated due process and equal protection. The trial court appointed an attorney to represent Buck and treated the motion as filed pursuant to RCr 11.42. In March 1996, the trial court denied the motion as a duplicate RCr 11.42 motion. The court noted that the grounds for this motion were similar to those of three prior motions. Counsel filed an appeal of the trial court order and was allowed to withdraw as counsel. In October 1996, the appeal was dismissed for failure to perfect.

In January 1997, Buck filed another "Motion to Correct Final Judgment," which is the subject of the current appeal. Although the motion cited no specific procedural rule, Buck sought relief based on "mistake, inadvertence, surprise or neglect." This language appears in Kentucky Rule of Civil Procedure (CR) 60.02(a).

However, the grounds for the motion again involved the trial judge's failure to follow the sentencing term of the plea agreement and the pretrial conference order. The trial court again appointed an attorney to represent Buck. The trial court denied the motion as a successive motion under RCr 11.42, again noting that it raised no new issues. Counsel has filed a notice of appeal and an appellate brief, thereby perfecting the current appeal.

In Gross v. Commonwealth, Ky., 648 S.W.2d 853 (1983), the Kentucky Supreme Court set out the procedure for challenging a criminal conviction, and stated that the structure for attacking a final judgment is not haphazard or overlapping. Id. at 856. A defendant must first bring a direct appeal when available and state every ground of error of which he or his counsel was reasonably aware. Id. at 857. Next, a defendant in custody or on probation or parole must utilize RCr 11.42 to raise errors of which he is aware or should be aware during the period this remedy is available. Id.

Final disposition of that [RCr 11.42] motion, or waiver of the opportunity to make it, shall conclude all issues that reasonably could have been presented in that proceeding. The language of RCr 11.42 forecloses the defendant from raising any question under CR 60.02 which are 'issues that could reasonably have been presented' by RCr 11.42 proceedings.

Id. (quoting RCr 11.42(3)). CR 60.02 is for "extraordinary situations 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 intended to correct errors in judgments not available by appeal or otherwise which were discovered after rendition of judgment).

In addition, the rule prohibiting successive RCr 11.42 motions is well established in case law. In Caudill v. Commonwealth, Ky., 408 S.W.2d 182 (1966), the court affirmed the denial of a second RCr 11.42 motion. It stated:

The grounds he now relies upon were previously presented to and rejected by the circuit court. Neither our Rules of Criminal Procedure nor our case law provides for a second assault to be made upon the judgment of conviction. RCr 11.42; Jennings v. Commonwealth, Ky., 400 S.W.2d 233; Tipton v. Commonwealth, Ky., 398 S.W.2d 493. The proper procedure for Caudill to have followed was the timely filing of an appeal to this court from the original judgment denying the relief he sought under his first RCr 11.42 motion.

Id. at 182. See also Satterly v. Commonwealth, Ky., 441 S.W.2d 144 (1969).

In Burton v. Tartar, Ky., 385 S.W.2d 168, 169 (1964), the court held that an attempt by the petitioner to bring a second RCr 11.42 motion on the same grounds that had been rejected in an earlier RCr 11.42 motion should be denied as an attempt at "trifling with the court." See also Shepherd v. Commonwealth, Ky., 477 S.W.2d 798 (1972) (fourth RCr 11.42 motion dismissed for failure to demonstrate reason why grounds for motion were not raised in earlier motions). A major purpose of the rule prohibiting successive or duplicative RCr 11.42 motions is to promote efficient utilization of court resources by imposing finality and requiring comprehensiveness for post-trial motions. As the court stated in Bell v. Commonwealth, Ky., 396 S.W.2d 772, 772-73 (1965), "[e]very person charged with a crime is entitled to at least one fair and impartial trial, but it is absolutely absurd

to take the time of the courts with continuous filing and refiling of motions for the same relief under the same proceedings." See also Warner v. Commonwealth, Ky., 398 S.W.2d 490, 490, cert. denied, 385 U.S. 885, 87 S. Ct. 178, 17 L. Ed. 2d 112 (1966) ("subsection (3) of RCr 11.42 was intended to protect courts against the abuse and vexation of successive proceedings to vacate the same judgment. . . ."); Hampton v. Commonwealth, Ky., 454 S.W.2d 672 (1970) (the courts have more to do than occupy themselves with successive "reruns" of RCr 11.42 motions).

Moreover, failure to receive a decision on the merits on appeal from denial of an earlier RCr 11.42 motion does not preclude dismissal of a subsequent motion. In Szabo v. Commonwealth, Ky., 458 S.W.2d 167 (1970), the Court held that a petitioner who abandons the appeal of his initial RCr 11.42 motion is not entitled to relief on a second RCr 11.42 motion even though there has never been an appellate post-conviction review on the merits of his initial motion. See also Lycans v. Commonwealth, Ky., 511 S.W.2d 232 (1974) (when appeal is not perfected or is dismissed, petitioner is not permitted to file a subsequent RCr 11.42 motion).

In the case at bar, Buck filed numerous post-judgment motions seeking a reduction in his sentence. Generally, entry of a guilty plea waives the right to directly appeal the conviction.¹

¹ A defendant waives the right to challenge by appeal all nonjurisdictional defenses to the conviction. See, e.g., Bush v. Commonwealth, Ky., 702 S.W.2d 46, 48 (1986); United States v. Pickett, 941 F.2d 411, 416 (6th Cir. 1991); United States v. Easton, 937 F.2d 160, 161 (6th Cir. 1991). Absent a conditional plea under RCr 8.09, a defendant waives the right to bring a direct appeal of the guilty plea, except for jurisdictional defects. See Hughes v. Commonwealth, Ky., 875 S.W.2d 99 (1994); Sanders v. Commonwealth, Ky., 663 S.W.2d 216 (1985); Ferguson v.
(continued...)

During the guilty plea hearing, Buck specifically waived his right to appeal. Thus, the trial court correctly addressed the merits of Buck's initial motion because a direct appeal was unavailable.² The trial court also properly treated Buck's initial four motions as post-judgment collateral appeals under RCr 11.42. Even if the latest motion filed in January 1997 was treated as a CR 60.02 motion, it would not be cognizable because the issue raised in that motion could be and was raised in the prior RCr 11.42 motions. See Gross, supra. The record clearly reveals that Buck filed four post-judgment (RCr 11.42) motions raising the same issue involving the twenty-year sentence and based on the same grounds involving the effect of the plea agreement and the pretrial conference order. Buck's failure to perfect the appeal on the initial motion does not prevent application of the successive motion rule. As a result, the trial court did not err in denying the January 1997 motion on procedural grounds as a successive motion.

In addition, Buck's substantive complaint is without merit. During the guilty plea hearing in March 1988, the trial court fully informed Buck of his constitutional rights under Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969). More importantly, the trial judge twice specifically told Buck that

¹(...continued)
United States, 699 F.2d 1071 (11th Cir. 1983).

²While Hughes supra and Sanders, supra recognize a right to bring a direct appeal from an unconditional guilty plea on the issue of sentencing, these cases involved the jurisdictional statutory authority of the trial court to impose the particular sentence. In the current case, the twenty year sentence imposed by the trial court was within the statutory sentencing range, and Buck's argument relies solely on the plea agreement.

the court was not bound by the Commonwealth's recommendation on sentencing, and that he could sentence Buck to twenty years. Buck responded that he understood. At the sentencing hearing in April 1988, Buck voiced no objection when the trial court indicated it was rejecting the Commonwealth's recommendation on sentencing and was imposing the maximum twenty-year sentence. Buck made no motion to withdraw his guilty plea at the sentencing hearing.

In Couch v. Commonwealth, Ky., 528 S.W.2d 712 (1975), the court held that a defendant had no right to withdraw his guilty plea simply because the trial judge did not follow the Commonwealth's recommendation on sentencing. The court indicated that under RCr 8.10, the trial judge had discretion not to allow withdrawal of the guilty plea where the defendant had not been misled on the possible sentence the court could impose. In Murphy v. Commonwealth, Ky. App., 551 S.W.2d 838 (1977), the court held that the trial court was not required to afford the defendant an opportunity to withdraw his guilty plea because the judge did not follow the Commonwealth's sentence recommendation. As in our case, Murphy did not move to withdraw his guilty plea at the sentencing hearing, but the court still applied the reasoning expressed in Couch. Similarly, in Carwile v. Smith, 874 F.2d 382 (6th Cir.), cert. denied, 493 U.S. 943, 110 S. Ct. 346, 107 L. Ed. 2d 334 (1989), the Sixth Circuit held that the due process clause did not require the trial court to give a defendant an opportunity to withdraw a guilty plea merely because the trial judge failed to follow the Commonwealth's recommendation and imposed a harsher sentence. The above cases were decided under the prior version of

RCr 8.10,³ which was in effect when Buck entered his guilty plea and was sentenced. While the legal landscape may have changed with the adoption of the current version of RCr 8.10 in August 1989,⁴ the trial court's conduct was proper under the law at the time of the sentencing.

Buck contends that even under Couch and the law applicable at the time, he is entitled to relief because he was misled to believe the trial judge would follow the Commonwealth's recommendation. He argues that the pretrial conference order constituted a judicial approval of the Commonwealth's sentencing recommendation. We disagree. The pretrial conference order merely sets out the terms of the Commonwealth's plea offer. There is no evidence, other than Buck's subjective allegation, that the trial court was either explicitly or implicitly obligating itself to the terms of the plea agreement between Buck and the Commonwealth. The trial judge's statements at the plea hearing informing Buck that he was not bound by the Commonwealth's sentencing recommendation contradict Buck's position. The record indicates that Buck was not misled about the trial court's ability to impose the twenty-year sentence. Therefore, the trial court did not err in denying the initial motion to correct the judgment based on the merits. See

³Rule 8.10. Withdrawal of plea. - At any time before judgment the court may permit the plea of guilty or guilty but mentally ill, to be withdrawn and a plea of not guilty substituted. (Amended June 29, 1983, effective January 1, 1985.)

⁴In Kennedy v. Commonwealth, Ky. App., 962 S.W.2d 880 (1997), this Court recently held that RCr 8.10 requires the trial court to provide a defendant an opportunity to withdraw his guilty plea if the judge rejects the plea agreement including the recommended sentence.

Franklin v. Commonwealth, 305 Ky. 111, 203 S.W.2d 2 (1947)
(defendant not entitled to withdraw guilty plea especially after
sentence pronounced merely because court did not follow
Commonwealth's sentence recommendation).

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

ABRAMSON, JUDGE, CONCURS.

GUIDUGLI, JUDGE, CONCURS IN RESULT ONLY.

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