

Commonwealth Of Kentucky

Court of Appeals

NO. 2001-CA-001248-MR

JOSEPH DONALD BARTLEY, JR.

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JOAN L. BYER, JUDGE
ACTION NO. 84-CR-000878

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** * * *

BEFORE: BUCKINGHAM, McANULTY, AND SCHRODER, JUDGES.

McANULTY, JUDGE: Joseph Donald Bartley, Jr. (Bartley) appeals from the trial court's denial of his motion for relief from judgment made under CR 60.03 and based on ineffective assistance of counsel. Bartley argues that he has never had a meaningful review of his ineffective assistance claim. Further, had he received adequate representation, he would not have entered an Alford plea in 1986 to various felony charges and to being a persistent felony offender in the second degree. Because we

conclude that this appeal is in contravention of the finality provisions of RCr 11.42(3) and the reasonableness requirement of CR 60.02, we affirm.

The charges against Bartley stemmed from the March 19, 1984 burglary of the home of Linda Nickel. The police arrested Bartley and two other co-defendants four days later after one of the co-defendants used Linda Nickel's credit card. Bartley initially pled not guilty.

Ultimately on April 7, 1986, after being represented by six attorneys and having his trial continued a number of times, Bartley entered a guilty plea under North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970), to theft by unlawful taking over \$100, second degree burglary, fraudulent use of a credit card, receipt of a stolen credit card, and to being a persistent felony offender in the second degree. He was sentenced to serve eight years in prison consecutive to a prior twelve-year sentence.

On May 16, 1988, Bartley filed a *pro se* motion pursuant to RCr 11.42 to vacate, set aside or correct his sentence and to appoint counsel to supplement his original motion. The specific ground set forth by Bartley in support of his claim was that his trial counsel failed to file pre-trial motions that would have enabled him to have a better opportunity to change the final outcome of the results. In particular,

Bartley challenged his trial counsel's failure to file a "Bill of Particulars" which would have enabled him to inspect and verify evidence and documentation that would be used by the Commonwealth to convict Bartley. In addition, Bartley alleged that his counsel was not prepared for trial and further failed to consult with him on any available defenses.

On May 20, 1988, the trial court granted that portion of Bartley's RCr 11.42 motion in which Bartley requested the appointment of counsel; however, there is no record of this original motion ever having been supplemented by counsel. On March 20, 1989, the trial court denied Bartley's RCr 11.42 motion, finding that all the grounds stated in the motion were insufficient to invalidate the judgment in all respects.

Bartley appealed and this court affirmed the trial court in an opinion rendered February 23, 1990.

In pertinent part, the opinion is as follows:

As grounds to vacate his sentences, the appellant alleges ineffective assistance of counsel, primarily because counsel failed to file pretrial motions...

With respect to the claim of ineffective assistance of counsel, the appellant has failed to allege that were it not for counsel's alleged errors he, the appellant, would not have pled guilty and would insisted [sic] on going to trial on the charges against him. He has also failed to point to anything in the record which would even raise a question that, but for counsel's alleged errors, there is a reasonable probability that the appellant would not have pled guilty.

The trial court did not err in denying without an evidentiary hearing the appellant's motion insofar as it was based upon the ineffective assistance of counsel.

(citations omitted).

The record indicates that an attorney did represent Bartley on appeal. Bartley then filed a *pro se* motion for discretionary review to the Kentucky Supreme Court; however, this motion was not filed timely.

On January 21, 2001, Bartley filed a *pro se* motion for relief from judgment under CR 60.03. On March 14, 2001, the trial court denied the motion, precipitating this appeal.

Bartley argues that he has never received a meaningful review of his claims of ineffective assistance of counsel. Bartley feels his initial collateral attack in the RCr 11.42 motion produced no relief because, as Bartley wrote it *pro se*, it was not properly worded, not amended or clarified by counsel, and not explored by the trial court through an evidentiary hearing. Bartley believes that this court did not liberally construe his claims in the first appeal, instead dismissing his claim because his unassisted *pro se* pleadings failed to articulate that, were it not for counsel's alleged errors, he would not have pleaded guilty and would have insisted on going to trial.

In this appeal, Bartley significantly expands on the initial, conclusory assertion from his RCr 11.42 motion that his trial counsel was not prepared for trial. Now, Bartley alleges that his trial counsel advised him that he should plead guilty because Bartley had already been found guilty on other charges and was doing time on those charges. His counsel reasoned that it was futile for Bartley to proceed in a prolonged and time-consuming trial in the face of his already impending prison sentence. However, Bartley insisted on going to trial, at which point Bartley's counsel informed Bartley that he was not prepared to represent him at trial. Thus, if Bartley did not plead guilty, then Bartley would have to go to trial without his attorney having reviewed the discovery. Only under these intimidating circumstances did Bartley decide to change his plea to an Alford plea.

In this appeal, Bartley admits that he did not clearly state the facts and circumstances surrounding his plea in his RCr 11.42 motion. Under RCr 11.42(2),(3),

(2) The motion shall be signed and verified by the movant and shall state specifically the grounds on which the sentence is being challenged and the facts on which the movant relies in support of such grounds. Failure to comply with this section shall warrant a summary dismissal of the motion.

(3) The motion shall state all grounds for holding the sentence invalid of which the movant has knowledge. Final disposition of the motion

shall conclude all issues that could reasonably have been presented in the same proceeding.

Accordingly, "this court will not review matters which have been or should have been raised and reviewed in prior motions to vacate." Shepherd v. Commonwealth, Ky., 477 S.W.2d 798, 799 (1972).

Contrary to Bartley's assertions in this appeal, that he filed his motion *pro se* is not a plausible reason why he did not advance his present claim in the previous RCr 11.42 motion. Even if Bartley was not initially aware that his trial counsel's actions may have warranted RCr 11.42 relief, he was certainly aware in 1990 when he filed his untimely, *pro se* motion for discretionary review with the Kentucky Supreme Court and made the allegations that he advances in this appeal. In accord with RCr 11.42(2),(3), and in the interests of finality, we conclude that Bartley is precluded from advancing this claim fourteen years later because it reasonably could have been presented in his initial RCr 11.42 motion when the trial court would have had the necessary parties and evidence before it to adequately hear the issue. For instance, the Jefferson Circuit Court has certified to this court that it cannot locate Bartley's guilty plea proceeding of April 7, 1986. Thus, we believe the lapse in time would advantage Bartley and unfairly prejudice the Commonwealth.

Moreover, we agree with the Commonwealth that Bartley's CR 60.03 motion is more properly construed as a motion under CR 60.02 because it is not truly an independent action as CR 60.03 contemplates. Instead, Bartley filed this motion as a part of the original case against him. In any event, under CR 60.03, "[r]elief shall not be granted in an independent action if the ground of relief sought has been denied in a proceeding by motion under Rule 60.02, or would be barred because not brought in time under the provisions of that rule." Under CR 60.02, motions for relief from judgment "shall be made within a reasonable time." The issue raised in this appeal could have been raised in 1988, but was not.

CR 60.03 requires that there be "appropriate equitable grounds in order that relief be granted." "Freedom from laches is generally regarded as a prerequisite to the granting of equitable relief from judgments, . . ." The delay deprives appellant of the right to assert equitable grounds.

Huffaker v. Twyford, Ky., 445 S.W.2d 124, 125 (1969) (internal citations omitted).

For the foregoing reasons, we affirm the Jefferson Circuit Court's denial of equitable relief under CR 60.03.

ALL CONCUR.

BRIEF FOR APPELLANT:

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