

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-002413-MR

DOUGLAS RAY MERCER

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE LAURANCE B. VANMETER, JUDGE
ACTION NO. 94-CR-01002

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING
** ** * * * * *

BEFORE: BARBER, COMBS, JOHNSON, JUDGES.

BARBER, JUDGE: This is an appeal by Douglas Ray Mercer, ("Mercer"), from an order of the Fayette Circuit Court, denying his post-conviction motion to convert a \$1,000.00 criminal fine to a six-month prison sentence and run the sentence concurrently with his twenty-year sentence. We affirm.

On December 12, 1994, Mercer was indicted on twenty counts of incest (KRS¹ 530.020). The charges resulted from the allegation that between 1985 and 1994 Mercer had on numerous occasions engaged in sexual intercourse and deviate sexual intercourse with his stepdaughter. On July 25, 1995, Mercer filed a motion to waive further proceedings and to enter a plea

¹Kentucky Revised Statutes.

of guilty. In exchange, the Commonwealth agreed to drop seventeen of the charges and to recommend a ten-year sentence on each of the remaining three charges, with two of the sentences to run consecutively and one concurrently, for a total sentence of twenty years. On September 6, 1995, the trial court entered sentencing in accordance with the plea agreement except, in addition, the trial court imposed a \$1,000.00 fine pursuant to KRS 534.030 (requiring an offender convicted of a felony to pay, in addition to any other punishment, a cash fine).

On July 31, 2000, Mercer filed a motion captioned "Motion to Convert fines(s) to a definite term running concurrently with an indeterminate term." The motion, citing to KRS 534.060, sought to convert the \$1,000.00 fine to a six-month prison sentence and to have the six-month sentence run concurrently with his twenty year sentence. On September 11, 2000, the trial court entered an order denying the motion. Mercer filed a "Motion to Reconsider" which was subsequently denied. This appeal followed.

In neither his trial court motion nor in his appellate brief does Mercer identify the procedural basis for seeking relief from the 1995 final judgment. There are three fundamental ways to attack the final judgment of a trial court in a criminal case: by direct appeal, by a motion under RCr² 11.42, and by a motion under CR 60.02. Gross v. Commonwealth, Ky., 648 S.W.2d 853, 856 (1983). Mercer's motion cannot succeed under any of these procedural methods.

²Kentucky Rules of Criminal Procedure.

It is far too late for Mercer to now seek relief by direct appeal; the time limit for bringing a direct appeal has long since expired, See RCr 12.04(3). Mercer is not entitled to relief under RCr 11.42 because he was required to bring a motion attacking the September 6, 1995, final judgment under this rule by September 6, 1998, three years from the entry of final judgment. See RCr 11.42(10).

It appears that the only post-conviction procedural device possibly available to Mercer is CR 60.02. More specifically, it appears that the relief sought by Mercer could conceivably fall within CR 60.02(f), which provides that a court may grant relief to a party for "any . . . reason of an extraordinary nature justifying relief." However, a request for relief under CR 60.02(f) must be brought "within a reasonable time." CR 60.02. Final judgment was entered in September 1998. Mercer did not file his motion to modify the sentence until July 31, 2000. Because all of the facts relevant to Mercer's present argument were known to him immediately following his 1995 conviction, it is apparent that Mercer did not bring his motion "within a reasonable time." Further, the reason for relief identified by Mercer is not "of an extraordinary nature."

Finally, on the merits, even if Mercer had brought a timely motion for post-conviction relief, Mercer's argument is unpersuasive. KRS 534.060(1) provides "[w]hen an individual sentenced to pay a fine defaults in the payment of the fine or any installment, the court upon motion of the prosecuting

attorney or upon its own motion may require him to show cause why he should not be imprisoned for nonpayment." The statute plainly requires that an action under KRS 534.060 be initiated by the prosecutor's motion or upon the trial court's own motion. Here, Mercer, not the prosecutor nor the trial court, brought the motion. Further, the judgment did not specify a due-date for payment of the fine, and it appears that no demand for payment has been made to date. Under these circumstances, it does not appear that Mercer is in default.

Mercer also contends that the trial court denied his rights to due process of law when it changed the terms of his plea agreement in the final judgment. Mercer, however, did not raise this issue in either his July 31, 2000 motion, or in his September 22, 2000 motion to reconsider. This theory was not presented to the trial judge; thus, it was not preserved for review. Kennedy v. Commonwealth, Ky., 544 S.W.2d 219, 222 (1976). For the foregoing reasons, the judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

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