

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1997-CA-002251-MR

WILLIE GLINSEY  
A/K/A KARIM AZIZ ABDULLAH

APPELLANT

v. APPEAL FROM SIMPSON CIRCUIT COURT  
HONORABLE WILLIAM R. HARRIS, JUDGE  
ACTION NOS. 87-CR-00054 & 87-CR-00056

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: DYCHE, GUIDUGLI AND JOHNSON, JUDGES.

GUIDUGLI, JUDGE. This is a pro se appeal by Willie Glinsey, a/k/a Karim Aziz Abdullah (Abdullah) from an order of the Simpson Circuit Court entered June 4, 1998, overruling his Kentucky Rules of Civil Procedure (CR 60.02) motion to vacate his sentence. We affirm.

On August 10, 1987, the Simpson County Grand Jury indicted Abdullah for robbery in the first degree. On August 19, 1987, the Simpson County Grand Jury indicted Abdullah as a persistent felony offender in the first degree (PFO I). On February 3, 1988, the Simpson Circuit Court consolidated these

indictments for trial. However, on July 1, 1988, Abdullah signed a waiver of right to trial by jury, an entry of plea of guilty and a plea agreement whereby Abdullah agreed to plead guilty to robbery in the first degree and the Commonwealth agreed to recommend a ten (10) year prison term enhanced to twenty (20) years on the PFO I.<sup>1</sup> The Simpson Circuit Court accepted the plea and Abdullah was sentenced to twenty (20) years in prison. Said twenty year sentence was to run consecutive to time (35 years) Abdullah was serving in Tennessee on unrelated charges.

On April 25, 1997, after being paroled by Tennessee authorities, Abdullah filed a motion to vacate his sentence pursuant to CR 60.02. The trial court denied this motion by order entered June 4, 1997. Abdullah then filed a petition and motion to file a belated appeal. This court granted his motion on November 12, 1997, and this appeal followed.

The trial court's decision in this case will not be reversed unless there was a clear abuse of discretion. "Any action under CR 60.02 addresses itself to the sound discretion of the court and the exercise of that discretion will not be disturbed on appeal except for abuse." Richardson v. Brunner, Ky., 327 S.W.2d 572, 574 (1959). Although not specifically stated in his motion and brief, Abdullah's motion to vacate falls under the provisions of CR 60.02(f). Under CR 60.02(f), the court may relieve a person from its final judgment for "any other reason of an extraordinary nature justifying relief." However,

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<sup>1</sup>Abdullah faced twenty (20) years in prison for first-degree robbery, which could have been enhanced to life in prison on the PFO I.

relief under CR 60.02(f) "may be invoked only under the most unusual circumstances..." Brown v. Commonwealth, Ky., 932 S.W.2d 359, 362 (1996) (citing Howard v. Commonwealth, KY., 365 S.W.2d 809, 810 (1963)).

Abdullah argues on appeal that the trial court should have vacated his sentence because it originally sentenced him on the PFO I without sentencing him on the underlying felony as required by KRS 532.080. Specifically, the language used in the judgment of the trial court states:

IT IS ORDERED AND ADJUDGED by the Court, pursuant to the plea of "guilty" by the defendant, that the defendant is guilty of the offenses charged in the above-numbered indictments, and, upon motion of the Commonwealth's Attorney, the defendant's punishment is hereby fixed as follows:

(A) For the offense of First-degree Robbery as charged in Indictment No. 87-CR-054, committed as a Persistent Felony Offender in the First-degree, as charged in Indictment No. 87-CR-056, at confinement in the State Penitentiary for a term of twenty (20) years. (Emphasis added).

In support of his argument, Abdullah refers this Court to Davis v. Commonwealth, Ky., 812 S.W.2d 505 (1991), and Commonwealth v. Hayes, Ky., 734 S.W.2d 467 (1987). In both Davis and Hayes, the Kentucky Supreme Court held that a defendant may not be convicted as a persistent felony offender without imposing sentence on the underlying felony. Davis, 812 S.W.2d at 506; Hayes, 734 S.W.2d at 469.

However, the Court in Hulett v. Commonwealth, Ky. App., 834 S.W.2d 688 (1992), distinguishes both Davis and Hayes from

Abdullah's situation. In Hulett, the defendant was convicted of trafficking in cocaine. Rather than go through a separate PFO I proceeding, the defendant agreed to plead guilty to the PFO I charge in exchange for the minimum sentenced allowed by the statute- ten (10) years- being affixed as the penalty for the offense. The defendant moved the trial court for permission to enter a plea of guilty to PFO I. Without formally fixing a sentence on the trafficking conviction, the trial court accepted the plea agreement. Thereafter, Hulett appealed seeking to have his sentence vacated pursuant to KRS 532.080 because he was not sentenced on the underlying felony. The trial court denied his motion. In affirming that decision, the Court stated:

The present case, furthermore, is distinguished from Davis v. Manis, Ky., 812 S.W.2d 505 (1991) Commonwealth v. Hayes, Ky., 734 S.W.2d 467 (1987). Those cases hold that a defendant cannot be convicted as a persistent felony offender unless a term of imprisonment is imposed as the punishment on the underlying charge. Davis at 506; Hayes at 469. Both cases, however, involve situations in which a defendant found guilty of trafficking in a controlled substance on the underlying charge received a fine rather than a prison sentence....

Since the defendants in Davis and Hayes received fines rather than imprisonment on their underlying convictions, the Supreme Court properly held that no predicate existed for the imposition of a persistent felony offender sentence. There is, however, no indication in this case that a fine in lieu of a prison sentence was even considered as the penalty for the underlying charge, let alone imposed.... Thus, Hulett's situation fundamentally differs from the scenarios found in Davis and Hayes.

Id. at 690.

Abdullah's situation is analogous to Hulett. Abdullah received the sentence to which he bargained for, i.e., ten (10) years for first-degree robbery enhanced to twenty (20) years by virtue of the PFO I. The following is the relevant portion of the plea agreement signed by appellant on July 1, 1988:

1. I, [Karim A. Abdullah] have been informed by the Court and I fully understand that I have been charged with the following offense(s):

<u>Charge(s)</u>	<u>Maximum Sentence on Conviction</u>
First Degree Robbery K.R.S. 515.020	20 years in the penitentiary
First Degree Persistent Felony Offender	Life in the penitentiary

The Commonwealth's Attorney has advised me that in the event I enter a Plea of Guilty to the above charges, he will recommend to the Court that the following sentences be imposed:

10 years on 1<sup>st</sup> degree robbery, Enhanced to 20 years on 1<sup>st</sup> degree persistent felony offender. Consecutive to any time to be served in State of Tennessee.

Thereafter, the trial court imposed the previous stated order sentencing appellant to "confinement in the state penitentiary for a term of twenty (20) years." The trial court did not enhance his sentence based upon a fine as in Davis and Hayes. The fact that the trial court mistakenly stated in the judgment that he was sentenced to twenty (20) years on the PFO I does not entitle Abdullah to have his sentence vacated. A thorough review of the record clearly shows that Abdullah received the sentence for which he bargained. Any mistake in the language of the judgment itself constitutes harmless error.

We find that the trial court did not abuse its discretion by overruling the motion to vacate. For the foregoing reasons, the decision of the trial court is affirmed.

ALL CONCUR.

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