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Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001654-MR

FRANK DUNCAN — APPELLANT

v.

APPEAL FROM GREEN CIRCUIT COURT
HONORABLE ALLAN RAY BERTRAM, JUDGE
ACTION NO. 92-CR-00003

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DYCHE, HENRY, AND TACKETT, JUDGES.

TACKETT, JUDGE: Frank Duncan appeals from the decision of the Green Circuit Court denying post-conviction relief pursuant to CR 60.02(E) and (F). The sole issue before the court is whether or not the denial of the motion was appropriate. We affirm.

Appellant Frank Duncan was indicted on February 5, 1992 and convicted on December 20, 1992 under a plea agreement reached on December 9, 1992 on four (4) counts of Rape in the First Degree. He was sentenced by the Circuit Court to twenty

(20) years on each of the counts to run concurrently for a total of twenty (20) years with the Department of Corrections.

A Kentucky Rule of Criminal Procedure 11.42 motion was filed on Duncan's behalf on January 3, 1995 arguing that Duncan was incompetent to enter a guilty plea, which was denied by the trial court on January 11, 1995. Over three (3) years later, Duncan filed a *pro se* motion seeking relief under Kentucky Rule of Civil Procedure (CR) 60.02(E) and (F), in which he sought equitable relief based on his poor health, incompetence at the time of his plea, evidence issues and his inability to complete sex offender treatment. On September 11, 1998, the Department of Public Advocacy entered an appearance on Duncan's behalf. Counsel for Duncan continued to develop arguments regarding his health and the length of his sentence.

On May 23, 2001, an evidentiary hearing was held on the CR 60.02 motion. At the hearing, Appellant's counsel outlined several health problems that the Appellant had incurred while in detention, including: hypertension, strokes, diabetes, ulcers and several other illnesses including "old age dementia." Following this testimony as well as the Appellant taking the stand himself, the issue was delayed so that the Commonwealth could consult with the victim and her family. Subsequently, a status hearing was convened on June 19, 2001, at which time the Commonwealth relayed the family's objection to any release. The

Appellant then changed his request to shock probation and the trial court took the matter under submission.

Nearly one (1) year later, the trial court issued its ruling and a hearing for this matter was held on May 8, 2002. The trial court noted the Appellants demeanor and appearance, and while acknowledging his health concerns noted that they were not enough to form the basis of releasing him from custody. With that, the trial court formally denied his motion for relief under CR 60.02(e-f).

The appellant argues that not only did the trial court abuse its discretion in its denial of the CR 60.02(e-f) motion, but that he has also been illegally denied good time credit based upon Kentucky Revised Statute (KRS) 197.045(4). Finally, appellant claims that he was mentally incompetent at the time of his trial and plea. However, all of these arguments must fail.

When a trial court makes a ruling on a CR 60.02 motion, it will be left undisturbed unless there is a showing of an abuse of discretion. Bethlehem Minerals Co. v. Church and Mullins Corp., Ky., 887 S.W.2d 327 (1994). In order for an appellate court to find that the trial court abused its discretion in ruling on a CR 60.02 motion, there must be "a clear showing of extraordinary and compelling equities . . . ." Bishir v. Bishir, Ky., 698 S.W.2d 823, 826 (1985). In the present case, no abuse of discretion occurred.

The courts of Kentucky have previously addressed the ability of a movant to seek relief under CR 60.02(f) at length in Wine v. Commonwealth, Ky. App., 699 S.W.2d 752 (1985). In Wine, the defendant asserted that a hardship based on the effects of his prison time on his family was grounds for a vacated sentence. However, the appellate court rejected this reasoning. The court said that CR 60.02 only concerns itself with significant defects in the trial proceedings that could result in a substantial miscarriage of justice, saying "The hardships cited by the appellant have no relation to the trial proceedings or any additional undiscovered evidence not presented at trial but only concern the adverse effect the appellant's incarceration is having on his family. . .we simply fail to see how family hardships of *any severity* (emphasis added) are so extraordinary that a "substantial miscarriage of justice" will result and relief under CR 60.02(f) would be justified." Wine at 754. Similarly, the appellant's health in this case is in no way related to the trial proceedings or any new evidence, and although severe, his health is not reason alone for a vacated sentence. There is absolutely no evidence that there is a relationship between the appellant's health now and his guilty plea.

Furthermore, in weighing the equities of this case, vacating the appellant's sentence due to his health must be

compared to the injury that the appellant inflicted on his young victim. Notwithstanding the gruesome nature of some of the charges, some facts from the case need to be necessarily rehashed. The appellant admittedly raped his stepdaughter repeatedly, buying her ice cream to entice her into these encounters. He went so far as to keep a special blanket to rape his stepdaughter. As the trial court heard, the victim still fears the appellant and worries that if he is released that he will come after her again and try to repeat his actions. On the other hand, the trial court also looked at the health of the appellant. It is uncontroverted that his health has declined since he has been in prison, but that in itself does not tip the scales in his favor. The trial court noted both its observations from earlier hearings, and facts that showed that the appellant was in a facility that could adequately meet his medical needs as reasons not to allow relief under CR 60.02. In fact, the trial court noted, "the court's impression is that he's not so old or in such bad health that that would form the basis for releasing him from custody." (Tape of hearing from 5/8/02, 9:13:30-9:13:45).

It is abundantly clear from the record and the facts that there was no abuse of discretion in this decision. Not only did the appellant fail to make "a clear showing of extraordinary and compelling equities", Bishir, *supra*, but the

appellant also failed to show any relationship between his health and the original verdict at the trial court level. Thus, the trial court not only did not abuse its discretion with its ruling on the CR 60.02 motion, but was plainly correct in the decision.

On top of this claim however, the appellant makes two more arguments pertaining to this appeal. The first is that he was mentally incompetent at the time of his trial and plea. Unfortunately for the appellant, he did not raise this issue at the trial court level nor did he raise the issue or any facts during the appellate process until this point about this issue. As has long been the practice in the Commonwealth, the appellant "will not be permitted to feed one can of worms to the trial judge and another to the appellate court." Kennedy v. Commonwealth, Ky., 544 S.W.2d 219, 222 (1976). This argument is without preservation and support from the facts in the record and is thus meritless.

Finally, the appellant argues that under KRS 197.045(4) he is being illegally denied good time credit and parole eligibility by the Department of Corrections. Much like the claim of mental incompetence at trial, the appellant did not properly preserve this issue and brings it before the court for the first time in this appeal. Thus, this court cannot take it

under review based upon the same rationale that barred the mental incompetence issue. Kennedy, *supra*.

Assuming *arguendo* that the claim was preserved, the claim is still without merit. As the appellant admits, he was removed from the sex offender treatment program that would have helped him build up good time credit based upon his retardation and inability to complete the program. Under KRS 197.045(4), an inmate can be prohibited from acquiring good time credit if they fail to complete the sexual offender treatment program. Yet, as the appellant also points out there are exceptions to this statute. The one the appellant relies on says that mentally retarded inmates are excluded from the statute allowing the denial of good time credits. Using this part of the statute, appellant tries to claim that since KRS 197.045(4) does not apply to those that are mentally retarded, he cannot be denied the good time credit. But what the appellant fails to point out is that there is another exception to the statute that also directly impacts him. The statute plainly says that the provisions it entails do not apply to those convicted before July 15, 1998. The appellant was convicted on December 20, 1992. Therefore, the exception to the statute that the appellant bases his claim on does not apply to his situation and would not have if even if it had been properly preserved.

For the foregoing reasons, the ruling of the Green Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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