

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-001158-MR

JASON POWERS

APPELLANT

v. APPEAL FROM WARREN CIRCUIT COURT
HONORABLE JOHN R. GRISE, JUDGE
INDICTMENT NO. 90-CR-00160

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BUCKINGHAM, DYCHE, AND GUIDUGLI, JUDGES.

DYCHE, JUDGE: On September 10, 1989, Jason Powers and Randall Rich burglarized a car wash in Bowling Green, Kentucky. They broke into the building and stole the change machine; after splitting the contents of the machine, the two pushed it over a bluff. They were indicted the following February for Burglary in the Third Degree and Theft By Unlawful Taking Over \$100 (the felony threshold at the time).

On August 13, 1990, Powers entered into a plea agreement with the Commonwealth. In exchange for Powers pleading guilty to the burglary charge, the Commonwealth would recommend a sentence of one year's incarceration, move to dismiss the theft count, and withdraw its motion to revoke parole on another indictment. The guilty plea was entered, and Powers was sentenced in September 1990 to an "adjusted sentence" of six months for Burglary in the Third Degree. A subsequent motion for shock probation was denied.

The record is silent for the next fourteen years. On August 19, 2004, Powers filed a motion pursuant to CR 60.02, claiming that the 1990 conviction is void. His motivation (as well as his explanation for the delay), according to a footnote in his brief, was to prevent the conviction from enhancing a federal felony charge he was facing. After hearing arguments on the motion and considering the Commonwealth's response to same, the Warren Circuit Court denied Powers's CR 60.02 motion on May 3, 2005. Powers appeals, and we affirm.

The gist of appellant's argument is this: By "adjusting" the sentence from an indeterminate term of one year to a determinate term of six months, the trial court effected an amendment from a felony to a misdemeanor.

We cannot agree with Powers's reasoning; we choose, rather, to hold with the trial court's assessment:

It clearly appears that the Court fully intended a felony conviction, but to impose only six months of jail time for the conviction. If the Court made an error by imposing a lesser sentence than it was authorized to impose, that mistake inured to the benefit of the defendant; it did not, however, void the judgment of conviction.

Furthermore, the trial court correctly determined that fourteen years is beyond a "reasonable time" within which a CR 60.02 motion is properly brought. See Gross v. Commonwealth, 648 S.W.2d 853, 858 (Ky. 1983).

The order of the Warren Circuit Court is affirmed.

ALL CONCUR.

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