

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000142-MR

RAYMOND HURT

APPELLANT

v. APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE EDWIN M. WHITE, JUDGE
ACTION NO. 95-CR-00285

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** * * * **

BEFORE: COMBS, GUIDUGLI AND SCHRODER, JUDGES.

GUIDUGLI, JUDGE. Raymond Hurt, Jr., (hereinafter Hurt) appeals the Christian Circuit Court's order denying his RCr 11.42 motion. We affirm.

Hurt was indicted by the Christian County Grand Jury on charges of first-degree possession of a controlled substance, first offense, cocaine (KRS 218A.1415), and carrying a concealed weapon (KRS 527.060) on October 4, 1995. A trial by jury was held in May, 1996. At the conclusion of all evidence, the trial

court granted Hurt's motion for a directed verdict of acquittal on the carrying a concealed weapon charge. The jury was instructed on the possession of a controlled substance charge and returned a guilty verdict. The jury received the following instruction as to the possession count:

INSTRUCTION NO. 1

POSSESSION OF A CONTROLLED SUBSTANCE, FIRST DEGREE, FIRST OFFENSE, COCAINE

You will find the Defendant guilty of Possession of a Controlled Substance, First Degree, First Offense, Cocaine, under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:

- A. That in this county on or about the 5th day of August, 1995, and before the finding of the Indictment herein, he had in his possession a quantity of cocaine;

AND

- B. That he knew the substance so possessed by him was cocaine.

Following the guilty verdict, the trial proceeded to the sentencing phase. Upon completion of testimony in this part of the trial, the court instructed the jury as to the penalty in the following manner:

INSTRUCTION NO. 1

You have found the Defendant guilty of Possession of cocaine and shall now proceed to fix his punishment on that charge. You first shall determine whether at the time of

the commission of the offense for which you have found him guilty you believe from the evidence beyond a reasonable doubt that the Defendant was in possession of a firearm. If you find that he was not in possession of a firearm, proceed to Verdict Form I. If you find and so state in your verdict that he was in possession of a firearm, proceed to Verdict Form II.

Pursuant to KRS 218A.1415, possession of a controlled substance in the first degree is a Class D felony (1-5 years) for a first offense. However, pursuant to KRS 218A.992, the above penalty is enhanced to a Class C felony (5-10 years) if one is in possession of a firearm at the time of the commission of the possession offense. Based upon the instruction as given by the court, the jury returned the following sentencing verdict:

VERDICT FORM II

We, the jury, having found the Defendant guilty of Possession of a Controlled Substance, First Degree, First Offense, Cocaine, and further believe from the evidence beyond a reasonable doubt that the Defendant was in possession of a firearm when he committed the offense, do hereby fix his punishment as follows:

Confinement in the penitentiary for
10 years.
(5 to 10)

/S/ Taylor S. Wright
Foreperson

Hurt appealed his conviction alleging ineffective assistance of counsel and insufficient evidence to support the verdict. His claims as to ineffective assistance of counsel, raised for the first time on appeal, were that his attorney failed to move to suppress evidence seized and failure to object to remarks made by the prosecutor in closing argument. In a not-to-be-published opinion rendered August 7, 1998, (Court of Appeals No. 96-CA-002313-MR) another panel of this Court rejected his arguments and affirmed his conviction.

Hurt then filed a CR 60.02 motion on February 1, 2001. In his memorandum of law in support of his CR 60.02 motion, Hurt alleged that the trial court had "erred by enhancing [his] sentence pursuant to KRS 218A.992." Under arguments one and three of his memorandum, Hurt argued that the trial court improperly enhanced his penalty and improperly changed the elements of the offense by permitting the jury to sentence him pursuant to KRS 218A.992. The court found his arguments "incorrect" and denied Hurt's CR 60.02 motion. No appeal was taken from the order entered March 1, 2001. Instead Hurt filed a RCr 11.42 on December 14, 2001. In his RCr 11.42 motion, Hurt again argues that his trial counsel was ineffective in failing to object to the improper jury instructions during the penalty phase of the trial resulting in his being sentenced, pursuant to KRS 218A.992, to ten years' imprisonment. The court denied his

motion finding that the motion was untimely under RCr 11.42(10), requiring such motion to be filed within three years after the judgment becomes final. In denying Hurt's motion, the court stated, in relevant part: "Three years have passed since that date (July 31, 1996, the date of sentencing) and nothing in the record or his motion indicates that either of the exceptions apply to him. Furthermore, even if the time limit did not exist, there is no basis in law or fact for granting his motion." This appeal followed.

On appeal the Commonwealth concedes that the trial court erred as to Hurt's RCr 11.42 motion being filed untimely. Both parties cite Palmer v. Commonwealth, Ky.App., 3 S.W.3d 763 (1999), which holds the three-year time limit begins to run not from the date of the filing of the trial court's judgment but from the date of the appellate court's judgment following direct appeal. Thus, Hurt's RCr 11.42 motion was timely filed. However, the Commonwealth does argue that Hurt's motion is procedurally flawed in that he had already raised the same issues in his previous CR 60.02 motion and is thus barred from raising the same issues in a subsequent collateral attack motion. We agree. Despite the fact that Hurt's arguments in this matter may have validity, he is barred from raising them. First, he should have raised these issues in his direct appeal. Although he did not raise these issues in his direct appeal,

once he raised the same issues in his CR 60.02 motion and received an unfavorable ruling he was required to appeal that order or be barred from raising them in a subsequent motion. The Commonwealth contends the "law of the case" doctrine prohibits Hurt from again trying to collaterally attack an alleged trial court error. The Commonwealth cites Commonwealth v. Schaefer, Ky., 639 S.W.2d 776, 777-78 (1982), in this regard, as follows:

The "law of the case" doctrine is firmly established in this Commonwealth. As early as 1870, we held that the Court of Appeals has no power on a second appeal to correct an error in the original judgment which either was, or might have been relied upon in the first appeal. McAllister's Adm'r. v. Commonwealth, 4 Ky. Opin. 178 (1870). This doctrine has carried through case law and in Sowers v. Coleman, 223 Ky. 633, 4 S.W.2d 731 (1928), we firmly solidified the policy of this doctrine as such:

The doctrine of "the law of the case" is founded upon the policy that there should be an end to litigation, and cases may not be presented by piecemeal. It is a sound policy, and well developed and understood in this jurisdiction. The doctrine as defined by the decisions, is that one adjudication settles all errors relied upon for a reversal, whether mentioned in the opinion of the court or not, and all errors lurking in the record on the first appeal which might have been, but were not expressly, relied upon as error.

We further held, in Aetna Oil Co. v. Metcalf, 300 Ky. 817, 190 S.W.2d 562, 563 (1945) that:

No rule is more firmly established in this jurisdiction than the one that the opinion on the first appeal becomes the law of the case not only as to the errors there relied upon for reversal but also as to errors appearing in the first record that might have been but were not there relied upon for a reversal.

A "final decision of (the Court), whether right or wrong, is the law of the case and is conclusive of the questions therein resolved. It is binding on the parties, the trial court, and the (appellate courts)." Martin v. Frasure, KY., 352 S.W.2d 817, 818 (1961).

More often appellate courts have relied upon the rule set out in Gross v. Commonwealth, Ky., 648 S.W.2d 853 (1983), that held:

. . . the proper procedure for a defendant aggrieved by a judgment in a criminal case is to directly appeal that judgment, stating every ground of error which it is reasonably to expect that he or his counsel is aware of when the appeal is taken.

Next, we hold that a defendant is required to avail himself of RCr 11.42 while in custody under sentence or on probation, parole or conditional discharge, as to any ground of which he is aware, or should be aware, during the period when this remedy is available to him. Final disposition of that motion, or waiver of the opportunity to make it, shall conclude all issues that

reasonably could have been presented in that proceeding. The language of RCr 11.42 forecloses the defendant from raising any questions under CR 60.02 which are "issues that could reasonably have been presented" by RCr 11.42 proceedings.

Id. at 857. Under either doctrine, Hurt, who first raised the issues now before this Court in his prior CR 60.02 motion, which was denied and not appealed, is precluded from presenting those same issues in this appeal.

For the foregoing reasons, the order of the Christian Circuit Court denying Hurt's RCr 11.42 motion is affirmed.

ALL CONCUR.

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