

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000093-MR

GARY L. DILLARD

APPELLANT

v. APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE EDWIN M. WHITE, JUDGE
ACTION NOS. 94-CR-00221 AND 94-CR-00433

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** * * *

BEFORE: BAKER, GUIDUGLI, AND SCHRODER, JUDGES.

SCHRODER, JUDGE. This is an appeal from an order denying appellant's CR 60.02 motion alleging double jeopardy and that he was wrongfully indicted for being a persistent felony offender (PFO). Since appellant's arguments could have been raised in his direct appeal or in his previous RCr 11.42 motion, the motion was properly denied. Hence, we affirm.

In July of 1994, appellant, Gary Dillard, was charged by information with murder, possession of a handgun by a convicted felon, and with PFO 2. These charges arose out of a shooting committed by Dillard outside a bar on July 8, 1994. In December of 1994, Dillard was indicted in a separate indictment for eight counts of first-degree wanton endangerment and PFO 2. These charges also arose out of the incident on July 8, 1994. A 1988 conviction for first-degree assault was the underlying offense of the PFO 2 charge.

In November of 1994, Dillard entered guilty pleas to two counts of possession of a handgun by a convicted felon pursuant to a plea agreement for which he was sentenced to eighteen months' imprisonment. In January of 1995, Dillard was tried by a jury on the murder and wanton endangerment charges. On January 11, 1995, the jury found Dillard guilty of murder and three counts of wanton endangerment in the first degree and sentenced him to life imprisonment on the murder charge and five years' imprisonment on each of the wanton endangerment charges. The court ultimately sentenced Dillard to life imprisonment and fifteen years' imprisonment to run concurrently with the life sentence.

Dillard subsequently filed a direct appeal of his convictions, as well as numerous other post trial motions. Thereafter, on December 7, 1995, Dillard filed an RCr 11.42

motion, alleging ineffective assistance of counsel and that perjured testimony was admitted at his trial. The record before us does not contain the order on that motion, only an order holding the motion in abeyance until the direct appeal was resolved. On October 5, 1999, Dillard filed a CR 60.02 motion, which was denied on the same date on grounds that the motion re-litigated issues which could have been presented on direct appeal or in an RCr 11.42 motion. On April 6, 2000, Dillard filed another CR 60.02 motion which was likewise denied.

On December 6, 2001, Dillard filed yet another CR 60.02 motion. As grounds for this motion, Dillard argued that his prior conviction for possession of a handgun by a convicted felon and his subsequent conviction for murder constituted double jeopardy. Dillard also argued that he was wrongfully indicted for PFO and murder, although he was never tried or convicted of the PFO charge. From the denial of this motion, Dillard now appeals.

Both arguments raised by Dillard in this CR 60.02 motion, that he was subject to double jeopardy and was wrongfully indicted for PFO and murder, were issues known to Dillard at the time of his direct appeal. Hence, they could have been raised in the direct appeal or in the RCr 11.42 motion, but were not. CR 60.02 is not a substitute for an RCr 11.42 motion. McQueen v. Commonwealth, Ky., 948 S.W.2d 415

(1997), cert. denied, 521 U.S. 1130, 117 S. Ct. 2535, 138 L. Ed. 2d 1035 (1997). Further, a CR 60.02 motion is not an opportunity to re-litigate issues which could have reasonably been presented by direct appeal or in an RCr 11.42 motion. Commonwealth v. Gross, Ky., 648 S.W.2d 853 (1983).

Additionally, this was Dillard's third CR 60.02 motion, yet this was the first time the issues in question were ever raised. Accordingly, the denial of the motion was entirely proper.

For the reasons stated above, the judgment of the Christian Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Gary Dillard, Pro Se
Central City, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler, III
Attorney General

Dennis W. Shepherd
Assistant Attorney General
Frankfort, Kentucky