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NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2003-CA-000884-MR

KENNETH WAYNE STURGILL APPELLANT

v.

APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE RODERICK MESSER, JUDGE
INDICTMENT NO. 96-CR-00174

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION

AFFIRMING

** ** ** ** **

BEFORE: GUIDUGLI, MINTON and VANMETER, Judges.

MINTON, Judge. Kenneth Wayne Sturgill appeals from an order of the Laurel Circuit Court denying his motion for relief from judgment brought pursuant to Kentucky Rules of Civil Procedure (CR) 60.02(f). We affirm.

On October 24, 1996, the police were called to the residence of Rebecca Mitchell, where they found her dead from a gunshot wound. Based on information obtained from neighbors and acquaintances of Mitchell, the police arrested her long-time boyfriend, Kenneth Sturgill. On November 15, 1996, a Laurel

County Grand Jury indicted Sturgill on one felony count of murder,[1] one felony count of burglary in the first degree,[2] and one felony count of stalking in the second degree.[3] Following extensive negotiations, on January 16, 1998, Sturgill entered a plea of guilty to the amended charge of manslaughter in the first degree while under the influence of extreme emotional disturbance.[4] Under the plea agreement as stated by the prosecutor at the guilty plea hearing, the Commonwealth moved to amend the murder charge, to dismiss the other two counts of the indictment for burglary in the first degree and stalking in the first degree, and recommended a sentence of eighteen years in the penitentiary. The written plea agreement signed by Sturgill also stated that "it is understood that sentencing shall be under provisions of a violent offender." On February 20, 1998, the trial court sentenced Sturgill to serve eighteen years for manslaughter in the first degree consistent with the plea agreement.

On August 17, 1998, Sturgill filed a motion for shock probation and requested a hearing, arguing that he should be exempt from the restrictions making him ineligible for shock

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[1] Kentucky Revised Statute (KRS) 507.020.

[2] KRS 511.020.

[3] KRS 508.150.

[4] KRS 507.030(b)(a Class B felony).

probation under KRS 533.060(1)[5] because he had been a victim of domestic violence. Sturgill submitted an extensive affidavit describing his turbulent relationship with Rebecca Mitchell alleging that she repeatedly beat, harassed, and stalked him to the point that he was afraid of her. He also submitted affidavits from six other persons in support of his claims. Sturgill maintained that Mitchell was shot accidentally in a struggle for his gun after she had attacked him. On August 28, 1998, the trial court denied the motion without a hearing, stating Sturgill should have raised the issue prior to the final sentencing and that he had agreed to be sentenced as a violent offender under KRS 439.3401 under the plea agreement.

On October 14, 1999, Sturgill filed a motion to vacate his sentence pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42 based on ineffective assistance of counsel and a motion for appointment of counsel on the motion. Sturgill

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[5] This provision states as follows: (1) When a person has been convicted of an offense or has entered a plea of guilty to an offense classified as a Class A, B, or C felony and the commission of the offense involved the use of a weapon from which a shot or projectile may be discharged that is readily capable of producing death or other serious physical injury, the person shall not be eligible for probation, shock probation, or conditional discharge, except when the person establishes that the person against whom the weapon was used had previously or was then engaged in an act or acts of domestic violence and abuse as defined in KRS 403.720 against either the person convicted or a family member as defined in KRS 403.720 of the person convicted. If the person convicted claims to be exempt from this statute because that person was the victim of domestic violence and abuse as defined in KRS 403.720, the trial judge shall conduct a hearing and make findings to determine the validity of the claim and applicability of this exemption. The findings of the court shall be noted in the final judgment.

alleged that defense counsel rendered constitutionally ineffective assistance for failing to investigate and assert a defense based on a claim that he was a victim of domestic violence, failing to move to suppress evidence, and failing to acknowledge a conflict of interest. The trial court appointed counsel to represent Sturgill on the RCr 11.42 motion, who notified the court that after consulting with Sturgill, he would not be filing a supplemental memorandum. On February 16, 2000, the trial court denied the RCr 11.42 motion, stating with reference to the claim of counsel's failure to assert a domestic violence defense that Sturgill had waived that claim by agreeing to be sentenced as a violent offender. Sturgill filed a motion to amend the findings pursuant to CR 52.02, which the trial court summarily denied. On August 3, 2001, this Court rendered an opinion affirming the trial court's denial of Sturgill's RCr 11.42 motion.[6] The Kentucky Supreme Court denied discretionary review of this Court's opinion.[7]

On January 3, 2003, Sturgill filed a motion pursuant to CR 60.02(f) requesting that the judgment be amended to a sentence of probation, rather than incarceration. He contended

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[6] *See* Sturgill v. Commonwealth, 2000-CA-000458-MR (not to be published).

[7] *See* Sturgill v. Commonwealth, 2001-SC-0671-D (entered May 8, 2002).

that the trial court violated his due process right to be considered for probation.[8] The trial court entered an order on January 30, 2003, denying the motion and stating it had considered and declined to grant probation at the time of sentencing. This appeal followed.

On appeal, Sturgill contends that he had a right to be considered for probation under the due process clauses in the Fifth and Fourteenth Amendments of the United States Constitution and Section 2 of the Kentucky Constitution. In fact, it is well established that defendants have no constitutional right to probation.[9] The grant of probation is considered a special privilege or act of grace extended to a defendant for his welfare and the welfare of society.[10] While probation is a function of the judicial branch,[11] the legislature has the initial power to limit or prohibit probation.[12] As a

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[8] As grounds for a sentence of probation, Sturgill asserted that placing him on probation would benefit the public interest "considering that the Kentucky Department of Correction being Five (5) million dollars in debt." He also quoted a passage from Shakespeare concerning the quality of mercy.

[9] *See* Berman v. United States, 302 U.S. 211, 58 S.Ct. 164, 82 L.Ed. 204 (1937); United States v. Belgard, 894 F.2d 1092 (9th Cir. 1990); King v. Commonwealth, Ky., 471 S.W.2d 297 (1971).

[10] Ridley v. Commonwealth, Ky., 287 S.W.2d 156 (1956); Tiryung v. Commonwealth, Ky.App., 717 S.W.2d 503 (1986).

[11] *See, e.g.*, Prater v. Commonwealth, Ky., 82 S.W.3d 898 (2002).

[12] *See* Mullins v. Commonwealth, Ky.App., 956 S.W.2d 222 (1997).

result, any right Sturgill may have to probation derives from and is defined by statutory law.[13]

As an initial matter, we note that review of Sturgill's claim is procedurally barred. In Gross v. Commonwealth,[14] the Kentucky Supreme Court set out the procedure for post-judgment review in criminal cases. The Court stated that the structure for appellate review is not haphazard or overlapping.[15] It held that a criminal defendant must first bring a direct appeal when available, then utilize RCr 11.42 by raising every error of which he should be aware, and only utilize CR 60.02 for extraordinary situations not otherwise subject to relief by direct appeal or by way of RCr 11.42.[16] More recently in McQueen v. Commonwealth,[17] the Supreme Court reaffirmed the procedural requirements set out in Gross, when it stated:

> A defendant who is in custody under sentence or on probation, parole or conditional discharge is required to avail himself of RCr 11.42 as to any ground of which he is

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[13] *Id. See also* KRS 533.010 (giving courts discretionary authority to grant probation for defendants not sentenced to death and setting forth factors to be considered and limitations).

[14] Ky., 648 S.W.2d 853 (1983).

[15] *Id.* at 856.

[16] *Id. See also* Bowling v. Commonwealth, Ky., 981 S.W.2d 545, 549 (1998); Sanborn v. Commonwealth, Ky., 975 S.W.2d 905, 908-09 (1998).

[17] Ky., 948 S.W.2d 415, 416 (1997).

> aware, or should be aware, during the period when the remedy is available to him. Civil Rule 60.02 is not intended merely as an additional opportunity to relitigate the same issues which could "reasonably have been presented" by direct appeal or RCr 11.42 proceedings. RCr 11.42; Gross, *supra* at 855. The obvious purpose of this principle is to prevent the relitigation of issues which either were or could have been litigated in a similar proceeding.[18]

Even though a defendant generally waives all non-jurisdictional defenses by entering a guilty plea, Kentucky courts have held that some sentencing issues may be brought on direct appeal because they are considered to be jurisdictional.[19] Other courts have recognized that a defendant may directly appeal the denial of probation even after a plea of guilty.[20]

Moreover, Sturgill clearly was statutorily ineligible for probation under KRS 533.060(1) because he entered a guilty plea to manslaughter in the first degree while under the influence of extreme emotional disturbance, which is a Class B felony, involving the use of a handgun. KRS 533.060(1), however, provides an exception for victims of domestic abuse; and Sturgill specifically raised and sought consideration for

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[18] *See also* Land v. Commonwealth, Ky., 986 S.W.2d 440, 442 (1999); Barnett v. Commonwealth, Ky., 979 S.W.2d 98, 101 (1998).

[19] *See* Hughes v. Commonwealth, Ky., 875 S.W.2d 99, 100 (1994); Gaither v. Commonwealth, Ky., 963 S.W.2d 621, 622 (1997).

[20] *See, e.g.*, Hughes, *supra*; Ware v. Commonwealth, Ky.App., 34 S.W.3d 383 (2000); Aviles v. Commonwealth, Ky.App., 17 S.W.3d 534 (2000); Fultz v. Commonwealth, Ky.App., 596 S.W.2d 28 (1979).

probation under that exception in his motion for shock probation. The trial court denied the motion, and Sturgill did not appeal that decision. Although KRS 439.265(2) precludes review of the denial of shock probation, in Terhune v. Commonwealth,[21] which involved a defendant who had pled guilty to various felonies, the court held that a defendant could bring a direct appeal of a denial of shock probation that concerned a question of the trial court's authority or jurisdiction to grant shock probation, as opposed to a challenge on the merits. Thus, Sturgill could have challenged his eligibility for probation in a direct appeal of the denial of his motion for shock probation. Sturgill also raised the issue of his status as a victim of domestic violence in his RCr 11.42 motion under the rubric of ineffective assistance of counsel although he failed to link it specifically to the question of probation. Consequently, Sturgill could and should have raised the question of probation either on direct appeal of the original judgment, or the order denying shock probation, or in his RCr 11.42, and is precluded from raising it under CR 60.02.

In addition to the procedural default, Sturgill's complaint lacks substantive merit. Sturgill claims that the trial court abused its discretion by denying his right to be

[21] Ky.App., 907 S.W.2d 779 (1995).

considered for probation. A review of the record indicates that the trial court did consider but denied Sturgill probation, consistent with the requirements of KRS 533.010(2). The court reviewed the presentence report after giving Sturgill an opportunity to challenge its contents and stated in the final judgment that it was denying probation because (1) there was a substantial risk that he would commit another crime during any period of probation; (2) he was in need of correctional treatment that could be provided most effectively by his commitment to a correctional institution; and (3) probation would have unduly depreciated the seriousness of his crime. Indeed, in his CR 60.02 motion, Sturgill requested probation, based on the fact that this was his first felony conviction, the Department of Corrections was in debt, and the court should extend mercy to his situation. These factors existed when the trial court initially denied probation. Even if his complaint could be raised under CR 60.02, Sturgill has not shown that the trial court improperly failed to consider probation, failed to follow the statutory law, or abused its discretion. As a result, the trial court did not err in denying the motion.

For the foregoing reasons, we affirm the order of the Laurel Circuit Court.

ALL CONCUR.

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