

Commonwealth of Kentucky
Court of Appeals

NO. 2015-CA-001332-MR

GREGORY SCOTT ROSS

APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE BRIAN C. EDWARDS, JUDGE
ACTION NO. 08-CR-002942

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: COMBS, D. LAMBERT, AND NICKELL, JUDGES.

COMBS, JUDGE: Gregory Scott Ross appeals the Jefferson Circuit Court's denial of his motion to vacate, set aside or correct his sentence pursuant to RCr¹ 11.42.

On appeal, Ross argues that he was entitled to post-conviction relief after he pleaded guilty in exchange for a deferred sentence. Because RCr 11.42 is not available to individuals on pretrial diversion, we affirm.

¹ Kentucky Rules of Criminal Procedures.

Ross was accused of touching two girls under the age of twelve in a sexual manner. A grand jury indicted him on two counts of first-degree sexual abuse. In exchange for Ross's plea of guilty, the Commonwealth agreed to recommend amending one count to custodial interference and the other count to sexual misconduct. It also agreed to recommend that he be placed on pretrial diversion. On March 16, 2010, Ross entered his guilty plea pursuant to *North Carolina v. Alford*.² The circuit court accepted Ross's plea as knowing and voluntary, and his one-year sentence for custodial interference and twelve-month sentence for sexual misconduct were deferred for five years.

Ross subsequently filed his RCr 11.42 motion in the circuit court, challenging the knowing and voluntary nature of his guilty plea based on constitutionally ineffective assistance of counsel. The circuit court denied the motion without holding a hearing. It found that Ross's claim was not cognizable because RCr 11.42 requires a movant to be in custody under sentence or on probation, parole, or conditional discharge. The court also found that although Ross's motion was filed prior to his completing pretrial diversion, he had since completed the program. Therefore, there was no conviction for which relief could be granted.

On appeal, Ross asserts that the circuit court erred in finding that he was not entitled to relief. In support, he argues that RCr 11.42 requires a sentence

² 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970). An "Alford Plea" allows a defendant to plead guilty in order to take advantage of a plea bargain while continuing to maintain his or her innocence.

but not a conviction and that pretrial diversion is a sentence. He further argues that pretrial diversion is a form of probation and that the legislature intended to protect individuals “sentenced” to pretrial diversion. Because the language of RCr 11.42 is clear and unambiguous, we decline to follow Ross’s reasoning to conclude that the rule provides relief for individuals placed on pretrial diversion.

RCr 11.42 allows a defendant who has been convicted of a crime to collaterally attack his sentence. The Rule expressly limits the filing of such a motion to one who is “in custody under sentence or . . . on probation, parole, or conditional discharge.” RCr 11.42(1). The list of those permitted to file motions under the Rule does not include individuals placed on pretrial diversion. “The language of [RCr 11.42] is plain and unambiguous[.]” *Parrish v. Commonwealth*, 283 S.W.3d 675 (Ky. 2009). Where the language of a rule is clear, we cannot resort to construction. *See Griffin v. City of Bowling Green*, 458 S.W.2d 456, 457 (Ky. 1970) (“Where the words used in a statute are clear and unambiguous and express the legislative intent, there is no room for construction and the statute must be accepted as it is written.”). Because RCr 11.42 does not include individuals placed on pretrial diversion, we cannot construe into existence language that is not in the Rule.

Moreover, it would be absurd to read the language of RCr 11.42 as including individuals placed on pretrial diversion. The Rule “[b]y its plain language . . . is a mechanism by which the party ‘claims a right to be released’ from his sentence. It is axiomatic that a person cannot be released from a sentence

which has been completed.” *Parrish*, 283 S.W.3d at 677. Similarly, a person cannot be released from a sentence that has never been imposed. In *Commonwealth v. Derringer*, 386 S.W.3d 123 (Ky. 2012), the Supreme Court of Kentucky concluded that a defendant placed on pretrial diversion is not yet sentenced and that he will never be sentenced if his diversion is successfully completed:

The trial court imposes a sentence on the defendant only after diversion is revoked and the trial court holds a sentencing hearing. Unlike sentences of probation or conditional discharge, pretrial diversion is not a sentencing alternative; it is an interruption of prosecution prior to final disposition of a case that enables defendants to obtain deferred sentencing for a specified period of time. With probation, the trial court . . . first decides on a sentence of imprisonment, but then imposes conditions for release and supervision—in lieu of implementation of incarceration—at sentencing. In diversion proceedings, a defendant is granted diversion subject to a guilty plea; but only if the trial court revokes diversion is the defendant sentenced. If the defendant successfully completes diversion, a sentence will never be imposed; and the conviction will be dismissed-diverted.

Id. at 130 (citations and internal quotation marks omitted). Therefore, one placed on diversion has no sentence from which he can claim a right to be released. This is particularly true for one who has successfully completed his diversion because at that point there is no possibility of executing the diverted sentence.

In this case, Ross was placed on diversion. He successfully completed his diversion, and his charges were dismissed. Therefore, he was never sentenced. There is not—and never will be in this case—a sentence from which

Ross can claim a right to be released. The language of RCr 11.42 is clear and unambiguous: relief is not available under the Rule for individuals placed on pretrial diversion. Accordingly, the trial court correctly denied Ross's motion.

We affirm the order of the Jefferson Circuit Court.

ALL CONCUR.

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