

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000204-MR

MICHAEL W. STRICKER

APPELLANT

v. APPEAL FROM MARION CIRCUIT COURT
HONORABLE DOUGHLAS M. GEORGE, JUDGE
ACTION NO. 93-CR-00082

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING IN PART,
VACATING IN PART AND REMANDING

** ** * * * * *

BEFORE: BARBER, COMBS, and KNOPF, Judges.

COMBS, JUDGE. The appellant, Michael W. Stricker, challenges the denial of his *pro se* motion to vacate judgment or sentence or, in the alternative, to compel compliance with the plea bargain agreement.

Pursuant to the terms of his plea agreement, Stricker is serving two concurrent twenty-year sentences for burglary and theft as a result of a guilty plea which he entered on July 16, 2001. Stricker claims that he should receive twenty-one (21)

months and five (5) days of additional credit for his prior federal sentences.

On July 17, 1990, a federal grand jury indicted Stricker for conspiracy to distribute marijuana. He entered a plea of guilty and was sentenced to twelve (12) months of imprisonment to commence on January 3, 1991, and to be followed by five (5) years of supervised release.

On February 25, 1993, Stricker committed various offenses, which ultimately led to his indictment in Marion Circuit Court on June 7, 1993, for burglary in the first degree, robbery in the first degree, theft, and PFO in the first degree. A warrant for his arrest was issued.

Meanwhile, on September 9, 1993, Stricker began serving a twenty-month federal sentence. Neither the record nor the briefs submitted to this court specify the offense for which this sentence was imposed or whether it relates to the earlier federal sentence of twelve months for conspiracy to distribute marijuana.

On April 4, 1994, Stricker was transferred from the federal penitentiary to the Marion County jail to stand trial on the Kentucky indictment (No. 93-CR-00082-002). Stricker has also stated that he served one month in June and July of 1994 in a state penitentiary in West Virginia on a fugitive warrant from Kentucky.

Following a jury trial, a final judgment was entered in the Marion County case on April 18, 1995. Stricker was sentenced to serve two life terms and twenty years concurrently with each other but consecutively as to any prior terms or sentences because he was alleged to have been on probation or parole at the time of the commission of the offenses.

This judgment was modified by two subsequent appeals. First, the Kentucky Supreme Court ordered the dismissal of the count of theft on the grounds of double jeopardy (95-SC-627-MR). Second, on March 19, 2001, this court vacated his PFO first-degree conviction because of ineffective assistance of counsel and remanded the case to the circuit court for further proceedings (No. 1998-CA-002390-MR). As a result of our ruling, Stricker entered a guilty plea in circuit court to an amended count of PFO in the second degree, on July 16, 2001. He was sentenced to twenty years for each of the two counts of robbery and burglary.

Stricker subsequently made two motions alleging that he was not being properly credited for time that he had served on his federal sentences. In his first motion, Stricker argued that the Kentucky Department of Corrections had ignored the specific sentencing instructions of the final judgment by failing to award him credit for his federal time served. In his second motion, he asked that the judgment be vacated because his

guilty plea was induced by "a bargain not kept" (*i.e.*, the plea bargain agreement). In the alternative, he moved the court to order that he be credited with twenty-one (21) months and five (5) days, the time which he had served on his federal sentence. These motions were both denied by the circuit court, and Stricker appeals.

As a preliminary matter, the Commonwealth contends that this appeal is barred by the doctrine of *res judicata* because the issue of credit for federal sentences was addressed by the circuit court in response to Stricker's first motion. The Commonwealth argues that Stricker was thereafter barred from making subsequent motions to the circuit court regarding this issue and that his proper course of action would have been an appeal of the denial of the first motion.

We note that Stricker's motions were filed *pro se*, and *pro se* litigants are not held quite as rigidly to the procedural standards as litigants represented by counsel. See Beecham v. Commonwealth, Ky., 657 S.W.2d 234, 236 (1983). Furthermore, this court accepts appellant's argument that *res judicata* should not apply to this appeal because the motions differed substantially. The first motion requested declaratory relief under the literal terms of the judgment. The second motion

attacked the validity of the guilty plea itself and was in effect a motion for relief under RCr¹ 11.42.

The substantive aspect of this appeal concerns the variance between the wording of the written plea offer made to Stricker by the Commonwealth and the wording of the final judgment. In its written plea offer to Stricker, the Commonwealth made the following recommendation:

On plea of guilty to Amended charges of PFO II, Commonwealth recommends 20 years on each [robbery and burglary] count, concurrent one with the other for a total of 20 years, **to run concurrently with any and all Federal sentences currently applicable to defendant or applicable to him at any time since his arrest herein.**" (Emphasis added.)

However, the final judgment ordered imprisonment for a maximum term of "20 yrs. on each ct [count] to run concurrent & **concurrent with any Federal sentence now serving.**" (Emphasis added.)

The difference in wording will undoubtedly affect the length of Stricker's sentence. Stricker had served approximately seven months of the unspecified twenty-month federal sentence when the Kentucky arrest warrant was executed on April 4, 1994. Under the literal terms of the plea agreement, those seven months should be credited to him based upon an interpretation that the phrase "since his arrest herein"

¹ Kentucky Rules of Criminal Procedure.

refers to the execution of the warrant. KRS² 197.035, which permits federal sentences to be run concurrently with state sentences, provides as follows:

[i]f the additional sentence is designated to be served concurrently, he [the defendant] shall be considered as having started to serve said sentence on the day he was committed on the first sentence. [Stricker began his federal sentence on September 9, 1993]."

Stricker also contends that he should receive credit for the year that he served on the first federal charge in 1991 to be followed by five years of supervised release. However, there is insufficient evidence in the record to support this contention. His reasoning is premised on an assumption that he was still serving time on his sentence when in fact he was at liberty on a supervised release at the time of his arrest in Marion County on state charges. We do not agree that released supervision equates with time actually served. Similarly, the record and briefs provide an insufficient basis for addressing the validity of Stricker's contention that he should receive credit for approximately one month involving June and July of 1994.

Our inquiry is focused upon the disparity between the plea agreement and the final judgment. That obvious contradiction implicates RCr 8.10, which requires the court to

² Kentucky Revised Statutes.

allow a defendant the opportunity to withdraw his guilty plea when and if the court chooses to deviate from the plea agreement. See Kennedy v. Commonwealth, 962 S.W.2d 880, 882 (1997). Both the Supreme Court of the United States and the Supreme Court of Kentucky have emphasized the importance of honoring plea agreements. "A promise that induces a plea must be fulfilled." Santobello v. New York, 404 U.S. 257, 262 (1971), and "the government should not be allowed to welsh on its bargain." Workman v. Commonwealth, Ky., 580 S.W.2d 206, 207 (1979).

After our careful review of the record, we do not believe that the court consciously or deliberately deviated from the terms of the written plea agreement to which Stricker agreed. The Commonwealth argues that Stricker effectively waived any disparity between the written plea agreement and the court's oral sentencing. However, it is abundantly apparent from the record of the sentencing and the disposition of Stricker's motions that confusion reigned among Stricker, his counsel, the Commonwealth's Attorney, and the court as to what Stricker's actual time to be served would or would not include.

The colloquy revealed a clear lack of understanding as to the actual time to be served -- with the court ultimately deferring to a subsequent calculation of time by the Department of Corrections. The Commonwealth argues that Stricker agreed to

that unknown calculation of time when in fact his counsel, Steve Mirkin, harkened back to the written terms of the plea agreement upon hearing the forthright admission by Barry Bertram, the Commonwealth's Attorney, that he did not know what time was involved, asking that the record so reflect the lack of specificity.

The court asked Stricker:

Will you all agree to let Probation and Parole do the credit or the Department of Corrections? Are you comfortable with that Mr. Stricker? I need you to respond yes or no.

Stricker responded: "Yes sir." Bertram then made the following statement:

What I understand about concurrentness means . . . if somebody had a year's service on a federal time, when we said ours would run concurrent, didn't mean he'd get - what if he'd had six years on federal, he didn't get six years credit then on this sentence, he only gets credit . . . for whatever time he spent on this charge and once they're sentenced on both of them then it's - that's the part I understand that's concurrent, but to me . . . those are probation matters . . . I just don't want us to agree to something that's not to get credit for something that's not state time at all

Stricker's counsel, Mirkin, responded: "I think Corrections will do that calculating."

Bertram stated: "I want it on the record that I don't know what that is."

Finally, Mirkin asked the court to "impose sentence consistent with the plea agreement."

The court concluded by saying "I will give you [Stricker] credit . . . to be determined by the Department of Corrections. . . . If for some reason Corrections has a problem, we can take it up later."

This appeal involves the predictable problem that ensued. We cannot agree that Stricker validly waived any of his rights as waiver involves a knowing and voluntary relinquishment. The obvious confusion on all sides clearly negates the necessary element of "knowingly" entering into an agreement. Furthermore, we do not believe that the court can properly delegate to the Department of Corrections the task of construing the terms of a plea agreement when its oral pronouncement is at odds with its written terms.

Therefore, we vacate and remand this matter for an accurate determination of the trial court as to what Stricker's sentence should be. At issue is the period of approximately seven months of the unspecified twenty-month federal sentence that he was serving when he was arrested on April 4, 1994. As noted earlier in this opinion, we do not agree with Stricker that he should be credited for time involving supervised release from his other federal sentence. Upon an accurate determination by the court of the actual terms of the plea agreement, Stricker

should be entitled to invoke the protection of RCr 8.10 to have the opportunity to withdraw his guilty plea if the court should choose to deviate from his plea agreement. Kennedy, supra.

Accordingly, we affirm in part and vacate in part and remand for proceedings consistent with this opinion.

ALL CONCUR.

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