

IMPORTANT NOTICE
NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

Supreme Court of Kentucky

FINAL

2002-SC-0413-TG

DATE 5-20-04 ELLA Grouitt, D.C.

DAJUAN TURNER

APPELLANT

V. ON APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE BARRY WILLETT, JUDGE
1994-CR-2732

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Dajuan Turner, pled guilty to murder, and was sentenced by the Jefferson Circuit Court to life imprisonment. Turner filed a pro se motion pursuant to RCr 11.42 and CR 60.02, raising three issues: (1) that he was improperly transferred from district court to circuit court; (2) that his guilty plea was not knowing and voluntary; and (3) that the trial court erred in failing to conduct a timely hearing pursuant to KRS 640.030. The Jefferson Circuit Court denied Turner's motion as to the first two claims, holding that both were untimely under RCr 11.42(10). The trial court agreed that Turner was denied his right to a hearing pursuant to KRS 640.030, and ordered an evidentiary hearing on the matter at which time the factors set forth in KRS 640.030 were considered. At that hearing, Turner moved for immediate release, arguing that the court had lost jurisdiction over the matter by failing to hold a timely KRS 640.030

hearing. The trial court denied that motion, and Turner now appeals all three rulings. For the reasons set forth below, we affirm the judgment of the Jefferson Circuit Court.

Facts and Procedural History

On April 10, 1994, Thomas Bell was shot and killed in a food mart in Louisville. Turner was arrested three days later; a Grand Jury subsequently indicted him for murder pursuant to KRS 507.020 and robbery pursuant to KRS 515.020. The Commonwealth offered a plea agreement, which he accepted. By entering a guilty plea, the robbery charge was dismissed as well as the sentencing possibilities of death and life imprisonment without the possibility of parole. The Jefferson Circuit Court entered the plea and sentenced Turner to life imprisonment. At the time of sentencing, he was seventeen years old. Due to his age, Turner was taken into custody by the Cabinet for Human Resources and was committed to the Northern Kentucky Treatment Center. By amended order of the court, Turner was to remain in the custody of the Cabinet for Human Resources until his eighteenth birthday.

Two days before Turner turned eighteen, the court entered an order transferring him from the Northern Kentucky Treatment Center to the Kentucky State Reformatory at LaGrange. No hearing concerning that transfer was held. In 1999, three years after his transfer, Turner filed a combined motion pursuant to RCr 11.42 and CR 60.02, alleging three errors: (1) that the district court failed to properly transfer him to circuit court; (2) that his guilty plea was not knowing, voluntary, and intelligent; and (3) that he was improperly transferred to the Department of Corrections without the hearing required by KRS 640.030. In an order dated September 1, 1999, the trial court denied the motion in part and granted in part, holding that Turner's complaints with respect to his transfer from juvenile to adult court and his guilty plea were untimely under RCr

11.42. The trial court did, however, grant Turner an evidentiary hearing to address the issues surrounding Turner's transfer to an adult facility without the benefit of a KRS 640.030 hearing. Turner then moved for immediate release, arguing that the trial court had lost jurisdiction over the case by its failure to conduct the KRS 640.030 hearing at the time of his eighteenth birthday. The trial court denied that motion, stating that the issue had been ruled upon in Turner's combined RCr 11.42 and CR 60.02 motion.

A hearing was held on May 4, 2000, during which the lower court considered the factors set forth in KRS 640.030. On June 5, 2000, the court entered an order pursuant to KRS 640.030 denying Turner's request for probation and ordering him to serve the remainder of his life sentence in the Department of Corrections. Turner now enters this appeal, citing three errors.

RCr 11.42 and Jurisdictional Issues

Turner first appeals the trial court's denial of his RCr 11.42 motion. By the September 1, 1999 order, the court dismissed two of Turner's claims without a hearing, determining that the claims were untimely pursuant to RCr 11.42(10), which provides in relevant part that "[a]ny motion under this rule shall be filed within three years after the judgment becomes final[.]". With respect to Turner's claim that his guilty plea was not knowing and voluntary, the trial court's ruling as to timeliness was correct. Turner was convicted and sentenced on July 5, 1995. The judgment of conviction and sentence entered by the trial court on that date was a final and appealable judgment. See RCr 11.04(1); Dillard v. Commonwealth, 995 S.W.2d 366, 375 (1999). Although Turner argues that no final judgment can be entered for RCr 11.42 purposes until the trial court makes its final sentencing determination under KRS 640.030, youthful offenders customarily file matter-of-right appeals from such judgments, see, e.g., Murphy v.

Commonwealth, Ky., 50 S.W.3d 173 (2001). In the case at bar, Turner waived his right to appeal when he entered a plea of guilty, and we thus hold that the trial court's judgment of conviction of sentence was a final judgment for RCr 11.42 purposes notwithstanding the possibility that the trial court could have modified the terms of Turner's sentence at a subsequent KRS 640.030 proceeding. Accordingly, Turner's petition for relief under RCr 11.42, which was filed on July 21, 1999, was filed more than a year late.

In his pro se motion, Turner also claimed that his transfer from district to circuit court was not conducted pursuant to KRS 640.010, which requires the district court to conduct a hearing during which certain factors are entertained before transferring a juvenile to circuit court. The trial court dismissed the claim as untimely under RCr 11.42(10). Unlike the claim discussed above, however, the trial court should have entertained the substance of the motion under CR 60.02. CR 60.02(e) authorizes relief where a judgment is void. If Turner were transferred without a valid transfer order, then the circuit court would have lacked subject matter jurisdiction, effectively rendering any judgment void. Johnson v. Commonwealth, Ky., 606 S.W. 2d 622 (1980). Thus, Turner's claim may be considered under CR 60.02.

However, it is not necessary to remand this matter to the trial court for consideration of Turner's jurisdictional claim; a review of the record reveals that his arguments are without merit. On October 19, 1994, before the Jefferson District Court, a hearing pursuant to KRS 640.010 was held, at which Turner's defense counsel waived written findings of fact as to the issue of transfer. Consequently, the court granted the Commonwealth's motion for transfer. Therefore, all provisions of KRS 640.010 were satisfied and Turner was properly transferred to the circuit court.

Withdrawal of Guilty Plea

Turner next argues that he should be permitted to withdraw his guilty plea because he was not afforded a timely hearing pursuant to KRS 640.030, commonly referred to as an "eighteen-year-old hearing." According to Turner, the denial of his eighteen-year-old hearing constitutes such a deviance from the accepted plea agreement as to warrant the opportunity for withdrawal under RCr 8.10. Turner goes on to argue that the trial court's failure to offer an opportunity for withdrawal pursuant to RCr 8.10 amounts to substantial error under RCr 10.26. The Commonwealth counters that this issue is not properly before this Court for review, as Turner did not present this issue to the trial court in any manner. In the alternative, the Commonwealth argues that the provisions of the plea agreement were accepted by the trial court and have been complied with, so no substantial error exists.

Turner concedes that this issue was not presented to the trial court, as the Commonwealth points out. However, Turner brings this argument under RCr 10.26, which permits review of errors constituting palpable error that affect the substantial rights of the party, "even though insufficiently raised or preserved for review." Of course, a finding of palpable error must be predicated on a finding that the delay of Turner's KRS 640.030 hearing amounts to a deviation from his plea agreement warranting an opportunity for withdrawal. We hold that it does not.

There is no doubt that Turner inexplicably was denied his statutory rights under KRS 640.030. Furthermore, Turner correctly points out that a defendant must be given the opportunity to withdraw a guilty plea when the trial court fails to follow the terms of the agreement. Kennedy v. Commonwealth, Ky. App., 962 S.W.3d 880, 882 (1997). Here, Turner claims that implicit in that plea agreement was the possibility that he would

be discharged at his eighteen-year-old hearing. KRS 640.030(2) provides the sentencing court with three options at the eighteen-year-old hearing: (1) to place the offender on probation or conditional discharge, (2) to return the offender to the custody of the Department of Juvenile Justice for six months or less at the end of which the offender will reappear before the court, or (3) to incarcerate the offender in an adult facility. The delay in Turner's eighteen-year-old hearing essentially denied him the opportunity to be eligible for option two; that is, to be returned to the juvenile facility for up to six months, at which point the sentencing court would revisit the case and either release the offender or sentence him or her to an adult facility. We hold that the loss of this option, in Turner's case, does not amount to a modification of his plea agreement and, consequently, no prejudicial error occurred.

In order for an error to amount to palpable error, there must be a showing that a different result would follow absent the claimed error. In other words, the error must be prejudicial. Abernathy v. Commonwealth, Ky., 439 S.W.2d 949, 952 (1969), overruled in part on other grounds, Blake v. Commonwealth, Ky., 646 S.W.2d 718 (1988). Here, Turner was denied the opportunity to spend another six months in the custody of the Department of Juvenile Justice, in the hope that he then would be released on probation or conditional discharge. There is nothing in the record to show, however, that the requisite different result would have followed if Turner had been afforded his KRS 640.030 hearing in 1996. The sentencing court ordered his transfer to the adult facility without the hearing, evidencing its opinion that Turner not be released. Furthermore, at his belated eighteen-year-old hearing, the lower court might have considered the extra four years that Turner had served and then ordered probation or conditional discharge. The lower court refused and ordered Turner to return to the

Department of Corrections, citing the seriousness of Turner's offense. For those reasons, we find that Turner's plea agreement was not so substantially deviated from as to amount to prejudicial error. He was sentenced to life imprisonment pursuant to the plea agreement, and was granted a KRS 640.030 hearing at which time the issue of probation or conditional discharge was contemplated, as required by statute. While Turner did receive this hearing four years late, in violation of the statute, he was nonetheless given the opportunity to be considered for probation and there is nothing in the record to show that a different result would have followed had the hearing been held in 1996. The lower court did not err in refusing to allow Turner to withdraw his guilty plea and therefore, no prejudicial error exists.

Violation of KRS 640.030

Turner's final claim is that the trial court erred in failing to vacate his sentence and order his release from prison due to the violation of KRS 640.030. He reasons that, because a KRS 640.030 hearing was not held until well after he turned eighteen, the trial court lost jurisdiction to resentence him at the age of twenty-two and therefore, his sentence should be vacated. The Commonwealth responds that Turner waived his right to seek vacation of his sentence at the belated KRS 640.030 hearing.

Turning first to the issue of waiver, we determine that Turner did not waive his right to seek vacation of his sentence at the KRS 640.030 hearing held on May 4, 2000. While Turner's attorney stated that he was not seeking vacation of his sentence, Turner himself unequivocally stated that he did not wish to waive the right to have his sentence vacated. Also, the May 4, 2000 hearing was held to address Turner's pro se motion, throughout which he repeatedly requests immediate release. Where the actions of counsel differ from the wishes of the client, the court should effectuate the

wishes of the client. Sullivan v. Levin, Ky., 555 S.W.2d 261, 263 (1977), overruled on other grounds, Hale v. Hale, Ky., 772 S.W.2d 628 (1989). Therefore, we find that Turner did not waive this argument.

Looking to the substance of Turner's claim, we reiterate that there is no doubt Turner has been denied his statutory rights under KRS 640.030. His eighteen-year-old hearing was held over four years after he turned eighteen, and four years after he had been transferred to the adult penitentiary without the benefit of such hearing. The need for an eighteen-year-old hearing was brought to the attention of the sentencing court twice in 1996, but for some reason Turner was not given a hearing until 2000.

However, though Turner was not afforded his statutory right, we find that he was not prejudiced by this error. Turner pled guilty to the serious crime of murder, which occurred because he wished to rob the victim of a cell phone and a fight ensued. At the time he turned eighteen, he had only been in the custody of the Department of Juvenile Justice for seventeen months. It is highly improbable that, had Turner been afforded an eighteen-year-old hearing in 1996, a sentencing court would have done anything other than order his transfer to the adult correctional facility to fulfill the remainder of his life sentence. The sentencing court, in fact, did transfer Turner to the adult facility upon his eighteenth birthday – evidence that the court believed he should fulfill the remainder of his sentence. Furthermore, when the court finally did conduct an eighteen-year-old hearing, Turner was returned to the adult facility even though he had served an additional four years in prison. The trial court specifically cited the seriousness of his crime as the reason for denial of probation. Therefore, the violation of KRS 640.030 in this case does not rise to the level of reversible error.

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

All concur.

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ORDER DENYING PETITION FOR REHEARING
AND
MODIFYING OPINION ON THE COURT'S OWN MOTION

The petition for rehearing filed by appellant, Dajuan Turner, is hereby DENIED.

On the Court's own motion, this Court hereby modifies the opinion rendered on February 19, 2004 by the deletion and addition of language on pages 3 and 4 of that opinion. Due to pagination, the attached unpublished opinion substitutes in full for the previously rendered opinion.

All concur.

Entered: May 20, 2004.



CHIEF JUSTICE