

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001840-MR

JIMMY DOOLITTLE PURVIS, JR.

APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE PAMELA R. GOODWINE, JUDGE
INDICTMENT NO. 97-CR-01329

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING IN PART,
VACATING AND REMANDING IN PART

** ** * * *

BEFORE: HENRY AND VANMETER, JUDGES; MILLER, SENIOR JUDGE.¹

HENRY, JUDGE: On October 23, 1998 Jimmy Doolittle Purvis pled guilty to raping and sodomizing his three step-daughters, who were 6, 7 and 8 years old at the time of the offenses.

Specifically, Purvis pled guilty to one count of First Degree Rape,² one count of Second Degree Rape³ and one count of Second

¹Senior 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 KRS 21.580.

²Proscribed by Kentucky Revised Statutes (KRS) 510.040. During plea negotiations this count was amended from a Class A to a Class B felony.

Degree Sodomy.⁴ He was sentenced to 15 years, 10 years and 10 years respectively, with all counts to run consecutively for a total of thirty-five years. As a result of plea negotiations fifteen other counts charging various sex crimes against the children were dismissed. Purvis, acting pro se, filed a motion pursuant to CR⁵ 60.01 and 60.02(f) requesting modification of his sentence. The Fayette Circuit Court overruled his motion. We affirm in part, and vacate and remand in part.

Purvis sets out three arguments in favor of modification of his sentence. He states that although he only agreed to a twenty-year sentence as written on his plea agreement, he was erroneously sentenced to forty years, which was then somehow changed to thirty-five years. The basis for this argument is the fact that "20" is crossed out on the plea agreement form and "40" is written over it. Purvis then argues that although he agreed to plead guilty to one count of Rape First Degree, one count of Rape Second Degree and one count of Sodomy Second Degree, somehow he ended up being sentenced for one count of Rape First Degree and two counts of Rape Second Degree. Finally Purvis contends that if his first two arguments for sentence modification are individually insufficient, he is

³Proscribed by KRS 510.050.

⁴Proscribed by KRS 510.080.

⁵Kentucky Rules of Civil Procedure.

nevertheless entitled to relief when both grounds are considered collectively.

Purvis's motion must fail for any of a number of reasons. The trial court overruled the motion because it was "untimely" and the issues presented had already been addressed, noting that "Judge Adams overruled the same motion on January 10, 2000." To the extent that Purvis argues that his sentence resulted from a mistake, it should properly be considered under CR 60.02(a), within one year after the judgment and sentence of conviction. Motions pursuant to CR 60.02(d), (e) or (f) must be made within a reasonable time. We would not contradict the trial court's ruling that seven years is too long to wait to file a motion based upon grounds which are apparent from the face of the record. "What constitutes a reasonable time in which to move to vacate a judgment under CR 60.02 is a matter that addresses itself to the discretion of the trial court." Gross v. Commonwealth, 648 S.W.2d 853, 858 (Ky. 1983). There has been no showing of abuse of discretion here.

CR 60.02 provides a special, extraordinary remedy which is reserved for matters that could not be presented on direct appeal or by way of RCr⁶ 11.42. Id. at 856. The movant has the burden of showing why he is entitled to this extraordinary relief. Id. at 856. CR 60.02 relief is not

⁶Kentucky Rules of Criminal Procedure.

available to relitigate issues which were, or could have been, litigated in a similar proceeding. McQueen v. Commonwealth, 948 S.W.2d 415, 416 (Ky. 1997). Purvis has not shown any convincing reason why the issues raised here could not have been presented in his earlier motion.

We have reviewed the videotape of Purvis's guilty plea. The record leaves no doubt that Purvis understood the proceedings and that the plea agreement was for a term of thirty-five years. There is no justification for a modification of Purvis's sentence.

The Commonwealth concedes, and the record reveals that although Purvis pleaded guilty to one count of First Degree Rape, one count of Second Degree Rape and one count of Second Degree Sodomy, the final judgment erroneously reflects one count of First Degree Rape and two counts of Second Degree Rape. This is an obvious clerical mistake of the kind that may be corrected by the court pursuant to RCr 10.10. Purvis suffered no harm or prejudice as a result of this mistake and he is entitled to no relief for the reasons stated above. He was originally charged with eighteen counts charging various sex offenses including multiple counts of rape and sodomy. Second Degree Rape and Second Degree Sodomy are both Class C felonies with the same range of punishment, and the correct sentence was recorded on each count. Purvis admitted the factual basis for all charges

on the record. Only the name of one offense was incorrect on the Judgment on Guilty Plea and the Order of Commitment.

Because both of Purvis's allegations of error are without merit, there is no cumulative effect, and no relief is justified.

The order of the Fayette Circuit Court is affirmed, except to the extent that, on our own motion, we vacate and remand the case to the Fayette Circuit Court with directions that an order be entered correcting the names of the charges listed in the Judgment on Guilty Plea and the Order of Commitment to agree with the names of the charges listed in the defendant's Petition to Enter Plea of Guilty.

ALL CONCUR.

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