

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-001871-MR

CLINTON BROWN

APPELLANT

v. APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE EDWIN M. WHITE, JUDGE
ACTION NO. 97-CR-00015

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

* * * * *

BEFORE: GUDGEL, Chief Judge; BUCKINGHAM, and JOHNSON, Judges.

BUCKINGHAM, JUDGE. Clinton Brown appeals from an order of the Christian Circuit Court denying his motion for shock probation.¹ We affirm.

In January 1997, Brown was indicted by a Christian County grand jury on three counts of trafficking in a controlled substance (cocaine), resisting arrest, and being a second-degree persistent felony offender (PFO). In June 1997, a plea agreement

¹ This court previously granted Brown's motion for a belated appeal of the trial court's order.

was entered in the record wherein it was indicated that Brown would plead guilty to the three counts of trafficking, that the resisting arrest charge would be dismissed, and that the PFO charge would be continued until sentencing. The plea agreement also provided that the Commonwealth would recommend that Brown receive shock probation after he served 180 days of his sentence and that Brown would pay \$5,000 in cash in lieu of forfeiture of property. Finally, the agreement provided that all noncontraband evidence, including a ring, would be returned to Brown. On the same day, Brown's written motion to enter a guilty plea was entered in the record, and he pled guilty pursuant to the plea agreement.

On August 4, 1997, a motion to set aside the guilty plea was filed on Brown's behalf. The motion stated that Brown's attorney and the Commonwealth's attorney had entered into the plea agreement "under a mistaken identity as to certain facts and circumstances" and that "the interest of justice would be served if the Defendant Clinton Brown be allowed to withdraw his plea entered on June 6, 1997." On September 3, 1997, Brown's motion was heard by the trial court in a hearing that was not mechanically recorded. The record indicates that the motion was denied, but there is nothing in the record to indicate the basis of the motion, why it was denied, or what transpired at the hearing. October 1, 1997, was assigned as Brown's final sentencing date. When he failed to appear on that date to be sentenced, a bench warrant for his arrest was issued and his bond was revoked.

Brown was arrested on November 3, 1997, and a sentencing date of November 26, 1997, was assigned. At the final sentencing hearing, Brown's counsel indicated in response to a question by the court that there was no reason why final sentencing should not be imposed. The Commonwealth's attorney then indicated to the court that the Commonwealth would not be able to honor its original agreement in regard to recommending that Brown receive shock probation because Brown was statutorily ineligible for shock probation.² The Commonwealth's attorney then noted that the terms of the agreement were modified and that Brown was not required to make the \$5,000 cash payment as the agreement had required. The Commonwealth's attorney also stated that Brown's bond should be refunded without being revoked and forfeited and that it was agreed that Brown would serve only 30 days in jail for violating the terms of probation of the sentence for a previous offense. Furthermore, the Commonwealth's attorney indicated that the PFO charge would be dismissed as well as the resisting arrest charge. After the trial court ascertained that the statements made by the Commonwealth's attorney were in accordance with Brown's understanding and agreement as to the disposition of his case, the trial court sentenced Brown to five years in prison on each of the three trafficking counts, to run concurrently.

On February 2, 1998, Brown filed a motion for shock probation pursuant to the provisions of KRS 439.265. The trial

² Brown apparently was on felony probation when he committed this offense and was thus ineligible for probation or shock probation. See Kentucky Revised Statute (KRS) 532.060(2).

court denied the motion, but Brown filed another motion for shock probation on May 15, 1998. The trial court likewise denied that motion. On July 30, 1998, Brown filed a motion to correct his sentence, stating that the plea agreement was that he was to receive shock probation after serving 180 days.³ In August 1998, Brown filed a motion for a belated appeal with this court. The motion was granted, and the matter is now before the court.

Brown argues that "the trial court erred by overruling appellant's motion to withdraw his guilty plea when the Commonwealth was unable to abide by the terms of the agreement." He contends that (1) the trial court erred in permitting the Commonwealth to welsh on its plea agreement with him, and (2) the trial court erred in failing to comply with Kentucky Rule of Criminal Procedure (RCr) 8.10 by not advising him of his right to withdraw his guilty plea when the original plea agreement was rejected. RCr 8.10 provides that

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.

If the court rejects the plea agreement, the court shall, on the record, inform the parties of this fact, advise the defendant personally in open court or, on a showing of good cause, in camera, that the court is not bound by the plea agreement, afford the defendant the opportunity to then withdraw the plea, and advise the defendant that if the defendant persists in that guilty plea the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement.

³ There is no indication in the record that the court ever ruled on this motion.

Brown's appeal is without merit for several reasons. First, he notes that his appeal is from the trial court's denial of his motion to set aside his guilty plea. However, his motion for belated appeal which was granted by this court stated only that he was appealing from the trial court's order denying his motion for shock probation. An order granting or denying a shock probation motion is not reviewable. KRS 439.265(2).

Second, if Brown's complaint is truly with the trial court's denial of his motion to withdraw his guilty plea, we must affirm that order since there is no mechanical recording of the hearing and no reason for denying the motion was stated by the trial judge in his order. "[W]hen the complete record is not before the appellate court, that court must assume that the omitted record supports the decision of the trial court." Commonwealth v. Thompson, Ky., 697 S.W.2d 143, 145 (1985).

Third, and most important, from reviewing the tape of the sentencing hearing, it is obvious that the parties had entered into a new plea agreement. As the Commonwealth was no longer able to honor the original agreement and recommend shock probation, the terms of the original agreement were changed and Brown was no longer required to make the \$5,000 payment in lieu of forfeiture and the PFO charge was dismissed. Furthermore, it is obvious that the parties had agreed that Brown's bond would not be revoked due to his failure to appear at the initial sentencing hearing and that he would only have to serve thirty days of a previous sentence for violating its terms of probation. In short, it appears to us that the parties had entered into a

new plea agreement and that the trial court had no reason to advise Brown of his right to withdraw his guilty plea, since the trial court was not rejecting that plea agreement.

The order of the Christian Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Kim Brooks
Covington, KY

BRIEF FOR APPELLEE:

Albert B. Chandler III
Attorney General

Matthew Nelson
Assistant Attorney General
Frankfort, KY