

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-002562-MR

CARL W. CRICK

APPELLANT

APPEAL FROM HOPKINS CIRCUIT COURT
v. HONORABLE CHARLES W. BOTELER, JR., JUDGE
ACTION NO. 99-CR-00288

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** *

BEFORE: BAKER, COMBS, and SCHRODER, Judges.

COMBS, JUDGE. Carl Crick appeals *pro se* from an order of the Hopkins Circuit Court denying his motion to vacate or set aside his sentence pursuant to RCr¹ 11.42 and CR² 60.02. Finding no error, we affirm.

On December 14, 1999, Crick was charged with the crimes of complicity to robbery and complicity to murder. The indictment alleged that he helped his girlfriend, Margaret

¹ Kentucky Rules of Criminal Procedure.

² Kentucky Rules of Civil Procedure.

Deason, rob and murder Welby Phillips. Pursuant to a plea agreement, on February 16, 2001, Crick entered a plea of guilty to two amended charges of tampering with evidence. According to the terms of the agreement, the Commonwealth agreed to recommend that Crick be sentenced to five years on one count of tampering and to two years on the second count -- with the sentences to run consecutively for a total of seven years. In exchange for the reduction of the charges pending against him, Crick agreed to testify against his co-defendant, Deason.

Before accepting the plea, the trial judge engaged in a lengthy colloquy with Crick to insure that Crick was informed of the constitutional rights that he was waiving by pleading guilty and that he was satisfied with the representation of his attorney. The judge also questioned Crick about his participation in the crimes against Phillips in order to ascertain that there was a factual basis for the plea to the amended charges. Crick confessed that he had wiped fingerprints from the scene of the crimes, had disposed of cigarette butts bearing traces of lipstick, and had removed a blood-stained chair from the premises. The trial court accepted the plea but postponed sentencing until after Deason's trial.

On February 4, 2002, Crick was sentenced to serve seven years in prison. Although the written judgment sentencing him conformed with the plea agreement in all respects, the trial

court erred in reciting the grounds, misstating that Crick was being sentenced for tampering with physical evidence and for the crime of facilitation to commit murder rather than for the two counts of tampering with evidence.

On July 29, 2002, Crick moved the trial court to vacate, set aside, or correct his sentence. As grounds for his motion, he argued: (1) that the trial court was biased against him; (2) that his trial counsel had rendered ineffective assistance by failing to correct the trial court's oral misstatement at sentencing; and (3) that his plea to two counts of tampering with physical evidence violated his constitutional guarantees against double jeopardy.

On September 18, 2002, the trial court entered an order addressing and correcting the sentencing error.

The plea agreement and judgement [sic] as originally filed, with 2 counts of tampering with evidence, are correct and said judgment on those counts for a total of 7 years was correctly imposed.

On November 7, 2002, the trial court entered a second order addressing Crick's motion to set aside the judgment. The Court determined that Crick's allegation of bias was without merit because: (1) Crick failed to present any evidence that he was treated unfairly by the trial court so as to indicate the alleged bias; (2) Crick had been sentenced consistently with his plea agreement. With respect to the double jeopardy issue, the

trial court noted that Crick himself requested that both of the charges against him be reduced to tampering with physical evidence. Additionally, the court concluded that Crick's action of wiping away fingerprints constituted one count of tampering while his removal of the blood-stained chair constituted a separate crime. Crick's motion was denied, and this appeal followed.

In his appeal, Crick argues that he is "imprisoned without any sentence whatsoever" and that the trial court erred in refusing to correct this injustice. (Appellant's brief p. 6.) He also argues that his constitutional rights have been violated because the trial court lacked jurisdiction to sentence him to serve five years for a crime for which he had never been indicted. Because he has already served the two-year sentence on one count of tampering, he seeks an order from this Court directing that he be immediately released from prison.

The sole basis for Crick's argument is the discrepancy between the court's oral statement at sentencing and the written judgment. However, as the Commonwealth points out, the written judgment correctly conformed to the plea agreement. Consequently, the trial court's erroneous citation has no legal import nor does it result in any adverse consequences to Crick.

When there is an inconsistency between oral statements of a court and an order reduced to writing, the latter must prevail.

Assuming for the sake of argument that the statements are inconsistent, if they could be used to, in effect, impeach the trial court's written order, "the result would be the destruction of any certainly as to the effect of judgments and a state of chaos in judicial proceedings."

Commonwealth v. Taber, Ky., 941 S.W.2d 463, 464 (1997), quoting Commonwealth v. Hicks, Ky., 869 S.W.2d 35, at 38 (1994).

Crick cannot avoid the terms of a legitimate plea agreement by recourse to an inadvertent error which was readily susceptible of correction. Cardwell v. Commonwealth, Ky., 12 S.W.3d 672, 675 (2000). As observed by our Supreme Court, sentencing should not "be a game in which a wrong move by the judge means immunity for the prisoner." Id., quoting Bozza v. United States, 330 U.S. 160, 166-667, 67 S.Ct. 645, 649, 91 L.Ed. 818 (1947). The trial court acted properly in declining the requested relief.

Crick also contends that the judgment and sentence violate the protections provided by the double jeopardy clauses of the state and federal constitutions. He contends that he visited the scene of the crime on only one occasion and that he was punished twice for the "very same crime." (Appellant's brief p. 8.) However, Crick did commit two separate acts of tampering with evidence during the course of that single visit. Protection against double jeopardy does not apply where separate offenses occur during the same transaction. Burge v.

Commonwealth, Ky., 947 S.W.2d 805 (1996). Crick pleaded guilty to violating KRS³ 524.100, which provides as follows:

- (1) A person is guilty of tampering with physical evidence when, believing that an official proceeding is pending or may be instituted, he:
 - (a) Destroys, mutilates, conceals, removes or alters physical evidence which he believes is about to be produced or used in the official proceeding with intent to impair its verity or availability in the official proceeding. . .

The trial court correctly reasoned that each act of destroying, altering, or removing physical evidence constituted a distinct and separate offense. In reviewing the test set forth in Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932), we conclude that the two counts of tampering (one involving wiping fingerprints from the scene and the other removing a chair) each required some proof which the other did not.

We need not address the Commonwealth's argument that Crick waived the right to invoke the double jeopardy clause by his own suggestion that both charges be reduced to tampering. Regardless of any waiver - implied or explicit, a constitutional analysis pursuant to Blockburger suffices to sustain the

³ Kentucky Revised Statutes.

determination of the trial court that Crick's rights were not violated.

The judgment of the Hopkins Circuit Court is affirmed.

ALL CONCUR.

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