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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-000660-MR

CLARENCE CRUMBLE — APPELLANT

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE KATHLEEN S. LAPE, JUDGE
ACTION NO. 09-CR-00048

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, JOHNSON AND J. LAMBERT, JUDGES.

COMBS, JUDGE: Clarence Crumble appeals from an Order of the Kenton Circuit Court that denied his Motion for Relief filed pursuant to CR[1] 60.02. After our review, we affirm.

[1] Kentucky Rules of Civil Procedure.

On January 29, 2009, Crumble was indicted by a Kenton County grand jury on six counts of robbery in the first degree (KRS[2] 515.020) and with being a persistent felony offender in the first degree (PFO I) (KRS 532.080). The indictment arose from crimes committed by Crumble during approximately a two-week period from November 9, 2008, to December 3, 2008, involving the robbery of four gas stations and two stores. During an interview with police, he confessed to having committed the robberies. Facing a possible sentence of seventy years to life in prison on the multiple offenses,[3] Crumble accepted an offer from the Commonwealth to enter a guilty plea in exchange for a recommended sentence of twenty years on each count -- to run concurrently for a total of twenty years in prison.

At the plea hearing on August 24, 2009, the circuit court reviewed the Commonwealth's Offer on a Plea of Guilty and the sentencing recommendation with Crumble. The court also reviewed the potential penalty of ten to twenty years on each of the six robbery charges. It also considered the PFO charge, which increased the sentence to twenty to fifty years or life -- as well as possible fines. Crumble stated he had had enough time with his counsel, that counsel had done everything he asked him to do, and that he was satisfied with counsel's advice and representation of him. The court conducted a guilty plea colloquy reviewing the nature of the offenses, the consequences of the plea, his competence to enter the

[2] Kentucky Revised Statutes.

[3] See KRS 532.110(c) and 532.080.

plea, and the waiver of his constitutional rights consistent with *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). The circuit court then found that Crumble had knowingly, voluntarily, and intelligently entered the guilty plea. *See, e.g., Sands v. Commonwealth*, 358 S.W.3d 9, 13 (Ky. App. 2011) ("The *Boykin* colloquy addresses the defendant's state of mind, whether he understands his options other than the guilty plea, if he is satisfied with the representation his counsel provided, and if the plea is his own choice.")

However, at the sentencing hearing on September 29, 2009, the court stated that it had reviewed the Presentence Investigation Report that detailed Crumble's criminal history, which included five prior felony robbery convictions as well as the six robberies involved in the current case to which Crumble had confessed. After that review, the court stated that it would not honor the plea agreement and the recommendation of the Commonwealth. The court did not believe that Crumble should receive a sentence equivalent to the minimum sentence on only one of the robbery offenses. It indicated that the punishment should be increased in severity as a deterrent to Crumble and others. The court pointed out that if he were to go to trial and be convicted, he would be subject to a maximum aggregate sentence of seventy years or life imprisonment. The court indicated that it was inclined to run one year of each of the sentences for the additional five crimes consecutively with respect to the minimum sentence on the first crime instead of running all six sentences concurrently. The result would be a total sentence of twenty-five years rather than the twenty-year minimum on one

offense. At this point, defense counsel asked if the court could recall the case later so that he could discuss the issue with Crumble.

The court recalled the case later in the morning of the same day after Crumble and defense counsel had discussed the judge's position rejecting the plea agreement. At that time, the following colloquy took place:

Court:	Mr. Crumble, do you understand that because I've announced that I don't intend to follow the recommendation—I intend to sentence you more harshly than what was recommended—do you understand you have a constitutional right to withdraw your guilty plea that you entered previously?
Crumble:	Yeah. (Nodding head yes).
Court:	Did you discuss that with your attorney?
Crumble:	(Nods head yes).
Court:	Alright. And have you come to a decision as to whether you want to exercise that right or waive that right? Do you want to maintain your guilty plea—
Crumble:	Yeah.
Court:	or do you want to withdraw it? You want to maintain it?
Def Counsel:	Judge, if I could interject here. We're maintaining our guilty plea with the previous understanding from the court that we were looking at 25.
Court:	Right. OK. Based on the representation I made as to where I'm going to go.
Def. Counsel:	Correct.
Court:	I indicated that I didn't necessarily have a problem with 20 years concurrent, but

that I would be looking at running a year on each of the other ones consecutively. The easiest way to do this is just to give him 25 years and run it all concurrent.

Def. Counsel: I would agree.

Court: From the standpoint — from a secretarial standpoint. If not, we'll have a 5 page order here. But it does basically what I'm after. He gets 20 on the first one, goes up a year on number two, another year on three, another year on four, another year on five and another year on six. So it sentences him successively and progressively harsher for recurring criminal conduct. Which, something like this, I think it's necessary.

Court: Alright. The sentence then will be 25 years on each of the six robbery counts. It will be enhanced to 25 years on the PFO. All of these sentences will be ordered to run concurrent, with applicable jail credit.

Def. Counsel: I know Mr. Crumble would like to address the Court.

Court: Yes sir.

Crumble: (Nods head no).

Court: You don't want to say anything?

Crumble: (Nods head no).

Court: OK.

At the conclusion of the final sentencing hearing, the circuit court sentenced Crumble to a total of twenty-five years on each of the robbery offenses enhanced by the PFO I offense, with the sentences to run concurrently for a total sentence of twenty-five years. On October 1, 2009, the court entered the Final Judgment of Conviction and Order of Sentence sentencing Crumble to twenty-five

years imprisonment. On June 8, 2015, Crumble filed a Motion for Relief Pursuant to CR 60.02, arguing that it was unlawful for the circuit court to impose a twenty-five-year sentence contrary to the plea agreement with the Commonwealth. On April 1, 2016, the circuit court denied the motion. This appeal followed.

The standard of review governing a trial court's denial of a CR 60.02 motion is whether the trial court abused its discretion. *Brown v. Commonwealth*, 932 S.W.2d 359, 362 (Ky. 1996); *White v. Commonwealth*, 32 S.W.3d 83, 86 (Ky. App. 2000). "The test for abuse of discretion is whether the 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," we must affirm the circuit court. *Gross v. Commonwealth*, 648 S.W.2d 853, 858 (Ky. 1983).

On appeal, Crumble contends that it was improper and unlawful for the circuit court to sentence him to twenty-five years after he and the Commonwealth had presented the court with an agreement that indicated the Commonwealth was agreeing to recommend a sentence of twenty years. Crumble argues that the circuit court did not have the authority to sentence him to a sentence higher than that which was set forth in the plea agreement. Crumble requests that the circuit court's judgment and sentence be vacated and that the court be ordered to sentence him to a twenty-year sentence consistent with the Commonwealth's recommendation.[4]

[4] Crumble does not challenge his conviction or the prospect of imprisonment.

The circuit court denied the CR 60.02 motion both on the merits and on procedural grounds. First, the court held that it had the authority to reject the proposed guilty plea and had followed the proper procedure in doing so in this case. "While the Commonwealth and a criminal defendant are free to enter into a plea agreement that both parties deem fitting, the court is not bound by the terms of the agreement." *Prater v. Commonwealth*, 421 S.W.3d 380, 386 (Ky. 2014) (citing *Covington v. Commonwealth*, 295 S.W.3d 814, 817 (Ky. 2009)). The circuit court has discretion as to whether to reject the plea agreement. *Id*. However, when a trial court imposes a sentence greater than that recommended by the Commonwealth under a plea agreement, the court is deemed to have rejected the plea agreement and must follow the procedure set forth in RCr[5] 8.10. The second paragraph of RCr 8.10 governs the effect of a trial court's rejection of a plea agreement, and it states, in pertinent part:

> If the court rejects the plea agreement, the court shall, on the record, inform the parties of this fact, advise the defendant personally in open court . . . that the court is not bound by the plea agreement, afford the defendant the opportunity to then withdraw the plea, and advise the defendant that if the defendant persists in that guilty plea the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement.

In other words, RCr 8.10 requires that "upon the determination of a trial court that it will not follow the plea agreement made between the prosecutor and the defendant, the defendant has a right to withdraw the guilty plea without prejudice to the right of either party to go forward from that point." *Haight v.*

[5] Kentucky Rules of Criminal Procedure.

Commonwealth, 938 S.W.2d 243, 251 (Ky. 1996) (citing *Commonwealth v. Corey*, 826 S.W.2d 319 (Ky.1992)); *Kennedy v. Commonwealth*, 962 S.W.2d 880 (Ky. App. 1997).

In this case, the circuit court informed Crumble that it was rejecting the plea agreement based on the inadequacy of the sentence as recommended by the Commonwealth. The court clearly and unequivocally indicated that it would not follow the recommendation set forth in the plea agreement. It properly followed the dictates of RCr 8.10 by providing Crumble an opportunity to withdraw his guilty plea and proceed to trial. But he chose instead to continue with full understanding that doing so meant that he would receive the circuit court's announced intended sentence of twenty-five years rather than the twenty-year sentence. "[A] defendant who expressly represents in open court that his guilty plea is voluntary may not ordinarily repudiate his statements to the sentencing judge." *Edmonds v. Commonwealth*, 189 S.W.3d 558, 568 (Ky. 2006) (quoting *United States v. Todaro*, 982 F.2d 1025, 1030 (6th Cir.1993)). Accordingly, the circuit court did not abuse its discretion in denying Crumble's CR 60.02 motion.[6]

We affirm the order of the Kenton Circuit Court.

ALL CONCUR.

[6] Since we are ruling on the merits of the motion, we shall not deal with the procedural ground addressed in the circuit court's order.

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