

RENDERED: NOVEMBER 22, 2006; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2005-CA-002009-MR

JAMES BUNCH

APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE BARRY WILLETT, JUDGE
ACTION NOS. 02-CR-001964 & 03-CR-003383

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: JOHNSON AND TAYLOR, JUDGES; BUCKINGHAM,¹ SENIOR JUDGE.

TAYLOR, JUDGE: James Bunch brings this appeal from a September 13, 2005, order of the Jefferson Circuit Court denying his Ky. R. Civ. P. (CR) 60.02 motion to partially vacate his judgment of conviction. We affirm.

Pursuant to a plea agreement, Bunch pleaded guilty to wanton endangerment in the first degree, unlawful imprisonment in the first degree, and assault in the fourth degree. By

¹ Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

judgment entered July 13, 2005, the circuit court sentenced Bunch to one-year imprisonment and ordered him to pay a \$1,000.00 fine pursuant to Kentucky Revised Statutes (KRS) 534.030.

Some two months thereafter, on September 2, 2005, Bunch filed a CR 60.02 motion "to strike from the Judgment of Conviction the fine of \$1,000.00." Bunch argued that the fine was not in accordance with the plea agreement entered with the Commonwealth and that a fine should not be imposed upon a person found to be indigent. KRS 534.030(4). Bunch further contended that he was an indigent person and unable to pay the fine. By order entered September 13, 2005, the circuit court denied Bunch's CR 60.02 motion. This appeal follows.

Bunch contends the circuit court committed error by denying his CR 60.02 motion to strike from the judgment of conviction the \$1,000.00 fine. He argues that the fine was not contained within the plea agreement and that the circuit court accepted the plea agreement in open court. Moreover, Bunch argues he is an indigent person within the meaning of KRS 534.030(4) and thus, not subject to the fine. However, for the reasons set forth hereafter, we decline to reach the merits of Bunch's appeal.

It is well-established that a CR 60.02 motion is not a substitute for a direct appeal. McQueen v. Commonwealth, 948

S.W.2d 415 (Ky. 1997). Indeed, a defendant may not litigate issues in a CR 60.02 motion that reasonably could have been presented by direct appeal. Id.

In the case at hand, the proper procedure for challenging the inclusion of the fine in the final judgment was a motion pursuant to Ky. R. Crim. P. 8.10 to withdraw guilty plea and, if necessary, a direct appeal from the denial of the motion. See Kennedy v. Commonwealth, 962 S.W.2d 880 (Ky.App. 1997). Accordingly, we are of the opinion that a CR 60.02 motion is not a proper venue for challenging Bunch's guilty plea and the circuit court did not err in denying the CR 60.02 motion.

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

ALL CONCUR.

BRIEFS FOR APPELLANT:

Chris C. Hodge
Donald M. Heavrin
Louisville, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

James Havey
Assistant Attorney General
Frankfort, Kentucky