

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-000239-MR

GEORGE W. HILL, JR.

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE THOMAS B. WINE, JUDGE
ACTION NO. 95-CR-000599

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BARBER, JUDGE; HUDDLESTON AND PAISLEY, SENIOR JUDGES.¹

BARBER, JUDGE: Appellant, George W. Hill, Jr., appeals, pro se, from the Jefferson Circuit Court's denial of his motion for CR 60.02(e) relief. The circuit court's decision is affirmed.

In July, 1992, Hill pled guilty to six counts of burglary in the second degree and two counts of receiving stolen property over \$300. The plea bargain agreement noted that Hill was to serve a total of twelve years. Sentencing was delayed until August of that year, for completion of the Pre-Sentence

¹ Senior Judges Joseph D. Huddleston and Lewis G. Paisley sitting as Special Judges by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Investigation, as required by KRS 532.050(1). Hill made no objection to the month long delay. Hill was released on bond pending final sentencing. In the judgment, the trial court noted "of record" that the Commonwealth had recommended a twelve-year sentence with the caveat that "[I]f defendant fails to show for sentencing or gets arrested on any new charges, he will forfeit his bond and will enhance his time to serve to a total of 20 years." The Judgment did not provide a sentence, but merely recited the Commonwealth's recommendation. Sentencing was set for August.

While free on bond, Hill was charged with new burglary charges. Hill asserts that those charges were later dismissed. In accordance with the provisions of the plea agreement, Hill was sentenced to serve a total of twenty years.

Hill contends that the new charges were fraudulent and that the police brought them solely to get him a harsher sentence and that the police officers knew that the charges were false when they were made. Counsel for Hill filed a motion pursuant to RCr 11.42 to have the original twelve-year sentence reinstated. That motion was denied. Hill then filed a motion pursuant to CR 60.02, claiming that as the burglary charges which were brought against him while he was free on bond were subsequently dismissed, his sentence should be returned to the

original twelve years, rather than the twenty ultimately imposed.

The Commonwealth asserts that the sentence provided for in the offer of guilty plea was conditional on Hill's staying out of trouble while he was free on bond. The Commonwealth argues that the new burglary charges voided that twelve-year offer. The trial court imposed the twenty-year sentence in accordance with the agreement, but expressed openness to revisiting the sentencing if the new charges were dismissed, or Hill was acquitted of those charges. The Commonwealth contends that Hill pled guilty to one of the new charges and was convicted of that charge.

The Commonwealth complains that in the CR 60.02 motion, Hill is merely re-litigating issues raised in his earlier motions. Counsel for Hill filed a motion pursuant to RCr 11.42 in May, 1998. That motion argued that the twenty-year sentence imposed on Hill should be amended to twelve years because the later charges, made while Hill was free pending sentencing, had later been dismissed. A hearing was held before the trial court and it was determined that Hill pled guilty to one of those later charges. Hill was sentenced to serve one year on that charge. Hill argued that because he had been sentenced on that charge, it was improper to use the charge as a reason for increasing the twelve-year sentence to twenty years.

The trial court denied the motion. Hill later filed a pro se motion pursuant to RCr 11.42, arguing that counsel had been ineffective, that he had suffered double jeopardy, and that his plea was not voluntary. This motion was also denied. Hill then filed the underlying CR 60.02 motion. The trial court denied the motion, stating the CR 60.02 did not provide Hill with an opportunity to relitigate matters which had been raised and ruled upon in earlier motions. This ruling is in accordance with law. See: Mills v. Commonwealth, 170 S.W.3d 310, 316 (Ky. 2005). The trial court's ruling is affirmed.

The question before the Court is whether Hill had an expectation of finality in his sentence at the time he was freed on bond pending sentencing. The fact that he knew sentencing was pending, combined with the express language of the trial court's judgment, show that he did not. The law holds that a judgment is not final when post-judgment remedies are still available to the parties. Francis v. Crouse Corp., 98 S.W.3d 62 (Ky.App. 2002). Where a sentence is not final, the defendant cannot claim that changes to it constituted double jeopardy or were unconstitutional.

Hill argues that the provision allowing for a harsher sentence if Hill was charged with any new crimes when free on bond permitted an improper enhancement of his sentence. Contrary to Hill's assertion on appeal, there was no improper

enhancement to his sentence, as no sentence was imposed prior to the imposition of the twenty-year term. This is in contrast to Galusha v. Commonwealth, 834 S.W.2d 696, 698 (Ky. 2000), the authority relied upon by Hill, which found that modification of a final sentence may be found improper.

With regard to the delay in sentencing, the Commonwealth notes that Hill requested the delay in order to resolve the new charges prior to sentencing on the previous charges. The delay was also necessitated by the requirement that a PSI be completed, in accordance with Kentucky law. Under such circumstances, the delay did not form a basis for reversal of the sentence imposed below.

A trial court's denial of a CR 60.02 motion is reviewed for an abuse of discretion. White v. Commonwealth, 32 S.W.3d 83, 86 (Ky.App. 2000). No abuse of discretion has been shown in the present case. For this reason, the ruling denying the motion is affirmed.

HUDDLESTON, SENIOR JUDGE, CONCURS.

PAISLEY, SENIOR JUDGE, CONCURS IN RESULT AND FILES SEPARATE OPINION.

PAISLEY, SENIOR JUDGE, CONCURRING IN RESULT: I concur in the result reached by the court, but write separately because I believe Appellant's CR 60.02 motion cannot be used to raise the matters he complains of. The sentence that Hill complains

of was imposed on him by the trial court on Aug. 29, 1995. Hill did not appeal from that judgment. Hill's initial RCr 11.42 motion, in which he challenged his sentence, was denied by the trial court on June 24, 1998. There was no appeal from that order. Hill's second RCr 11.42 motion was denied by the trial court on Aug. 21, 1998. He did appeal from that order but failed to perfect his appeal and it was dismissed by this court on August 4, 1999. Hill cannot now raise these issues by a CR 60.02 motion. Gross v. Commonwealth, 648 S.W.2d 853 (Ky. 1983).

BRIEF FOR APPELLANT:

George Hill, Pro Se
Pineville, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Michael A. Nickles
Assistant Attorney General
Frankfort, Kentucky