

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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2011-CA-001205-MR

ROSCOE DEES, JR.

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES D. ISHMAEL, JR., JUDGE
ACTION NO. 98-CR-00327

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: DIXON, KELLER AND STUMBO, JUDGES.

KELLER, JUDGE: Roscoe Dees Jr. appeals from the Fayette Circuit Court's order denying his motion for post-conviction relief pursuant to Kentucky Rules of Civil Procedure (CR) 60.02(e) and(f). For the following reasons, we affirm.

FACTS

In 1998, Dees entered a plea of guilty to possession of drug paraphernalia, second offense, and to being a persistent felony offender in the first degree. The Commonwealth recommended a sentence of one year on the drug paraphernalia charge, enhanced by the PFO to ten years. At the time of his sentencing, Dees asked to be placed on probation and to enter a drug rehabilitation program. The trial court agreed to probate Dees if he accepted a longer sentence of twenty years. Dees voluntarily agreed to this modification of the agreement, and he was sentenced to twenty years' imprisonment, conditionally probated for five years. As a condition of his probation, Dees was required to complete a substance abuse treatment program.

Two months later, Dees violated his probation by failing to complete the treatment program. The circuit court agreed to give him another chance and reinstated the conditions of his probation. Shortly thereafter, Dees again failed to complete the treatment program. Following a hearing, his probation was revoked and he was ordered to serve the twenty-year prison sentence. Dees was released on parole in 2005, but it was later revoked for a drug charge in Ohio where he was then living. He was returned to prison, where he remains.

Since his sentencing in 1998, Dees has filed seven motions pursuant to CR 60.02, arguing that various amendments to the criminal code should be applied retroactively to reduce or vacate his sentence. The denials of these motions have been the subject of numerous appeals to this Court and the Kentucky

Supreme Court. *See Dees v. Commonwealth* (Ky. 1999)(99-SC-0056-T); *Dees v. Commonwealth* (Ky. 2000)(1999-SC-0683-TG); *Dees v. Commonwealth* (Ky.App. 2002)(2001-CA-000228-MR); *Dees v. Commonwealth*, 2010 WL 1926771 (Ky. App. 2010)(2009-CA-000388-MR).¹

The motion at issue in the present appeal was filed by Dees on April 20, 2011, pursuant to CR 60.02(e) and (f), arguing that recent changes in the law and legislative policy have made his sentence inequitable. The motion was denied by the Fayette Circuit Court, which reasoned that changes in the law do not justify extraordinary relief under CR 60.02. Additionally, the court noted that Dees's current incarceration was due to his choice to violate the conditions of his probation and parole.

STANDARD OF REVIEW

“The standard of review of an appeal involving a CR 60.02 motion is whether the trial court abused its discretion.” *White v. Commonwealth*, 32 S.W.3d 83, 86 (Ky.App. 2000). To amount to an abuse of discretion, the trial court's decision must be “arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). Absent a “flagrant miscarriage of justice,” the trial court’s decision will be affirmed. *Gross v. Commonwealth*, 648 S.W.2d 853, 858 (Ky. 1983).

ANALYSIS

¹ *See also Dees v. Commonwealth*, 2004 WL 2567152 (Ky.App. 2004) (2003-CA-001737) (addressing denial of Kentucky Rules of Criminal Procedure (RCr) 11.42 motion).

Under the recently-revised KRS 218A.500(5), which classifies possession of drug paraphernalia as a misdemeanor that is not subject to any PFO enhancement, Dees's conviction would now carry a sentence of only three years. Dees argues that in the interests of equity, the statutory provision should be applied retroactively. Dees raised similar arguments in his earlier CR 60.02 motions, in which he argued that other statutory amendments should be applied retroactively to reduce his sentence. KRS 446.080(3) states that "[n]o statute shall be construed to be retroactive, unless expressly so declared." "[T]he determination of penalties for criminal conduct necessarily concerns the consideration of various public policy interests that are peculiarly within the role of the legislature." *Wilfong v. Commonwealth*, 175 S.W.3d 84, 93 (Ky. App. 2004). No declaration of retroactivity has been made by the legislature in regard to KRS 218A.500(5), and it is not the role of this Court to attribute such a meaning to the statute.

Dees further argues that his continued imprisonment is inequitable and contrary to the current state policy of treating substance abuse sufferers rather than incarcerating them at great expense to the public. If Dees believes that the continued service of his sentence is inimical to this policy, his recourse lies in an appeal to the legislative or executive branches. "The legislature bases its decisions on experience, empirical data, and the will of the people, and this Court is not in a position to second guess the legislators." *County of Harlan v. Appalachian Regional Healthcare, Inc.*, 85 S.W.3d 607, 614 (Ky. 2002).

Moreover, Dees was given two opportunities by the circuit court to complete a substance treatment program in Kentucky, and was also given a parole opportunity in Ohio. Thus, it appears that the approach of our courts has been fully in keeping with the policy of encouraging treatment as an alternative to incarceration.

Finally, Dees contends that he has already served the ten-year sentence sought by the Commonwealth in the original plea agreement, and that he “sold his soul” when he was pressured into accepting the twenty-year sentence as the only alternative to immediate incarceration. The voluntariness of Dees’s guilty plea and his acceptance of the lengthier sentence was the subject of an earlier appeal; it cannot and will not be addressed again. *See Dees v. Commonwealth*, (Ky. 2000) (99-SC-0056-T) (“A review of the record clearly demonstrates that he entered his guilty plea freely, voluntarily and knowingly and was properly convicted and sentenced under the terms of the plea agreement. . . . In addition, the circuit court was not improperly involved in the plea negotiations between Dees and the Commonwealth.”). CR 60.02 is not intended to provide an additional opportunity to relitigate issues which have already been resolved in a direct appeal. *McQueen v. Commonwealth*, 948 S.W.2d 415, 416 (Ky. 1997).

CONCLUSION

For the foregoing reasons, we affirm the order denying Dees’s CR 60.02 motion.

ALL CONCUR.

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