RENDERED: March 11, 2005; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001504-MR

WILLIAM LEON STOUT JR. — APPELLANT

v.

APPEAL FROM BOONE CIRCUIT COURT
HONORABLE JOSEPH F. BAMBERGER, JUDGE
INDICTMENT NO. 00-CR-00105

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION

AFFIRMING

** ** ** ** **

BEFORE: BARBER AND VANMETER, JUDGES; HUDDLESTON, SENIOR JUDGE.[1]

HUDDLESTON, SENIOR JUDGE: William Leon Stout Jr. appeals *pro se* from orders of the Boone Circuit Court denying his Kentucky Rules of Criminal Procedure (RCr) 11.42 motion to vacate his sentence. He also claims that the circuit court erred when it denied his request for an evidentiary hearing.

[1] Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Stout entered a plea of guilty to first-degree sexual abuse on April 25, 2000. He was sentenced to five years' imprisonment probated for a like period in accordance with a plea agreement. The final judgment, entered on June 14, 2000, provided that "**[u]pon release from probation**, pursuant to KRS 532.043, [Stout] . . . will be conditionally discharged for a period of three years." (Emphasis supplied.)

At the time of Stout's sentencing, Kentucky Revised Statutes (KRS) 532.043 provided that:

> (1) In addition to the penalties authorized by law, any person convicted of, pleading guilty to, or entering an Alford plea to a felony offense under KRS Chapter 510, KRS 530.020, 530.064, or 531.310 **shall be sentenced to** a period of conditional discharge following release from:
>
> (a) Incarceration upon expiration of sentence; or
>
> (b) Completion of parole.
>
> (2) The period of conditional discharge shall be three years. (Emphasis supplied.)

The statute made no mention, however, of whether the conditional discharge period should be imposed if the sentence was probated.

Approximately one month later, an amended version of the statute took effect. The alteration in its wording that is significant for purposes of this appeal is that the phrase

"shall be subject to" was substituted for "shall be sentenced to" in the opening passage, which now provides that:

> In addition to the penalties authorized by law, any person convicted of, pleading guilty to or entering an Alford plea to a felony offense under KRS Chapter 510, KRS 530.020, 530.064, or 531.310 **shall be subject to** a period of conditional discharge.[2]

Several months later, Stout's probation officer submitted affidavits to the court asserting that Stout had violated the terms of his probation. On November 14, 2000, following a hearing, the circuit court entered an amended order that revoked and set aside Stout's probation and sentenced him to serve five years in prison. No mention was made in this order of the period of conditional discharge.

Stout then moved to suspend or vacate his sentence pursuant to RCr 11.42. He claimed that his guilty plea had been involuntary, and his counsel ineffective, because he was never informed that he would be subject to the three-year conditional discharge statute. He further argued that, under KRS 532.043, conditional discharge may only be imposed following incarceration or completion of parole. He maintained, therefore, that the initial judgment that imposed the

[2] KRS 532.043(1)(emphasis supplied).

conditional discharge to follow the completion of the probated sentence was erroneous.

The court denied Stout's motion on the ground that "KRS 532.043 as amended effective July 14, 2000, provides that the three (3) year conditional discharge is imposed as a matter of law rather than as part of the sentence." Stout's motion for reconsideration was denied, and this appeal followed.

On appeal, Stout has not raised the ineffective assistance of counsel claim made in his original RCr 11.42 motion. The two principal arguments that he advances are: first, that his guilty plea was involuntary because he was not informed that in addition to the five year sentence, he would also be subject to a three-year period of conditional discharge; and second, that the imposition of the three-year conditional sentence was an *ex post facto* application of the law.

Although the three-year period of conditional discharge was not mentioned in the Commonwealth's written offer on a plea of guilty or in Stout's written plea agreement, the circuit court explicitly raised the issue with him at the June 13, 2000, sentencing hearing. Before imposing sentence, the court engaged in the following colloquy with Stout and his attorney:

Court: I need to tell you that that there's a statute . . . that requires three years conditional discharge after the five. [Indistinct] aware of that?

Defense counsel: Yeah.

Court: So, after I impose the sentence – even though it's five years – there's another three on the back.

Stout: **Yes, sir, I know that.** (Emphasis supplied.)

Court: You know that?

Stout: Yes.

At no time during this exchange did Stout express any doubt about the potential length of his sentence.

Stout now claims that he was sentenced "without the Trial Court or Defense Counsel ever advising him as to what the three year Conditional Discharge was, and how it would affect his sentence." This allegation is clearly refuted by the record. Stout informed the court that he knew that three years of conditional discharge would follow the five-year sentence. There is no indication, therefore, that his plea did not meet the knowing, intelligent and voluntary standard for guilty pleas established by Boykin v. Alabama.[3]

Stout's second argument is that the circuit court, in denying his RCr 11.42 motion, violated the prohibition against *ex post facto* application of statutes. He refers specifically

[3] 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969).

to the court's reliance on the most recently amended version of KRS 532.043 for its statement that the period of conditional discharge was imposed as a matter of law, thereby implying that it did not need to be expressly included in the final judgment and sentence.

In discussing when statutes are deemed to have an impermissible *ex post facto* effect, the United States Supreme Court has stressed two factors particularly relevant to an analysis of Stout's case: the potential for an unforeseen increase in the defendant's sentence, and the necessity of a "fair warning."

> Although the Latin phrase "ex post facto" literally encompasses any law passed "after the fact" . . . "[i]t is settled . . . that any statute which punishes as a crime an act previously committed, which was innocent when done; **which makes more burdensome the punishment for a crime, after its commission**, or which deprives one charged with crime of any defense available according to law at the time when the act was committed, is prohibited as ex post facto. (Emphasis supplied.)[4]

[4] Martin v. Chandler, 122 S.W.3d 540, 546 (Ky. 2003), quoting Collins v. Youngblood, 497 U.S. 37, 41, 110 S.Ct. 2715, 2718, 111 L.Ed.2d 30, 38 (1990), quoting, in turn, Beazell v. Ohio, 269 U.S. 167, 46 S.Ct. 68, 70 L.Ed. 216 (1925).

In Weaver v. Graham,[5] the Supreme Court explained that the constitutional prohibition against the *ex post facto* application of laws was intended "to assure that legislative Acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed."[6] In a later case, the Court further refined its analysis by stressing that "[t]he focus of the ex post facto inquiry is not on whether a legislative change produces some ambiguous sort of 'disadvantage,' . . . but on whether any such change alters the definition of criminal conduct or increases the penalty by which a crime is punishable."[7]

It is apparent that Stout was given "fair warning" of the conditional discharge at his sentencing hearing. He stated as much in open court. The revision of the phrase in KRS 532.043 from "shall be sentenced to a period of conditional discharge" to "shall be subject to a period of conditional discharge" did not change the definition of the criminal conduct to which he pleaded guilty, nor did the change result in an

[5] 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981).

[6] Martin, supra, note 4, at 546, quoting Weaver v. Graham, id. at 28, 101 S.Ct. at 964, 67 L.Ed.2d at 23.

[7] California Dep't of Corrections v. Morales, 514 U.S. 499, 506 n. 3, 115 S.Ct. 1597, 1602 n. 3, 131 L.Ed.2d 588, 595 n. 3 (1995), quoted in Martin, supra, note 4, at 547.

increase in his penalty. The second order revoking his probation merely reinstated the sentence initially imposed.[8]

As to the judgment, two interpretations are possible: first, that the imposition of conditional discharge to follow probation merely failed to reflect fully the judge's oral sentence, in which case the judge was free to amend it at any time as a clerical error;[9] or second, that the initial written order was contrary to law in that it did not expressly impose conditional discharge to follow the prison sentence as required under the earlier wording of the statute. If that is the case, the judge was similarly free to correct the sentence at any time.[10]

The reliance of the circuit court on the amended version of KRS 532.043 to support its denial of Stout's RCr

---

[8] See Commonwealth v. Tiryung, 709 S.W.2d 454, 455 (Ky. 1986), quoting McCulley v. State, 486 S.W.2d 419, 423 (Mo. 1972) ("[P]robation standing alone does not function as a sentence . . . [o]ne consequence of the revocation of probation can be a court's order that the sentence previously imposed be executed").

[9] See Cardwell v. Commonwealth, 12 S.W.3d 672, 674-75 (Ky. 2000). It is has by no means been established, as Stout seems to assume, that the period of conditional discharge is not intended to follow a probated sentence. Indeed, one author has argued, "it seems the better view would be that the three-year period of conditional discharge must be added to each sentence, regardless of whether probation is granted. A sentence that is probated is, nevertheless, a sentence, and must be served if probation is revoked." Gregory M. Bartlett, Alternative Sanctions and the Governor's Crime Bill of 1998 (HB455): Another Attempt at Providing a Framework for Efficient and Effective Sentencing, 27 N. Ky. L. Rev. 283, 302 (2000).

[10] See Neace v. Commonwealth, 978 S.W.2d 319, 322 (Ky. 1998), citing Skiles v. Commonwealth, 757 S.W.2d 212, 215 (Ky. App. 1988).

11.42 motion was therefore unnecessary. At most, it constituted harmless error.

Moreover, even following an unconditional guilty plea, a defendant retains the right to appeal when a sentence is imposed that is contrary to law.[11] Stout was free to appeal if he believed the sentence was erroneous, but he chose not to do so. The structure for appellate review is not haphazard or overlapping.[12] A criminal defendant must first bring a direct appeal when available, then he must utilize RCr 11.42 by raising every error of which he should be aware.[13] Stout has failed to explain why he did not raise the issue of the allegedly erroneous judgment of June 14, 2000, by means of a direct appeal.

The evidentiary hearing to which Stout contends he was entitled is required under RCr 11.42 only 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.[14] Because the record conclusively refutes Stout's allegations, he was not entitled to a hearing.

---

[11] Hughes v. Commonwealth, 875 S.W.2d 99 (Ky. 1994).

[12] Gross v. Commonwealth, 648 S.W.2d 853, 856 (Ky. 1983).

[13] Id.

[14] Fraser v. Commonwealth, 59 S.W.3d 448, 452 (Ky. 2001).

For the foregoing reasons, the order denying Stout's RCr 11.42 motion is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

William Stout Jr., *pro se*
LaGrange, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Natalie Lewellen
Assistant Attorney General
Frankfort, Kentucky