RENDERED: NOVEMBER 7, 2014; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-000095-MR

JOE ALLEN EVANS — APPELLANT

v.

APPEAL FROM MARTIN CIRCUIT COURT
HONORABLE JOHN DAVID PRESTON, JUDGE
ACTION NO. 00-CR-00005

COMMONWEALTH OF KENTUCKY — APPELLEE

AND NO. 2013-CA-000096-MR

JOE ALLEN EVANS — APPELLANT

v.

APPEAL FROM MARTIN CIRCUIT COURT
HONORABLE JOHN DAVID PRESTON, JUDGE
ACTION NO. 03-CR-00020

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, LAMBERT, AND NICKELL, JUDGES.

NICKELL, JUDGE: In these related appeals, Joe Allen Evans challenges the Martin Circuit Court's denial of his motions for post-conviction relief pursuant to CR[1] 60.02 in two separate criminal cases. Following a careful review, we affirm.

The historical facts surrounding the present controversy are lengthy and convoluted due to Evans' numerous convictions in multiple counties for similar offenses. We shall attempt to shorten and simplify our recitation of these facts as much as possible. However, our brevity should not be interpreted as having short-circuited the review process.

On January 28, 2000, Evans was indicted for operating a motor vehicle while his license was suspended or revoked for driving under the influence (third offense) ("OSL/DUI 3rd")[2] in Martin Circuit Court Case No. 00-CR-00005. On June 28, 2001, Evans entered a guilty plea to the felony offense based on the Commonwealth's recommendation of a one-year prison term.

Separately, in Martin Circuit Court Case No. 03-CR 00020, Evans was charged on April 25, 2003, with fourth offense DUI[3] resulting from his arrest

[1] Kentucky Rules of Civil Procedure.

[2] Kentucky Revised Statutes (KRS) 189A.090(1) and (2)(c), a Class D felony.

[3] KRS 189A.010(1) and (5)(d), a Class D felony.

on May 31, 1998.[4] At his jury trial, Evans stipulated the offense was, in fact, a fourth offense. The jury convicted Evans and recommended a sentence of three years' imprisonment.

Several years later, on September 7, 2012, the Martin District Court apparently[5] entered a *nunc pro tunc* order in Case No. 97-T-00635, vacating his conviction of OSL/DUI (second offense) in that case and amending it to operating on a suspended license pursuant to KRS 186.620. Evans subsequently filed motions pursuant to CR[6] 60.02 to alter, amend or vacate his convictions in Case Nos. 00-CR-00005 and 03-CR-00020. In his motions, Evans argued the Martin District Court's order effectively required a downward amendment of his subsequent convictions because the requisite number of prior convictions no longer existed to support the felony charges. The trial court denied both of Evans's CR 60.02 motions by separate orders entered on December 12, 2012. Evans timely appealed from both adverse decisions.

This Court reviews the denial of a CR 60.02 motion under an abuse of discretion standard. *Brown v. Commonwealth*, 932 S.W.2d 359, 361 (Ky. 1996). The test for an abuse of discretion is whether the trial judge's decision was "arbitrary, unreasonable, unfair, or unsupported by sound legal principles."

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[4] The record does not reveal the reason for a five-year delay between the date of arrest and indictment and no challenge is raised concerning the interval.

[5] Although a purported copy of this Order is appended to each of Evans's briefs before this Court, it does not appear in the certified records provided on appeal.

[6] Kentucky Rules of Civil Procedure.

Commonwealth v. English, 993 S.W.2d 941, 945 (Ky. 1999) (citing 5 Am.Jur.2d Appellate Review § 695 (1995)). 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).

Evans contends the trial court erred in overruling his motions for post-conviction relief. As he did before the trial court, Evans argues before us that the vacation of his conviction for OSL/DUI 2nd by the Martin District Court implicitly vacated his convictions for OSL/DUI 3rd and DUI 4th by removing a necessary prior conviction. We have carefully and fully reviewed the record and discern no abuse of discretion.

First, Evans argues the trial court should have granted his motion for relief in Case No. 00-CR-00005 and amended his conviction for OSL/DUI 3rd down to a second offense based on the Martin District Court's order. We disagree.

Evans entered a guilty plea to OSL/DUI 3rd. It is axiomatic that entering a voluntary guilty plea waives all defenses other than that the indictment charges no offense. *Thompson v. Commonwealth*, 147 S.W.3d 22, 39 (Ky. 2004), *superseded by statute on other grounds as recognized in Jackson v. Commonwealth,* 363 S.W.3d 11, 19 n. 3 (Ky. 2012). Further, we have held the failure to challenge a conviction prior to its use as an enhancement for a subsequent charge constitutes a waiver. *Commonwealth v. Lamberson*, 304 S.W.3d 72, 77 (Ky. App. 2010). Clearly, Evans had a sufficient opportunity to challenge the 1997 conviction for OSL/DUI 2nd prior to entry of his guilty plea in

this matter in 2001. For reasons known only to himself, he did not do so and his failure precludes him from launching such an attack now. The conviction in Martin District Court Case No. 97-T-00635 was valid and unchallenged when it was used to enhance the charge in the instant matter.

Were we to adopt Evans's position, great uncertainty would arise surrounding the finality of judgments. This we cannot countenance. Evans entered a knowing and voluntary plea of guilty to the offense charged in exchange for a recommendation by the Commonwealth of a minimum sentence. Evans received the benefit of his bargain. He was fully aware of the facts and circumstances surrounding the enhanced penalty which he faced because of his previous convictions at the time of his plea, yet raised no challenge for more than a decade. Further, as the trial court noted, even a cursory review of his criminal history indicates more than a sufficient number of prior offenses existed to support the conviction of OSL/DUI 3rd even in the absence of the conviction in Case No. 97-T-00635. Thus, we conclude the trial court did not abuse its discretion in denying Evans's motion for relief.

Next, on the same basis as above, Evans challenges the trial court's denial of his motion to vacate and amend his DUI 4th conviction. However, this argument is wholly without merit. As correctly found by the trial court, in his CR 60.02 motion filed in Case No. 03-CR-00020, Evans failed to argue any factual or legal basis applicable to his conviction therein. The entire motion—and indeed his entire brief before this Court—is devoted to arguments related to his OSL/DUI 3rd

conviction and the effect of the Martin District Court's order entered in Case No. 97-T-00635 vacating a second offense OSL/DUI. No argument is made concerning any errors or improprieties with the offense for which he was convicted in Case No. 03-CR-00020—DUI 4th offense. As no adequate challenge has been raised to this conviction, we cannot say the trial court erred in denying Evans the relief he sought.

Finally, we comment on the timing of Evans's motions to set aside his convictions. A motion made pursuant to CR 60.02 must be brought within a "reasonable time" and will be granted only when there are "extraordinary circumstances justifying relief." *Reyna v. Commonwealth*, 217 S.W.3d 274, 276 (Ky. App. 2007). Evans has not demonstrated extraordinary circumstances, nor has he explained the more than eight-year delay in moving to set aside his DUI 4th offense conviction and eleven-year delay in seeking relief on his OSL/DUI 3rd offense conviction. In *Graves v. Commonwealth*, 283 S.W.3d 352 (Ky. App. 2009), a seven-year delay was held to be unreasonable, as was a five-year delay in *Gross*, 648 S.W.2d at 858. In *Reyna,* a delay of only four years was deemed unreasonable.

Here, Evans waited over twice that long to assert his convictions were invalid. Although the trial court did not base its decision on the untimely filings, it would have been well within its discretion to do so. Evans's unreasonable delay in challenging his convictions constitutes sufficient grounds to deny his CR 60.02 motions even absent the support for the trial court's decisions noted herein, and we

may affirm the trial court for any reason supported by the record. *McCloud v. Commonwealth,* 286 S.W.3d 780, 786 (Ky. 2009).

For the foregoing reasons, we hold the Martin Circuit Court did not abuse its discretion. The judgments entered on December 12, 2012, denying CR 60.02 relief, are affirmed.

ALL CONCUR.

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