

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001365-MR

ARLISS WAYNE GROSS

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE THOMAS J. KNOFF, JUDGE
ACTION NO. 01-CR-002665

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BUCKINGHAM, GUIDUGLI AND McANULTY, JUDGES.

BUCKINGHAM, JUDGE: Arliss Wayne Gross killed the two-year-old son of his girlfriend, Susan Hagan, on November 12, 2001. On March 13, 2002, he signed a plea agreement with the Commonwealth and entered an Alford plea of guilty to the crimes of murder and tampering with physical evidence. Pursuant to the plea agreement, Gross was sentenced to thirty-seven years in prison for murder and five years in prison for tampering with physical

evidence. The court ordered the sentences to run concurrently for a total sentence of thirty-seven years.

On May 2, 2002, Gross filed a Motion for Modification/Reduction of Sentence. Therein, he claimed that the court did not hear all the facts and that the child's death was not intentional but was an accident. He also alleged in his motion that his lawyers failed him by coercing him into pleading guilty, by not asking the court to have him evaluated for competency, and by not calling witnesses that would support his theory that the death was an accident. He also asserted that his lawyers were inexperienced and did not devote sufficient time to his case. As far as the relief requested in the motion, Gross did not request that his conviction be vacated or reversed. Rather, he acknowledged that he "deserves to serve a sentence in prison," but he requested the court to reduce the charge to manslaughter and to reduce the sentence to ten years' imprisonment.

When Gross filed his motion, he did not specify that it was filed pursuant to any statute or rule. In its order denying Gross's motion, the trial court assumed that the motion was an attempt to seek postconviction relief pursuant to RCr¹ 11.42. Gross now argues in his brief that his motion was not an RCr 11.42 motion but was a motion for sentence modification or

¹ Kentucky Rules of Criminal Procedure.

reduction pursuant to KRS² 532.070 and CR³ 60.02. Although it is understandable that the trial court would view the motion as an RCr 11.42 motion since it alleged ineffective assistance of counsel, it does appear, as claimed by Gross, that the motion was one for sentence modification or reduction since the only relief that Gross was seeking was a reduction in the charge and the sentence.

Gross's primary argument seems to be that the trial court did not hear his version of the facts of the case and that, based on those facts, the charge and sentence should be reduced. What Gross overlooks is that he signed a plea agreement wherein he agreed to plead guilty to the murder charge and accept a thirty-seven year sentence. In light of that fact, the trial court clearly did not abuse its discretion in denying Gross's motion.

More importantly, we know of no authority under which the trial court could modify or amend the judgment of conviction and reduce the charge and sentence. Gross argues for relief pursuant to KRS 532.070. However, that statute allows for modification of the sentence only where it was initially fixed by a jury. That was not the case here; rather, Gross's sentence

² Kentucky Revised Statutes.

³ Kentucky Rules of Civil Procedure.

was fixed by the court following his guilty plea. Therefore, KRS 532.070 was not applicable.

As for Gross's allegations that his attorneys failed him and coerced him into pleading guilty, we conclude that such allegations are not the proper subject of a motion to modify or reduce a sentence or a motion pursuant to CR 60.02 but are best left for a motion pursuant to RCr 11.42. See Gross v. Commonwealth, Ky., 648 S.W.2d 853, 856-57 (1983). Although the trial court rejected Gross's ineffective assistance arguments, we do not believe that Gross is now precluded from filing a proper motion seeking relief pursuant to RCr 11.42.

The order of the Jefferson Circuit Court denying Gross's Motion for Modification/Reduction of Sentence is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Arliss Wayne Gross, *Pro Se*
Burgin, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler III
Attorney General of Kentucky

David A. Smith
Assistant Attorney General
Frankfort, Kentucky