

RENDERED: JUNE 24, 2005; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001820-MR

AARON J. GARNER

APPELLANT

v. APPEAL FROM MUHLENBERG CIRCUIT COURT
HONORABLE DAVID H. JERNIGAN, JUDGE
INDICTMENT NO. 00-CR-00096

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

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

MINTON, JUDGE: Aaron J. Garner, *pro se*, appeals from an order of the Muhlenberg Circuit Court denying his CR² 60.02 motion to vacate his conviction. Garner argues that his conviction is void because his guilty plea was not knowing and intelligent.

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 Civil Procedure.

Because we conclude that the circuit court did not abuse its discretion in denying the motion, we affirm.

Garner is serving a prison sentence of up to ten years for a conviction of manufacturing methamphetamine based upon a sentence imposed on August 28, 2000. The charge arose from a search of the premises occupied by Garner. During the search, officers found evidence of methamphetamine manufacturing, including starter fluid, syringes, one jar of finished product, plastic tubing, a box of Morton's salt, and ephedrine pills. Officers also found baggies, duct tape, a coffee filter, and a spoon, all of which contained methamphetamine residue.

The grand jury indicted Garner for the offense of manufacturing methamphetamine by manufacturing methamphetamine or possessing the chemicals or equipment for the manufacture of methamphetamine with the intent to manufacture methamphetamine,³ and also charged him as a persistent felony offender in the second-degree.⁴ At his arraignment on July 12, 2000, Garner waived a formal arraignment and entered a plea of "not guilty."

During plea bargaining, the Commonwealth agreed to dismiss the persistent felony offender charge in exchange for Garner changing his plea to "guilty" of the offense of manufacturing methamphetamine. In his Motion to Enter Guilty

³ KRS 218A.1432.

⁴ KRS 532.080.

Plea, filed in the Muhlenberg Circuit Court, Garner declared that his plea of guilty was "freely, knowingly, intelligently and voluntarily made." After extensive questioning of Garner and his attorney, the Muhlenberg Circuit Court determined that Garner understood the nature of the charges against him and that his plea was voluntarily made. At final sentencing, the court fixed his punishment at confinement in the penitentiary for a maximum of ten years.

On August 23, 2004, Garner filed a CR 60.02 motion in which he claimed that based on the Kentucky Supreme Court decision in Kotila v. Commonwealth,⁵ his conviction is void.⁶ Garner alleges that based on the Kentucky Supreme Court's construction of the phrase "the chemicals or equipment" in Kotila v. Commonwealth, his conviction is void. In Kotila, the Court construed the language of KRS 218A.1432 to mean *all* of the chemicals or *all* of the equipment necessary to manufacture methamphetamine. Garner argued that because he was not found to be in possession of either *all* of the chemicals or *all* of the equipment, his conviction under KRS 218A.1432 is void. Consequently, Garner alleged that considering the Court's construction of KRS 218A.1432, his plea of "guilty" was not

⁵ 114 S.W.3d 226 (Ky. 2003).

⁶ The court in Kotila concluded that KRS 218A.1432(1)(b) "applies only when a defendant possesses *all* of the chemicals or *all* of the equipment necessary to manufacture methamphetamine." *Id.* at 240-241. (emphasis in original).

knowing and intelligent because, at the time of his plea, he misunderstood the substance of the law.

The circuit court distinguished Kotila from Garner's case noting that Kotila involved a trial before a jury and evidence presented to the finders of fact, while Garner pled guilty, waiving his right to a trial by jury. Relying on Johnson v. Commonwealth,⁷ the circuit court denied Garner's CR 60.02 motion finding that Garner's guilty plea to the offense of manufacturing methamphetamine precluded his post-judgment challenge to the sufficiency of the evidence in his case. This appeal followed. Garner brings the same arguments before this Court as he did before the circuit court. Namely, Garner alleges that his conviction is void because he did not possess *all* of the chemicals or *all* the equipment necessary to manufacture methamphetamine; and, thus, his plea of guilty was not knowing or intelligent.

It is within the trial court's discretion whether to grant relief under CR 60.02.⁸ This court uses an abuse of discretion standard to review the trial court's order. We will affirm the trial court unless there is a showing of some "flagrant miscarriage of justice."⁹

⁷ 103 S.W.3d 687 (Ky. 2003).

⁸ Gross v. Commonwealth, 648 S.W.2d 853, 857 (Ky. 1983).

⁹ *Id.* at 858.

As described by our Supreme Court, “[t]he structure provided in Kentucky for attacking the final judgment of a trial court in a criminal case is not haphazard and overlapping, but is organized and complete.”¹⁰ The proper procedure for a defendant to attack a judgment in a criminal case is to first directly appeal the judgment. Next, a defendant is required to use RCr 11.42 relief “[on] any ground of which he is aware, or should be aware, during the period when this remedy is available [].”¹¹ Finally, one may avail himself of CR 60.02.¹²

Relief under CR 60.02 is available only when such “relief [] is not available by direct appeal and not available under RCr 11.42.”¹³ The subsections of CR 60.02 address “*extraordinary* situations which do not as a rule appear during the progress of a trial.”¹⁴ In order to prevail under CR 60.02,

¹⁰ *Id.* at 856.

¹¹ *Id.* at 857. The final judgment in Garner’s case was rendered on August 28, 2000. We note that Kotila was decided on June 12, 2003, and, thus, created a two-month window until Garner’s three-year timeframe for a RCr 11.42 remedy lapsed. While, procedurally, the issue brought in Garner’s CR 60.02 motion could have fallen under a RCr 11.42 proceeding, we realize that this could not have been “reasonably” presented, as required by RCr 11.42, in such a short time period.

¹² *Id.*

¹³ *Id.* at 856.

¹⁴ *Id.* (emphasis in original).

"[t]he movant must demonstrate why he is entitled to this special, extraordinary relief."¹⁵

In his motion, Garner relies on provisions (e) and (f) of CR 60.02. These provisions state that

[O]n 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: [] (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 [].¹⁶

While Garner attempts to demonstrate why he is entitled to this special, extraordinary relief with his use of Kotila, he is unable to overcome the limitations placed on him resulting from his plea of "guilty."

While no procedural bar precludes Garner from raising his CR 60.02 motion, Garner's post-judgment motion is invalid because he knowingly and intelligently pled guilty to the charge of manufacturing methamphetamine, a Class "B" felony, in violation of KRS 218A.1432

Garner's argument is a challenge to the sufficiency of the evidence used in his conviction. As noted by the trial

¹⁵ Gross at 856.

¹⁶ CR 60.02.

court in its denial of Garner's CR 60.02 motion, the law in Kentucky is that entry of a voluntary, intelligent guilty plea precludes a post-judgment challenge to the sufficiency of the evidence.¹⁷ Garner's claim that he did not intelligently and knowingly enter his plea of guilty is weak, at best. As cited by this Court in Taylor v. Commonwealth, the United States Supreme Court has explained, "a counseled plea of guilty is an admission of factual guilt so reliable that, where voluntary and intelligent it *quite validly* removes the issue of factual guilt from the case."¹⁸

Prior to entering a plea of "guilty," Garner faced charges of manufacturing methamphetamine by manufacturing methamphetamine or possessing the chemicals or equipment for the manufacture of methamphetamine with the intent to manufacture methamphetamine, and as a persistent felony offender in the second degree. The Class "B" felony of manufacturing methamphetamine carries a penalty of ten to twenty years.¹⁹ Adding the charge of persistent felony offender enhanced this penalty to twenty to fifty years or life.²⁰ By accepting the

¹⁷ Johnson v. Commonwealth, 103 S.W.3d 687, 696 (Ky. 2003) (citing Taylor v. Commonwealth, 724 S.W.2d 223, 225 (Ky.App. 1986)).

¹⁸ 724 S.W.2d 223 (Ky.App. 1986) (citing Menna v. New York, 423 U.S. 61, 62 (1975) (emphasis in original)).

¹⁹ KRS 218A.1432.

²⁰ KRS 532.080.

Commonwealth's plea bargain, Garner received a maximum sentence of ten years of penitentiary confinement. At final sentencing, Garner agreed to the facts set forth in the Commonwealth's Offer on a Plea of Guilty that "defendant manufactured meth."

Permitting Garner to proceed with his CR 60.02 motion would allow him to challenge the factual basis of his conviction that would have been addressed at the trial he elected to forgo. Such a benefit is not granted under the laws of this state.

For the reasons stated above, the Muhlenberg Circuit Court's Order is affirmed.

ALL CONCUR.

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