RENDERED: APRIL 21, 2006; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-002232-MR

JAMES R. HAZELWOOD — APPELLANT

v.

APPEAL FROM MARION CIRCUIT COURT
HONORABLE ALLAN RAY BERTRAM, JUDGE
ACTION NOS. 96-CR-00029, 96-CR-00030 & 96-CR-00032

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: GUIDUGLI, McANULTY, AND SCHRODER, JUDGES.

McANULTY, JUDGE: James R. Hazelwood challenges the denial of his motion under CR 60.02 to vacate his amended judgment and sentence under a plea agreement. Under the terms of his plea agreement, Hazelwood is serving a 14 year sentence for robbery in the first degree in Washington County. In addition, Hazelwood pled guilty to three class D felonies in Marion County -- knowingly receiving stolen property, possession of a controlled substance (cocaine) in the first degree, and theft by failure to make required disposition of property valued more

than $300 -- for which the trial court sentenced him to five years on each to run concurrent with each other and with the 14 year sentence in Washington County. Because we conclude the trial court did not abuse its discretion in denying Hazelwood's motion for relief under CR 60.02, we affirm.

In this appeal, Hazelwood only challenges the denial of the CR 60.02 motion for the Marion County charges, not the Washington County charge. The indictment numbers and original charges are as follows: (1) 96-CR-00029, receiving stolen property over $300.00 and persistent felony offender in the second degree (PFO II); (2) 96-CR-00030, possession of a controlled substance in the first degree and PFO II; and (3) 96-CR-00032, failure to make required disposition of property over $300 and PFO II.

Hazelwood elected to go to trial on the charges under indictment 96-CR-00029. The jury convicted him of both charges and recommended a sentence of ten years' imprisonment. On August 9, 1996, Hazelwood pled guilty to the remaining charges in indictment numbers 96-CR-00030 and 96-CR-00032. Consequently, the trial court issued a judgment against him, sentencing him to imprisonment for a total of ten years, to run concurrently with the previously-imposed sentence in 96-CR-00029.

The majority of the charges and sentences that form the basis of this appeal stemmed from Hazelwood's activities in Washington and Marion counties on the evening of February 13 and in the early morning hours of February 14, 1996. The charge of failure to make required disposition of property, however, concerned a time period shortly before February 13, 1996. Even so, he committed all the offenses while on parole from a ten year sentence he received in Marion County under indictment number 86-CR-00024 for robbery in the first degree and assault in the first degree. He pled guilty to those charges and was sentenced on January 29, 1987 (the 1987 conviction).

A little over ten years after the 1987 conviction and while imprisoned as a result of his commission of the current offenses, Hazelwood filed an RCr 11.42 motion. In his collateral attack, he sought to vacate the 1987 conviction on the basis that his attorney was ineffective in failing to advise him that the charge of first-degree assault merged into the first-degree robbery charge. A panel of this Court agreed with Hazelwood. In an unpublished opinion (1997-CA-001611-MR), this Court vacated Hazelwood's conviction and remanded the case to the trial court to allow Hazelwood to withdraw his guilty plea. In so doing, the court noted that while Hazelwood could not be convicted of both first-degree robbery and first-degree assault, he may be tried on both offenses, with the instructions worded

such that the jury could only convict on one offense or the other.

In the eleven or so years that passed between Hazelwood's 1987 conviction and this Court's opinion, the complaining witness in the 1987 conviction died. The Commonwealth had no choice but to dismiss the charges against Hazelwood under indictment number 86-CR-00024. Because the underlying charge on which the PFO II charges were based had been dismissed, Hazelwood filed a motion under CR 60.02(b) -- newly discovered evidence -- to allow him to withdraw his guilty pleas. At a later hearing on Hazelwood's motion held on July 19, 1999, he amended his motion to a motion under CR 60.02(e) to alter, amend or vacate the judgment.

At the hearing, Hazelwood, his attorney, two attorneys for the Commonwealth representing Marion and Washington counties and a victim's advocate reached an amended plea agreement. In exchange for Hazelwood's plea, the Commonwealth agreed to remove one year from the Washington County robbery first-degree sentence. So that sentence was reduced from 15 years to 14 years. In addition, the Commonwealth agreed to dismiss the PFO II charges under the three Marion County indictments and run each of the five year sentences concurrent with the 14 year Washington County sentence. A review of the hearing reveals that while all parties were in agreement, Hazelwood was the

master of the plea and was extremely anxious to get it entered that day.

Ten days after the hearing that resulted in the plea agreement, on July 29, 1999, the trial court issued an order amending the judgment and sentence in accordance with the agreement. A little less than 5 years later, Hazelwood filed a pro se motion under CR 60.02 (d) and (f) to vacate and set aside the July 29, 1999 Order on the basis that the trial court failed to comply with KRS 532.050 in not ordering a presentence investigation (PSI) report before imposing a sentence for the conviction. Hazelwood contended that had the trial court complied with the mandatory sentencing statutes, it could have determined that he no longer had a prior felony conviction, and considered other sentencing alternatives under KRS 533.010 on each Class D felony. As relief, he requested that the court vacate the July 29, 1999 Order, reinstate the former judgment and hold a hearing. Upon motion, the trial court later allowed Hazelwood to supplement the CR 60.02 motion and argue that he did not waive the PSI report. The Commonwealth did not respond to the initial CR 60.02 motion or the supplemental motion.

In a seven-page order, the trial court fully addressed Hazelwood’s arguments. The trial court ultimately denied his request for relief on the ground that he had not demonstrated why he was entitled to the special, extraordinary relief

provided by the rule when the trial court issued an order that amended Hazelwood's sentence exactly the way he wanted it to be amended.

In this appeal, consistent with his arguments before the trial court, Hazelwood challenges his sentence. However, he raises an additional argument that he did not raise before the trial court: the amended judgment stripped him of the seven years and nine months he served in jail on the vacated sentence. He argues that the trial court made substantial changes to his original judgment when it was only given limited jurisdiction to review a certain aspect of the original judgment for error. Hazelwood contends that the trial court thereby subjected him to double jeopardy. The substantial change he alleges was that his original judgment ordered his Washington County robbery sentence to run concurrent with his 1987 conviction, but the trial court removed that term in amending his sentence by way of the July 29, 1999 Order.

Actions under CR 60.02 are addressed to the sound discretion of the trial court. See Brown v. Commonwealth, 932 S.W.2d 359, 362 (Ky. 1996). Thus, our standard of review is abuse of discretion. See id.

CR 60.02 is for relief that is not available by direct appeal and not available collaterally under RCr 11.42. See Gross v. Commonwealth, 648 S.W.2d 853, 856 (Ky. 1983). And CR

60.02 should only be used to provide relief when the movant demonstrates why he or she is entitled to the special, extraordinary relief provided by the rule. See Gross, 648 S.W.2d at 856.

The Commonwealth defends Hazelwood's claims on procedural grounds only. Without addressing the merits at all, the Commonwealth simply argues that Hazelwood's motion is successive. Thus, the Commonwealth contends that Hazelwood is foreclosed from filing a third motion raising new grounds. While this is a correct statement of law, the Commonwealth is mistaken as to the number and substance of the CR 60.02 motions that Hazelwood has filed pertaining to the three Marion County indictments at issue. Hazelwood's second CR 60.02 motion is not successive as it challenges the trial court's July 29, 1999 Order. Hazelwood did not file a third motion. Apparently, the Commonwealth counted a CR 60.02 motion that Hazelwood filed in Washington County and attached to his Marion County motion as an exhibit. We acknowledge that the circumstances of the case are unusual and procedurally complex, but observe that the Commonwealth has done nothing to assist the trial court or this Court in addressing the merits of Hazelwood's pro se contentions.

We now turn to the merits of Hazelwood's first contention. In considering the merits, however, this Court must

follow the law pertaining to relief under CR 60.02. As stated above, CR 60.02 is for relief that is not available by direct appeal. In this case, despite the fact that Hazelwood pled guilty, the sentencing issues Hazelwood raises could have been raised on direct appeal "since all defendants have the right to be sentenced after due consideration of all applicable law." See Hughes v. Commonwealth, 875 S.W.2d 99, 100 (Ky. 1994).

The direct appeal avenue notwithstanding, we conclude that the trial court did not abuse its discretion in denying Hazelwood relief under CR 60.02 for four reasons. First, he did waive the PSI at the July 19, 1999 hearing. Hazelwood argues that he did not waive it, but we agree with the trial court that he did. He contends that his attorney waived the PSI, not him. We disagree. Even though he could not be seen on camera when his attorney said they would "waive sentencing because he is a state prisoner anyway," Hazelwood was standing right behind his attorney and was actively participating in the hearing. Hazelwood expressed his desire on numerous occasions to get everything taken care of that day.

Second, the trial court was well aware that the 1987 conviction had been dismissed. That is the sole reason that the 1996 judgment was amended to dismiss the PFO II charges and reduce the enhanced sentences to within the sentencing range of a Class D felony.

Third, Hazelwood did not bring his CR 60.02 motion within a reasonable time as required by CR 60.02. He brought his motion a little less than five years after the trial court issued the amended judgment. He offers no reason for the delay.

Fourth, having received an updated PSI, it is highly unlikely that the trial court would have considered that probation, probation with an alternative sentencing plan, or conditional discharge as provided in KRS Chapter 533 was appropriate for Hazelwood. Granted, the 1987 conviction had been vacated. It was vacated, not reversed, however; and Hazelwood had initially pled guilty to the charges. Moreover, while on parole, he committed four offenses in Marion and Washington Counties, one of which was robbery in the first degree, a Class B felony. In short, we agree with the trial court that Hazelwood has not shown that he is entitled to the special, extraordinary relief provided by Rule 60.02.

As to Hazelwood's second argument, it is clearly not preserved. In spite of the fact that it is unpreserved, the record refutes his argument. The 1996 plea agreement does not specify that the Washington County sentence was to run concurrent with the 1987 conviction that was later dismissed. And there was no discussion of this term in the July 19, 1999 hearing.

We affirm the order of the Marion Circuit Court that denied relief under CR 60.02.

ALL CONCUR.

BRIEF FOR APPELLANT:

James R. Hazelwood, pro se
LaGrange, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Perry T. Ryan
Assistant Attorney General
Frankfort, Kentucky