

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-002570-MR

COY LEE HUDSON

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE REBECCA M. OVERSTREET, JUDGE
ACTION NO. 01-CR-00200

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: GUIDUGLI, McANULTY AND SCHRODER, JUDGES.

GUIDUGLI, JUDGE: Coy Lee Hudson appeals from an opinion and order of the Fayette Circuit Court denying his motion for RCr 10.26 relief. He argues that the circuit court committed reversible error in failing to rule that the trial judge violated RCr 8.10 by initially accepting the Commonwealth's recommended sentence but subsequently increasing it. Hudson maintains that he is entitled to an order reversing the matter and remanding with instructions that the trial court impose the recommended sentence. For the reason stated below, we affirm the order on appeal.

On February 20, 2001, the Fayette County grand jury indicted Hudson on one count each of flagrant nonsupport, resisting arrest, and third-degree escape. After entering into negotiations with the Commonwealth, Hudson appeared in open court on March 2, 2001, and entered a guilty plea on each of the three counts of the indictment. In exchange for pleading guilty, the Commonwealth recommended that Hudson serve 12 months on the nonsupport and resisting arrest charges, and seven days on the escape charge.

On March 23, 2001, the trial judge conducted a sentencing hearing, where she rejected the Commonwealth's recommended sentence. She gave Hudson the option of withdrawing his guilty plea, or accepting a concurrent sentence of five years on the nonsupport charge, twelve months on the resisting arrest charge, and seven days on the escape charge. After consulting with counsel, Hudson chose to accept the five-year sentence. The court then imposed the sentence, which was then probated.

On October 24, 2003, Hudson stipulated that he violated the terms of his probation by failing to pay child support, report to his probation officer and complete a substance abuse treatment program. His probation was revoked, and he was ordered to serve the underlying five-year sentence.

On October 14, 2004, Hudson filed a pro se motion for relief under RCr 10.26 (palpable error). He maintained that he was entitled to relief because the trial court improperly rejected the Commonwealth's sentencing recommendation. Upon considering the motion, the circuit judge¹ rendered an order denying the relief sought. This appeal followed.

The sole issue for our consideration is Hudson's contention that the circuit court erred in failing to rule that the trial judge improperly increased the Commonwealth's recommended sentence. Hudson argues that the trial court accepted the original plea and sentence as recommended by the Commonwealth, and in so doing was barred from subsequently increasing the sentence. He maintains that manifest injustice resulted from the improper sentencing, and he seeks an order reversing the denial of his RCr 10.26 motion and directing the trial court to impose the original sentence as recommended by the Commonwealth.

The record refutes Hudson's assertion that the Commonwealth's sentencing recommendation was accepted by the trial court, and then increased by the court at a later date. Rather, Hudson pled guilty on March 2, 2001, at which time the Commonwealth recommended a one-year sentence. That recommendation was never accepted by the trial court. On March

¹ The judge who ruled upon the motion (Judge James Ishmael) was not the trial judge (Judge Rebecca Overstreet).

23, 2001, the trial judge stated that she would not follow the Commonwealth's recommendation, and she gave Hudson the option either of withdrawing his guilty plea and going to trial on the charges or continuing with the guilty plea and receiving a total sentence of five years in prison.

RCr 8.10 states in relevant part that,

If the court rejects the plea agreement, the court shall, on the record, inform the parties of this fact, advise the defendant personally in open court or, on a showing of good cause, in camera, that the court is not bound by the plea agreement, afford the defendant the opportunity to then withdraw the plea, and advise the defendant that if the defendant persists in that guilty plea the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement.

The record reveals no basis for concluding that the trial court's rejection of the plea agreement ran afoul of RCr 8.10. As required by the rule, after rejecting the agreement the trial judge afforded Hudson the opportunity to withdraw the plea, and advised him that if he persisted with the plea the disposition of the case could be less favorable than that contemplated by the plea. Nothing more is required. The trial court is vested with discretion in determining whether to accept or reject a recommended sentence,² and nothing in the record

² Rodriguez v. Commonwealth, 87 S.W.3d 8 (Ky. 2002).

supports Hudson's assertion that the judge abused her discretion in rejecting the recommended sentence.

Hudson's instant motion alleged the presence of a palpable error arising from the trial court's disposition of the plea agreement. RCr 10.26 states,

A palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.

Having determined that the trial court properly disposed of the plea agreement via RCr 8.10, we cannot conclude that the circuit court erred in refusing to find palpable error pursuant to RCr 10.26.

For the foregoing reasons, we affirm the opinion and order of the Fayette Circuit Court which denied Hudson's motion for RCr 10.26 relief.

ALL CONCUR.

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