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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001737-MR
AND
NO. 2012-CA-001444-MR

ROBERT W. MCKINNEY — APPELLANT

APPEALS FROM JEFFERSON CIRCUIT COURT
v. HONORABLE JUDITH E. MCDONALD-BURKMAN, JUDGE
ACTION NO. 05-CR-002114

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, LAMBERT AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Robert W. McKinney appeals from the trial court's denial of his motions filed pursuant to Kentucky Rules of Civil Procedure (CR) 60.02. He alleges he was denied due process when the trial court enforced a hammer clause in a plea agreement he entered into with the Commonwealth and improperly imposed court costs without considering his present or future ability to pay.

In 2005, McKinney entered a plea of guilty to two counts of theft by unlawful taking over $300; burglary in the third degree; two counts of receiving stolen property over $300; criminal possession of a forged instrument in the second degree; giving a police officer a false name; and operating a motor vehicle without a driver's license. The Commonwealth recommended an aggregate of seven years if McKinney was sentenced to serve prison time or an aggregate sentence of fourteen years if he received probation. Additionally, the offer contained a hammer clause providing McKinney would serve twenty years, the maximum sentence, and waive probation, if he failed to testify truthfully at the trial of a co-defendant, failed to appear at sentencing, or incurred any new criminal charges. Sentencing was set for December 5, 2005. However, because McKinney did not appear at successive scheduled sentencing dates, the final sentencing was not held until July 14, 2006.

At the final sentencing, there was some confusion regarding the reasons for McKinney's failure to appear on prior sentencing dates, specifically whether his nonappearances were due to his incarceration. Consequently, the trial court chose to ignore his failure to appear for sentencing and, instead, focused on the provision in the hammer clause that McKinney not receive any new charges.

The Commonwealth advised the court McKinney pled guilty to possession of drug paraphernalia in district court. McKinney's counsel pointed out to the court McKinney entered his district court plea without representation of counsel.

After discussion of the presentence investigation report, McKinney made a motion for probation and addressed the court. McKinney's counsel emphasized McKinney's twelve prior felony convictions occurred over a decade ago and he had yet to receive needed drug treatment. He informed the court McKinney had family in Kentucky and, before his incarceration, had been employed. McKinney apologized for his crimes and stated he wanted drug treatment. Noting McKinney's lengthy criminal record, the trial court denied probation. The court proceeded and imposed the twenty-year sentence provided for in the hammer clause based on McKinney's new misdemeanor conviction.

At sentencing, no issue concerning the imposition of courts costs was discussed. However, in the final judgment of conviction and sentence entered on July 18, 2006, the court imposed $125 in costs.

On June 27, 2011, McKinney filed a CR 60.02 motion alleging the trial court erroneously imposed a twenty-year sentence pursuant to the hammer clause almost five years earlier. That motion was denied on Septembers 1, 2011, and McKinney appealed.

On July 9, 2012, McKinney filed a second CR 60.02 motion alleging the court erred in imposing $125 costs in its 2006 final judgment of conviction and sentence. That motion was denied and McKinney appealed. By order of this Court, his appeals were consolidated.

McKinney filed his CR 60.02 motions pursuant to subsections (e) and (f). Subsection (e) provides a judgment may be set aside if it 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[.]" Subsection (f) provides the same relief based on "any other reason of an extraordinary nature justifying relief." Under both provisions, a motion must be filed within a reasonable time and permit a judgment to be corrected or vacated only "upon facts or grounds, not appearing on the face of the record and not available by appeal or otherwise, which were not discovered until after rendition of judgment without fault of the parties seeking relief." *Harris v. Commonwealth*, 296 S.W.2d 700, 701 (Ky. 1956). CR 60.02 relief is extraordinary and granted only in rare circumstances. *Brown v. Commonwealth*, 932 S.W.2d 359, 362 (Ky. 1996).

McKinney did not appeal from the judgment imposing the alleged illegal sentence. Although an unconditional guilty plea waives the right to appeal on numerous grounds, sentencing issues can be properly raised on appeal. *Commonwealth v. Reed*, 374 S.W.3d 298, 300 (Ky. 2012). Sentencing issues, include "a claim that a sentencing decision is contrary to statute … or was made without fully considering what sentencing options were allowed by statute[.]" *Grisby v. Commonwealth*, 302 S.W.3d 52, 54 (Ky. 2010).

We recognize that after McKinney was sentenced, our Supreme Court issued its opinions concerning hammer clauses in *McClanahan v. Commonwealth*, 308 S.W.3d 694 (Ky. 2010), and *Knox v. Commonwealth*, 361 S.W.3d 891 (Ky. 2012). Although in both cases the Court was critical of such clauses in plea

agreements, it held sentences entered pursuant to such clauses are not *per se* invalid. Additionally, the Court issued *Maynes v. Commonwealth*, 361 S.W.3d 922 (Ky. 2012), pertaining to the imposition of court costs upon indigent defendants. While the Court's pronouncements may lend merit to McKinney's allegations if raised on direct appeal, the issues were not properly presented in his CR 60.02 motions filed many years after the entry of his judgment of conviction and sentence. The issues presented in McKinney's CR 60.02 motion could have been presented on direct appeal and, therefore, his motions were properly denied.

Moreover, we cannot say that McKinney's motions were filed within a reasonable time. His judgment of conviction and sentence was entered on July 18, 2006. His first CR 60.02 motion was not filed until June 27, 2011, and his second motion not until July 9, 2012. Under the circumstances, we cannot say his motions were filed within a reasonable time.

Based on the foregoing, orders of the Jefferson Circuit Court are affirmed.

ALL CONCUR.

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