

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000179-MR

ERIC STRATTON

APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE BARRY WILLETT, JUDGE
ACTION NOS. 83-CR-000883 AND 83-CR-000966

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** *

BEFORE: GUIDUGLI, JOHNSON AND KNOPF, JUDGES.

JOHNSON, JUDGE: Eric Stratton has appealed from an opinion and order entered by the Jefferson Circuit Court on November 30, 2001, that denied his motion for relief pursuant to CR¹ 60.02 from a criminal sentence. Having concluded that the circuit court did not err, we affirm.

¹ Kentucky Rules of Civil Procedure.

On June 22, 1983, a Jefferson County grand jury indicted Stratton for two counts of kidnapping² and two counts of robbery in the first degree.³ Approximately one month later, the grand jury issued another indictment against Stratton, charging him with seven counts of kidnapping and five counts of robbery in the first degree. These charges arose from a series of kidnappings and robberies committed in Louisville, Kentucky, from April 1983 to May 1983.

Pursuant to a plea agreement with the Commonwealth, Stratton entered a guilty plea to each count contained in both indictments on December 14, 1983. In return for these guilty pleas, the Commonwealth agreed to recommend that the sentences for these offenses run concurrently, giving Stratton a total prison sentence of ten years. When entering his guilty pleas, Stratton informed the trial court that he understood that the trial court was not bound by the Commonwealth's sentencing recommendation. Prior to being sentenced on January 18, 1984, Stratton also confirmed his understanding that the trial court was not bound by the recommendation. Thereafter, the trial court refused to accept the Commonwealth's sentencing recommendation. Instead, the trial court entered a sentence of ten years' imprisonment for the nine kidnapping counts and a

² Kentucky Revised Statutes (KRS) 509.040.

³ KRS 515.020.

sentence of ten years' imprisonment for the seven robbery counts, with these sentences ordered to run consecutively for a total prison sentence of 20 years.

On July 25, 1984, Stratton filed a motion to vacate this judgment pursuant to RCr⁴ 11.42, arguing that the trial court should have permitted him to withdraw his guilty plea after rejecting the Commonwealth's recommendation. The trial court denied this motion. On December 13, 1985, a panel of this Court affirmed the trial court's judgment.⁵ The Supreme Court of Kentucky denied Stratton's belated motion for discretionary review on January 30, 1986.⁶

In 1990 Stratton petitioned the United States District Court for the Western District of Kentucky for a writ of habeas corpus. This petition was denied on March 8, 1991.⁷ The United States Court of Appeals for the Sixth Circuit affirmed the district court's judgment on October 10, 1991.⁸

On June 11, 2001, Stratton filed his CR 60.02 motion with the trial court, reviving the arguments originally made in

⁴ Kentucky Rules of Criminal Procedure.

⁵ Stratton v. Commonwealth, 1984-CA-002557-MR (not to be published).

⁶ Stratton v. Commonwealth, 1986-SC-000030-I (not to be published).

⁷ Stratton v. Smith, C90-0488-L(A) (not to be published).

⁸ Stratton v. Smith, 946 F.2d 896 (6th Cir. 1991).

his RCr 11.42 motion. The trial court denied the CR 60.02 motion on November 30, 2001. This appeal followed.⁹

In Gross v. Commonwealth,¹⁰ the Supreme Court established the procedure for appellate review in criminal cases. The Supreme Court stated that the structure for appellate review is not haphazard or overlapping.¹¹ A criminal defendant must first bring a direct appeal when available, then utilize RCr 11.42 by raising every error of which he should be aware.¹² CR 60.02 should be utilized only for extraordinary situations not subject to relief by direct appeal or by way of RCr 11.42.¹³ The Supreme Court reaffirmed the procedural requirements set out in Gross in its opinion in McQueen v. Commonwealth:¹⁴

⁹ In his reply brief, Stratton argues that we should strike the Commonwealth's brief because it was not timely filed pursuant to CR 76.12(2)(a). Stratton has misconstrued the appellate rules. CR 76.12(2)(b)(ii) clearly states that, in an appeal of a criminal matter, if the appellant is represented by someone other than the Public Advocate of the Commonwealth or the Attorney General of the Commonwealth, the appellee's brief shall be filed within 60 days after the date on which the appellant's brief was filed or within 60 days after the date on which the record on appeal was received by the clerk of this Court, whichever is later. This option applies herein because Stratton filed this appeal pro se. Since the record was received by the clerk of this Court on July 17, 2002, the Commonwealth had until September 19, 2002, to file its brief. The Commonwealth filed its brief on September 13, 2002. Thus, the Commonwealth's brief was timely filed.

¹⁰ Ky., 648 S.W.2d 853 (1983).

¹¹ Id. at 856.

¹² Id.

¹³ Id.

¹⁴ Ky., 948 S.W.2d 415, 416 (1997).

A defendant who is in custody under sentence or on probation, parole or conditional discharge, is required to avail himself of RCr 11.42 as to any ground of which he is aware, or should be aware, during the period when the remedy is available to him. Civil Rule 60.02 is not intended merely as an additional opportunity to relitigate the same issues which could "reasonably have been presented" by direct appeal or RCr 11.42 proceedings. RCr 11.42(3); Gross v. Commonwealth, *supra*, at 855, 856. The obvious purpose of this principle is to prevent the relitigation of issues which either were or could have been litigated in a similar proceeding.

Gross and McQueen clearly establish that "[a]n issue raised and rejected on direct appeal may not be litigated [in an RCr 11.42 proceeding] by claiming that it amounts to ineffective assistance of counsel."¹⁵ This same logic applies to CR 60.02 motions since, by the very terms of the rule, it provides "extraordinary relief" just as RCr 11.42 does. In order to be eligible for CR 60.02 relief, Stratton must demonstrate why he is entitled to such extraordinary relief.¹⁶

In his brief, Stratton once again argues that his sentences are invalid because the trial court should have permitted him to withdraw his guilty pleas after rejecting the sentencing recommendations of the Commonwealth. This argument was raised, and ultimately rejected, by a panel of this Court in

¹⁵ Sanborn v. Commonwealth, Ky., 975 S.W.2d 905, 909 (1998), cert. denied, 526 U.S. 1025 (1999).

¹⁶ Barnett v. Commonwealth, Ky., 979 S.W.2d 98, 101 (1998).

1985. Consequently, Stratton is barred from raising these issues again by a CR 60.02 motion.

Additionally, Stratton failed to exercise due diligence in pursuing his claim. Under CR 60.02, a motion must be filed within a reasonable time if the motion is based upon an extraordinary reason justifying the relief sought. Here, Stratton waited until June 11, 2002, to file his CR 60.02 motion with the trial court. A delay of over 17 years under the circumstances of this case is not reasonable and does not comply with CR 60.02 requirements. Therefore, the trial court did not err in denying Stratton's CR 60.02 motion.

For the foregoing reasons, the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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