

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000622-MR

ENOCH MARTIN

APPELLANT

v. APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE LEONARD L. KOPOWSKI, JUDGE
ACTION NO. 02-CR-00353

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** **

BEFORE: COMBS, CHIEF JUDGE; GUIDUGLI, JUDGE; MILLER, SENIOR JUDGE.¹

MILLER, SENIOR JUDGE: Enoch Martin (Martin), pro se, brings this appeal from an Order of the Campbell Circuit Court, entered February 27, 2004, summarily overruling his motion, made pursuant to Kentucky Rules of Civil Procedure (CR) 60.02(e) and (f),² to set aside a "Judgment and Sentence on a Plea of Guilty,"

¹ Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

² 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

entered December 18, 2002, adjudging him guilty of first-degree assault³ and first-degree burglary,⁴ sentencing him to concurrent terms of fifteen-years and ten-years, and finding that Martin is not eligible for parole until after serving 85% of his sentence due to the victim's suffering a serious physical injury. Before us, Martin argues that his convictions for first-degree assault and first-degree burglary are in violation of the double jeopardy provisions of both the federal and state constitutions.⁵ We affirm.

On August 8, 2002, the Campbell County Grand Jury returned Indictment No. 02-CR-00353 against Martin for the offenses of first-degree assault and first-degree burglary. Specifically, they charged that on April 16, 2002, Martin "knowingly and unlawfully entered a building with the intent to commit an assault and caused physical injury to Kimberly Powell, who was not a participant in the crime" and "intentionally beat Kimberly Powell with a long, solid cylindrical object and inflicted serious physical injury." Several days before the

following grounds: . . . (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.

³ Kentucky Revised Statutes 508.010, a class B felony, carrying a penalty of ten to twenty years in the penitentiary.

⁴ Kentucky Revised Statutes 511.020, a class B felony, carrying a penalty of ten to twenty years in the penitentiary.

⁵ U.S. CONST. amend. V; KY CONST., § 13.

trial, Martin, with the advice of counsel, accepted the Commonwealth's offer of concurrent fifteen-year and ten-year sentences in exchange for a plea of guilty to the indicted charges. In accepting the plea, the circuit court conducted a colloquy pursuant to Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). On December 18, 2002, Martin was sentenced in accordance with the plea.

On February 24, 2004, Martin, pro se, filed a CR 60.02 motion which is the subject of this appeal. As the basis for this motion, Martin asked the circuit court to set aside the judgment under CR 60.02(e) and (f), arguing that his convictions and sentences for both first-degree assault and first-degree burglary violated both federal and state double jeopardy provisions. More specifically, he argued that double jeopardy was violated as the same physical injury was used as an element in both charges. On February 27, 2004, the circuit court's Order was entered which summarily overruled Martin's motion. This appeal follows.

The Kentucky Supreme Court has held that convictions for first-degree assault and first-degree burglary are not violations of federal or state double jeopardy provisions as each statutory offense requires proof of a fact which the other does not. Polk v. Commonwealth, 679 S.W.2d 231, 233-34 (Ky.

1984). As such, Martin's convictions for both do not violate either federal or state double jeopardy provisions.

For the foregoing reason, the Order of the Campbell Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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