

RENDERED: March 4, 2005; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2004-CA-000923-MR

MICHAEL BRIGGS

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE DENISE CLAYTON, JUDGE
ACTION NO. 99-CR-001361

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: GUIDUGLI AND TAYLOR, JUDGES; EMBERTON, SENIOR JUDGE.¹

GUIDUGLI, JUDGE: Michael Briggs appeals from an order of the Jefferson Circuit Court denying his pro se motion for CR 60.02 relief. He contends that his 10 year sentence for DUI, traffic offenses, and persistent felony offender status was improperly increased to 14 years when the sentence was probated. For the reasons stated herein, we affirm the order on appeal.

On September 26, 2000, Briggs entered into a plea agreement with the Commonwealth on charges of DUI fourth,

¹ Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 100(5)(b) of the Kentucky Constitution and KRS 21.580.

operating a motor vehicle with no insurance and no license, disregarding a stop sign, and first degree persistent felony offender. The agreement provided that Briggs would serve a total sentence of 10 years in prison, or 14 years if probated.

The matter went before the Jefferson Circuit Court, where a Boykin analysis was undertaken and a determination was made that Briggs entered into the agreement knowingly and voluntarily. The court accepted the plea, after which Briggs' counsel successfully argued for probation. Pursuant to the terms of the plea agreement, Briggs received a 14-year probated sentence.

Briggs violated the terms of his probation by consuming alcohol, being arrested for disorderly conduct, failing to complete rehabilitation sessions, and moving from a halfway house without notifying his probation officer. A revocation hearing was conducted on April 2, 2003, after which the court rendered an order revoking Briggs' probation and sending him to prison to serve 14 years as provided for by the plea agreement.

After Briggs' July 14, 2003, motion for shock probation was denied, he filed a pro se CR 60.02 motion on October 15, 2003. The motion was overruled by way of an order rendered on November 18, 2003. After Briggs wrote a letter to the court inquiring as to the status of the motion, a second

order denying the motion was rendered on April 7, 2004. This appeal followed.

Briggs now argues that the trial court committed reversible error in denying his motion for CR 60.02 relief. He contends that he is entitled to extraordinary relief because the trial court improperly imposed a 14-year sentence when the terms of the plea agreement provided for a 10-year sentence. He also argues that he was improperly subjected to "double enhancement" because DUI fourth offense is itself an enhanced offense which cannot be subjected to additional PFO enhancement. Lastly, he maintains that he was improperly denied the appointment of counsel in the instant matter. He seeks an order reversing the order on appeal and remanding the matter to the circuit court for the appointment of counsel and an evidentiary hearing on his CR 60.02 motion.

We have closely examined Briggs' arguments and find no basis for tampering with the order denying his motion for CR 60.02 relief. We must first note that CR 60.02 is not the correct vehicle for bringing Briggs' claims of error. It states in relevant part that,

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.

CR 60.02 allows a judgment to be corrected or vacated based "upon facts or grounds, not appearing on the face of the record and not available by appeal or otherwise, which were not discovered until after rendition of judgment without fault of the parties seeking relief."² It is meant to provide relief which is not available by direct appeal or under RCr 11.42.³ In order to be eligible for CR 60.02 relief, the movant must demonstrate why he is entitled to extraordinary relief.⁴

In the matter at bar, the claims of error which Briggs now raises should have been brought, if at all, by way of a direct appeal. They were not, and this fact taken alone forms a proper basis for affirming the order denying the motion for CR 60.02 relief.

Arguendo, even if the matter were properly before us, we would find no error on the question of whether Briggs'

² Barnett v. Commonwealth, 979 S.W.2d 98, 101 (Ky. 1998), citing Davis v. Home Indemnity Co., 659 S.W.2d 185 (Ky. 1983).

³ Gross v. Commonwealth, 648 S.W.2d 853 (Ky. 1983); McQueen v. Commonwealth, 948 S.W.2d 415 (Ky. 1997).

⁴ Barnett, 979 S.W.2d at 101.

sentence was improperly fixed at 14 years. The plea agreement provided in clear and unambiguous terms that Briggs would receive a sentence of 10 years if served, or 14 years if probated. Briggs received the latter, and was properly sentenced to 14 years in prison after violating the terms of his probation. As noted above, Briggs was fully questioned by the court on the question of whether he understood the terms of the plea and was entering into it voluntarily. If this issue were properly before us via a direct appeal, which it is not, we would find no basis for finding error in the duration of Briggs' sentence.

Similarly, we find no error on Briggs' argument that he was improperly subjected to "double enhancement". Relying on Corman v. Commonwealth,⁵ he argues that an offense cannot be used both to enhance a DUI charge and to result in a PFO charge. Again, the issue is not properly before us by way of a direct appeal. Even if it were, Briggs waived any error pursuant to Boykin by accepting the plea agreement in exchange for avoiding a jury trial.

Briggs' final argument is that he was improperly denied appointed counsel to bring his CR 60.02 claim. The record refutes this argument. The trial court sustained a motion for appointing counsel by way of an order rendered on May

⁵ 908 S.W.2d 122 (Ky.App. 1995).

4, 2004. Thereafter, the Department of Public Advocacy sought not to provide counsel to Briggs based on its determination that the proceeding was not one that a reasonable person with adequate means would be willing to bring at his own expense.⁶ The DPA's position on this issue was found to be persuasive, and it was allowed to withdraw. Thus, the circuit court did not deny to Briggs the appointment of counsel as he contends, and we find no basis for finding error.

For the foregoing reasons, we affirm the order of the Jefferson Circuit Court denying Briggs' motion for CR 60.02 relief.

ALL CONCUR.

BRIEF FOR APPELLANT:

Michael Briggs, pro se
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BRIEF FOR APPELLEE:

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Attorney General

George G. Seelig
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⁶ See generally, KRS 311.110(2)(c).