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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2011-CA-002055-MR

TEDDY ALLMAN

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE PAMELA R. GOODWINE, JUDGE
ACTION NO. 03-CR-00248

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: CLAYTON, MAZE, AND TAYLOR, JUDGES.

CLAYTON, JUDGE: This is an appeal from the denial of a motion brought pursuant to Kentucky Rules of Civil Procedure (CR) 60.02 by the Fayette Circuit Court. Based upon the following, we affirm the decision of the circuit court.

BACKGROUND INFORMATION

Appellant, Teddy Albert Allman, entered a guilty plea to Sodomy I. Allman was ordered to be a lifetime registrant on the sex offender registry and was subject to the three-year conditional discharge requirement found in Kentucky Revised Statutes (KRS) 532.043(2). This was set forth with specificity at his final sentencing where he received a ten-year sentence.

On August 30, 2011, Allman filed a CR 60.02 motion asserting that the ruling in *Jones v. Commonwealth*, 319 S.W.3d 295 (Ky. 2010), voided his three year conditional discharge. The circuit court denied his motion and he brought this appeal.

STANDARD OF REVIEW

We review the denial of a CR 60.02 motion under an abuse of discretion standard. *White v. Commonwealth*, 32 S.W.3d 83, 86 (Ky. App. 2000); *Brown v. Commonwealth*, 932 S.W.2d 359, 361 (Ky. 1996). “The test for abuse of discretion is whether the trial judge’s decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). Therefore, we will affirm the lower court’s decision unless there is a showing of some “flagrant miscarriage of justice.” *Gross v. Commonwealth*, 648 S.W.2d 853, 858 (Ky. 1983).

DISCUSSION

In his CR 60.02 motion, Allman contends that based upon the ruling in *Jones*, 319 S.W.3d 295, KRS 532.043 was found unconstitutional due to its violation of the separation of powers doctrine. In *Jones*, the Kentucky Supreme Court held that:

The General Assembly can, consistent with the separation of powers doctrine, create a form of conditional release with terms and supervision by the executive branch. However, the statutory scheme runs afoul of the separation of powers doctrine when revocation is the responsibility of the judiciary. Once a prisoner is turned over to the Department of Corrections for execution of the sentence, the power to determine the period of incarceration passes to the executive branch.

Jones, 319 S.W.3d 299-300 (footnote omitted).

Allman contends that as a result of this ruling, his three year conditional discharge should be voided. We disagree. In *Jones*, the Court specifically set forth that their “ruling [was] limited to KRS 532.043(5).” *Id.* at 300. The Court went on to opine that “[o]nly the revocation procedure established by this subsection is unconstitutional. Because subsection (5) is severable from the remainder of the statute, the statute’s other provisions remain in force.” *Id.* (footnote omitted).

KRS 532.043(2) provides for a period of post-incarceration supervision.

Subsection 5, however, deals with violation of post-incarceration supervision.

Thus, the trial court was correct in denying Allman’s CR 60.02 motion and we will affirm its decision.

ALL CONCUR.

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