

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1999-CA-000498-MR

DRAKIE E. LITTLE (THACKER)

APPELLANT

v.

APPEAL FROM PIKE CIRCUIT COURT  
HONORABLE EDDY COLEMAN, JUDGE  
ACTION NO. 87-CR-00164

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: DYCHE, GUIDUGLI AND MILLER, JUDGES.

GUIDUGLI, JUDGE. Draxie E. Little (Thacker) appeals from an order of the Pike Circuit Court which denied her CR 60.02 motion for sentence modification. We affirm.

Appellant filed her CR 60.02 motion on February 11, 1999, seeking relief from the twenty (20) years sentence she received for murder. She had been convicted of murder following a trial by jury on September 29, 1992. Her conviction was upheld on appeal by the Kentucky Supreme Court in a not-to-be-published opinion rendered September 2, 1993 (92-SC-0112-MR). Thereafter appellant filed a RCr 11.42 motion claiming ineffective

assistance of counsel. The circuit court had denied her motion without a hearing. On appeal, the Kentucky Court of Appeals, in a not-to-be-published opinion rendered January 30, 1998 (97-CA-1028-MR), affirmed in part and reversed in part and remanded to the trial court with instructions to conduct "an evidentiary hearing on Little's allegation that her counsel failed to convey the Commonwealth's plea offer and that had he, she would have accepted."

The Pike Circuit Court conducted an evidentiary hearing in compliance with the Court of Appeals' mandate on May 21, 1998. After the hearing, the trial court entered an order denying appellant's motion. Appellant timely appealed that ruling, but subsequently filed a motion to withdraw the pending appeal. Appellant's RCr 11.42 appeal was dismissed by a panel of this Court on October 8, 1998.

Appellant then filed her CR 60.02 motion on February 11, 1999. She sought modification of her twenty years sentence based upon the following two allegations: (1) perjury committed by trial counsel during the (RCr 11.42) evidentiary hearing; and (2) the plea agreement entered between Kevin Sanders (an alleged co-conspirator turned state witness) and the Commonwealth by which Sanders agreed to testify against appellant violated her constitutional rights and violated federal statutes. We find no merit in either agreement and hence affirm.

As to her first issue, Appellant claims her trial attorney, Mr. Bernard Pafunda, gave perjured testimony during the RCr 11.42 evidentiary hearing. Specifically, she claims he lied

when he stated he had practiced law in Arizona, West Virginia, Tennessee and Ohio. Based upon this alleged testimony, appellant contacted the Bar Associations in each of the four states and "discovered" that he was not licensed in or a member of the bar of any of the four states mentioned. Appellant then argues that if Mr. Pafunda would lie about "something so trivial" it raises the issue that he probably lied when he testified that no plea agreement was offered by the Commonwealth in her murder case. Again, this was the issue the Court of Appeals had remanded for an evidentiary hearing in her first RCr 11.42 appeal.

However, the videotape of the May 21, 1998, hearing clearly refutes appellant's argument. At the hearing, the following exchange took place between Elizabeth Graham, an Assistant Commonwealth Attorney, and Mr. Pafunda:

Ms. Graham: How long have you practiced law?

Mr. Pafunda: Since 1976.

Ms. Graham: Where did you graduate from?

Mr. Pafunda: Louisville.

Ms. Graham: Where have you practiced law?

Mr. Pafunda: Arizona, West Virginia, Tennessee, Ohio and Kentucky.

Ms. Graham: Are you admitted to the bars of those states?

Mr. Pafunda: No.

Ms. Graham: Where are you licensed?

Mr. Pafunda: Only Kentucky.

Later in the hearing Mr. Pafunda emphatically states several times that there was never any plea offer in appellant's murder

case from the Commonwealth Attorney. This was confirmed by Mr. Rick Bartley, Assistant Commonwealth Attorney, who tried the murder case. Mr. Bartley also stated several times that no plea bargain was ever made to Mr. Pafunda in that case.

The alleged factual basis for appellant's CR 60.02 motion of fraud and newly discovered perjured testimony has no foundation in reality. Mr. Pafunda did not offer perjured testimony as to his bar membership in various other states. Appellant withdrew her RCr 11.42 appeal. However, it should be noted that we have reviewed the entire evidentiary hearing held on appellant's RCr 11.42 motion and find nothing in the record which would be a basis for reversal.

The second issue raised by appellant is that the government violated her constitutional rights by negotiating a plea agreement with Kevin Sanders, an alleged co-conspirator and primary witness against her. In her brief, appellant relies upon the case of U.S. v. Singleton, 144 F3d 1343, (10<sup>th</sup> Cir., 1998), which held that 18 USC 201(c)(2) making it a crime to give anything of value to a witness in return for testimony also applied to prosecutor's promises of leniency in plea bargains with cooperating co-conspirators. However, as the Commonwealth points out and appellant concedes in her reply brief, the Singleton ruling was set aside by the same court sitting en banc in U.S. v. Singleton, 165 F3d 1297 (10<sup>th</sup> Cir., 1999). Also, appellant's argument in this vien is not a proper subject for CR 60.02 relief.

Based upon the foregoing, we believe there to be no factual or legal basis for appellant's CR 60.02 motion and thus, the order of the Pike Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT PRO SE:

Draxie E. Little (Thacker)  
Pewee Valley, KY

BRIEF FOR APPELLEE:

A. B. Chandler, III  
Attorney General

Gregory C. Fuchs  
Assistant Attorney General  
Frankfort, KY