

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-001176-MR

COMMONWEALTH OF KENTUCKY

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE FREDERIC COWAN, JUDGE
ACTION NO. 11-CR-001279

STEVEN ROBINSON

APPELLEE

OPINION
DISMISSING AND REMANDING

** ** * * * * *

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

COMBS, JUDGE: Appellant, Commonwealth of Kentucky (Commonwealth), has filed this interlocutory appeal from an order of the Jefferson Circuit Court pursuant to KRS¹ 22A.020(4). After our review, we are compelled to dismiss the appeal.

In 2011, Appellee, Steven Robinson, was indicted by a Jefferson County Grand Jury and charged with one count of Kidnapping, a class B felony;

¹ Kentucky Revised Statutes.

one count of First-Degree Sexual Abuse, a class D felony; and one count of Indecent Exposure, a class B misdemeanor. Robinson entered into a plea agreement which included dismissal of the kidnapping charge, and the Commonwealth agreed not to prosecute a charge of bail jumping in another case. In addition to a three-year sentence, the Commonwealth recommended that Robinson be required to register on the sexual offender registry for a period of twenty (20) years and to complete a Sexual Offender Treatment Program (SOTP).

On August 28, 2012, the Jefferson Circuit Court, Division Six (6), Hon. Olu A. Stevens, entered an Order-Plea of Guilty accepting Robinson's plea. Entry of the judgment imposing sentence was postponed pending a pre-sentence investigation. On October 10, 2012, the court entered Judgment of Conviction and Sentence for Sex Offender in which it denied probation, dismissed the kidnapping charge, and sentenced Robinson to three years on Sexual Abuse I and to 90 days on Indecent Exposure -- to run concurrently for a total of three years. Robinson was ordered to register as a sex offender and to comply with all provisions of KRS 17.500 through 17.580 (the statutes governing sex-offender registration). In addition, the court ordered the Kentucky Sex Offender Risk Assessment Unit to prepare a written sex-offender evaluation.

Robinson completed his sentence on July 5, 2014. By virtue of KRS 532.043 and 532.060(3), he became subject to a five-year period of post-incarceration supervision beginning on July 6, 2014, and continuing through July 6, 2019. KRS 532.060(3) provides that:

For any felony specified in KRS Chapter 510, KRS 530.020, 530.064(1)(a), or 531.310, the sentence shall include an additional five (5) year period of postincarceration supervision which shall be added to the maximum sentence rendered for the offense. During this period of postincarceration supervision, if a defendant violates the provisions of postincarceration supervision, the defendant may be reincarcerated for:

(a) The remaining period of his initial sentence, if any is remaining; and

(b) The entire period of postincarceration supervision, or if the initial sentence has been served, for the remaining period of postincarceration supervision.

In November 2014, Robinson was reincarcerated for a technical violation of his post-incarceration supervision. It appears that he remains incarcerated at present.

On March 9, 2016, Robinson, by counsel, filed a motion to set aside his guilty plea asking to withdraw his plea and seeking his immediate release from custody. As the Commonwealth notes, Robinson had previously filed and withdrawn, *pro se*, a motion for relief pursuant to RCr² 11.42. Further, his counsel initially filed a Motion to Set Aside Guilty Plea in October 2015; that earlier motion was remanded after Robinson indicated he did not want to go forward with it. In his March 9, 2016, motion, Robinson contended that neither his plea agreement nor the sentencing order reflected that he was subject to an additional five years of post-incarceration supervision and that he was never informed that failure to complete the SOTP could result in additional incarceration.

The matter was heard on June 1, 2016. The Commonwealth argued that Robinson's motion was untimely under RCr 11.42. Robinson's counsel

² Kentucky Rules of Criminal Procedure.

asserted that his motion was not made under RCr11.42; rather, his claim was that his guilty plea had not been made knowingly and voluntarily.

By Order of July 11, 2016, the Jefferson Circuit Court, Division Six (6), Hon. Frederic Cowan, concluded that **some relief** was appropriate. The court discussed KRS 532.043 and KRS 532.060(3) and the fact that Robinson had not been informed of the statutory requirement “during either the taking of his plea or the sentencing hearing.” The court also noted that the statutory language had not been included in the judgment of conviction and the sentence. The court explained that it must determine an appropriate action to address what appeared to be an unlawful order, stating that it:

may correct the original Judgment of Conviction and Sentence ... at any time by adding the penalty imposed by KRS 532.043 and KRS 532.060(3) ... and intends to do so at its first opportunity.

The court further explained that correcting the sentencing order would constitute rejection of the plea agreement that it had previously accepted and that Robinson would be permitted to withdraw his plea under RCr 8.10, which provides in relevant part that “[a]t any time before judgment the court may permit the plea of guilty or guilty but mentally ill to be withdrawn and a plea of not guilty substituted.”

However, the court **did not** set aside the guilty plea. Instead, it scheduled a hearing for August 18, 2016, reciting as follows:

the Court will advise the Defendant that it is rejecting the original plea agreement so that it can correct the

Judgment of Conviction and Sentence for Sex Offender to include the post-incarceration supervision required by KRS 532.043 and 532.060(3), and shall inform the Defendant of his right to withdraw his original plea pursuant to RCr 8.10. At that point, the Defendant can [either] decline to withdraw his original guilty plea or [he can] withdraw the plea.

The court then outlined what it designated as option A: namely, how it would proceed if Robinson declined to withdraw his original plea. The court explained that it would issue a Corrected Judgment and Sentence for Sex Offender to the effect that Robinson would be subject to a five-year period of post-incarceration supervision under such conditions/orders as specified by the Department of Corrections and that he would be subject to reincarceration for violation of the conditions of his post-incarceration supervision. Robinson's status with the Department of Corrections would remain unchanged. He would serve the remainder of his period of incarceration in case of violation of the conditions of supervision as determined by the Department and be subject to the requirements to maintain his sex offender registration for the remainder of the twenty - (20) year period and complete the SOPT.

The court then offered option B: what would transpire if Robinson chose to withdraw his plea. The court would order his release from the Department of Corrections and restore the parties to their original positions. The charges against Robinson would then proceed to resolution either by plea agreement or by jury trial. If convicted, Robinson would be subject to the full range of penalties authorized by law on each charge with a credit for time served as

appropriate; he would be subject to the requirements that he register as a sexual offender under KRS 17.500, *et seq.*, and complete a SOTP; and he would be subject to post-incarceration supervision in accordance with KRS 532.043 and 532.060(3) with credit for “time spent under post-incarceration supervision and incarceration for violation of a condition of that supervision.”

Based upon these options, the Court ordered Robinson to appear for the hearing on August 18, 2016, where it additionally advised him of its course of action with respect to his choice either of option A or of option B:

4. If the Defendant declines to withdraw his original plea, the Court will proceed as outlined in Option A above unless it receives an appropriate objection or suggestion for proceeding differently;

5. If the Defendant chooses to withdraw his original plea, he shall be allowed to do so and the court will proceed as outlined in Option B above, unless it receives an appropriate objection or suggestion for proceeding differently[.]

On August 9, 2016, the Commonwealth filed a notice of appeal to this Court from the July 11, 2016, Order pursuant to RCr 12.04, KRS 22A.020, and Kentucky Constitution §115. To reiterate, the court decreed in the July 11, 2016, order that “some relief” was warranted. It outlined the two options that it intended to discuss with Robinson on August 18. This notice of appeal intervened.

The parties have brought subsequent procedural events to our attention which bear mentioning. To the extent that subsequent orders are not included in

the record on appeal, we take judicial notice of them. KRE³ 201; *Rogers v. Com.*, 366 S.W.3d 446 (Ky. 2012).

On November 4, 2016, Judge Cowan entered an Order Denying Stay of Proceedings (Exhibit “C” to Appellee’s Brief) after the Commonwealth objected to the court’s taking any further action with respect to its July 11, 2016, Order pending appeal. The court explained that its “July 11, 2016, Order simply requires a hearing to determine whether Mr. Robinson chooses to accept a correction of the Judgment of Conviction ... or to withdraw his plea The Commonwealth will not suffer any harm by the hearing being conducted or by Mr. Robinson announcing his choice.” The circuit court re-scheduled the hearing for December 8, 2016, noting that Robinson would be making his choice of the two options previously offered by the court.

On December 9, 2016, Hon. Olu A. Stevens entered the following order that the Commonwealth has brought to our attention by a notice that it filed on February 23, 2017:

The matter was to come before the Court for the purpose of hearing on December 8, 2016. The Court was in trial in another matter and the hearing had to be reassigned. The procedural history of this matter is noted. Another court sitting for this one offered the Defendant a choice between setting aside his guilty plea and accepting “the amendment correcting judgment”. [sic]. This Court finds the previous court’s offer to the Defendant to be preposterous and premature. This Court’s Judgment of Conviction and Sentence is not “illegal” by any means. It simply contains a typographical omission, one this Court now rectifies by

³ Kentucky Rules of Evidence.

expressly imposing the mandatory five-year post-incarceration supervisory requirement pursuant to KRS 532.043 and 532.060(3). The Defendant's motion for relief pursuant to RCr 11.42^[4] cannot be resolved by review of the record and shall be set for evidentiary hearing.

IT IS HEREBY ORDERED that the orders dated July 11, 2016 and November 4, 2016 are VACATED IN THEIR ENTIRETIES AND HELD FOR NAUGHT.

By way of a footnote in its reply brief, the Commonwealth questions the court's jurisdiction to enter the December 9, 2016, Order after this appeal was perfected; however, that Order is not before us.

On appeal, the Commonwealth contends that the circuit court lacked jurisdiction to grant Robinson's motion to set aside his plea. Second, it argues that even if the court had had jurisdiction, it abused its discretion by finding that Robinson was entitled to withdraw his plea and have it set aside. However, we do not reach the merits because we conclude that the matter is not properly before us. We are dealing with an interlocutory order, and the Commonwealth relies on KRS 22A.020(4) which provides:

An appeal may be taken to the Court of Appeals by the state in criminal cases from an adverse decision or ruling of the Circuit Court, but only under the following conditions

⁴ It appears that the RCr 11.42 motion referred to in Judge Stevens's December 9, 2016, order concerned the calculation of parole eligibility. See April 13, 2017, order entered by another panel of this Court in *Robinson v. Cowan*, No. 2017-CA-000028-OA, denying Robinson's Petition for Writ of Prohibition (App. 1 to Appellant's Reply Brief at p. 5). Robinson appealed the order denying his Petition to the Kentucky Supreme Court in No. 2017-SC-000210, which is still pending. http://apps.courts.ky.gov/supreme/sc_dockets.shtml.

Its reliance on KRS 22A.020(4) has been discussed by our Supreme Court:

[T]he General Assembly has limited the Court of Appeals' jurisdiction over the interlocutory orders of a circuit court. ... In “criminal cases,” the Commonwealth can appeal from an interlocutory “**adverse decision or ruling**” by the circuit court under certain conditions and in the manner provided for by court rules. KRS 22A.020(4).

Commonwealth v. Farmer, 423 S.W.3d 690, 692-93(Ky. 2014) (citations omitted) (boldface emphasis added).

The July 11, 2016, Order was interlocutory, but it was not a decision or ruling *adverse* to the Commonwealth as contemplated by KRS 22A.020(4). The court did not set aside the guilty plea as the Commonwealth prematurely argues. It simply scheduled a hearing and offered Robinson a choice – Option A or Option B. In criminal cases, “the very limited interlocutory appeal right accorded the Commonwealth in KRS 22A.020(4) is all that our legislature has seen fit to authorize.” *Farmer* at 698.

Therefore, we must dismiss this appeal as premature and interlocutory, and we shall do so by separate order dismissing. This case is remanded to the circuit court for further proceedings.

ALL CONCUR.

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