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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2003-CA-000380-MR

THOMAS R. PAYNE

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE TOM McDONALD, JUDGE
INDICTMENT NO. 147073

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** * * *

BEFORE: GUIDUGLI and MINTON, Judges; and MILLER, Senior Judge.¹

MINTON, Judge: Thomas Payne appeals from two opinions and orders of the Jefferson Circuit Court: one entered on November 7, 2002, which denied his motion for relief pursuant to Kentucky Rules of Civil Procedure (CR) 60.02, and one entered on January 2, 2003, which denied his motion to alter, amend, or vacate the November 7, 2002, opinion and order pursuant to CR 59.05. After reviewing the record, we conclude that Payne

¹ Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Ky. Rev. Stat. (KRS) 21.580.

has failed to demonstrate reasons sufficient to justify extraordinary relief under CR 60.02 and is not entitled to relief by this court under CR 59.05. Therefore, we affirm the Jefferson Circuit Court.

On May 24, 1972, a Jefferson County grand jury indicted Payne on one count of rape of a female over the age of twelve, Kentucky Revised Statutes (KRS) 435.090, and one count of detaining a female, KRS 435.110, for acts which occurred in 1971.² When the indictment was returned, Payne was incarcerated in Georgia for unrelated crimes. On May 17, 1977, a Jefferson County grand jury indicted Payne on two additional counts of detaining a female, KRS 435.110, for acts which also occurred in 1971. The two indictments were then consolidated for trial. Payne was paroled by Georgia and released to Kentucky pursuant to the interstate detainer agreement. On September 7-8, 1977, Payne was tried by jury in Jefferson Circuit Court on one count of rape of a female over twelve and two counts of detaining a female.³ The jury returned a guilty verdict on all three counts. The circuit court entered a judgment against Payne and sentenced him to life imprisonment for rape and five years each for both

² Both KRS 435.090 and KRS 435.110 later were repealed with the enactment of the Kentucky Penal Code, which became effective on January 1, 1975.

³ The third count of detaining a female was not tried at this time and was subsequently dismissed.

counts of detaining a female, with all sentences to run concurrently. Payne appealed his conviction to the Kentucky Supreme Court, which affirmed the conviction on April 1, 1980. He then filed a motion for relief pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42. This motion was denied by the circuit court on September 2, 1981, and the denial of this motion was subsequently affirmed on appeal. Payne was paroled in 1983. In December 1986, he was convicted of another crime in California and incarcerated there. After being released from custody in California in 2000, he returned to Kentucky to serve out the remainder of his life sentence.

Payne filed a *pro se* CR 60.02 motion on February 8, 2001, asserting that he received ineffective assistance of counsel both at trial and on direct appeal and, alternatively, that his sentence of life imprisonment for rape is unconstitutional. In March 2001, Payne was appointed counsel from the Department of Public Advocacy (DPA) for his CR 60.02 motion. His appointed counsel filed a supplemental brief on behalf of Payne reiterating and further developing Payne's earlier *pro se* motion. At Payne's request, an evidentiary hearing was conducted on October 24, 2002, concerning his CR 60.02 motion. On November 7, 2002, the Jefferson Circuit Court entered an opinion and order denying Payne's motion for relief pursuant to CR 60.02.

On November 18, 2002, Payne filed a CR 59.05 motion requesting the circuit court to alter, amend, or vacate its November 7, 2002, opinion and order. On January 2, 2003, the Jefferson Circuit Court entered an opinion and order denying Payne's CR 59.05 motion. Payne filed a notice of appeal of the opinions and orders denying his CR 60.02 motion and CR 59.05 motion on January 16, 2003.

Relief under CR 60.02 is discretionary because it is phrased permissively: "On motion a court may, upon such terms as are just, relieve a party or his legal representative from its final judgment, order, or proceeding."⁴ In Gross v. Commonwealth,⁵ the Kentucky Supreme Court outlined the precise role of CR 60.02 in the scheme of appellate review of criminal cases. A convicted individual defendant must first seek appellate review then file a motion for relief under RCr 11.42 raising every issue of which he should be aware before filing a motion for relief under CR 60.02.⁶ CR 60.02, like the writ of *coram nobis* which it replaced,⁷ is designed to provide "special, extraordinary relief"⁸ rather than an opportunity to relitigate

⁴ CR 60.02. Emphasis added.

⁵ Ky., 648 S.W.2d 853 (1983).

⁶ *Id.* at 857.

⁷ *Id.*

⁸ McQueen v. Commonwealth, Ky., 948 S.W.2d 415,416 (1997).

those issues which reasonably could have been presented on direct appeal or in an RCr 11.42 proceeding. CR 60.02 relief is restricted to specifically named grounds. Payne relies upon the following grounds: "(e) ...it is no longer equitable that the judgment should have prospective application; or (f) any other reason of an extraordinary nature justifying relief." A claim that a conviction was obtained in violation of constitutionally protected rights is considered to fall within the category of "any other reason of an extraordinary nature justifying relief."⁹ CR 60.02 also requires as a threshold to relief that "the motion shall be made within a reasonable time." The Kentucky Supreme Court has stated that "[w]hat constitutes a reasonable time in which to move to vacate a judgment under CR 60.02 is a matter that addresses itself to the discretion of the trial court."¹⁰

On appeal, Payne argues that the circuit court abused its discretion in denying his CR 60.02 motion. He asserts that he is entitled to relief under CR 60.02 because he received ineffective assistance of counsel both at trial and on direct appeal. Specifically, Payne asserts that neither his trial counsel nor appellate counsel informed him that, pursuant to KRS 446.110, he could be sentenced according to the mitigating provisions of the rape statute which was in effect at the time

⁹ Gross, 648 S.W.2d at 857.

¹⁰ *Id.* at 858.

of his 1977 trial rather than the rape statute that was in effect when the rape was committed in 1971. Payne was indicted, convicted, and sentenced under KRS 435.090, rape of a female over twelve.¹¹ KRS 435.090 states that rape of a female over twelve "shall be punished by death,¹² or by confinement in the penitentiary for life without privilege of parole, or by confinement in the penitentiary for life, or by confinement in the penitentiary for not less than ten (10) nor more than twenty (20) years." Effective January 1, 1975, KRS 435.090 was repealed and KRS 510.040, rape in the first degree, went into effect. KRS 510.040(2) states that "[r]ape in the first degree is a Class B felony unless the victim is under twelve (12) years old or receives serious physical injury in which case it is a Class A felony." Payne asserts, and the Commonwealth does not dispute, that the victim of his rape did not sustain serious physical injury. We will assume this to be true solely for the purpose of argument. Because Payne was indicted, convicted, and sentenced with committing the offense of "rape of a female over

¹¹ This statute, effective June 13, 1944, remained in force and unchanged until repealed by the adoption of the Kentucky Penal Code, effective January 1, 1975.

¹² Although this case does not involve the imposition of the death penalty, we note that the United States Supreme Court subsequently ruled that the imposition of the death penalty for rape of an adult woman is excessive and violates the Eighth Amendment's prohibition against cruel and unusual punishment. Coker v. Georgia, 433 U.S. 584, 592, 987 S.Ct. 2861, 2866, 53 L.Ed.2d 982, 989 (1977).

twelve," we know that the victim was twelve years of age or older. Therefore, if Payne had been sentenced under KRS 510.040, he would have been sentenced as if he had committed a Class B felony. The sentencing range available for a Class B felony is not less than ten (10) years imprisonment nor more than twenty (20) years imprisonment.¹³ Notably, life imprisonment may not be imposed for a single, unenhanced class B felony.

Payne asserts that, pursuant to KRS 446.110, he should have been sentenced for rape according to the more lenient sentencing range available under KRS 510.040 rather than the applicable rape statute in effect in 1971 when the rape was committed, KRS 435.090. KRS 446.110 states as follows:

No new law shall be construed to repeal a former law as to any offense committed against a former law, nor as to any act done, or penalty, forfeiture or punishment incurred, or any right accrued or claim arising under the former law, or in any way whatever to affect any such offense or act so committed or done, or any penalty, forfeiture or punishment so incurred, or any right accrued or claim arising before the new law takes effect, except that the proceedings thereafter shall conform, so far as practicable, to the laws in force at the time of the proceedings. If any penalty, forfeiture or punishment is mitigated by any provision of the new law, such provision may, by the consent of the party affected, be applied to any judgment pronounced after the new law takes effect.

¹³ KRS 532.060(2)(b).

Payne asserts that, pursuant to the last sentence of this statute, his counsel should have informed him that he could choose whether to be sentenced according to the old rape statute, KRS 435.090, or the mitigating provisions of the new rape statute, KRS 510.040. Courts are required to sentence a defendant in accordance with the law that existed at the time the offense was committed, unless the defendant specifically consents to the application of a subsequently-enacted law and the new law is certainly or definitely mitigating.¹⁴ In the instant case, the sentencing structure of KRS 510.040 is definitely mitigating of that of KRS 435.090 because the sentencing range under KRS 435.090 included three sentences which are more severe than any penalty available under KRS 510.040: death,¹⁵ life imprisonment without the possibility of parole, and life imprisonment.

Payne testified at his evidentiary hearing that neither his trial counsel nor appellate counsel informed him that he could be sentenced under the more lenient sentencing guidelines of KRS 510.040 pursuant to KRS 446.110. KRS 446.110 went into effect in 1942. KRS 510.040 went into effect in 1975. Payne was tried, convicted, and sentenced in 1977. He stated that he first learned of these statutes in approximately 2000

¹⁴ Lawson v. Commonwealth, Ky., 53 S.W.3d 534, 550 (2001).

¹⁵ See *supra* note 11, at 6.

through a legal aid worker. According to Payne, the legal aid worker told him of an inmate named Daniel Jones who had been sentenced in 1975 to life imprisonment without the possibility of parole for rape but whose sentence had been reduced in 1998 by the Lyon Circuit Court to twenty years imprisonment pursuant to the mitigating provisions of KRS 446.110 and KRS 510.040.

Even if Payne's claims concerning the legal aid worker and Jones are true, they do not provide grounds for relief under CR 60.02. Payne should have raised the issue of KRS 446.110 and KRS 510.040 and their impact on his sentencing sooner. Kentucky's highest court has held that the fact that a party or his counsel has misinterpreted or misunderstood the law is not grounds for a new trial; the proper remedy is direct appeal.¹⁶ Moreover, the fact that Payne may not have had actual knowledge about the statutes in question at the time of his direct appeal is not relevant because "[e]very person is conclusively presumed to know the law."¹⁷ Because Payne knew the underlying facts and was presumed to have knowledge of the relevant statutes at the

¹⁶ Hurd v. Laurel County Board of Education, Ky., 267 Ky. 730, 103 S.W.2d 277 (1937).

¹⁷ Oppenheimer v. Commonwealth, Ky., 305 Ky. 147, 202 S.W.2d 373, 375 (1947).

time of his direct appeal, he could have and should have raised his claim then.¹⁸

Ordinarily, before addressing the merits of a motion for relief under CR 60.02, we also would address the timeliness of the motion since the rule requires that a motion for relief "shall be made within a reasonable time." Curiously, the circuit court did not address the timeliness of Payne's motion in its opinion and order, despite the fact that it was filed twenty-three years after his conviction. Whether a motion under CR 60.02 is timely is an issue to be decided by the circuit court.¹⁹ Payne asserts that the fact that the circuit court ordered an evidentiary hearing and then addressed the merits of his argument in its order and opinion means that the circuit court necessarily determined that his CR 60.02 motion was made within a reasonable time. We disagree with this assumption. However, because Payne's case may be resolved on other grounds, we need not decide this issue. We will assume for the purpose of argument that the circuit court did determine that Payne's motion was filed within a reasonable time.

¹⁸ Payne's claim of ineffective assistance of counsel on direct appeal is addressed *infra* at 11-12.

¹⁹ Gross, 648 S.W.2d at 858.

The standard for an ineffective assistance of counsel claim, as set forth in Strickland v. Washington²⁰ and adopted by the Kentucky Supreme Court in Gall v. Commonwealth,²¹ requires the movant to show that counsel's performance was deficient and that the deficient performance prejudiced the defense. In order to show prejudice, the movant must demonstrate a reasonable possibility that the jury would have reached a different result.²²

Regarding Payne's claim that his counsel on direct appeal also provided ineffective assistance of counsel, the United States Supreme Court has stated that the standard for ineffective assistance of counsel for a matter-of-right, first, direct appeal in a criminal case is the same as stated in Strickland.²³ Notwithstanding this, the Kentucky Supreme Court later stated unequivocally in Lewis v. Commonwealth that "[i]neffective assistance of appellate counsel is not a cognizable issue in this jurisdiction."²⁴ Despite this apparent conflict in the law, we are bound by Rule 1.030(8)(a) of the

²⁰ 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 693 (1984).

²¹ 702 S.W.2d 37, 39 (1985).

²² Bowling v. Commonwealth, Ky., 981 S.W.2d 545, 551 (1998).

²³ See Smith v. Robbins, 528 U.S. 259, 285-89, 120 S.Ct. 746, 764-66, 145 L.Ed.2d 756, 780-81 (2000).

²⁴ 42 S.W.3d 605, 614 (2001).

Rules of the [Kentucky] Supreme Court to apply Lewis regardless of our evaluation of its correctness. Therefore, we hold that Payne's ineffective assistance of appellate counsel claim is not cognizable in Kentucky. Even if it were, however, Payne's claim would fail on the merits because it is based on the same facts as his ineffective assistance of trial counsel which fails on the merits for the reasons noted herein.

In the instant case, Payne has failed to show that his trial counsel's representation was deficient, meaning objectively unreasonable. It was not objectively unreasonable for Payne's trial counsel to fail to inform him of the mitigating provisions of KRS 446.110 and KRS 510.040 because, as a matter of statutory law, Payne was not eligible to take advantage of these provisions. KRS 500.040 sets forth the following restrictions on the applicability of the Kentucky Penal Code:

(1) The provisions of this code shall not apply to any offense committed prior to January 1, 1975, notwithstanding the provisions of KRS 446.110. Such an offense must be construed and punished according to the provisions of law existing at the time of the commission thereof in the same manner as if this code had not been enacted.

. . . .

(3) For purposes of this section, an offense shall be deemed to have been committed prior to January 1, 1975, if any

element of the offense occurred prior thereto.²⁵

Based on the plain meaning of this statute, a criminal defendant who is charged with an offense, any element of which occurred before January 1, 1975, may not take advantage of KRS 446.110 to request sentencing according to a mitigating statute in the Kentucky Penal Code adopted subsequent to the commission of his crime. Instead, he must be sentenced according to the law in effect at the time the crime was committed. As the Kentucky Supreme Court has stated, "[t]he Penal Code is not retroactive."²⁶ It is undisputed that the acts for which Payne was indicted and convicted all occurred in 1971, prior to the 1975 adoption of the Penal Code. KRS 510.040, however, became effective on January 1, 1975, with the adoption of the Penal Code. Therefore, even if Payne had been informed of KRS 446.110 and the more lenient sentencing provisions of the subsequently-enacted rape statute in effect at the time of his 1977 trial, KRS 510.040, it would have made no difference. The court was required by KRS 500.040(1) to sentence Payne in accordance with the sentencing provisions of the rape statute in effect in 1971 when he committed the crime, KRS 435.090. Payne's reliance

²⁵ Emphasis added.

²⁶ Cole v. Commonwealth, 553 S.W.2d 468, 472 (1977).

upon Commonwealth v. Phon,²⁷ in which the Kentucky Supreme Court held that the sentence of life without the possibility of parole could be imposed as a mitigating provision even though it did not exist at the time the capital offense was committed is misplaced. Phon dealt with crimes which occurred in 1996, after the adoption of the Penal Code.²⁸ Payne alleges that his counsel did not inform him of KRS 446.110 and KRS 510.040. However, pursuant to KRS 510.040(1), Payne is in the class of persons specifically excluded from relying on the mitigating provisions of KRS 446.110 because his crimes were committed before the adoption of the Penal Code. Counsel's failure to inform Payne of a partial defense which was not available to him as a matter of law is far from objectively unreasonable. Therefore, Payne has failed to demonstrate any deficiency in his representation at trial.

Likewise, Payne has not established prejudice, meaning a reasonable probability that a different result would have been reached in his case but for his counsel's failure to inform him of KRS 446.110 and KRS 510.040. As noted above, even if Payne had known of these statutes and had requested to be sentenced according to KRS 510.040, the trial court would have been required to deny his request pursuant to KRS 500.040(1). Payne

²⁷ Ky., 17 S.W.3d 106, 108 (2000).

²⁸ *Id.* at 107.

would inevitably have been sentenced for rape under KRS 435.090 and, hence, eligible to receive the life sentence which he received.

Payne also asserts that the circuit court abused its discretion in denying his motion for relief under CR 60.02(e) because, due to changes in social norms and the law, his sentence of life imprisonment has become inequitable. Similarly, he argues that these same changes entitle him to relief under CR 60.02(f) because they have rendered his sentence excessive and, hence, cruel and unusual punishment in violation of the Eight Amendment. Payne focuses on the fact that when the legislature enacted the Kentucky Penal Code, it changed the penalty range for rape of a victim twelve years of age or older who received no serious physical injury to ten to twenty years imprisonment, eliminating the harsher possible penalties of death, life imprisonment without benefit of parole, or life imprisonment. Payne asserts that this change in the maximum allowable sentence, which occurred more than two years before he was sentenced, reflects a change in the social norms about what is an acceptable punishment for the crime he committed. Payne also relies in part upon Workman v. Commonwealth,²⁹ in which Kentucky's highest court held that life imprisonment for the

²⁹ Ky., 429 S.W.2d 374 (1968).

crime of rape is cruel and unusual punishment when applied to juvenile offenders.³⁰ However, Payne ignores the fact that the Workman court expressly limited its holding to juvenile offenders, stating that life without the possibility of parole for the crime of rape "remains the law of this jurisdiction and in our opinion validly so when applied to adults."³¹ Payne was an adult when he committed the crime at issue. Also, Payne was not sentenced to life without the possibility of parole but, rather, the lesser sentence of life imprisonment.³² Payne's arguments concerning the alleged inequity or unconstitutionality of his sentence of life imprisonment for rape fail, however, because the Kentucky Supreme Court has already rejected the claim that the sentence of life imprisonment without the possibility for parole for rape is cruel and usual punishment or so inequitable as to justify relief.³³ Significantly, the appellants in that case were convicted under the same rape statute as Payne, KRS 435.090, and received even harsher sentences. Therefore, we find that Payne's claims that he is

³⁰ *Id.* at 377.

³¹ *Id.*

³² In fact, Payne was paroled for these crimes in 1983. He lost his freedom when he was convicted of a felony in California in 1986. He was incarcerated there until 2000 before returning to Kentucky to serve the remainder of his life sentence.

³³ Land v. Commonwealth, 986 S.W.2d 440, 442 (1999).

entitled to relief under CR 60.02(e) because the continued imposition of his sentence is no longer equitable or, alternatively, that he is entitled to relief under CR 60.02(f) because his life imprisonment is excessive and, hence, cruel and unusual punishment in violation of the Eighth Amendment are without merit.

For the foregoing reasons, we affirm the Jefferson Circuit Court's November 7, 2002, opinion and order denying Payne's motion for relief pursuant to CR 60.02.

ALL CONCUR.

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