

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001796-MR

JOE TURNER

APPELLANT

v.

APPEAL FROM ALLEN CIRCUIT COURT
HONORABLE WILLIAM R. HARRIS, JUDGE
ACTION NO. 97-CR-00087

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: HENRY AND SCHRODER, JUDGES; EMBERTON, SENIOR JUDGE.¹

EMBERTON, SENIOR JUDGE: Joe Turner, pro se, appeals from the circuit court's denial of his RCr² 10.10 motion. He alleges that the circuit court erred when it refused to amend his judgment of conviction to reflect that he was found guilty of wanton murder and not murder. He also alleges that the trial court erroneously denied his motion to proceed in forma pauperis on appeal and that the Commonwealth "constructively amended the

¹ Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

² Kentucky Rules of Criminal Procedure.

indictment" in violation of the double jeopardy provisions of the United States Constitution³ and the Kentucky Constitution.⁴ We find that no prejudicial error occurred and affirm.

The substantive facts of this case are set forth in the Supreme Court's published opinion affirming Turner's conviction and need not be fully reiterated in this opinion.⁵ After his direct appeal was unsuccessful, Turner filed multiple post-conviction motions pursuant to RCr⁶ 11.42 and CR⁷ 60.02 all of which were denied by the circuit court. As recently as this past year, this court has considered three appeals from orders denying Turner's post-conviction motions.

Turner's most recent attempt to obtain relief is an RCr 10.10 motion. The rule provides that the court may correct a clerical mistake in a judgment arising from oversight or omission at any time either on its own initiative or on the motion of any party. Turner contends that the jury found him guilty of wanton murder and not murder as stated in the final judgment of conviction. The Commonwealth objected to Turner's

³ The Fifth Amendment to the United States Constitution states in part that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb."

⁴ Section 13 of the Kentucky Constitution states in part that [n]o person shall, for the same offense, be twice put in jeopardy of his life or limb. . . ."

⁵ Turner v. Commonwealth, 5 S.W.3d 119 (Ky. 1999).

⁶ Kentucky Rules of Criminal Procedure.

⁷ Kentucky Rules of Civil Procedure.

motion on the basis that the mistake, if any, was not a clerical error that can be corrected pursuant to RCr 10.10.

In Smith v. Commonwealth⁸ the court held that there is one offense of murder that may be committed with either of two culpable mental states, intentional or wanton. "Wanton murder, however, is not a lesser-included offense of murder. It is simply murder committed with a different state of mental culpability, but murder, whether intentional or wanton is a capital offense."⁹ The crime of murder under our criminal statute includes both intentional and wanton murder and provides for the same penalty.¹⁰ The omission of the adjective "wanton" from the judgment is not an error that the circuit court was required to correct.

We find no merit to Turner's remaining allegations. His claim that he was entitled to pursue this appeal in forma pauperis is refuted by his own affidavit that discloses that he owns real property valued at \$27,000. Any alleged double jeopardy claim was or could have been raised in any number of Turner's previous post-conviction motions and is not a clerical error properly raised under RCr 10.10.

⁸ 737 S.W.2d 683 (Ky. 1987).

⁹ Id. at 689.

¹⁰ KRS 507.020.

The Commonwealth requests that pursuant to KRS 197.045, sanctions be imposed for the filing of a factually frivolous appeal. Although this court has previously admonished Turner regarding the filing of frivolous motions and appeals, we also recognize that he is a pro se litigant and is not subject to the same standards as litigants represented by counsel.¹¹ Although we have found that any error was not prejudicial, Turner's allegation that he was found guilty of wanton murder and not murder as the judgment states was not factually frivolous but simply legally inconsequential. We decline at this point to impose sanctions but remind Turner, who at this point should be well versed in the law regarding successive post-conviction motions, that the courts will not tolerate abuse of the judicial process.

The order of the Allen Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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¹¹ Beecham v. Commonwealth, 657 S.W.2d 234, 236 (Ky. 1983).