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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-000831-MR

RICHARD ALAN GAILLARD — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE BARRY WILLETT, JUDGE
ACTION NO. 94-CR-000625

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: GUIDUGLI, McANULTY, AND MINTON, JUDGES.

McANULTY, JUDGE: In March 1994, Richard Gaillard (hereinafter appellant) was indicted by the Jefferson County Grand Jury for first-degree burglary, kidnapping, first-degree sodomy, first-degree rape, intimidating a witness, first-degree wanton endangerment (2 counts), terroristic threatening (2 counts), and violation of a protective order (2 counts). On July 11, 1995, he appeared before the Court for the apparent purpose of

entering a guilty plea.[1] Apparently, Judge Laurence Higgins (retired) was presiding when his plea agreement was made, and appellant asserts that Judge Higgins accepted his plea.

Appellant alleges that, subsequently, the regularly presiding judge in Division One, Judge Ernest Jasmin, refused to accept the plea despite being informed that Judge Higgins had already accepted it. However, Judge Jasmin's signature appears on an order on the plea of guilty entered on July 24, 1995. This order recites the court's acceptance of the plea, and it notes the Commonwealth's recommendation of sentence of twelve years on the burglary, kidnapping, sodomy and rape charges; three years on the wanton endangerment and intimidating a witness charges; and twelve months on the terroristic threatening and violation of protective order charges; all to run concurrently for a total sentence of twelve years.

Without explanation in the record, a second written plea offer is entered in the record, again signed by appellant and defense counsel, on August 11, 1995. Appellant contends that Judge Jasmin informed the defense at the sentencing hearing that he would not accept the previous sentence recommendation. In the second offer, the plea agreement is changed from 12 years

[1] This appearance is not recorded on videotape. The video record of the proceedings is limited to a plea colloquy and sentencing hearing on August 11, 1995.

to 15 years to serve in total. On August 11, 1995, appellant entered his guilty plea in open court before Judge Daniel Schneider of Division Six. At that hearing, appellant entered a knowing, intelligent and voluntary plea to all counts in the indictment and the Commonwealth recommended fifteen (15) years to serve. Appellant waived separate sentencing and the court caused to be entered its Judgment of Conviction on the same date and sentenced appellant to a total of fifteen years imprisonment.

On January 8, 2003, Appellant filed a motion pursuant to CR 60.02(f)/RCr 10.26 before the trial court seeking to compel the Commonwealth to carry out its original plea agreement. The Commonwealth responded to the motion and the court denied same on March 6, 2003. The court below held that (1) CR 60.02 was not the proper method for appellant to seek relief since he could have raised the issue in an earlier proceeding, and (2) his motion for relief pursuant to CR 60.02 was not filed within a reasonable time. The court additionally found that appellant could not use RCr 10.26 because it was only available in a motion for new trial or direct appeal. Appellant appeals this order. We affirm because we agree that appellant's arguments should have been raised in an RCr 11.42 proceeding, and that the CR 60.02 motion was not timely.

Appellant is challenging the sentence he received and claiming the right to enforcement of the original plea offer rejected by the trial court. Appellant alleges that once the court accepted the plea agreement, it did not have the power to thereafter require the parties to change the agreement.

Appellant correctly states that his original plea agreement was accepted by the trial court, albeit by Judge Jasmin rather than Judge Higgins as he assumes. Although Judge Higgins may have been involved during plea negotiations, it is clear from the record that Judge Jasmin accepted appellant's original plea agreement in writing on July 24, 1995. In this case, the trial court's written order accepting the plea agreement was an official order that superseded any other statements from the bench. When an order is signed the trial court has officially accepted the guilty plea since a court speaks only through its records. Allen v. Walter, Ky., 534 S.W.2d 453, 455 (1976).

Under the above authority, the written order controls, and the plea agreement was officially accepted in this case. Once the trial court accepts a defendant's plea, the plea agreement becomes binding on the Commonwealth, and the defendant is entitled to enforce it. Matheny v. Commonwealth, Ky., 37 S.W.3d 756 (2001). By necessary implication, if the trial judge knows of the agreement and concurs in it the judge would not be

permitted to repudiate it any more than would the Commonwealth's Attorney. Commonwealth v. Reyes, Ky., 764 S.W.2d 62, 66 (1989).

Nevertheless, we agree with the court below that appellant needed to bring this claim in an RCr 11.42 action.[2] The structure in Kentucky for attacking the final judgment of a trial court in a criminal case 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 (1983). The language of RCr 11.42 forecloses the defendant from raising any questions under CR 60.02 which are "issues that could reasonably have been presented" by RCr 11.42 proceedings. Id. CR 60.02 is for relief that is not available by direct appeal and not available under RCr 11.42. Id. The movant must demonstrate why he is entitled to this special, extraordinary relief. Id. Even claims of constitutional error do not qualify for CR 60.02 relief if they could have been brought in an earlier proceeding. Gross, 648 S.W.2d at 857.

We agree that appellant could have brought a motion pursuant to RCr 11.42 to allege that his plea was not voluntary because the plea agreement had changed. It is also conceivable that appellant could have raised this as an issue of ineffective

[2] The court below and the Attorney General mistakenly asserted that appellant could have raised this issue via direct appeal. However, appellant's plea of guilty waived his right to appeal his sentence and appellant had only the ability to bring a collateral attack pursuant to RCr 11.42.

assistance of counsel in an RCr 11.42 motion. However, appellant did not previously bring any post-conviction actions. Because this issue could have been raised in an RCr 11.42 motion, we find that it is not appropriate for consideration at this time.

Furthermore, CR 60.02 is a mechanism for grievances not known until after rendition of the judgment. Gross, 648 S.W.2d at 846. The issue of acceptance of the plea agreement was certainly known to appellant at the time of his final sentencing in August 1995. Appellant brought his CR 60.02 motion on January 28, 2003. What constitutes a reasonable time in which to move to vacate a judgment under CR 60.02 is a matter addressed to the discretion of the trial court. Gross, 648 S.W.2d at 858. The trial court determined that a delay of over seven years was an excessive amount of time before attacking a judgment under CR 60.02, and we find no abuse of discretion in that determination. Finally, we affirm the trial court's determination that RCr 10.26 by its terms can only be used in a motion for new trial or on direct appeal, and not as an avenue for post-conviction relief.

For the reasons stated above, the order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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