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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-001217-MR

HOSEA AARON CHATMAN — APPELLANT

v.

APPEAL FROM MCCRACKEN CIRCUIT COURT
HON. CRAIG Z. CLYMER, JUDGE
INDICTMENT NO. 10-CR-00112

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: JONES, D. LAMBERT, AND MAZE, JUDGES.

JONES, JUDGE: The Appellant, Hosea Chatman, appeals from the McCracken Circuit Court's order denying his CR[1] 60.02 motion and denying him an evidentiary hearing on the issues raised in the CR 60.02 motion. Having reviewed the record in conjunction with the applicable legal authorities, we affirm.

I. BACKGROUND[2]

[1] Kentucky Rule of Civil Procedure.

[2] In part, we relied on *Chatman v. Commonwealth*, 2012-CA-001179, 2014 WL 199066 (Ky. App. Jan. 17, 2014), to summarize the underlying facts. In that opinion, a separate panel considered the same conviction and sentence at issue herein.

On March 5, 2010, the grand jury of McCracken Circuit Court indicted Hosea Chatman on charges related to a robbery at Bluegrass Check Advance on or about January 20, 2010, in Paducah, Kentucky. Those charges consisted of the following: (Count one) first-degree robbery; (Counts two and three) kidnapping; (Count four) second-degree fleeing / evading police (on foot); (Count five) criminal attempt to disarm a peace officer; (Count six) third-degree assault; (Count seven) third-degree criminal mischief; (Count eight) resisting arrest; and (Count nine) being a first-degree persistent felony offender.

Chatman's jury trial began October 25, 2011, but on the second day of trial, Chatman informed the court that he wished to take a guilty plea. As part of the plea bargain, the Commonwealth recommended that the robbery in the first degree charge be reduced to robbery in the second degree and that the persistent felony offender charge be reduced from first degree to second degree. The Commonwealth also provided that the recommended sentence would total forty years, with the forfeiture of all of Chatman's seized items, aside from his eyeglasses, which would be returned to him. Finally, the Commonwealth also stated that it would recommend that Chatman would serve twenty percent of his sentence before becoming eligible for parole, and that he would be ineligible for probation and shock probation due to being on felony parole at the time he committed these offenses. Chatman agreed to these terms. He was then permitted to enter a guilty plea pursuant to *North Carolina v. Alford* [3] on the two kidnapping

[3] *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970). An *Alford* plea "permits a conviction without requiring an admission of guilt and while permitting a protestation

charges, while pleading guilty on the remaining charges in accord with the Commonwealth's offer.

Because he waived his right to a direct appeal as part of his unconditional guilty plea, Chatman filed a motion for post-conviction relief under RCr[4] 11.42 and CR 60.02 on May 16, 2012. Chatman's motion alleged an improper denial of a *Faretta* [5] hearing and ineffective assistance of counsel. This motion was denied by the circuit court, and the circuit court ruling was affirmed by a panel of this court on January 17, 2014, with discretionary review denied by the Kentucky Supreme Court on February 11, 2015.[6] On July 11, 2014, Chatman filed another motion for post-conviction relief under CR 60.02, alleging prosecutorial misconduct, ineffective assistance of counsel, and that the Commonwealth violated his plea agreement by not returning his glasses. On July 27, 2015, the circuit court denied Chatman's motion on grounds that he had already filed unsuccessful post-conviction motions, and that he was not entitled to argue issues which could have been and should have been raised previously. This appeal followed.

II. ANALYSIS

As a preliminary matter, the Commonwealth submits that we should not consider any issues related to Chatman's CR 60.02 motion because he failed to

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of innocence." *Wilfong v. Commonwealth*, 175 S.W.3d 84, 103 (Ky. App. 2004). "The entry of a guilty plea under the *Alford* doctrine carries the same consequences as a standard plea of guilty." *Id*. at 102.

[4] Kentucky Rules of Criminal Procedure.

[5] *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975).

[6] *Chatman v. Commonwealth*, 2012-CA-001179, 2014 WL 199066 (Ky. App. Jan. 17, 2014).

sign the original motion as required by CR 11 and, likewise, failed to sign the certificate of service, as required by RCr 1.08(c) and CR 5.03.

CR 11 states that an unsigned pleading "shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant." The problem in this case, however, is that we cannot discern that the error was ever called to Chatman's attention at the trial court level or that the trial court was ever given an opportunity to consider this issue. The best we are able to tell, the Commonwealth's brief to this Court was the first time the issue was raised. Since this issue was not timely raised as part of the proceedings below where it could have been corrected, we deem the issue unpreserved. Chatman appears to have signed all filings with this Court. His appeal is proper. Therefore, we will address its substantive merits.

The standard of review for a CR 60.02 is as follows:

> We review the denial of a CR 60.02 motion under an abuse of discretion standard. The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. Therefore, we will affirm the lower court's decision unless there is a showing of some flagrant miscarriage of justice.

Foley v. Commonwealth, 425 S.W.3d 880, 886 (Ky. 2014.). Furthermore, "a CR 60.02 movant must demonstrate why he is entitled to this special, extraordinary relief." *McQueen v. Commonwealth*, 948 S.W.2d 415, 416 (Ky. 1997).

For his first issue on appeal, Chatman asserts that the circuit court erred in not permitting him to withdraw his guilty plea due to the Commonwealth's

failure to abide by the plea agreement. Briefly stated, Chatman alleges that he wanted his eyeglasses returned to him, and stated as such in his plea negotiation, but the glasses are now unable to be returned. The Final Sentencing Order, entered October 26, 2011, states that Chatman's glasses should be returned to him. Unfortunately, the circuit court's Order of Forfeiture, entered November 30, 2011, mistakenly included Chatman's glasses among the items permitted to be destroyed. The circuit court attempted to correct this by issuing another order on December 9, 2011, allowing the return of the glasses. However, the record indicates that the countermanding order was served on the McCracken County Sheriff's Office instead of the Paducah Police Department, who were in actual possession of the glasses. Unaware of the second Order, the Paducah Police Department destroyed the glasses pursuant to the first Order. Chatman now asserts that the Commonwealth failed to honor the plea agreement, and that consequentially, he should be permitted to withdraw his guilty plea.

Chatman briefly addressed the missing glasses in his previous combined RCr 11.42 / CR 60.02 motion, filed May 16, 2012. Chatman failed to object when the circuit court did not render specific findings on that issue and, likewise, failed to request additional factual findings. Therefore, we believe that the eyeglasses issue has already been litigated in one post-conviction proceeding. We reject Appellant's attempt to relitigate it as part of this appeal. Additionally, we observe that the failure to retain the eyeglasses is not material.

Chatman's second issue stems from the circuit court's finding that his due process rights were not violated by the denial of a suppression motion, regarding an eyewitness identification. This issue is moot due to Chatman's unconditional guilty plea. "[T]he general rule in this state is that an unconditional guilty plea waives all defenses except that the indictment does not charge a public offense." *Jackson v. Commonwealth*, 363 S.W.3d 11, 15 (Ky. 2012). "It is well-settled law in Kentucky that a voluntary, intelligent plea of guilty precludes a post-judgment challenge to the sufficiency of the evidence." *Thompson v. Commonwealth*, 147 S.W.3d 22, 41 (Ky. 2004) (*superseded on other grounds by statute*) (internal citations and footnote omitted). "Because he entered a guilty plea as if the trial never took place, [the defendant] is precluded from challenging the evidence at trial and the associated jury instructions." *Bishop v. Commonwealth*, 357 S.W.3d 549, 553 (Ky. App. 2011). There was no abuse of discretion by the circuit court in denying relief on this issue.

Chatman's third issue on appeal is that the circuit court erred in denying him his rights to self-representation under *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). This argument fails on similar grounds to the previous one. Chatman's entry of an unconditional guilty plea rendered moot the questions regarding his right to self-representation during the trial. "[T]he general rule in this state is that an unconditional guilty plea waives all defenses except that the indictment does not charge a public offense." *Jackson* at 15. We must also point out that the *Faretta* issue was thoroughly examined in

Chatman's previous appeal, and further consideration of the matter is barred by law of the case, *res judicata*, and collateral estoppel.

Chatman's fourth issue is that there was ineffective assistance of appellate counsel. However, a claim of ineffective assistance of appellate counsel is only available to attack the performance of counsel on *direct* appeal. Ineffective assistance of post-conviction counsel is not a cognizable claim under Kentucky law. "For further clarity, we additionally emphasize that [ineffective assistance of appellate counsel] claims are limited to counsel's performance on direct appeal; there is no counterpart for counsel's performance on RCr 11.42 motions or other requests for post-conviction relief." *Sanders v. Commonwealth*, 339 S.W.3d 427, 435 (Ky. 2011) (quoting *Hollon v. Commonwealth*, 334 S.W.3d 431, 437 (Ky. 2010)). This issue is therefore not subject to our review and we decline to address it.

Chatman's fifth and final issue is that the circuit court improperly denied him an evidentiary hearing on issues relating to the plea agreement (Appellant's first argument) and the witness identification (Appellant's second argument). "Before the movant is entitled to an evidentiary hearing, he must affirmatively allege facts which, if true, justify vacating the judgment and further allege special circumstances that justify CR 60.02 relief." *Gross v. Commonwealth*, 648 S.W.2d 853, 856 (Ky. 1983). The facts behind Chatman's issue with his plea agreement are sufficiently preserved in the record, and the witness identification at trial was mooted by entry of the unconditional guilty plea.

Chatman fails to identify how an evidentiary hearing would have provided relevant illumination to the court on these issues. The circuit court did not abuse discretion in denying an evidentiary hearing on the CR 60.02 motion.

III. CONCLUSION

For the foregoing reasons, we AFFIRM the McCracken Circuit Court's Order Denying Defendant's Motion to Alter, Amend, or Vacate Judgment, entered July 27, 2015.

ALL CONCUR.

BRIEF FOR APPELLANT:

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