Commonwealth of Kentucky
Supreme Court
No. 2023-SC-0518-DG
Electronically filed

COMMONWEALTH OF KENTUCKY **APPELLANT**

v.

Appeal from Fayette Circuit Court
Hon. Kimberly N. Bunnell, Judge
Indictment No. 12-CR-00334

DARRELL STRUNK **APPELLEE**

Reply Brief for the Commonwealth of Kentucky

Submitted by,

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CERTIFICATE OF SERVICE

I certify that on February 24, 2025, a copy of the Reply Brief for the Commonwealth of Kentucky has been served as follows: via U.S. Mail to Hon. Kimberly N. Bunnell, Judge, 120 North Limestone, Lexington, Kentucky 40507; via electronic mail to Hon. Kimberly Henderson Baird, Commonwealth's Attorney, 116 North Upper Street, Suite 300, Lexington, Kentucky 40507; and via U.S. Mail to Hon. John Landon, Landon Law, PLLC, counsel for Appellee, 271 W. Short Street, Suite 110, Lexington, Kentucky 40507. The appellate record was not checked out.

/s/ Melissa A. Pile
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INTRODUCTION

The purpose of this reply brief is to address the contentions in Appellee's brief. The Commonwealth does not intend to waive arguments by declining to address them.

STATEMENT CONCERNING ORAL ARGUMENT

On April 12, 2024, this Court granted discretionary review and designated this appeal for oral argument under RAP 38.

STATEMENT CONCERNING CITATIONS TO THE RECORD

The Commonwealth's video record citation will conform to RAP 31(E)(4).

The transcript of court filings will be cited as "TR [Volume number], [page number]."

Appellee's brief will be cited as "Appellee's Br., [page number]."

WORD-COUNT CERTIFICATE

This document complies with the 3,500 word-count limit of RAP 31(G)(3)(b) because, excluding the parts of the brief exempted by RAP 15(D) and RAP 31(G)(5), this document contains 1,581 words.

STATEMENT OF POINTS AND AUTHORITIES

COUNTERSTATEMENT OF THE CASE

The Commonwealth stands by the statement of the case in its Appellant's brief.

ARGUMENT

I. Review by this Court was not improperly granted.

In his appellee brief, Darrell Strunk, asserts that this issue was not properly preserved and was raised for the first time in the Commonwealth's petition for rehearing. (Appellee's Br, 4.) He notes that this Court can determine that its discretionary review "may have been improvidently granted." (*Id.*)

The circuit court denied Strunk's motion for relief from his sentence under CR 60.02. (TR Vol. III, 348-52.) It determined that Strunk's sentences were from separate indictments and acts; therefore, his guilty plea was statutorily authorized and did not contravene *Duncan v. Commonwealth*, 640 S.W.3d 84 (Ky. App. 2021). (*Id.* at 351.)

The Court of Appeals disagreed and determined that Strunk's sentences violated of KRS 532.110(1)(c) and KRS 532.080(6)(b). *Strunk v. Commonwealth*, No. 2023-CA-0900-MR, slip op. at 10-11, 13 (Ky. App. Sept. 8, 2023). The Court of Appeals concluded that "the appropriate remedy" was to reverse and remand with instructions for the circuit court to vacate the excess portion of Strunk's sentence. *Id.* at 12. The Court of Appeals relied on *McClanahan v. Commonwealth*, 308 S.W.3d 694 (Ky. 2010), to reach its conclusion that Strunk's sentence was not permissible. *Strunk*, slip op. at 9-11. It then relied on *Duncan* and concluded that "the appropriate remedy" was to reverse and remand with instructions for the circuit court to vacate the excess portion of Strunk's sentence. *Id.* at 12. The result the Court of Appeals reached differed vastly from *McClanahan*, in which this Court directed that McClanahan be permitted to withdraw his guilty plea and that the Commonwealth could

reinstate the dismissed charges if it so chose to. *McClanahan*, 308 S.W.3d at 702. Here, the Commonwealth petitioned the Court of Appeals for rehearing based on the differing remedies under *McClanahan* and *Duncan*.

It was not until the Court of Appeals relied on *McClanahan*, but reached a different result in the remedy it granted Strunk, that the Commonwealth could seek to resolve the resulting conflict that had occurred—and at that point, it could do so only through a petition for hearing. (Petition for rehearing, 2.)[1] At that time, the Commonwealth also asserted that the Court of Appeals "overlooked law applicable to plea agreements and the overarching principle of CR 60.02 that it is the judgment that should be vacated." (*Id.*)

As the party affected by the Court of Appeals' opinion reversing and vacating ten years from Strunks' sentence, the Commonwealth was permitted to seek a petition for rehearing from the Court of Appeals. RAP 43(B)(1). A petition for rehearing is permitted "when it appears that the court has overlooked a material fact in the record, or a controlling statute or decision, or has misconceived the issues presented on the appeal or the law applicable thereto." RAP 43(B)(1)(a). When the Commonwealth's petition for rehearing was denied, it sought discretionary review from this Court.

In the Commonwealth's motion for discretionary review, it again asked this Court to resolve the conflict in remedies from the Court of Appeals' opinion reversing. (Motion for Discretionary Review, 2.) Specifically, the Commonwealth's question of law was: "As it pertains to a void sentence from a plea agreement, should the judgment be vacated as established in *McClanahan*, or should the excess portion be vacated as established in *Duncan*?"

[1] Copies of the Commonwealth's petition for rehearing and motion for discretionary review can be found in the appendix to its initial appellant brief.

(*Id.* at 3.) On April 12, 2024, this Court granted discretionary review.

"Such review is a matter of judicial discretion and will be granted only when there are special reasons for it." RAP 44(A). The moving party is to provide the questions of law involved and "the specific reason or reasons why the judgment should be reviewed." RAP 44(C)(5). A motion for discretionary review to this Court must be filed before the Court of Appeals' opinion is final. *See* RAP 44(B). Understandably so, because a discretionary appeal to this Court "is simply an extension of the first appeal." *Fischer v. Fischer*, 348 S.W.3d 582, 594 (Ky. 2011), *abrogated on other grounds by Nami Res. Co., L.L.C. v. Asher Land & Min., Ltd.*, 554 S.W.3d 323 (Ky. 2018).

This Court "generally require[s] a party to properly preserve allegations of error at the trial court level and upon every level of appellate review. *Gasaway v. Commonwealth*, 671 S.W.3d 298, 312 (Ky. 2023). The Commonwealth could not raise the remedy issue with the circuit court because the Commonwealth was the prevailing party at the trial court level. *See Fischer*, 348 S.W.3d at 592 ("Since this Court reverses or affirms *judgments* rather than *issues,* then if a judgment has been affirmed, there is obviously no logical reason for the prevailing party to appeal, regardless of the ground or grounds upon which affirmance occurs."). It was not until the Court of Appeals reversed and remanded for imposition of a new sentence that the Commonwealth could seek review of the remedies issue. *See id.* at 596 ("The discretionary review rules were designed with an eye toward the Court addressing narrow issues of law in the course of reviewing the Court of Appeals' decision."). Until that time, the Commonwealth had not been aggrieved by any court decision in this case.

Contrary to Strunk's claim, there is not a preservation issue with the Commonwealth's argument that renders this Court's review improper. (Appellee's Br., 4.) As

recently clarified, this Court "review[s] issues, not arguments." *Gasaway*, 671 S.W.3d at 313 (quoting *Brewer v. Commonwealth*, 478 S.W.3d 363, 367 n.2 (Ky. 2015)). Whether Strunk should get relief from his sentence is a preserved issue for this Court's review. *See*, *e.g.*, *Ellis v. Commonwealth*, 694 S.W.3d 294, 300 (Ky. 2024) ("Thus, there being no question that the issue of whether Ellis' statements should have been suppressed for violation of *Miranda* is preserved, we are well-within our authority to consider that question as applicable precedent demands."). Indeed, the Commonwealth would have had no opportunity to preserve this issue until it was decided adversely to the Commonwealth. That did not happen in the trial court, and happened only upon issuance of the Court of Appeals' opinion. This Court should reject Strunk's claim that review was improperly granted and decide the merits of the issue.

II. Strunk was not entitled to an evidentiary hearing to question prior counsel about his advice.

Next, Strunk claims that if this Court does not agree with the Court of Appeals' opinion, then a hearing to question his prior counsel is warranted. (Appellee's Br., 10.) He acknowledges that under *Campbell v. Commonwealth*, 316 S.W.3d 315, 320 (Ky. App. 2009), the issue about his sentence is a legal one that should not require a hearing. (Appellee's Br., 10.) But he claims that if precedent does not resolve this issue, then it was error for the circuit court not to hold a hearing and allow him to "question counsel about what he told" Strunk. (*Id.*)

On June 17, 2016, almost exactly three years from entry of final judgment, Strunk sought relief under RCr 11.42 and requested concurrent sentencing. (TR Vol. II, 264-76.) The Commonwealth opposed that motion, and Strunk eventually withdrew it. (*Id.* at 279-92.) Even if Strunk had not waived his opportunity for a possible RCr 11.42 hearing to question

his prior counsel, he is correct that the imposition of his sentence is a legal question. *See Gasaway*, 671 S.W.3d at 314 ("The valid waiver of a known right precludes appellate review while a forfeited claim of error may be reviewed for palpable error."). In denying Strunk's CR 60.02 motion, the circuit court also determined that the issue was resolved by its review of the record and a hearing was not necessary. (TR Vol. III, 347, 352; VR 6/10/22, 1:31:00.) Before the Court of Appeals, Strunk had requested alternative relief for a hearing. (Court of Appeals Appellant's Br., 8-9.) The Court of Appeals' opinion is silent on that relief, but it implicitly did not reach that issue, since it reversed and remanded for imposition of a new sentence.

Still, Strunk correctly states that a sentencing error is a legal issue for which a hearing is not necessary. (Appellee's Br., 10.) In *Campbell*, the Court of Appeals noted that "the purpose of an evidentiary hearing . . . is to determine facts which are not discernable from the record" and an evidentiary hearing was not necessary for a legal conclusion of the retroactivity of a change in law. 316 S.W.3d at 320. This Court has similarly agreed that a hearing is not necessary for legal conclusions when ruling a CR 60.02 motion. *See*, *e.g.*, *Foley v. Commonwealth*, 425 S.W.3d 880, 884 (Ky. 2014) ("An evidentiary hearing is not required to assess the reasonable time restriction inherent in CR 60.02 motions because this determination is left to the discretion of the trial court."); *Gross v. Commonwealth*, 648 S.W.2d 853, 856 (Ky. 1983); *Commonwealth v. Carneal*, 274 S.W.3d 420, 433 (Ky. 2008).

Here, should this Court disagree with the Court of Appeals' opinion, it should conclude that the circuit court did not abuse its discretion in denying Strunk's motion for an evidentiary hearing.

CONCLUSION

For these reasons, the opinion of the Court of Appeals should be reversed and, if this Court finds that there was a statutory-cap violation, the Fayette Circuit Court should be directed to set aside the judgment, not just to vacate the excess portion of Strunk's sentence.

Respectfully submitted,

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