

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-000651-MR

DAVID WAYNE PARKS

APPELLANT

v. APPEAL FROM KNOX CIRCUIT COURT
HONORABLE RODERICK MESSER, JUDGE
ACTION NO. 87-CR-00087

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** * * *

BEFORE: GUIDUGLI, McANULTY AND MINTON, JUDGES.

GUIDUGLI, JUDGE. David Wayne Parks ("Parks") appeals from an order of the Knox Circuit Court denying his motion for RCr 60.02 relief. Parks argued below that his plea of guilty to criminal charges was not entered knowingly, intelligently, and voluntarily, and that he was denied the right to effective assistance of counsel. For the reasons stated herein, we affirm the order on appeal.

On December 10, 1987, Parks was indicted by the Knox County Grand Jury on charges of murder, first-degree robbery and first-degree burglary. The charges stemmed from a burglary and robbery occurring at Partin's Grocery in Artemus, Kentucky, on September 18, 1987. Joyce Partin ("Partin") was shot and killed during the course of the robbery.

On November 14, 1988, Parks, with the assistance of counsel, pled guilty to murder and first-degree burglary in exchange for the Commonwealth's recommendation that Parks receive a sentence of twenty-five (25) years in prison on the murder charge and ten (10) years in prison on the burglary charge. On November 30, 1988, however, Parks filed a pro se motion to withdraw his guilty plea. As a basis for the motion, he contended that his counsel had "scared" him into pleading guilty to something he did not do. The motion was denied, and Parks later was sentenced to consecutive twenty-five (25) year and ten (10) year terms of imprisonment pursuant to the plea. Parks appealed to the Supreme Court of Kentucky, which rendered an opinion on May 2, 1991, holding that the circuit court did not abuse its discretion in denying Park's motion to withdraw his guilty plea.

On July 10, 2001, Parks filed a pro se CR 60.02(f) motion to vacate his judgment. Before the motion was heard, Parks filed a petition for writ of mandamus. Parks later

received appointed counsel from the Department of Public Advocacy ("DPA"), but on January 13, 2003, his appointed counsel tendered a motion to withdraw, stating that counsel's opinion was that a reasonable person would not pursue the motion at his own expense. On February 27, 2003, the circuit court rendered an order granting appointed counsel's motion to vacate the order appointing him, and denying Parks's motions for an evidentiary hearing and for CR 60.02(f) relief. This appeal followed.

Parks first argues that the circuit court erred in failing to conclude that his guilty plea was not entered knowingly, intelligently and voluntarily. He claims that he was under the influence of drugs and alcohol at the time of the offenses, that he was a minor (age 17) when the offenses occurred, and that as such he could not have had the requisite mens rea to be convicted of murder and burglary. He maintains that he was forced to plead guilty, and that the circuit court erred in failing to so rule.

We have closely examined Parks's argument and find it to be without merit. As the parties are well aware, Parks prosecuted a direct appeal from his conviction to the Supreme Court of Kentucky. Upon considering Parks's claims of error, the court concluded that there was no showing that the trial court abused its discretion in finding that the plea of guilty was knowing and intelligent. The instant issue either was

brought, or should have been brought, on direct appeal. Parks admits that the issue of drug and alcohol intoxication was raised in the guilty plea proceeding, and as such we must conclude that the issue should have been addressed on direct appeal.

Arguendo, had Parks not brought a direct appeal, the issue would have been properly maintained, if at all, via RCr 11.42. RCr 11.42 is a mechanism for collaterally attacking a judgment of conviction. RCr 11.42; Commonwealth v. Basnight, Ky. App., 770 S.W.2d 231 (1989). It is limited to issues which cannot be raised on direct appeal, and was not designed to give a convicted defendant an additional appeal. Id.; Sanders v. Commonwealth, Ky., 89 S.W.3d 380 (2002), citing Sanborn v. Commonwealth, Ky., 975 S.W.2d 905 (1998). Issues may be raised via CR 60.02 only when other procedural mechanisms are unavailable. McQueen v. Commonwealth, Ky., 948 S.W.2d 415 (1997).

The Commonwealth properly notes that a criminal defendant may not endlessly litigate the same issue. Commonwealth v. Tamme, Ky., 83 S.W.3d 465 (2002). Parks had the opportunity to address the issue of intoxication on direct appeal and via RCr 11.42, and the circuit court correctly concluded that since all of the information set out in his affidavit and motion was known to him at the time of his guilty

plea, he was not entitled to prevail on his CR 60.02(f) motion on this issue.

The record also refutes Parks's assertion that he was a minor at the time the offenses were committed. He was born on October 1, 1968, and the offenses were committed on September 18, 1987, making him 18 years old. He was 20 years old on November 14, 1988, a fact which he states as part of the guilty plea colloquy. This issue is not a basis for tampering with the order on appeal.

Parks goes on to argue that he did not waive his right to have a jury fix his punishment under RCr 9.84(2). It provides, in relevant part, that a defendant who pleads guilty to a charge punishable by death may demand that his punishment be fixed by a jury. Parks contends that he was unaware of RCr 9.84(2) at the time of sentencing and would have demanded jury sentencing had he been aware of the rule.

We find no error on this issue. We have previously stated that,

. . . a knowing, voluntary and intelligent waiver does not necessarily include a requirement that the defendant be informed of every possible consequence and aspect of the guilty plea. A guilty plea that is brought about by a person's own free will is not less valid because he did not know all possible consequences of the plea and all possible alternative courses of action. To require such would lead to the absurd result

that a person pleading guilty would need a course in criminal law and penology.

Turner v. Commonwealth, Ky. App., 647 S.W.2d 500, 501 (1983).

On direct appeal in the matter at bar, the Supreme Court of Kentucky found no basis for concluding that Parks's guilty plea was not knowing, voluntary and intelligent. Accordingly, we find no error.

Parks's final argument is that he was denied effective assistance of counsel by counsel's failure to investigate the facts of his case. He maintains that counsel would have learned the Parks was under the influence of drugs and alcohol at the time of the offenses, that he was a minor, and that there was no unlawful entry into Partin's Grocery Store because it was open for business. He seeks to have his conviction reversed and the matter remanded for the appointment of new counsel and further proceedings.

We again find no error. As stated above, this issue should have been raised, if at all, via RCr 11.42. Commonwealth v. Basnight, Ky. App., 770 S.W.2d 231 (1989). Arguendo, even if this issue was properly brought via RCr 11.42, it would not provide a basis for relief because the record refutes the claims of ineffective assistance. Trial counsel was aware of the intoxication issue, evidenced by the fact that it was addressed as part of the guilty plea colloquy. And as we noted above,

Parks's claim of being a juvenile when the crime was committed is refuted by the record. The circuit court properly denied Parks's motion for CR 60.02 relief on this issue.

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

ALL CONCUR.

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