

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-002103-MR

KENNETH SWARTZ

APPELLANT

v. APPEAL FROM BATH CIRCUIT COURT
HONORABLE WILLIAM B. MAINS, JUDGE
ACTION NO. 96-CR-00011

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** * * *

BEFORE: BUCKINGHAM, GUIDUGLI AND TACKETT, JUDGES.

GUIDUGLI, JUDGE. Kenneth Swartz ("Swartz") appeals from an order of the Bath Circuit Court denying his pro se motion for CR 60.02 relief from a criminal judgment and sentence. We affirm.

On October 17, 1996, Swartz was indicted by the Bath County Grand Jury on the charge of first-degree sodomy involving a female under the age of 12. On February 27, 1998, he accepted a plea offer from the Commonwealth, the terms of which called for him to plead guilty to the amended charge of two counts of

first-degree sexual abuse. Under the terms of the plea, the Commonwealth recommended two terms of five years each, to be served consecutively for a total sentence of ten years. The trial court accepted the plea, and on May 26, 1998 rendered a judgment and sentence reflecting the plea's terms.

On April 11, 2002, Swartz filed a CR 60.02 motion to modify his sentence, asking the court to impose concurrent rather than consecutive terms for a total sentence of five years in prison. As a basis for the motion, he maintained that equity demanded the relief sought. He also argued that the sentence constituted cruel and unusual punishment in violation of the Kentucky Constitution and United States Constitution. Swartz's motion was denied, and this appeal followed.

Swartz now argues that the trial court erred in denying his motion for CR 60.02 relief. He notes that he was originally indicted on one count of first-degree sodomy, and claims that he unknowingly and improperly pled guilty to two counts of first-degree sexual abuse under the plea agreement. He maintains that the court was without authority to accept a guilty plea on two counts as he was indicted under only one count, and that the sentence must be amended as it constitutes cruel and unusual punishment. He seeks to have the order on appeal reversed, and the matter remanded for entry of a single five year sentence.

We have closely studied Swartz's argument, and find no error in the denial of his motion for CR 60.02 relief. CR 60.02 provides in relevant part that, "[O]n motion a court may, upon such terms as are just, relieve a party or his legal representative from its final judgment, order, or proceeding upon the following grounds . . . (f) any . . . reason of an extraordinary nature justifying relief.¹

Swartz has offered nothing of an extraordinary nature showing that he is entitled to the relief sought. While represented by counsel, he accepted a plea offer from the Commonwealth rather than face the possibility of a substantially longer sentence had the matter gone to trial. The record indicates that he did so knowingly and voluntarily, and that he signed a waiver of rights reflecting the knowing and voluntary nature of the plea. As to his assertion that he could not have pled guilty to two counts of first-degree sexual abuse when the indictment alleged only one count of first-degree sodomy, the record reveals that the indictment was amended as part of the plea agreement.

Just as important, and as the Commonwealth properly notes, the entry of a guilty plea waives all defenses except that the indictment charged no offense. Centers v.

¹The basis for Swartz's motion below does not reasonably fall within sections (a) through (e).

Commonwealth, Ky., 799 S.W.2d 51 (1990). It is uncontroverted in the matter at bar that the indictment charged an offense, to wit, first-degree sodomy. This fact alone forms a sufficient basis upon which we may affirm the order on appeal.

Finally, we believe that the trial court's implicit conclusion that a sentence of two consecutive five-year terms of imprisonment following a plea to two counts of first-degree sexual abuse does not represent constitutionally-prohibited cruel and unusual punishment is correct. Even if a CR 60.02 motion was the correct mechanism for raising such an argument, and even if this argument was not waived by the entry of the guilty plea, we would not find it persuasive as the sentence falls squarely within the sentencing provisions for Class D felonies. KRS 532.060. As such, we find no error in the trial court's denial of Swartz's motion for relief.

For the foregoing reasons, we affirm the order of the Bath Circuit Court denying Swartz's motion for CR 60.02 relief.

ALL CONCUR.

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