

RENDERED: SEPTEMBER 5, 2014; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2013-CA-001670-MR

YAKIE ARMSTRONG

APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE AUDRA J. ECKERLE, JUDGE  
ACTION NO. 10-CR-000302

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: COMBS, THOMPSON AND STUMBO, JUDGES.

STUMBO, JUDGE: Yakie Armstrong appeals from an Opinion and Order of the Jefferson Circuit Court denying two motions for CR 60.02 relief. Armstrong argued that he was entitled to have his sentence for trafficking in a controlled substance reduced from ten to five years. In support of the motions, Armstrong pointed to KRS 218A.1412(3)(b) and the federal Fair Sentencing Act. In denying the relief sought, the Jefferson Circuit Court determined that the Fair Sentencing

Act applied solely to sentencing in federal courts and did not form a proper basis for amending Armstrong's sentence herein. This appeal followed.

On February 2, 2012, the Jefferson County grand jury indicted Armstrong for Trafficking in a Controlled Substance I (cocaine), Tampering with Physical Evidence, and Fleeing or Evading Police II. He later entered a guilty plea in exchange for a ten-year probated sentence.

On March 9, 2012, Armstrong stipulated to having violated his probation on charges of Trafficking in a Controlled Substance I, Tampering with Physical Evidence, Fleeing or Evading Police II, Resisting Arrest, and operating a vehicle without a license. Armstrong also had outstanding warrants for Flagrant Non-Support. On July 17, 2012, the Court revoked Armstrong's probation and sentenced him to serve the underlying ten-year sentence.

During the months that followed, Armstrong filed various motions for shock probation and jail time credit, which were denied. On December 28, 2012, Armstrong filed a *pro se* Motion to Modify Sentence Pursuant to CR 60.02(e) and (f) in conjunction with KRS 218A.1412(3)(b). Armstrong maintained that because the Kentucky Legislature had decreased the penalty for trafficking in less than four grams of cocaine from a Class C felony to a Class D felony, he was entitled to have his sentence reduced from ten to five years.

Before Armstrong's Motion was adjudicated, he filed another CR 60.02 motion on February 4, 2013, styled "Motion to Modify Sentence Pursuant to CR 60.02(e)(f), Fair Sentencing Act, 124 Stat. 2372, 2374, And U.S. Sentencing

Guidelines.” The Department of Public Advocacy then successfully withdrew from its representation of Armstrong on its contention that a reasonable person of adequate means would not pursue the motions at his own expense. Armstrong subsequently filed Motion for Judgment on the Pleadings, a Petition for Writ of Mandamus, and numerous AOC Form 280 Notices of Submission.

On August 7, 2013, the Jefferson Circuit Court rendered an Opinion and Order denying Armstrong's motions for CR 60.02 relief. As a basis for the Order, the court determined that the crux of Armstrong's argument was that the Fair Sentencing Act, 124 Stat. 2372 (2010) ("FSA") preempts the Commonwealth of Kentucky's penal code and sentencing procedures. The court found that Armstrong's argument must fail for two reasons. First, Armstrong failed to make an argument why the FSA should apply herein, and instead merely focused on what the statute said. Second, Armstrong failed to meet his burden of proof under CR 60.02 because the FSA clearly applies to federal cocaine sentences thereby restricting the application of the law to Federal Courts. The court also concluded that Armstrong made no other argument, nor has he provided any evidence which would serve as a basis for granting the extraordinary relief sought. This appeal followed.

Armstrong now argues that the Jefferson Circuit Court erred in denying his motions for CR 60.02 relief. He maintains that the trial court erred in failing to conduct an evidentiary hearing on the motions because the matter could not be adjudicated on the face of the record. He also contends that the trial court

erred in failing to conclude that the application of the FSA to the instant facts rendered his 10-year sentence excessive.

Kentucky Rules of Civil Procedure (CR) 60.02 states that,

On motion 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: (a) mistake, inadvertence, surprise or excusable neglect; (b) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59.02; (c) perjury or falsified evidence; (d) fraud affecting the proceedings, other than perjury or falsified evidence; (e) 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 (f) any other reason of an extraordinary nature justifying relief. The motion shall be made within a reasonable time, and on grounds (a), (b), and (c) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this rule does not affect the finality of a judgment or suspend its operation.

Armstrong relies on subsections (e) and (f), to wit, that the judgment is void or satisfied, or for any other reason of an extraordinary nature justifying relief. In disposing of Armstrong's motion, the Jefferson Circuit Court determined that Armstrong failed to make an argument as to why the FSA justified CR 60.02 relief under the facts at bar and that the FSA was applicable only to federal sentencing. These conclusions are supported by the record and the law. The corpus of Armstrong's claim is that the FSA preempts the Commonwealth's penal code and sentencing procedures. By its own terms, however, and as the trial court

properly recognized, the FSA's Preamble states that its purpose is "to restore fairness to *federal* cocaine sentencing." (Emphasis added). The matter from which Armstrong appeals does not implicate federal cocaine sentencing guidelines.

*Arguendo*, even if the FSA applied to the Commonwealth's sentencing procedures, Armstrong has not propounded any basis for concluding that the application of the FSA herein justified CR 60.02 relief. That is to say, even if the FSA was applicable herein, Armstrong has not demonstrated that it would entitle him to CR 60.02(e) relief based on a void or satisfied judgment, nor CR 60.02(f) relief for any reason of an extraordinary nature.

The burden of proof falls squarely upon Armstrong to allege facts which, if true, justify vacating the judgment and further allege special circumstances justifying CR 60.02 relief. *Stoker v. Commonwealth*, 289 S.W.3d 592, 596 (Ky. App. 2009). He has not met that burden. Additionally, as Armstrong failed to affirmatively allege facts which, if true, would have justified relief from judgment or order, the trial court did not err in disposing of the matter without a hearing. *Id.* at 598. We find no error.

Finally, Armstrong appears to claim that KRS 218A.1412(3)(b) (characterizing the sale of less than four grams of cocaine as a Class D Felony) and House Bill (HB) 463 (amending various provisions of Kentucky's sentencing guidelines) operate in conjunction with the FSA to support his claim of entitlement to CR 60.02 relief. These provisions were not expressly addressed by the trial court in its Opinion and Order on appeal. The court did conclude that Armstrong

"has made no other argument, nor has he provided any evidence, which would serve as a basis for granting this extraordinary relief," and we find no error in this determination. Though not directly addressed by the trial court, we nevertheless have examined KRS Chapter 218A and HB 463 in the context of Armstrong's argument, and do not conclude that they bolster Armstrong's claim of entitlement to CR 60.02 relief. In any event, Armstrong bore the burden of demonstrating entitlement to the relief sought, *Stoker, supra*, and has not met that burden.

For the foregoing reasons, we Affirm the Opinion and Order of the Jefferson Circuit Court denying Armstrong's Motions for CR 60.02 relief from Judgment.

ALL CONCUR.

BRIEF FOR APPELLANT:

Yakie Armstrong, *pro se*  
Central City, Kentucky

BRIEF FOR APPELLEE:

Jack Conway  
Attorney General of Kentucky

James Havey  
Assistant Attorney General  
Frankfort, Kentucky