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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-001799-MR

ANTHONY YANCEY

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE SUSAN SCHULTZ GIBSON, JUDGE
ACTION NO. 12-CR-001466

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, STUMBO AND VANMETER, JUDGES.

STUMBO, JUDGE: Anthony Yancey brings this appeal from the Jefferson Circuit Court's denial of his motion pursuant to Kentucky Rule of Civil Procedure (CR) 60.02. He argues that the circuit court abused its discretion when it sentenced him to a longer period of time than that specified in his plea agreement when he left his sentencing hearing early. Because we agree with the trial court that Yancey violated his plea agreement, we affirm.

Facts

On August 27, 2012, Yancey pled guilty to three counts of wanton endangerment in the first degree,¹ one count of criminal trespass in the first degree² and three counts of terroristic threatening in the third degree.³ Pursuant to the plea agreement, Yancey would receive three years, enhanced to six years by his persistent felony offender charge. Yancey's plea agreement also stated that the

Commonwealth does not object to [releasing Yancey on his own recognizance] pending sentencing, and if the Defendant appears for sentencing, cooperates with the PSI or and [sic] does not commit any new offenses, the Commonwealth will move to dismiss the PFO II, recommend a sentence of three (3) years to serve and will take no stand on probation.

Yancey was released pending sentencing. Before final sentencing, Yancey received the following additional charges: one count of criminal mischief in the first degree,⁴ three counts of wanton endangerment in the first degree,⁵ three counts of terroristic threatening in the third degree⁶ and one count of being a persistent felony offender in the second degree.⁷

¹ Kentucky Revised Statute (KRS) 508.060, a class D felony.

² KRS 511.060, a class A misdemeanor.

³ KRS 508.080, a class A misdemeanor.

⁴ KRS 512.020, a class D felony.

⁵ KRS 508.060, a class D felony.

⁶ KRS 508.080, a class A misdemeanor.

⁷ KRS 532.080(2).

Though Yancey apparently did appear for sentencing, he contends that the court informed him that his attorney could not be located. Because Yancey could not locate his attorney, he left. He was later sentenced at a rescheduled sentencing hearing.

Yancey apparently never filed a proper motion pursuant to CR 60.02, and only made his arguments in letters; however, the circuit court issued an order on September 24, 2014, holding Yancey's claim to be meritless. This appeal follows.

Analysis

Yancey's sole argument on appeal is that the trial court erred by sentencing him to six years under the plea agreement, when he actually did appear at his initial sentencing hearing, but left early.

"CR 60.02 is not a separate avenue of appeal to be pursued in addition to other remedies, but is available only to raise issues which cannot be raised in other proceedings." *McQueen v. Commonwealth*, 948 S.W.2d 415, 416 (Ky. 1997). Furthermore, "a trial court's ruling on the motion receives great deference on appeal and will not be overturned except for an abuse of discretion." *Barnett v. Commonwealth*, 979 S.W.2d 98, 102 (Ky. 1998). The trial court must hold a hearing under CR 60.02 if the movant "affirmatively alleges facts which, if true, justify vacating the judgment and further allege[s] special circumstances that

justify CR 60.02 relief.” *White v. Commonwealth*, 32 S.W.3d 83, 86 (Ky. App. 2000) (footnote and citations omitted).⁸

In *Jones v. Commonwealth*, 995 S.W.2d 363 (Ky. 1999), our Supreme Court considered a situation in which a defendant was offered a reduced sentence in exchange for his compliance with the following terms: “1) that Jones give a statement of his illegal activities; 2) that he meet with a member of the Attorney General’s office on a set date and give a full and complete statement; and 3) that he reappear in court for final sentencing.” *Id.* at 365. Jones then failed to appear for sentencing. *Id.* Our Supreme Court ultimately upheld Jones’ enhanced sentencing, noting that his sentence was within range allowed by statute:

It is undisputed that the four consecutive 5–year terms for four counts of fraud was a lawful sentence for the Class D felonies. The 6–year sentence recommended under the plea agreement was conditioned upon his full compliance with the plea agreement. The offered sentence reduction by the Commonwealth was an entirely proper incentive under the plea bargain, and *the failure by Jones to adhere to the bargain properly released the Commonwealth from any obligation to recommend the lower sentence following the breach.*

Id. at 366 (emphasis added) (citations omitted). Our Supreme Court further distinguished *Jones* in *McClanahan v. Commonwealth*, 308 S.W.3d 694 (Ky. 2010), noting that the sentencing agreement in *Jones* was permissible, even though it contained a “hammer clause,” because it fell within the potential sentencing ranges. *Id.* at 698-99. *See also Prater v. Commonwealth*, 421 S.W.3d 380, 388

⁸ The Commonwealth asserts that Yancey is not entitled to relief under CR 60.02, but does not argue that his motion was untimely, successive or otherwise barred procedurally. We agree with the Commonwealth that CR 60.02 requires an actual motion to be filed with the trial court.

(Ky. 2014) (“[I]f Appellant failed to comply with its terms, the hammer clause would free the Commonwealth to recommend the maximum lawful sentence.”).

It is true that Yancey initially “appeared” for sentencing, even though he later left. We hold that, under *Jones*, Yancey’s initial failure to appear for sentencing was sufficient for the court to extend Yancey’s prison time under his plea agreement. The plea agreement’s obvious implication is that Yancey had to be present and *actually be sentenced* in order to comply.

Moreover, Yancey received multiple additional felony charges during the time that he was on conditional release, and this also clearly violated the terms of Yancey’s agreement for his release pending sentencing. This Court has previously discussed how plea agreements involve contractual principles:

In general, “[p]lea agreements are contracts, and we interpret them according to ordinary contract principles.” *United States v. Ramunno*, 133 F.3d 476, 484 (7th Cir.1998) (citation omitted). “[A] defendant who breaches a plea agreement forfeits any right to its enforcement.” *United States v. Wells*, 211 F.3d 988, 995 (6th Cir.2000) (citing *United States v. Skidmore*, 998 F.2d 372, 375 (6th Cir. 1993)). *See also United States v. Garcia-Velilla*, 122 F.3d 1 (1st Cir.1997); *United States v. Rivera*, 954 F.2d 122 (2nd Cir.1992). “Further, if a defendant materially breaches his plea agreement, the prosecution is released from its obligations under that agreement and may bring a new indictment on previously dismissed charges.” *Hentz v. Hargett*, 71 F.3d 1169, 1176 (5th Cir.1996) (citation omitted). These cases are also supported by *Jones v. Commonwealth, Ky.*, 995 S.W.2d 363, 366 (1999), which similarly held that following a defendant’s breach of a plea agreement, the Commonwealth was relieved of its obligation to recommend favorable sentencing.

O'Neil v. Commonwealth, 114 S.W.3d 860, 863-64 (Ky. App. 2003). Because Yancey agreed to a longer term of imprisonment (which was within the applicable sentencing range for his charges) in the event that he violated one of several conditions, and because Yancey did violate those conditions, his argument that the trial court impermissibly sentenced him to a period longer than three years is without merit. The circuit court did not err in dismissing Yancey's CR 60.02 motion.

Conclusion

For the foregoing reasons, the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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