

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-001348-MR

COMMONWEALTH OF KENTUCKY

APPELLANT

v.

APPEAL FROM KNOTT CIRCUIT COURT
HONORABLE JOHN R. MORGAN, JUDGE
ACTION NO. 87-CR-00038

AARON PRATT

APPELLEE

OPINION
AFFIRMING
** ** * * * * *

BEFORE: GUDGEL, CHIEF JUDGE; COMBS AND MILLER, JUDGES.

MILLER, JUDGE: Commonwealth of Kentucky brings this appeal from a May 11, 1998 Order of the Knott Circuit Court. We affirm.

On November 19, 1987, appellee and another individual, Robert Melton, were indicted for the class C felony of second-degree burglary (Kentucky Revised Statutes 511.030). On May 3, 1988, both defendants entered pleas of guilty and were sentenced to one year imprisonment probated. On April 15, 1998, appellee filed a motion pursuant to Ky. R. Civ. P. (CR) 60.02 to clarify sentence. Therein, he maintained that he pled guilty to a misdemeanor rather than a felony offense. The Commonwealth made no objection to the motion. In a May 11, 1998 order, the circuit

court concluded that appellee had pled guilty to a Class A misdemeanor. On May 21, 1998, the Commonwealth filed a CR 59.05 motion to vacate, set aside or correct order. The Commonwealth alleged the circuit court committed error by granting appellee's CR 60.02 motion. On the same day, the Commonwealth filed a notice of appeal to this court from the circuit court's May 11, 1998 order. This Court abated the appeal pending the circuit court's ruling upon the Commonwealth's motion to alter, amend or vacate. The circuit court eventually denied the Commonwealth's motion on September 30, 1999.

The Commonwealth brings but a single issue on appeal -- whether the circuit court erred by granting appellee's CR 60.02 motion. We harbor grave concern as to whether such error has been adequately preserved for appellate review. The record indicates the Commonwealth made no objection to appellee's CR 60.02 motion. Rather, the Commonwealth's protest came only after the circuit court entered its order in appellee's favor and in the form of a motion to alter, amend or vacate. To be properly preserved for review, we think the Commonwealth should have objected to appellee's CR 60.02 motion before entry of the order granting same. We shall, nevertheless, consider this appeal upon its merits.

We perceive appellee's CR 60.02 motion as proceeding under subsection (a) and (f). We note the record is silent as to whether appellee pled guilty to a Class C felony or a Class A misdemeanor. The transcript is also devoid of reference to either during the guilty plea proceeding.

In granting appellee's CR 60.02 motion, the court stated:

[A]fter reviewing the tape of the guilty plea in question, [the court] hereby finds that the Defendant plead [sic] guilty to a Class A misdemeanor in this action.

The circuit court's decision to grant appellee's CR 60.02 motion will not be disturbed on appeal absent a clear showing of abuse of discretion. See Fortney v. Mahan, Ky., 302 S.W.2d 842 (1957), and Schott v. Citizens Fidelity Bank & Trust Company, Ky. App., 692 S.W.2d 810 (1985). Based upon the ambiguous record, we simply are unable to conclude that the circuit court abused its discretion in granting appellee's CR 60.02 motion.

For the foregoing reasons, the Order of the Knott Circuit Court is affirmed.

COMBS, JUDGE, CONCURS.

GUDGEL, CHIEF JUDGE, DISSENTS.

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