

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002580-MR

JOEY WATSON

APPELLANT

v.

APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE CRAIG Z. CLYMER, JUDGE
ACTION NO. 85-CR-00048

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: GUIDUGLI, TACKETT AND VANMETER, JUDGES.

TACKETT, JUDGE: Joey Watson appeals from an order of the McCracken Circuit Court denying his motion to set aside the judgment on a guilty plea pursuant to Kentucky Rule of Civil Procedure (CR) 60.02. At issue is whether the record establishes that Watson entered his plea knowingly, intelligently and voluntarily. The record does not specifically indicate that Watson was advised of the possible penalty range he was facing when he pled guilty to first-degree rape, first-degree sodomy, first-degree robbery, kidnapping, and second-degree escape. The trial court concluded that Watson's

statement at the time of his plea that he was not promised anything in exchange for his plea negates his contention that his attorney promised him a twenty year sentence. For this and other reasons which we will make clear in the body of our opinion, we affirm.

Watson entered a guilty plea to four Class B felonies and one Class D felony in 1985. The only record of the guilty plea colloquy is a questionnaire on which the court reporter hand wrote Watson's answers to the trial court's questions. One question, the one that advised Watson of the possible penalty range for the offenses to which he pled guilty, was left unanswered. At his sentencing one month after the plea, the trial court imposed the maximum sentence on each offense and ran all sentences consecutively for a total of eighty-five years' imprisonment. Watson attacked his attorney in the courtroom and had to be physically restrained by the bailiff. His guilty pleas and sentence were never directly appealed. In 1999, the trial court ruled on a motion filed by Watson which asked the court to amend his sentence. As grounds for this motion, Watson stated that the eighty-five year sentence he received was too harsh, but did not claim that he was unaware of the penalty range he faced when he pled guilty. The current CR 60.02 motion was filed in 2003 and, for the first time, Watson alleged that he was unaware that he could be sentenced to eighty-five years'

imprisonment as a result of his guilty plea. Further, Watson claims that his attorney promised him that the court would impose a twenty year sentence. The trial court denied this motion without a hearing, and this appeal followed.

Watson argues that the trial court erred in denying his motion to set aside the judgment and guilty plea because he was unaware of the possible penalty range he was facing and, thus, his plea was not knowingly, intelligently, and voluntarily given. CR 60.02 states as follows:

On 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: (a) mistake, inadvertence, surprise or excusable neglect; (b) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59.02; (c) perjury or falsified evidence; (d) fraud affecting the proceedings, other than perjury or falsified evidence; (e) the judgment is void, or has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (f) any other reason of an extraordinary nature justifying relief. The motion shall be made within a reasonable time, and on grounds (a), (b), and (c) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this rule does not affect the finality of a judgment or suspend its operation.

Watson claims relief under subsection (f) which we note requires that the request for relief be filed within a reasonable time.

At the time of his sentencing in 1985, Watson was aware of the sentence imposed by the trial court; in fact, he subsequently filed a motion to amend the sentence which was denied in 1999. In addition, Watson surely knew at the time of his sentencing whether or not he had been advised of the possibility of an eighty-five year sentence, and yet he waited eighteen years before asking for relief under CR 60.02(f). The Commonwealth's response to Watson's request for CR 60.02 relief asserted that his motion was untimely, and we agree. Nevertheless, the trial court did not rely on the motion's untimeliness in its order denying relief.

The trial court listed several reasons why Watson was not entitled to CR 60.02 relief from the judgment on his guilty plea, including an affidavit filed by Watson's attorney at the time of the plea asserting that counsel had discussed all of the sentencing options and that Watson knowingly, intelligently, and voluntarily elected to plead guilty and rely on the trial court to impose the proper penalty for his actions. More importantly, the trial court points out that Watson had filed a *pro se* motion prior to the current CR 60.02 motion asking for his sentence to be amended. In that motion, Watson claimed only that the eighty-five year sentence was too harsh. The trial court reasoned that Watson's failure to assert that he was unaware of

the possible penalty range contradicted the basis of his current CR 60.02 motion.

Watson correctly points out that the record is silent as to whether he was advised that he could be sentenced to eighty-five years' imprisonment. Nevertheless, the trial court declined to find that the record of Watson's guilty plea was silent as to whether his plea was knowing, intelligent and voluntary based on the failure to document one answer out of twenty questions asked. There were five additional queries after the unanswered question regarding the eighty-five year possible penalty. One addressed whether anyone had made promises or representations to Watson in order to induce him to plead guilty. Watson answered in the negative. Further, the trial court asked whether Watson understood that no one could make him a promise which bound the trial court's authority to act. Watson stated that he understood. The trial court concluded, and we agree, that this directly contradicts Watson's current assertion that he pled guilty in reliance on his attorney's promise of a twenty-year sentence.

Finally, the Commonwealth directs our attention to the Kentucky Supreme Court's holding in Jewell v. Commonwealth, Ky., 725 S.W.2d 593 (1987), wherein the Court held that a trial court's failure to question a criminal defendant about the possible sentence he faced as a result of pleading guilty did

not violate his constitutional rights. We are bound by this precedent to accept the trial court's decision that Watson's plea was knowingly, intelligently and voluntarily given. Watson argues that our subsequent decision in D.R. v. Commonwealth, Ky. App., 64 S.W.3d 292 (2001), entitles him to relief based on his lack of knowledge regarding the possible penalty he faced; however, this case is factually distinct from the situation at hand. D.R. involved a juvenile defendant who pled guilty without representation of counsel and who was not advised of any of his constitutional rights, including the possible consequences of his guilty plea. We decline to extend our holding in that case to apply to an adult who was represented by counsel and fully advised of all of the constitutional rights he was waiving by pleading guilty solely on the ground that he was not aware of the possible penalty range he faced.

For the foregoing reasons, the judgment of the McCracken Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Emil Samson
Mayfield, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Todd D. Ferguson
Assistant Attorney General
Frankfort, Kentucky