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NOT TO BE PUBLISHED

# Commonwealth of Kentucky

## Court of Appeals

NO. 2003-CA-001581-MR

ANDRE PATTON

APPELLANT

v. APPEAL FROM FULTON CIRCUIT COURT  
HONORABLE WILLIAM LEWIS SHADOAN, JUDGE  
ACTION NO. 01-CR-00069

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: BUCKINGHAM, DYCHE, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Andre Patton appeals from an order of the Fulton Circuit Court denying his motion to enforce his plea agreement with the Commonwealth by reducing his conviction for first-degree persistent felony offender to second-degree persistent felony offender. We affirm, but for reasons different from those of the circuit judge.

On July 26, 2001, Patton was indicted for first-degree trafficking in a controlled substance, second offense (Kentucky

Revised Statutes (KRS) 218A.1412)) and first-degree persistent felony offender (KRS 532.080). The trafficking charge resulted from the allegation that on or about May 25, 2001, Patton sold crack cocaine to an undercover police officer. The persistent felony offender (PFO) charge resulted from prior felonies committed by Patton which qualified him as a PFO I pursuant to KRS 532.080.

On April 12, 2002, the Commonwealth, Patton, and Patton's attorney executed the "Commonwealth's Offer on a Plea of Guilty." Section 1 of the offer recited the charges listed in the indictment. Section 4 of the offer is captioned "Recommendations on a Plea of Guilty (Plea Agreement)." Section 4 indicates that in return for Patton's guilty plea to first-degree trafficking in a controlled substance and PFO II, the Commonwealth will recommend a sentence of 6 1/2 years imprisonment enhanced to 13 1/2 years based upon the PFO II conviction. Section 2 contains an area in which amended charges are to be listed; however, "N/A" is notated in that section. This notation contradicts the entry in Section 4, which reflects an amendment of the PFO I charge to PFO II.

On April 13, 2002, Patton executed a form captioned "Arrestment Order (Guilty Plea)." Section 7 of the order indicates that in return for Patton's guilty plea to first-degree trafficking and PFO I, the Commonwealth agrees to

recommend a sentence of 6 1/2 years on the trafficking charge, enhanced to 13 1/2 years. Thus, while the term of imprisonment is consistent on the Commonwealth's Offer and the Arraignment Order, the PFO recommendation was not consistent therewith.

On April 25, 2002, Patton appeared before the trial court to enter his guilty plea. At the plea hearing, the trial court informed Patton of the charges contained in the indictment, including the PFO I charge. The trial court then stated the parties had negotiated a plea agreement which provided that Patton would plead guilty to first-degree trafficking with a recommendation of 6 1/2 years, and to PFO II with an enhanced sentence of 13 1/2 years. However, later in the hearing the trial court asked Patton how he wanted to plead to the charges of first-degree trafficking and PFO I. Patton replied "guilty." Thus, at the plea hearing, there was an inconsistency in the statements made by the trial court concerning the PFO situation. The PFO discrepancy was apparently not noticed by counsel for the parties nor appellant. Sentencing was postponed pending preparation and review of the pre-sentence investigation report.

On July 11, 2002, the final sentencing hearing was held. The trial court initially identified the plea agreement as being for first-degree trafficking, second offense, and PFO I. Defense counsel and the Commonwealth both corrected the

trial court that the agreement was for first-offense trafficking. However, once again the issue of the PFO discrepancy was not raised. Final judgment and sentence was pronounced adjudging Patton guilty of first-degree trafficking in a controlled substance, first offense, and PFO I.

On October 21, 2002, Patton filed a "Motion to Correct Sentence." The motion stated that it was Patton's intention, pursuant to the original Commonwealth's Offer on a Plea of Guilty, to plead guilty to PFO II as reflected in Section 4 of the Commonwealth's Offer rather than to PFO I.

In its response, the Commonwealth argued that the handwriting in Section 4 reflecting an agreement to amend to PFO II was not in the handwriting of Commonwealth's Attorney Timothy A. Langford;<sup>1</sup> that the arraignment order reflected a plea to PFO I; and that Patton pled guilty to PFO I at the hearing. The Commonwealth also incorrectly stated that the sentence received by Patton reflected PFO II sentencing to the exclusion of PFO I sentencing. The Commonwealth incorrectly represented that PFO I sentencing would have required a sentence of 20 years or more.

A hearing on the motion was held on October 24, 2002. At the hearing counsel informed the trial court regarding the

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<sup>1</sup> It is not clear what the Commonwealth's point was in raising this as an issue. If the Commonwealth is repudiating the entries in Section 4 of the Commonwealth's Offer on a Plea of Guilty because the entries were not authorized by the Commonwealth's Attorney's Office, the issue arises of whether there was a properly executed plea agreement. Patton claims that the entry was made by Assistant Commonwealth's Attorney Dawn Stacey.

discrepancy in the paperwork concerning the plea and stated that it was Patton's intention to plead guilty to PFO II rather than to PFO I. The Commonwealth conceded that the original offer reflected an offer for PFO II, but noted that at the plea hearing Patton had pled guilty to PFO I and that he was sentenced consistent with that plea. In addition, the Commonwealth stated that the enhanced sentence of 13 1/2 years reflected a sentence enhancement consistent with PFO II sentencing rather than PFO I sentencing; defense counsel agreed with this sentencing analysis. The trial court similarly agreed that the sentence actually reflected PFO II sentence enhancement and denied the motion to correct sentence. Hence, the Commonwealth's Attorney, defense counsel, and the trial court, all incorrectly concluded that the sentence imposed reflected PFO II sentencing to the exclusion of PFO I sentencing.<sup>2</sup> No appeal was taken from the denial of this motion.

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<sup>2</sup> KRS 532.080(6) provides that "[a] person who is found to be a persistent felony offender in the first degree shall be sentenced to imprisonment as follows: . . . (b) If the offense for which he presently stands convicted is a Class C or Class D felony, a persistent felony offender in the first degree shall be sentenced to an indeterminate term of imprisonment, the maximum of which shall not be less than ten (10) years nor more than twenty (20) years. KRS 218(2)(a) provides that first-degree trafficking in a controlled substance, first offense, is a Class C felony. Hence, Patton's enhanced sentence fell within the sentencing range for a PFO I conviction. The more important point, however, is that the Commonwealth thought the sentence reflected PFO II sentencing to the exclusion of PFO I sentencing, which lends credence to Patton's argument that the agreement was for an amended charge to PFO II.

On April 10, 2003, Patton filed, pro se, a "Motion for Commonwealth of Kentucky to Uphold and Fulfill Plea Agreement." This motion again noted that the Commonwealth's original offer reflected an agreement to amend the PFO I charge to PFO II and stated that it was appellant's intention to plead guilty to PFO II rather than to PFO I. In its response, the Commonwealth noted that Section 2 of the Commonwealth's Offer, the section for listing amended charges, contained the notation "N/A."<sup>3</sup> The response filed by Commonwealth Attorney Langford also stated that "someone wrote PFO, 2<sup>nd</sup> on the bottom of the form. The handwriting is not that of this officer of the Commonwealth."<sup>4</sup>

On April 24, 2003, a hearing on the motion was held in which the Commonwealth reiterated the arguments made in its response. Following the hearing the trial court entered an order denying the motion. This appeal follows.

Patton contends the trial court erred by denying the motion to correct his sentence to reflect a conviction for PFO II rather than PFO I.<sup>5</sup> Patton contends his agreement with the Commonwealth was to amend the PFO I charge to PFO II, and that

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<sup>3</sup> The significance of this notation is questionable. It is undisputed that the trafficking charge was amended from second-offense to first-offense, which indicates that this section of the form was incorrectly filled out.

<sup>4</sup> Again, the Commonwealth's point in raising this issue is unclear.

<sup>5</sup> Patton is prejudiced by the PFO I conviction primarily because pursuant to KRS 532.080(7) he would be required to serve 10 years before being eligible for parole, whereas a conviction for PFO II would require the serving of only 20% of his sentence prior to parole eligibility.

this is confirmed by the notation in Section 4 of the Commonwealth's Offer on a Plea of Guilty.

We first address the procedural posture of this case. Patton's motion to the circuit court was captioned "Motion for Commonwealth of Kentucky to Uphold and Fulfill Plea Agreement." The motion was signed by Patton, but was not verified. Neither the parties nor the trial court have addressed the procedural authority under which the motion was brought. However, that issue should first be resolved as it will control our standard of review in this appeal.

"The structure provided in Kentucky for attacking the final judgment of a trial court in a criminal case is not haphazard and overlapping, but is organized and complete. That structure is set out in the rules related to direct appeals, in RCr 11.42, and thereafter in CR 60.02." Gross v. Commonwealth, Ky., 648 S.W.2d 853, 856 (1983). "A defendant who is in custody under sentence or who is on probation, parole or conditional discharge, is required to avail himself of RCr 11.42 as to any ground of which he is aware, or should be aware, during the period when the remedy is available to him." McQueen v. Commonwealth, Ky., 948 S.W.2d 415, 416 (1997).

Patton's pro se April 10, 2003, motion amounts to a first-time post-conviction collateral attack on the July 11, 2002, final judgment and falls within the three-year limitations

period for bringing an RCr 11.42 motion. We ordinarily would treat the motion as one brought pursuant to RCr 11.42; however, the motion is not verified and as such does not comply with RCr 11.42(2). While the motion is signed, the doctrine of substantial compliance does not apply to RCr 11.42(2). Bowling v. Commonwealth, Ky., 981 S.W.2d 545 (1998).

Similarly, we cannot interpret the motion as a motion under CR 60.02 because a post-conviction collateral attack must first be brought under RCr 11.42 if the limitations period for bringing a motion under that rule has not expired. McQueen, 948 S.W.2d at 416.

We are aware of no other post-conviction procedural authority which would authorize Patton's April 10, 2003, motion. It follows that the motion was not properly brought, and that the trial court lacked jurisdiction to reach a decision on the merits. Since the motion was denied, we thus affirm but for a different reason - the court lacked jurisdiction to consider the motion under the circumstances presented. Kentucky Farm Bureau Mut. Ins. Co. v. Gray, Ky. App., 814 S.W.2d 928 (1991).

We note that final judgment was entered in this case on July 11, 2002. Patton, thus, has ample time to refile a verified motion to properly raise his claim before the circuit court pursuant to RCr 11.42. A hearing is required in an RCr 11.42 proceeding if there is a material issue of fact that



cannot be conclusively resolved, (i.e., conclusively proved or disproved), by an examination of the record. Stanford v. Commonwealth, Ky., 854 S.W.2d 742 (1993), cert. denied, 510 U.S. 1049, 114 S.Ct. 703, 126 L.Ed.2d 669 (1994); Lewis v. Commonwealth, Ky., 411 S.W.2d 321 (1967). The circuit judge may not simply disbelieve factual allegations in the absence of evidence in the record refuting them. Drake v. United States, 439 F.2d 1319 (6th Cir.1971); Fraser v. Commonwealth, Ky., 59 S.W.3d 448 (2001).

Accordingly, if Patton does timely file a properly verified RCr 11.42 motion regarding his alleged agreement with the Commonwealth to amend the PFO I charge to PFO II, Patton would be entitled to an evidentiary hearing based on the record before this Court.

For the foregoing reasons the judgment of the Fulton Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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