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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-001671-MR

DONNIE RAY STEPHENS — APPELLANT

v.

APPEAL FROM RUSSELL CIRCUIT COURT
HON. VERNON MINIARD, JR., JUDGE
INDICTMENT NO. 11-CR-00004

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, DIXON AND TAYLOR, JUDGES.

DIXON, JUDGE: Donnie Ray Stephens appeals from the Russell Circuit Court's order denying his Motion to Amend Sentence pursuant to CR[1] 60.02, entered October 5, 2015. We affirm.

[1] Kentucky Rules of Civil Procedure.

BACKGROUND

Donnie Ray Stephens was indicted on January 19, 2011, in Russell County, Kentucky on charges of Rape in the first degree[2] and Incest,[3] both Class A felony charges involving his minor daughter. On August 11, 2011, Stephens entered a guilty plea to two amended charges in Russell Circuit Court: (1) Rape in the second degree,[4] and (2) Unlawful Transaction with a Minor in the first degree.[5] Both of these amended charges were Class C felonies. Stephens was asked by the circuit court if he understood his constitutional rights and the nature of the charges against him prior to taking the plea, to which he responded affirmatively. Pursuant to his plea agreement, Stephens was sentenced to six years for each offense, to run consecutively for a total of twelve-years' imprisonment. The circuit court's written order of final judgment and sentence of imprisonment was entered November 16, 2011, and includes a statement that "[t]he Court further finds that the defendant is a violent offender in accordance with KRS 439.3401."

On July 13, 2015, Stephens filed a "Motion to Amend Sentence Pursuant to CR 60.02." This was Stephens' second CR 60.02 motion, as he had previously filed a motion to amend sentence under CR 60.02 on July 23, 2013, that ultimately proved unsuccessful. The circuit court declined to address this CR

[2] Kentucky Revised Statutes (KRS) 510.040.

[3] KRS 530.020.

[4] KRS 510.050.

[5] KRS 530.064(2)(a).

60.02 motion on the merits, on the basis that successive CR 60.02 motions are impermissible under Kentucky law. This appeal followed.

ANALYSIS

Initially we note, CR 60.02 is an extraordinary remedy intended for extraordinary circumstances.

> CR 60.02 was enacted as a substitute for the common law writ of coram nobis. The purpose of such a writ was to bring before the court that pronounced judgment errors in matter of fact which (1) had not been put into issue or passed on, (2) were unknown and could not have been known to the party by the exercise of reasonable diligence and in time to have been otherwise presented to the court, or (3) which the party was prevented from so presenting by duress, fear, or other sufficient cause.

Gross v. Commonwealth, 648 S.W.2d 853, 856 (Ky. 1983) (citing *Black's Law Dictionary, Fifth Edition*, 487, 1444). Furthermore, "CR 60.02 relief is discretionary. The rule provides that the court '*may*, upon such terms as are just, relieve a party from its final judgment …'" *Gross* at 857 (emphasis as per *Gross*). "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).

Stephens first argues on appeal that he was sentenced to post-incarceration supervision without his knowledge, and outside the plea agreement. He contends this post-incarceration supervision amounts to an increased penalty beyond the statutory maximum sentence for his offenses. We agree with the Commonwealth that this issue was not properly before the Russell Circuit Court.

Once Stephens was sentenced to incarceration all jurisdiction left the Circuit Court's jurisdiction. Other than shock probation—probation to which Stephens did not qualify due to the nature of his offenses—the Circuit Court no longer had any authority over his sentence. Any complaint Stephens has over this issue may only be made initially administratively with the Department of Corrections.

Next, Stephens contends he "has been sentenced to a punishment that can only be applied in an *ex-post-facto* manner in violation of the [United States] and [Kentucky] Constitutions". While it is not entirely clear to which statute Stephens refers, his argument makes plain that he is indeed challenging the constitutionality of a Kentucky statute. And, as such, unfortunately Stephens fails to comply with CR 24.03[6] and KRS 418.075(2),[7] which mandate notice to the Attorney General of Kentucky for constitutional challenges to statutes.

> We have made plain that strict compliance with the notification provisions of KRS 418.075 is mandatory, meaning that even in criminal cases, we have refused to address arguments that a statute is unconstitutional unless the notice provisions of KRS 418.075 had been fully satisfied.

[6] CR 24.03, in relevant part, states as follows: "When the constitutionality of an act of the General Assembly affecting the public interest is drawn into question in any action, the movant shall serve a copy of the pleading, motion or other paper first raising the challenge upon the Attorney General."

[7] KRS 418.075(2) states as follows: "In any appeal to the Kentucky Court of Appeals or Supreme Court or the federal appellate courts in any forum which involves the constitutional validity of a statute, the Attorney General shall, before the filing of the appellant's brief, be served with a copy of the pleading, paper, or other documents which initiate the appeal in the appellate forum. This notice shall specify the challenged statute and the nature of the alleged constitutional defect."

Benet v. Commonwealth, 253 S.W.3d 528, 532 (Ky. 2008) (internal footnotes and citations omitted). The mere filing of an appellate brief is also insufficient to satisfy the requirements of KRS 418.075. *Id*. Because of this failure to comply with KRS 418.075, we decline to review the merits of these arguments.

Thirdly, Stephens maintains the circuit court improperly determined him to be a violent offender since the written judgment does not state whether death or serious physical injury occurred. Stephens argues that such a determination is required by the language of the violent offender statute, KRS 439.3401(1). The statute does state that "[t] he court shall designate in its judgment if the victim suffered death or serious physical injury." But this provision does not apply to those who are captured by the portion of the statute applicable to Stephens, KRS 439.3401(1)(e): "As used in this section, 'violent offender' means any person who has been convicted of or pled guilty to the commission of . . . [t]he commission or attempted commission of a felony sexual offense described in KRS Chapter 510." The issue of death or serious physical injury is a relevant question for those captured by KRS 439.3401(1)(c), which designates violent offenders as those who are convicted or plead guilty to "[a] Class B felony involving the death of the victim or serious physical injury to a victim."

This interpretation is supported by an examination of our case law. "[The Kentucky Department of Corrections] correctly classified Fambrough as a violent offender pursuant to KRS 439.3401(1) despite the absence of the 'death or

serious physical injury' language from the trial court's judgment." *Fambrough v. Department of Corrections*, 184 S.W.3d 561, 563 (Ky. App. 2006); *see also Benet v. Commonwealth*, 253 S.W.3d 528 (Ky. 2008):

> Additionally, we also reject Benet's argument that he should not be, or cannot be, classified as a violent offender under KRS 439.3401 because the trial court's final judgment did not specifically designate him as a violent offender. *We agree with the Court of Appeals' recent conclusion that a defendant automatically becomes a violent offender at the time of his or her conviction of an offense specifically enumerated in KRS 439.3401(1)* regardless of whether the final judgment of conviction contains any such designation.

Id. at 533 (emphasis added) (internal footnotes and citations omitted); *see also Pate v. Department of Corrections*, 466 S.W.3d 480, 486 (Ky. 2015) (addressing the amendment in the violent offender statute to encompass other categories of crimes other than Class B felonies involving death or serious physical injury). Stephens pleaded guilty to an offense defined in KRS Chapter 510 and thus falls squarely into the ambit of KRS 439.3401(1) (e). We find no error.

Lastly, Stephens claims the circuit court misled him at sentencing by stating that he would not serve more than three years in prison. The record of the sentencing hearing on November 7, 2011, contains the following exchange between the circuit court and defense counsel:

> Defense Counsel: Oh, we ask that the court costs be waived. Because of the sex offense, he will probably do most of it…
>
> Circuit Court: Yes, at the very least thirty-six months for the…
>
> Defense Counsel: Oh yeah, at the least.

Based on this conversation, Stephens argues that the circuit court led him to believe that he would be eligible for release after thirty-six months. This is not a plausible argument for several reasons, the first of which is that the court did not actually make any promises to the appellant. Viewed within the context of the discussion between the circuit court and defense counsel, it seems plain that they were discussing the length of time necessary to complete the Sex Offender Treatment Program, which is required for sex offenders in Kentucky. "As an eligible sex offender, the appellant is required to complete the Sex Offender Treatment Program before he can be granted parole. KRS 439.340(11). . . . However, the Sex Offender Treatment Program is a three-year program . . . ." *Garland v. Commonwealth*, 997 S.W.2d 487, 489 (Ky. App. 1999).

It is also significant that defense counsel stated in this same conversation that Stephens would have to "do most of it," referring to his sentence. It is not reasonable to assume that three years is "most" of a twelve-year sentence. Finally, it is worth noting that Stephens agreed to the plea offer on August 8, 2011, almost exactly three months *before* the sentencing hearing in which the above conversation between the court and defense counsel occurred. It is not possible for Stephens to have relied upon a misinterpretation or a misrepresentation in signing a plea agreement, based upon an event that took place three months in the future. Accordingly, we find no error in the circuit court's denial of relief on this basis.

CONCLUSION

For the foregoing reasons, we affirm the Russell Circuit Court's Order denying defendant's Motion to Amend Sentence pursuant to CR 60.02, entered October 5, 2015.

ALL CONCUR.

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