

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2001-CA-000619-MR

TROY LEE THOMAS

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE THOMAS J. KNOFF, JUDGE  
ACTION NO. 95-CR-000634

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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

BEFORE: BUCKINGHAM, COMBS, and TACKETT, Judges.

COMBS, JUDGE. Troy Thomas appeals *pro se* from an order of May 19, 2000, of the Jefferson Circuit Court, which denied his motion for post-conviction relief pursuant to CR<sup>1</sup> 60.02. Thomas argues that his conviction and fifteen-year sentence are impermissibly based on an involuntary guilty plea. He contends that although the trial court recognized the invalidity of his conviction, it refused to set it aside. After our review of the

---

<sup>1</sup> Kentucky Rules of Civil Procedure.

record, we conclude that the trial court did not abuse its discretion in denying Thomas's motion. Therefore, we affirm.

On March 16, 1995, Thomas was indicted on three counts of theft by unlawful taking over \$300 and three counts of receiving stolen property over \$300. On July 12, 1995, he entered a plea of guilty to all six crimes. In exchange for his guilty plea, the Commonwealth agreed to recommend a sentence of two (2) years on each of the three counts of theft and three counts of receiving stolen property -- to run concurrently -- for a total of two (2) years. It also agreed to leave the issue of probation to the discretion of the trial court. During his plea colloquy with the court, Thomas acknowledged that he had broken into three automobiles and that he had removed stereo equipment valued at more than \$300 from each vehicle.

When Thomas failed to appear in court for his sentencing, a warrant was issued for his arrest. He remained at large for nearly two years before he was apprehended and arrested in June 1997. Before finally imposing its sentence on July 18, 1997, the trial court heard testimony from several individuals -- including Thomas's employer and members of his family. In asking that his sentence be probated, the witnesses testified that Thomas had led an exemplary life during the two years following his guilty plea and subsequent disappearance.

Initially, the trial court appeared disinclined to grant probation. However, because of Thomas's efforts at rehabilitation, it reluctantly agreed to probate his sentence for a period of five (5) years. The conditions for probation now included the imposition of the maximum sentence for the crimes. Consequently, the trial court gave Thomas the option of withdrawing his guilty plea or of being probated but sentenced to a term of five (5) years on each of the six crimes with which he was charged. Thomas chose the latter. Accordingly, he was sentenced to serve five (5) years on each count of the three counts of theft by unlawful taking to run consecutively and five (5) years on each of the three counts of receiving stolen property to run concurrently. He received a total of fifteen (15) years to serve. The trial court cautioned Thomas that if he did anything wrong during the five-year term of his probation, he would be required to serve the entire fifteen-year sentence.

Nearly two years later, on May 26, 1999, the Commonwealth moved to revoke Thomas's probation. At the revocation hearing, Thomas admitted that he had tested positive for drugs on five separate occasions -- thus violating a condition of his probation. In an order of July 12, 1999, the trial court again gave Thomas the opportunity to remain out of prison and remanded the Commonwealth's motion. However, it also

ordered that Thomas's probation would be automatically revoked if another probation violation were established. In September 1999, Thomas tested positive on a drug test for cocaine. Another revocation proceeding ensued. On February 15, 2000, his probation was revoked and he was sent to prison.

On April 25, 2000, Thomas filed a motion to vacate his conviction. Although he stated that he was proceeding pursuant to CR 60.02, Thomas's claims raised issues of ineffective assistance of counsel more appropriate for resolution pursuant to RCr<sup>2</sup> 11.42. Specifically, Thomas alleged: that he had not been involved in stealing the stereo equipment found in the trunk of his car; that none of the items he was charged with stealing was worth \$300; that trial counsel neglected to inform him that he had defenses to the charges against him; and that if he had been properly advised, he would not have entered a plea of guilty. On May 1, 2000, the motion was denied. Thomas did not appeal.

In December 2000, Thomas filed a second motion to vacate his sentence pursuant to CR 60.02. In this motion, Thomas alleged that his convictions for theft and receiving stolen property involved the same property and that, therefore, his right to protection from exposure to double jeopardy under the state and federal constitutions had been violated. He

---

<sup>2</sup> Kentucky Rules of Criminal Procedure.

argued that because his plea and subsequent convictions were constitutionally defective, he was entitled to relief from his multiple sentences.

At the hearing on the motion, the trial court acknowledged the impropriety of Thomas's convictions for the theft and receipt of the same property. However, the trial court disagreed that Thomas established any extraordinary grounds to warrant the vacating of both sentences. Rather, the court offered to vacate Thomas's conviction and the three five-year sentences for the three counts of receiving stolen property. Thomas remained unsatisfied and argued that he should have been allowed to choose which conviction to be set aside. In light of the history of the case and the leniency that Thomas had received in his previous encounters with the court, the trial court refused to set aside the fifteen-year sentence for theft. The motion was denied and this appeal followed.

Thomas continues to argue that the double jeopardy violation caused his plea to be involuntary. He asks this Court to remand the matter to the Jefferson Circuit Court with directions to vacate his convictions and sentences and to allow him to begin the plea process anew. The Commonwealth argues that Thomas should have raised his double jeopardy concerns in a direct appeal or in a motion filed pursuant to RCr 11.42. It also contends that the CR 60.02 motion was untimely, that the

motion violates the rule against filing successive post-judgment motions, and that the trial court did not abuse its discretion in denying Thomas's motion for relief.

We have reviewed the record and conclude that Thomas's claim for post-conviction relief was correctly denied. In order to establish entitlement to relief under CR 60.02, Thomas was required to demonstrate that he suffered injustice of an extraordinary nature. See, Barnett v. Commonwealth, Ky., 979 S.W.2d 98, 100 (1998). The record refutes any notion that Thomas would not have entered into the plea agreement even if he had been properly advised that the principles of double jeopardy precluded his conviction and sentence for both theft and receiving stolen property. On the contrary, the record reflects that Thomas, who was represented by counsel, willingly agreed to an increase in his negotiated sentence (which had been a sentence totalling two years on all six charges) to fifteen years as a *quid pro quo* to retain his freedom. The plea agreement successfully secured a favorable result for Thomas under the circumstances. We cannot conclude that the plea was involuntary for purposes of extraordinary relief contemplated by CR 60.02.

We note that Thomas's sentences for receiving stolen property were to run concurrently with his sentences for theft. Although error occurred, Thomas will not be required to serve

any additional time in custody because of the improper convictions. For these reasons, we believe that the trial court crafted a sufficient remedy for the double jeopardy violation by offering to vacate Thomas's conviction for receiving stolen property.

Having concluded that the trial court did not abuse its discretion in refusing to vacate Thomas's entire sentence, we affirm the order of the Jefferson Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Troy Thomas, *pro se*  
Lagrange, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler III  
Attorney General of Kentucky

George G. Seelig  
Assistant Attorney General  
Frankfort, Kentucky