

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002570-MR

KIT PRESCOTT

APPELLANT

v. APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE JANET P. COLEMAN, JUDGE
ACTION NO. 04-CR-00045

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: MOORE AND WINE, JUDGES; BUCKINGHAM,¹ SENIOR JUDGE.

MOORE, JUDGE: Appellant, Kit Prescott, appeals an order from the Hardin Circuit Court denying his Motion to Vacate Sentence, brought pursuant to Kentucky Rule of Civil Procedure (CR) 60.02. In September of 2004, Prescott entered a plea of guilty on two counts of first-degree trafficking in a controlled substance, second offense, a violation of KRS 218A.1412. Appellant was sentenced to twenty years, 240 days of the sentence to be served and the remainder of the sentence was probated under certain conditions. He subsequently filed a motion pursuant to CR 60.02 in circuit court. After a thorough review of the record, we affirm the Hardin Circuit Court's order.

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 KRS 21.580.

I. FACTUAL AND PROCEDURAL BACKGROUND

On January 29, 2004, Appellant was indicted on two counts of first-degree trafficking in a controlled substance, second offense, Class B felonies, and a third count of Persistent Felony Offender (PFO) in the second-degree. In response to this indictment, on September 20, 2004, Appellant entered a plea of guilty to the two counts of first-degree trafficking in a controlled substance, second offense. In exchange for a plea of guilty, the Commonwealth agreed to dismiss the third count of PFO in the second-degree. In accordance with this plea and as previously stated, Appellant was sentenced to serve twenty years of imprisonment with 240 days of the sentence to be served and the remainder of the sentence probated with certain conditions. On November 9, 2004, Appellant was granted shock probation. Appellant subsequently violated this probation in January of 2006.

In the circuit court's final judgment and order imposing sentence, the court mistakenly categorized the charges as Class C felonies as opposed to Class B felonies, as was stated in the indictment. An order to amend the final judgment to accurately state the two counts of trafficking in a controlled substance in the first-degree, second offense, as two Class B felonies was entered on January 31, 2006.

On November 22, 2006, Appellant filed a motion pursuant to CR 60.02 in which he presented three arguments: 1) that his guilty plea was not entered knowingly and voluntarily because he was unaware a second offense was an enhancement; 2) that the amendment of the final judgment to Class B felonies from Class C was improper; and 3) that the sentence imposed by the court was not within the appropriate range for Class C felonies and therefore unauthorized by law. The trial court denied this motion on November 30, 2006. Appellant now files this appeal.

II. STANDARD OF REVIEW

On appeal, we review the denial of a CR 60.02 motion for an abuse of discretion. “A movant is not entitled to a hearing on a CR 60.02 motion unless he affirmatively alleges facts which, if true, justify vacating the judgment and further allege[s] special circumstances that justify CR 60.02 relief.” *White v. Commonwealth*, 32 S.W.3d 83, 86 (Ky. App. 2000) (internal quotation marks and citation omitted). A trial court has abused its discretion if its decision was arbitrary, unreasonable, unfair or unsupported by sound legal principles. *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999) (citations omitted).

III. ANALYSIS

A. CLAIM THAT APPELLANT’S GUILTY PLEA WAS NOT ENTERED KNOWINGLY AND VOLUNTARILY

Appellant claims that his plea of guilty was not made knowingly and voluntarily because he was not informed that a second offense of first-degree trafficking in a controlled substance was an enhancement. The Commonwealth argues that Appellant did not follow the proper procedures in opposing a final judgment of the trial court. Specifically, the Commonwealth states that Appellant’s claim could have been filed under a motion pursuant to Kentucky Rule of Criminal Procedure (RCr) 11.42. The Commonwealth’s argument is substantiated by *Gross v. Commonwealth*, 648 S.W.2d 853, 856 (Ky.1983). “CR 60.02 is not intended merely as an additional opportunity to raise *Boykin* defenses. It is for relief that is not available by direct appeal and not available under RCr 11.42.” We nevertheless choose to evaluate the merits of this claim.

A guilty plea is valid and entered knowingly, intelligently and voluntarily if the trial court questions the accused to ensure he has a complete understanding of the consequences of the plea, including the waiver of constitutional rights, and the record firmly establishes this understanding. *O’Neil v. Commonwealth*, 114 S.W.3d 860, 863

(Ky.App. 2003) (citing *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 1712, 23 L.Ed.2d 274 (1969)); see also *Sparks v. Commonwealth*, 721 S.W.2d 726 (Ky. App. 1986).

Appellant contends that he was unaware that a second offense for trafficking in a controlled substance, first-degree, would be used as an enhancement. Instead, he claims the only enhancement of which he was informed was the third count of PFO.² However, the indictment clearly includes two counts of first-degree trafficking in a controlled substance, second offense, Class B felonies. Also, Appellant's plea agreement, which bears his signature, refers back to the indictment for other facts of the case. Even more, the plea agreement recommends that Appellant be sentenced to twenty years' imprisonment for each count of trafficking in a controlled substance in the first-degree, *second offense*.

Further, the record clearly indicates that during Appellant's plea colloquy, the court read out loud to Appellant the charges to which he was pleading guilty. The court informed Appellant of the charges contained in the indictment and proceeded to read and discuss the terms of the plea agreement with Appellant. The trial court then asked Appellant to read over the agreement and gave him the opportunity to discuss any questions or concerns regarding the agreement with his counsel or the court. The trial court also informed Appellant of the constitutional rights he agreed to waive with a plea of guilty.

Appellant testified affirmatively that he fully understood the charges and his plea. He also acknowledged that he was entering his guilty plea "freely, knowingly, intelligently and voluntarily with representation of competent counsel." This combination

² This third count was dropped in exchange for Appellant's plea of guilty to the trafficking charges.

of the trial court's thorough explanation and Appellant's firm, audible responses to the question confirm Appellant's plea of guilty was entered knowingly and voluntarily.

B. CLAIM THAT THE TRIAL COURT'S AMENDMENT OF THE FINAL JUDGMENT WAS IMPROPER.

Appellant's second claim is that the trial court erred when it amended the final judgment to state Class B felonies as opposed to Class C felonies. The trial court found the error was clerical in nature; therefore, it could be amended at anytime.

Kentucky Rule of Criminal Procedure 10.10 states that clerical mistakes in judgments or orders and errors which arise from oversight or omission may be corrected by the court at *any time*, either by the motion of a party or by the court on its own initiative (emphasis added). A clerical error is an error or mistake made by a clerk or another judicial officer in a writing or record and "not the product of judicial reasoning and determination." *Cardwell v. Commonwealth*, 12 S.W.3d 672, 674 (Ky. 2000) (citations omitted). The question of whether an error in the judgment is "judicial" or "clerical" turns on whether the amended judgment embodies the trial court's oral judgment as expressed in the record. *Viers v. Commonwealth*, 52 S.W.3d 527 (Ky. 2001).

The court's oral judgment in this case was to assign Appellant a sentence of two, twenty-year sentences, *i.e.*, one sentence for each count of trafficking in a controlled substance in the first-degree, second offense. These charges are consistent with KRS 218A.1412(2)(b), which mandates that a second offense for first-degree trafficking shall be a Class B felony. At Appellant's plea colloquy, he was asked how he wished to plead to "two counts of trafficking in a controlled substance, in the first-degree[sic], second or more offense." Appellant stated that he wished to enter a plea of guilty to both counts. Even though the trial court did not specify that the charges were Class B felonies, it was evident from the oral record that Appellant was entering a plea

of guilty to two counts of first-degree trafficking in a controlled substance, *second offense*. Kentucky Revised Statute 218A.1412(2)(b) unequivocally shows that a conviction for this crime is a Class B felony. Furthermore, the indictment states clearly that the counts are Class B felonies, and his plea agreement provided that he was pleading guilty pursuant to the facts and charges alleged in the indictment.

The final written order providing that Appellant was guilty of two counts of trafficking in a controlled substance in the first degree, Class C felonies was made in error. This writing does not match the trial court's oral announcement that Appellant pleaded guilty to trafficking in a controlled substance in the first degree, *second or more offense*. The omission of the "second offense" language was made when the oral judgment was reduced to writing, thereby making this error clerical in nature. According to RCr. 10.10, clerical errors in judgments may be amended at any time. Therefore, we find no error.

C. CLAIM THAT THE SENTENCE IMPOSED BY THE COURT WAS NOT WITHIN THE APPROPRIATE RANGE FOR CLASS C FELONIES AND THEREFORE UNAUTHORIZED BY LAW.

Appellant's final claim is that the sentence of two separate twenty-year imprisonment terms was unauthorized by law, as the maximum punishment for a "Class C" felony is only ten years. KRS 532.020(1)(b). The only place the record lists Appellant as having charges of a Class C felony against him is in the final judgment. This classification was merely made in error. This error in the final judgment was later amended to accurately reflect the charges to which Appellant pleaded guilty. The charges of trafficking in a controlled substance, first-degree, second offense, as analyzed above, are classified as Class B felonies. The proper range of punishment for Class B felonies, as specified in KRS 532.020(1)(c), is imprisonment for at least ten, but not more than twenty years. Thus, the two separate twenty-year imprisonment sentences ordered by the trial court were within the appropriate range of punishment for the charged offenses.

Accordingly, the order of the Hardin Circuit Court dismissing Appellant's motion is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Kit Prescott, *pro se*

BRIEF FOR APPELLEE:

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