

RENDERED: OCTOBER 12, 2012; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2011-CA-000916-MR

RICHARD COOKSEY

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE BARRY WILLETT, JUDGE
ACTION NO. 03-CR-003219

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: COMBS AND STUMBO, JUDGES; LAMBERT,¹ SENIOR JUDGE.

LAMBERT, SENIOR JUDGE: Richard Cooksey appeals from an order of the Jefferson Circuit Court denying his motion to vacate or set aside judgment pursuant to Kentucky Rules of Civil Procedure (CR) 60.02. Cooksey contends

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

that his constitutional rights were violated when the district court failed to hold a preliminary hearing in accordance with Kentucky Revised Statutes (KRS) 640.010(2) before transferring his case to circuit court.

Cooksey was arrested on a charge of robbery in the first degree, committed when he was seventeen years of age. According to the police report, Cooksey and his codefendants planned and executed the robbery of a Breadworks bakery in Louisville. Cooksey allegedly drove the getaway car and received a share of the proceeds of the robbery. He had reached the age of eighteen when he appeared in district court on November 18, 2003. The case was transferred from the district court to the circuit court pursuant to a “rocket docket” agreement. On December 8, 2003, Cooksey entered a plea of guilty to theft by unlawful taking over \$300 pursuant to *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970). He was sentenced to pre-trial diversion, in accordance with the plea agreement. In August 2004, the Commonwealth filed a petition to revoke the sentence of diversion because Cooksey had been arrested for driving under the influence of alcohol. On January 20, 2005, following a hearing, he was sentenced to one year, probated for two years.

More than four years later, Cooksey filed a CR 60.02 motion, claiming that his adult felony conviction had been obtained in violation of his due process rights and contrary to KRS 610.010(2)(b) and 635.020(2). He argued that the transfer of his juvenile case had been made without following mandated

statutory and procedural safeguards. Following a hearing, the circuit court denied his motion and this appeal followed.

We review the denial of a CR 60.02 motion for an abuse of discretion. *White v. Commonwealth*, 32 S.W.3d 83, 86 (Ky.App. 2000). To warrant relief, the trial court's decision must have been "arbitrary, unreasonable, unfair, or unsupported by sound legal principals." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). A movant must demonstrate that "he is entitled to this special, extraordinary relief." *Gross v. Commonwealth*, 648 S.W.2d 853, 856 (Ky. 1983). We will affirm the trial court's decision absent a "flagrant miscarriage of justice." *Id.* at 858.

Cooksey's motion was made pursuant to sections (e) and (f) of CR 60.02, which provide that

a court may, upon such terms as are just, relieve a party or his legal representative from its final judgment, order, or proceeding upon the following grounds: . . . the judgment is void, or has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or . . . any other reason of an extraordinary nature justifying relief.

CR 60.02(e) and(f).

This rule further specifies that motions made pursuant to sections (e) and (f) shall be made within a reasonable time.

Cooksey argues that his due process rights were violated because the district court failed to hold a preliminary hearing before transferring his case to

circuit court, as required under the terms of KRS 610.010(2)(b), KRS 640.010(2)(a) and KRS 635.020(2).

Before a case is transferred from juvenile court to circuit court pursuant to KRS 635.020(2), KRS 640.010(2) provides in pertinent part that

the District Court shall, upon motion by the county attorney to proceed under this chapter, and after the county attorney has consulted with the Commonwealth's attorney, conduct a preliminary hearing to determine if the child should be transferred to Circuit Court as a youthful offender. The preliminary hearing shall be conducted in accordance with the Rules of Criminal Procedure.

The statutory requirement of a preliminary hearing prior to transfer may be waived. *Humphrey v. Commonwealth*, 153 S.W.3d 854, 857 (Ky.App. 2004). For such a waiver to be valid, “the court must inform the child of the right to the preliminary hearing and ensure that the waiver of this right is voluntarily, knowingly and intelligently made.” *Id.* at 858.

The record indicates that Cooksey's case was transferred to circuit court after he made a brief appearance in district court. No mention was made of a transfer hearing or waiver of such a hearing. Cooksey contends that the transfer was made without his awareness or consent, as evidenced by the fact that neither he nor his attorney signed the “Stipulation and Order.” He further argues that the “Stipulation and Order” contained inadequate findings under *Schooley v. Commonwealth*, 556 S.W.2d 912 (Ky.App. 1977), in which it was held that a waiver order must contain “a statement of the reasons for the transfer which are

specific enough to permit meaningful review[.]” 556 S.W. 2d at 914. The “Stipulation and Order” in this case is a pre-printed form, signed by the district court judge and the county attorney, stating that the parties were in agreement that probable cause existed to believe that Cooksey had committed the offense of complicity to theft by unlawful taking over \$300, that he was seventeen years of age at the time of the offense, that the offense was serious and that there was “little likelihood of reasonable rehabilitation of the juvenile in the juvenile justice system.”

In its order denying Cooksey’s CR 60.02 motion, the trial court acknowledged that neither Cooksey nor his attorney signed the “Stipulation and Order” transferring the case to circuit court and that there was no meaningful colloquy between the district court judge and Cooksey. On the other hand, the trial court noted that Cooksey had signed a “Waiver of Rights” form, as well as the form detailing the Commonwealth’s offer on a plea of guilty. The “Waiver of Rights” was signed on the day he appeared in district court, and states among other things that he had been informed that he was entitled to a preliminary hearing. The trial court noted that Cooksey answered affirmatively that he had read, understood and voluntarily signed the “Waiver of Rights” form, and that the circuit court had explained to him that the form meant that he was waiving his rights to a probable cause hearing in district court and that this case was originally on the juvenile docket and was waived up as a rocket docket by agreement. Cooksey replied that he understood. The trial court also noted that Cooksey was represented by counsel

throughout the district and circuit court proceedings, and that his parents were present at both hearings.

We agree with the trial court that Cooksey's waiver of a hearing was valid. As we have already stated, a waiver is valid under *Humphrey* if the defendant is informed of the right to a preliminary hearing and the waiver of this right is made voluntarily, knowingly and intelligently. The trial court's findings are firmly based on the facts in the record and those elicited at the hearing on the motion. The trial court's ruling was neither unfair nor arbitrary and consequently did not constitute an abuse of its discretion.

The order denying Cooksey's CR 60.02 motion is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

David S. Mejia
Louisville, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Heather M. Fryman
Assistant Attorney General
Frankfort, Kentucky