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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-001897-MR

JUAN K. BERRY APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE AUDRA J. ECKERLE, JUDGE
ACTION NO. 08-CR-001047

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, J. LAMBERT, AND THOMPSON, JUDGES.

CLAYTON, JUDGE: Juan K. Berry appeals *pro se* from an order of the Jefferson Circuit Court that denied his Motion for Resentencing filed pursuant to Kentucky Rule of Civil Procedure (CR) 60.02 and Kentucky Rule of Criminal Procedure (RCr) 10.26. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In March 2008, Berry was indicted on one count of sodomy in the first degree (Sodomy I) (Class B Felony) (Kentucky Revised Statute (KRS) 510.070(1)(a)), unlawful transaction with a minor in the first degree (Class B Felony) (KRS 530.064), sexual abuse in the first degree (Sexual Abuse 1) (Class D Felony) (KRS 510.110(1)(a)), and being a persistent felony offender in the first degree (PFO I) (KRS 532.080). On June 11, 2008, the circuit court entered a Judgment and Sentence consistent with a guilty plea agreement between Berry and the Commonwealth sentencing him to the amended charges of being a persistent felony offender in the second degree (PFO II) (KRS 532.080); sodomy in the third degree (Sodomy III) (Class D Felony) (KRS 510.090), five years enhanced to ten years by being PFO II; unlawful transaction with a minor in the second degree (Class D Felony) (KRS. 530.065), five years enhanced to ten years by being a PFO II; and the unamended charge of Sexual Abuse I, five years enhanced to ten years by being a PFO II; all to run consecutively for a total of thirty years. The Commonwealth's Offer on a Plea of Guilty and the Judgment both noted that Berry agreed to waive the statutory cap on sentencing in exchange for a more favorable parole eligibility resulting from the offer.

On December 27, 2013, Berry filed a pro se Motion for Resentencing pursuant to CR 60.02, along with a Motion for Appointment of Counsel. The circuit court granted the latter motion and appointed counsel filed a similar Motion

to Vacate Judgment of Conviction pursuant to CR 60.02(e). On November 24, 2015, the circuit court denied the motions. This appeal followed.

STANDARD OF REVIEW

The standard of review involving the denial of a CR 60.02 motion is abuse of discretion. *White v. Commonwealth*, 32 S.W.3d 83, 86 (Ky. App. 2000); *Brown v. Commonwealth*, 932 S.W.2d 359, 362 (Ky. 1996). 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). Absent a "flagrant miscarriage of justice," the trial court should be affirmed. *Gross v. Commonwealth*, 648 S.W.2d 853, 858 (Ky. 1983).

ANALYSIS

Berry argues that the circuit court erred by denying his CR 60.02 and not reducing his sentence because the thirty-year sentence illegally exceeded the statutory limits for his convicted offenses. He maintains that the maximum aggregate sentence for the three multiple Class D Felony offenses pursuant to KRS 532.080(6)(b) and KRS 532.110(1)(c)[1] was twenty years. *See Gibbs v. Commonwealth*, 208 S.W.3d 848, 855 (Ky. 2006), overruled on other grounds by *Padgett v. Commonwealth*, 312 S.W. 3d 336 (Ky. 2010). Berry further argues that his agreement to accept the higher sentence as part of the guilty pleas does not render the improper sentence permissible relying on *McClanahan v.*

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[1] KRS 532.110(1)(c) provides that when consecutive indeterminate sentences are imposed, the aggregate of the terms may not exceed the longest extended term for the highest class of crime authorized by the PFO statute, KRS 532.080. In this case, KRS 532.080(6)(b) provides the maximum term for a Class C or Class D felony as between ten and twenty years.

Commonwealth, 308 S.W.3d 694 (Ky. 2010). In *McClanahan*, the Supreme Court held that a "sentence that lies outside the statutory limits is an illegal sentence, and the imposition of an illegal sentence is inherently an abuse of discretion." *Id.* at 701. The Court further held that the establishment of sentencing ranges is an inherently legislative function that the judiciary is obligated to follow despite a plea agreement or consent by a defendant to deviate from the statutes. *Id*.

The Commonwealth notes, however, that the *McClanahan* decision was rendered in 2010, approximately two years after Berry entered his guilty plea and was sentenced. Furthermore, under the existing law at the time, a trial court could impose a sentence outside the limitations of the sentencing statutes based on an agreement or waiver by the defendant. At the time Berry entered his guilty plea, the law in Kentucky was that "a defendant may validly waive the maximum aggregate sentence limitation in KRS 532.110 (1)(c) that otherwise would operate to his benefit." *Myers v. Commonwealth*, 42 S.W.3d 594, 597 (Ky. 2001), overruled by *McClanahan v. Commonwealth*, 308 S.W.3d 694 (Ky. 2010). *See also Johnson v. Commonwealth* 90 S.W.3d 30, 44 (Ky. 2003), overruled by *McClanahan v. Commonwealth*, 308 S.W.3d 694 (Ky. 2010). The Commonwealth argues that *McClanahan* should not be applied retroactively to invalidate Berry's sentence.

One important aspect of the current appeal involves the fact that it is a collateral attack raised pursuant to CR 60.02. First, CR 60.02 replaced the common law writ of *coram nobis*, which was intended to correct factual, not legal

errors. *See Leonard v. Commonwealth*, 279 S.W.3d 151, 161 (Ky. 2009). Generally, cases involving new rules are not applied retroactively to cases which have become final before the new rule is announced. *Id*. at 159. "The proscription against 'applying new rules retroactively once a judgment is final on direct review makes sense, given the interest in finality of judgments.'" *Berry v. Commonwealth*, 322 S.W.3d 508, 511 (Ky. App.2010) (quoting *Leonard*, 279 S.W.3d at 160). *See also Campbell v. Commonwealth*, 316 S.W.3d 315 (Ky. App. 2009). "A change in the law is simply not grounds for CR 60.02 relief except in 'aggravated cases where there are strong equities.'" *Leonard*, *supra* at 162 (quoting *Reed v. Reed*, 484 S.W.2d 844, 847 (Ky. 1972)).

There are no published cases dealing specifically with the retroactive application of *McClanahan*. This issue has been addressed in a few unpublished opinions wherein this Court affirmed the circuit court's denial of a CR 60.02 motion based on the decision not to apply *McClanahan* retroactively. For instance, in *Rothfuss v. Commonwealth*, 2010-CA-000117, 2010 WL 3361769, at *2 (Ky. App. Aug. 27, 2010), the Court stated:

> We are aware that *Myers* and *Johnson* were recently overruled by our Supreme Court in *McClanahan v. Commonwealth*, 308 S.W.3d 694 (Ky. 2010), wherein the Court held any sentence imposed in excess of that allowed by KRS 532.110(1)(c) is void and unenforceable, regardless of whether the defendant had consented to such a sentence. However, the holding in McClanahan cannot be applied retroactively to justify the relief Rothfuss seeks. *See Leonard v. Commonwealth*, 279 S.W.3d 151, 160–61 (Ky. 2009) (generally, decisions are not applied retroactively). . . .

> Rothfuss has pointed us to no facts allowing us to conclude there are strong equities requiring a departure from the proscription against retroactive application of new decisions. To the contrary, Rothfuss has enjoyed a reduction in his charges from Class A felonies carrying the potential for a seventy-year term of imprisonment to Class C felonies carrying an actual sentence of only twenty-five years. In addition, Rothfuss is parole-eligible after serving twenty percent of his sentence rather than the eighty-five percent he would have been required to serve had he been convicted of the higher offenses. Finally, we note that although his conviction is nearly a decade old and he has had ample opportunity to do so, Rothfuss has not previously attacked his conviction and sentence on any ground. Thus, we conclude equity does not demand retroactive application of *McClanahan*.

See also Eads v. Commonwealth, 2010-CA-001318, 2012 WL 512487 (Ky. App. February 17, 2012) (holding that circuit court was not required to apply *McClanahan* retroactively); *Hall v. Commonwealth*, 2015-CA-001315, 2016 WL 1558505 (Ky. App. April 15, 2016).

In the current case, Berry's plea and sentence were lawful at the time it was entered, and the decision in *McClanahan* was rendered a few years after Berry's sentence became final. Berry entered his plea voluntarily with full knowledge that the sentence exceeded the statutory sentencing terms with the express purpose of obtaining more favorable treatment for parole considerations. Under the plea agreement, the two Class B felonies of Sodomy I and Unlawful Transaction with a Minor with possible enhanced sentences of life imprisonment upon conviction were amended down to Class D felonies with lower maximum

sentences. Moreover, Berry thereby became eligilble for parole after serving twenty percent, rather than eighty-five percent, of his sentences because of the reduction in the Class designations of the substantive offenses and the reduction in the degree of the PFO charge. Consequently, Berry has failed to show that there are strong equities requiring departure from the proscription against retroactive treatment of new decisions changing prior law or that failure to resentence him would constitute a flagrant miscarriage of justice. Thus, we conclude that the circuit court did not abuse its discretion in denying Berry's CR 60.02 motion.

For the foregoing reasons, we affirm the judgment of the Jefferson Circuit Court.

ALL CONCUR.

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