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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001137-MR

JOHN T. YOUNG — APPELLANT

v.

APPEAL FROM HOPKINS CIRCUIT COURT
HONORABLE CHARLES W. BOTELER, JR., JUDGE
ACTION NO. 97-CR-00033

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: BARBER, BUCKINGHAM, AND JOHNSON, JUDGES.

BARBER, JUDGE: John T. Young (Young) appeals from a denial of a motion filed pursuant to CR 60.02 attacking his conviction and sentence for first-degree rape, first-degree sodomy, and second-degree assault. We affirm.

Young was indicted on February 25, 1997 for the above-mentioned crimes. On May 27, 1997 Young filed a motion to enter a guilty plea to the charges. The motion reflects that, in return for Young's plea to the charges set forth in the indictment, the Commonwealth agreed to recommend 12 years on the

rape charge, 12 years on the sodomy charge, and 10 years on the assault charge. The Commonwealth also filed a formal offer that reflected the same recommendation.

On May 27, 1997 the court held a guilty plea hearing. At the hearing Young acknowledged that his attorney had read the guilty plea document to him and that he understood its contents. He also indicated that he understood the nature of the charges against him and the consequences. The court asked Young whether he was satisfied with the services of his attorney and whether his attorney had done everything that he asked him to do to which Young replied in the affirmative. Young denied that he was sick, his judgment was impaired, or that he was under the influence of any drugs. The court reviewed the recommendation of the Commonwealth on Young's plea of guilty and Young acknowledged that his attorney went over that offer with him and that he signed it. Further, Young stated in response to questioning from the court that he understood that he was giving up the right to have a jury trial, the right to appeal, the right to cross-examine witnesses, and the right not to incriminate himself. The court questioned whether he was entering into the plea willingly, freely, and voluntarily and Young said "yes." Following this colloquy the court accepted Young's plea.

On July 7, 1997 the court held a sentencing hearing. At the hearing both Young and his attorney stated that they had no mitigating evidence to present to the court. The court imposed the sentence recommended by the Commonwealth stating on the record that Young was to receive 12 years on the rape charge, 12 years on the sodomy charge, and 10 years on the assault charge to run concurrently for a total of 12 years.

On July 9, 1997 the court's judgment and sentence was entered in the record. However, it incorrectly reflected that Young was to receive 12 months on the assault charge instead of 10 years.

On August 13, 1997 the court entered an amended order, *sua sponte*, correcting the judgment to show that Young was to receive 10 years on the assault charge.

No direct appeal was prosecuted since Young had pled guilty and he did not file a motion under RCr 11.42 for which, he concedes, the time has run. On December 19, 2003 Young filed a motion pursuant to CR 60.02 seeking to set aside his conviction and sentence. The court denied the motion and also denied Young's subsequent motion for reconsideration. This appeal followed.

On appeal Young makes three arguments for why his conviction and sentence should be set aside. First, he argues that the court did not have jurisdiction to amend the written

judgment pertaining to the time he must serve for the assault charge. Secondly, Young alleges that both the prosecutor and his attorney violated his rights by failing to adequately investigate the charges against him. He further argues that his attorney should have bargained for a lesser sentence. Lastly, he contends that the court failed to ascertain whether he was competent to enter a plea of guilty.

Young's first argument is based on Silverburg v. Commonwealth, 587 S.W.2d 241 (Ky. 1979) and its progeny. Silverburg stands for the general proposition that 10 days after entry of judgment the trial court loses its jurisdiction, and, therefore, does not have the power to enter orders modifying its judgment. Id. at 244. However, the recent case of Cardwell v. Commonwealth, 12 S.W.3d 672 (Ky. 2000), directs courts to consider whether a mistake in the judgment, such as happened here, is judicial or clerical in nature. Id. at 674. There the Court held where the mistake is one in reducing an oral judgment to writing it is not "the product of judicial reasoning and determination[;] [i]t is a clerical error." Id. at 674-675. See also Viers v. Commonwealth, 52 S.W.3d 527, 528-529 (Ky. 2001).

In Young's case the mistake was plainly in reducing the judgment to writing. The guilty plea form, the guilty plea offer, the colloquy at the guilty plea hearing and sentencing

hearing all make clear that the Commonwealth's offer on the second-degree assault charge was 10 years. Young either signed or was present and acknowledged the agreement in every instance. Therefore, the error in the written judgment was clerical in nature and the court did not lack jurisdiction to correct the sentence. Furthermore, we cannot see how this would effect Young's incarceration time. He was sentenced to 12 years on both the rape and sodomy charges. The sentences were all to run concurrently. Thus, any time to serve on the assault charge is subsumed.

Young's allegations that the prosecutor and his attorney violated his rights by failing to adequately investigate his case and that his attorney should have bargained for lesser sentences on the charges are not appropriate matters to be raised through CR 60.02. CR 60.02 allows error to be claimed on the basis of facts that were unknown and could not have been known through reasonable diligence in time to be presented to the court. Barnett v. Commonwealth, 979 S.W.2d 98, 101 (Ky. 1998); McQueen v. Commonwealth, 948 S.W.2d 415, 416 (Ky. 1997); cert.den., McQueen v. Kentucky, 117 S.Ct. 2535, 521 U.S. 1130, 138 L.Ed.2d 1035 (1997). Further, relief under CR 60.02 is intended for those claims that cannot be presented through direct appeal or RCr 11.42. Barnett 979 S.W.2d at 101.

The facts Young points to do not merit relief under CR 60.02. Investigation of the facts and circumstances of the crime were certainly known before Young ever agreed to enter his guilty plea. Young had a responsibility to participate in his defense and make his attorney aware of these issues. At the guilty plea hearing he indicated to the court that he had sufficient opportunity to apprise his attorney of all matters and was satisfied with his services.

There is no merit to Young's argument that his attorney should have bargained for lesser sentences. The crimes committed by Young are very serious in nature and carry the potential, as noted by the trial court at the guilty plea hearing, of resulting in a maximum sentence of 50 years. Viewed in this light, a plea bargain that requires service of 12 years total appears to be very favorable to Young. There is simply no evidence that the prosecutor violated Young's rights in any way.

Moreover, these issues could have been presented in an RCr 11.42 action.

Finally, Young contends that the court did not determine whether he was competent to enter his guilty plea. Implicit in this assertion is that he was not competent to do so. Young's primary argument on this point is that he suffers from dyslexia and was illiterate at the time. The validity of a guilty plea must be measured considering the totality of the

circumstances. Kotas v. Commonwealth, 565 S.W.2d 445, 447 (Ky. 1978).

The circumstances of Young's guilty plea and sentencing are outlined above. From a review of the record it is apparent that the court ascertained through questioning Young that Young understood the nature and consequences of the charges against him as well as the recommendation of the Commonwealth in return for his plea. The court further made certain that Young, although illiterate, had been read the documents to be entered in the record and understood their contents. At sentencing Young denied that there were any circumstances that would prevent the court from pronouncing its sentence.

Considering all the facts and circumstances surrounding Young's guilty plea, as well as his sentencing hearing, there is no doubt that he was competent at the time. Suffering from dyslexia or illiteracy does not equate with an inability to understand and appreciate court proceedings.

For the foregoing reasons the decision of the Hopkins Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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