

Commonwealth Of Kentucky

Court of Appeals

NO. 2001-CA-000611-MR

DAVID WARD

APPELLANT

v. APPEAL FROM MARSHALL CIRCUIT COURT
HONORABLE DENNIS R. FOUST, JUDGE
ACTION NO. 98-CR-00165

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: KNOPF, TACKETT AND TAYLOR, JUDGES.

TAYLOR, JUDGE: David Ward brings this appeal from an order entered February 20, 2001, by the Marshall Circuit Court denying his motion to amend, modify or vacate sentence pursuant to Ky. R. Crim. P. (RCr) 13.04 and Ky. R. Civ. P. (CR) 60.02 and CR 60.03. Ward seeks to vacate his sentence based upon the argument that Kentucky Revised Statutes (KRS) 218A.1432 is unconstitutionally vague and overbroad and its enforcement

violates the due process and equal protection clauses under both the United States and Kentucky Constitutions. We affirm.

On December 21, 1998, the grand jury of Marshall Circuit Court indicted Ward, charging him with manufacturing methamphetamine while being in possession of a firearm. Shortly thereafter, Ward moved to suppress the items seized under a warrant because the affidavit filed in support of the search warrant did not provide probable cause. The trial court denied the motion. On May 3, 1999, Ward entered a conditional guilty plea, pursuant to RCr 8.09, to manufacturing methamphetamine (without a firearm enhancement). Ward reserved his right to appellate review of the trial court's ruling on his suppression motion only. The trial court entered its final judgment of conviction on July 19, 1999 and sentenced Ward to imprisonment for fifteen years. Ward appealed his conviction to this Court in appeal number 1999-CA-001891-MR. By unpublished opinion rendered July 21, 2000, the judgment of the Marshall Circuit Court was affirmed. Ward subsequently filed a Motion for Discretionary Review with the Supreme Court of Kentucky, which was denied by Order entered November 15, 2000.

On January 18, 2001, Ward then filed in the Marshall Circuit Court, a motion to amend, modify or vacate his sentence,

pursuant to RCr 13.04, CR 60.02 and CR 60.03.¹ In this Motion, Ward now challenges the constitutionality of KRS 218A.1432, the statute under which Ward had pled guilty. At no time during the trial court proceeding nor while this matter was on appeal, did Ward ever raise the issue regarding the constitutionality of KRS 218A.1432. The Marshall Circuit Court by Order entered February 20, 2001, denied Ward's motion. This appeal follows.

The sole issue raised by Ward on this appeal is that KRS 218A.1432 is unconstitutionally vague and thus his sentence should be vacated and he should be released from incarceration. The Court disagrees.

Initially, Ward's challenge to the constitutionality of this statute has not been properly made nor preserved. RCr 8.09 specifically provides that a defendant may enter a conditional plea of guilty while reserving the right to appeal the judgment to review any adverse determination of any specified trial or pretrial motion. We have carefully reviewed the record below, including the plea agreement entered into by Ward. At no time did Ward ever raise the constitutionality of the statute that he was being charged with as a defense nor did he preserve such a challenge in his plea agreement.

¹ The actual style of Ward's motion was "Motion to Amend, Modify or Vacate Sentence Pursuant to Rcr 13.04; CR 60.02; CR 60.03; Article I, Sections 9 and 10 and the Fifth, Eighth and Fourteenth Amendments to the United States Constitution, and Sections Two, Eleven, Seventeen, Nineteen, and Twenty-six of the Kentucky Constitution."

Furthermore, Ward failed to raise this issue by way of a RCr 11.42 motion, which would have been proper after entry of the judgment.

Ward also failed to raise this issue in his earlier appeal to this Court. Only after the Supreme Court denied discretionary review did Ward attempt this collateral attack on his judgment via CR 60.02 and CR 60.03. CR 60.02 is not a separate avenue of appeal to re-litigate issues which were or could have been raised in a motion under RCr 11.42. Land v. Commonwealth, Ky., 986 S.W.2d 440, 442 (1999).

Additionally, this Court does not believe that Ward's CR 60.02 motion sets forth sufficient grounds to vacate the judgment as required by the rule, nor has the motion been timely filed, given the final judgment of conviction was entered on July 19, 1999 and the motion was filed on January 18, 2001. For this reason, there exists no independent ground under CR 60.03 to bring this motion.

Finally, any issue regarding the constitutionality of KRS 218A.1432 has recently been considered and addressed by our highest court. In Kotila v. Commonwealth, Ky., 114 S.W.3d 226, 249 (2003), the Supreme Court of Kentucky has held that this statute passes constitutional muster and is not unconstitutionally vague.

For the foregoing reasons, the Order of the Marshall
Circuit Court is affirmed.

ALL CONCUR.

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