

RENDERED: OCTOBER 5, 2018; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2016-CA-001025-MR

MAYNARD SHIPMAN

APPELLANT

v. APPEAL FROM HARLAN CIRCUIT COURT  
HONORABLE KENT HENDRICKSON, JUDGE  
ACTION NO. 09-CR-00596

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
REVERSING AND REMANDING

\*\* \*\* \* \*\* \* \*\*

BEFORE: ACREE, JOHNSON, AND JONES, JUDGES.

JOHNSON, JUDGE: Maynard Shipman appeals *pro se* from an order of the Harlan Circuit Court disposing of postconviction motions concerning his guilty plea to various sexual offenses committed against two minor victims. After reviewing the record in conjunction with the applicable legal authorities, we

reverse the judgment of the circuit court and remand the matter for entry of an order allowing Shipman to withdraw his guilty plea.

## **BACKGROUND**

In 2012, pursuant to a plea agreement with the Commonwealth, Shipman pleaded guilty to a host of sexual offense crimes against two minor victims. At the time of his plea, Shipman was facing a total of ten charges: Counts 1 and 2 were Rape in the first degree;<sup>1</sup> Count 3 was Rape in the second degree;<sup>2</sup> Count 4 was Rape in the third degree;<sup>3</sup> Counts 5 and 6 were Sexual Abuse in the first degree;<sup>4</sup> Count 7 was Sodomy in the first degree;<sup>5</sup> Count 8 was Sodomy in the second degree;<sup>6</sup> Count 9 was Sodomy in the third degree;<sup>7</sup> and Count 10 was Sexual Abuse in the first degree.

The Commonwealth stated in its offer, “Investigation revealed that [Child 1],<sup>8</sup> was 12 years old when this conduct began, thus requiring dismissal of Counts 1, 2, 5, and 7 [based on the age requirement of those counts].” Based upon his plea agreement with the Commonwealth, the trial court entered a May 9, 2012 order sentencing Shipman to serve 25 years in the penitentiary. At the time of

---

<sup>1</sup> Kentucky Revised Statutes (“KRS”) 510.040.

<sup>2</sup> KRS 510.050.

<sup>3</sup> KRS 510.060.

<sup>4</sup> KRS 510.110.

<sup>5</sup> KRS 510.070.

<sup>6</sup> KRS 510.080.

<sup>7</sup> KRS 510.090.

<sup>8</sup> One of Shipman’s two alleged victims, whom we shall refer to as Child 1.

sentencing, Shipman attempted to withdraw his guilty plea, alleging ineffective assistance of counsel. The trial court denied the motion to withdraw based upon testimony of Shipman's counsel who recounted the work he had done on the case, as well as upon the trial court's own determination that Shipman had voluntarily entered the guilty plea after a proper colloquy by the court. In attempting to withdraw his guilty plea, Shipman never made a claim of innocence.

On August 30, 2012, Shipman filed a "Motion to Vacate Judgement Pursuant [sic] to RCr<sup>9</sup>] 11.42." The trial court denied this motion on March 19, 2013, stating as follows:

The record establishes that [Shipman] entered a knowing, intelligent and voluntary plea of guilty to a variety of sexual offenses and that he received a sentence that was commensurate with his crimes. [Shipman] complains because his attorney was unwilling to mount a defense to the charges based upon the extreme emotional disturbance of [Shipman]. Frankly, the court fails to see how the extreme emotional disturbance of [Shipman] could possibly mitigate or constitute a defense to charges of rape, sodomy and sexual abuse. [Shipman] has no grounds to set aside the judgment in this case. Defense counsel did the best with what he had to work with. [Shipman's] motion is denied.

Shipman did not appeal this order. However, on August 28, 2014, Shipman filed a motion styled "Motion to Vacate and Set Aside Judgment Pursuant to RCr 11.42, Alternatively a Motion Pursuant to RCr 10.26," again arguing his trial counsel was

---

<sup>9</sup> Kentucky Rules of Criminal Procedure.

ineffective. After appointment by the trial court, the Department of Public Advocacy entered its notice of appearance on May 4, 2015.

With the assistance of his appointed counsel, on May 7, 2015, Shipman filed a supplement to his previous RCr 11.42 motion, as well as a motion pursuant to Kentucky Rules of Civil Procedure (“CR”) 60.02(e) and (f). In his supplemental motion, Shipman argued that his earlier *pro se* motion alleging ineffective assistance of counsel should still be addressed by the trial court, but added a new claim alleging that his trial counsel was ineffective in advising him to enter into a plea agreement greater than the sentencing cap established by statute. Next, Shipman alleged that his trial counsel was deficient in advising him to plead guilty to the highest penalty for each charge, arguing that he could have fared no worse by taking his chances at trial. Finally, Shipman requested that the trial court correct his improper sentence which was in excess of the maximum prison term allowable by statute.

On June 10, 2016, in an order granting in part and denying in part, the trial court disposed of Shipman’s motions, ruling that Shipman had pleaded guilty to an improper sentence. On the same day, the trial court entered an amended judgment and sentence, capping Shipman’s overall sentence at 20 years’ imprisonment rather than the 25 years he had agreed to serve in his initial guilty plea.

Regarding Shipman's other arguments in his supplemental motion, the trial court ruled that entry of the amended judgment and sentence "mooted, or at least cured" the RCr 11.42 claim based on his trial counsel advising him to accept a plea agreement with a punishment greater than the statutory sentencing cap. The trial court also rejected Shipman's argument that his trial counsel was ineffective in advising him to accept a plea agreement for the maximum penalty for each charge, again arguing that he could have fared no worse at trial. In rejecting the reasoning supporting Shipman's argument, the trial court stated:

Shipman argues Counts I, II, V, and VII of the indictment were dismissed because each "alleged that the victim was under 12, but investigation revealed that she was 12 years old when the conduct began, requiring dismissal of those counts." Supplement to Motion at 7. But that is true only of Counts I, II, and V, but not count VII.<sup>10</sup> Count VII charges:

That during or about the period from April 16, 2008, through October 16, 2009, in Harlan County, Kentucky, the Defendant committed the offense of Sodomy in the First Degree, a Class B felony, to wit:

The Defendant engaged in deviate sexual intercourse with TM, by *forcible compulsion*.

---

<sup>10</sup> The trial court, in its own footnote placed here, notes "The 'Commonwealth's Offer On a Guilty Plea' does state, incorrectly in part, 'that [victim] [Child 1] was 12 years old when this conduct began, thus requiring dismissal of Counts I, II, V, and VII.' *Id.* At para 3. However, Count VII concerns a second victim, [Child 2], and as discussed . . . , the charge in Count VII is not predicated on the victim's age."

The trial court pointed out that the forcible compulsion component of Count 7 of the indictment placed Shipman squarely in danger of a possible Sodomy in the first degree conviction—a Class B Felony—without any reliance on the victim’s age.<sup>11</sup> The trial court concluded its analysis by stating, “Shipman could have done much worse by proceeding to trial; he benefited from the plea bargain. He was not prejudiced by counsel’s advice.”

Furthermore, the trial court stated that based upon the fact that Shipman’s sentence had been amended, and considering its analysis of the other arguments set out in his supplemental filing, Shipman failed to demonstrate that his trial counsel was ineffective. Thus, the trial court concluded that a hearing on the supplemental RCr 11.42 motion was not required.

As to the other arguments advanced in Shipman’s *pro se* RCr 11.42 motion which predated the entry of the DPA into the case, the court stated:

[I]n his earlier *pro se* 11.42 motion, Shipman collaterally attacks his guilty plea on a number of state and federal constitutional grounds, all of which are packaged inside an ineffective assistance claim. The gist of these claims is that Shipman did not enter his plea knowingly and voluntarily. However, the record refutes this. The Court’s video shows the trial court in this case conducted complete guilty plea proceedings. Moreover, Shipman stated unequivocally during the hearing that his plea was knowing and voluntary and that he was satisfied with advice of counsel.

---

<sup>11</sup> See KRS 510.070(1)(a).

The DPA filed a notice of appeal on Shipman’s behalf on July 13, 2016. However, after conducting its own review of the record, the DPA moved to withdraw from the matter based on KRS 31.110(2)(c).<sup>12</sup> This Court subsequently granted the DPA’s motion.

Thereafter, Shipman was permitted to file a *pro se* appellate brief. In addition to the aforementioned issues, Shipman alleges his trial counsel breached its duty to provide effective representation by failing to challenge the validity of the initial indictment against him.

### **STANDARD OF REVIEW**

The standard of review of an appeal involving a CR 60.02 motion is whether the trial court abused its discretion. A movant is not entitled to a hearing on a CR 60.02 motion unless he affirmatively alleges facts which, if true, justify vacating the judgment and further alleges special circumstances that justify CR 60.02 relief.

*White v. Commonwealth*, 32 S.W.3d 83, 86 (Ky. App. 2000) (citations, quotation marks, and brackets omitted).

### **ANALYSIS**

In addition to his claims under RCr 11.42, Shipman requested relief from the guilty plea under CR 60.02(e) and (f). CR 60.02 is designed to correct

---

<sup>12</sup> “To be represented in any . . . appeal from a post-conviction . . . action[,] [it must be] a proceeding that a reasonable person with adequate means would be willing to bring at his or her own expense . . . .”

mistakes in the legal process. The portions of that rule pertinent to this appeal state:

On motion a court may, upon such terms as are just, relieve a party . . . from its final judgment . . . upon the following grounds: . . . (e) the judgment is void . . . or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (f) any other reason of an extraordinary nature justifying relief.

CR 60.02(e) and (f). It is undisputed that the sentence based on Shipman’s guilty plea was illegal. The maximum penalty Shipman could have faced was a 20-year prison term, not the 25-year sentence he accepted per the Commonwealth’s offer.<sup>13</sup> The trial court’s remedy for this error was to give Shipman a new judgment and sentence in line with the statutory guidelines. This decision was error and an abuse of discretion. The Supreme Court of Kentucky has established a “bright line” rule concerning acceptance of guilty pleas to illegal sentences:

Appellant’s thirty-five year sentence exceeded the lawful range of punishment established by the General Assembly, and whether agreed upon or not, the trial court’s imposition of such a sentence is a violation of the separation of powers doctrine embodied in Sections 27 and 28 of the Kentucky Constitution, and is an abuse of discretion.

....

---

<sup>13</sup> See KRS 532.110 and *Commonwealth v. Stambaugh*, 327 S.W.3d 435, 437-38 (Ky. 2010).

. . . Under our Constitution, it is the legislative branch that by statute establishes the ranges of punishments for criminal conduct. It is . . . erroneous for a trial judge to [disregard the sentencing limits established by the legislature] by the acceptance of a plea agreement that disregards those statutes.

. . . 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.

. . . .

Generally, plea agreements in criminal cases are contracts between the accused and the Commonwealth, and are interpreted according to ordinary contract principles. A widely recognized principle of contract law is that agreements that run contrary to law . . . are illegal and will not be enforced. Because the plea agreement involved here contravenes [the Kentucky Revised Statutes], it is a contract which our courts may not enforce.

. . . .

. . . [We therefore] [r]evers[e] this matter [to permit] Appellant to withdraw his pleas [which] allows for the reinstatement of those charges, should the Commonwealth elect to do so.

*McClanahan v. Commonwealth*, 308 S.W.3d 694, 698-702 (Ky. 2010) (citations omitted).

Under this clear precedent of our state's highest court, we are convinced that Shipman must be permitted to withdraw his guilty plea for which the trial court imposed an illegal sentence. We also note that once the guilty plea is

withdrawn, the Commonwealth will be free to reinstate any charges it may have agreed to dismiss as part of the plea negotiation process or those charges to which Shipman pleaded guilty pursuant to his plea agreement with the Commonwealth.

### CONCLUSION

Based upon the foregoing, we reverse the judgment of the Harlan Circuit Court and remand for further proceedings permitting Shipman to withdraw his guilty plea.

ALL CONCUR.

BRIEF FOR APPELLANT:

Maynard Shipman, *pro se*  
Burgin, Kentucky

BRIEF FOR APPELLEE:

Andy Beshear  
Attorney General

James Havey  
Assistant Attorney General  
Frankfort, Kentucky