

RENDERED: August 15, 2003; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2001-CA-002290-MR

GERALD E. RAMSEY

APPELLANT

v. APPEAL FROM MADISON CIRCUIT COURT
HONORABLE JULIA HYLTON ADAMS, JUDGE
INDICTMENT NOS. 79-CR-00076, 80-CR-00080 AND 80-CR-00081

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** * * *

BEFORE: PAISLEY and TACKETT, Judges; HUDDLESTON, Senior Judge.¹

HUDDLESTON, Senior Judge. Gerald Ramsey appeals from a Madison Circuit Court order denying his post-judgment motion for relief pursuant to Kentucky Rules of Civil Procedure (CR) 60.02(e) and (f).

¹ Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Ky. Rev. Stat. (KRS) 21.580.

Ramsey was charged in an indictment with two counts of theft by unlawful taking² on August 29, 1979, under indictment 79-CR-076. On October 30, 1979, he entered a guilty plea to the charges and was sentenced on November 1, 1979, to one year on each count for a total of two years' imprisonment. On October 14, 1980, Ramsey was indicted on one count of second-degree burglary³ and one count of receiving stolen property⁴ under indictment 80-CR-080. This burglary occurred at the dwelling of Terry Fields. Also, on October 14, 1980, Ramsey was indicted on one count of second degree burglary⁵ under indictment 80-CR-081 for events occurring at the dwelling of Rosanne Cleveland. On January 7, 1981, Ramsey entered a guilty plea to one count of receiving stolen property under 80-CR-080 and one count of an amended charge of burglary in the third degree under indictment 80-CR-081. In exchange for the guilty plea, the Commonwealth dismissed the burglary charge under 80-CR-080 and amended the burglary charge under 80-CR-081 down to burglary in the third degree. Ramsey was sentenced to one year for receiving stole property to be served consecutively to his two-year sentence under 79-CR-076. Ramsey was sentenced to four years for

² Ky. Rev. Stat. (KRS) 514.030.

³ KRS 511.030.

⁴ KRS 514.110.

⁵ KRS 511.030.

burglary in the third degree to be served consecutively to his two-year sentence under 79-CR-076 and consecutively to his one-year sentence under 80-CR-080, for a total of seven years.

On August 23, 1999, Ramsey filed a motion for expungement of his record for second-degree burglary pursuant to Kentucky Revised Statutes (KRS) 431.076. The trial court denied the motion, finding that Ramsey had pleaded guilty to the lesser offense of burglary in the third degree in exchange for having the charge of burglary in the second degree dismissed. Ramsey did not appeal from that order.

On September 26, 2001, Ramsey filed a motion pursuant to CR 60.02(e) and (f), claiming his counsel was ineffective for failing to investigate what Ramsey contends was a defective indictment. The circuit court denied the motion stating:

The movant has filed a Motion for relief under CR 60.02 (e) and (f). The court has reviewed the multiple records and finds that Argument I - Ineffective Assistance of Counsel is barred from consideration by [Kentucky Rules of Criminal Procedure (RCr)] 11.42 said convictions occurred more that twenty years past. [sic] The motion is long on legal argument and short on factual bases to support the relief requested. The Court finds that the burden is on the movant, and that he had [sic] failed to show

that the motion has been brought within a reasonable time, or that the conditions required by CR 60.02(e) and (f) exist.

It is from this order that Ramsey appeals.

The case of Gross v. Commonwealth⁶ clearly sets forth the structure for attacking a final judgment of a trial court in a criminal case and explains the purpose of a CR 60.02 motion. CR 60.02 is for relief that is not available by direct appeal nor available under RCr 11.42. In order to prevail, the movant must demonstrate why he is entitled to the special, extraordinary relief provided by CR 60.02.⁷ The proper procedure is to directly appeal the judgment, stating every ground it is reasonable to then present.⁸ Next, a defendant is required to avail himself of RCr 11.42 relief, as to any ground of which he is or should be aware.⁹ A defendant is precluded from raising issues under CR 60.02 which could reasonably have been presented on direct appeal or in a RCr 11.42 motion.

Ramsey claims that he did not discover the information on which his claim was based until the three year limitation had

⁶ Ky., 648 S.W.2d 853 (1983).

⁷ Id. at 857.

⁸ Id.

⁹ Id.

run for him to file a motion pursuant to RCr 11.42. The record refutes this claim. The indictments against Ramsey clearly spelled out the charges against him. Ramsey entered guilty pleas to the charges in open court after a separate colloquy for each of the indictments. The circuit court explained the charges to which Ramsey was pleading, the sentencing possibilities, which charge was being dismissed, and that the charge of second-degree burglary was being amended to third-degree burglary.

The circuit court denied Ramsey's motion because he failed to make the claim within a reasonable time. In Gross, the Court addressed the standard of review of a trial court's determination that a CR 60.02 motion was not brought within a reasonable time. The Court said that: "Absent some flagrant miscarriage of justice an appellant court should respect the trial court's exercise of discretion in these circumstances."¹⁰ Under the circumstances, the circuit court did not abuse its discretion resulting in a flagrant miscarriage of justice.

The order denying Ramsey's CR 60.02 motion is affirmed.

ALL CONCUR.

¹⁰ Id. at 858.

BRIEF FOR APPELLANT:

Gerald E. Ramsey, pro se
LaGrange, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler III
Attorney General

William L. Daniel, II
Assistant Attorney General