

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000867-MR

WINSTON L. WRIGHT

APPELLANT

v.

APPEAL FROM PULASKI CIRCUIT COURT
HONORABLE WILLIAM T. CAIN, JUDGE
ACTION NO. 97-CR-00005

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** * * *

BEFORE: McANULTY, MINTON, AND SCHRODER, JUDGES.

McANULTY, JUDGE. Winston Wright appeals his motion to vacate sentence pursuant to CR 60.02 and RCr 10.26. In his CR 60.02 motion, appellant alleges that his guilty plea was coerced by the actions of the then Commonwealth Attorney, Ray Carmichael; that his plea was not voluntarily or willfully entered; and that his attorneys were ineffective.

The Commonwealth initially asserts that appellant did not timely file his notice of appeal and, therefore, the appeal

must be dismissed. CR 73.02(1)(a) states that "[t]he notice of appeal shall be filed within 30 days after the date of notation of service of the judgment or order under Rule 77.04(2)." The trial court entered an order on February 13, 2002, denying the CR 60.02 motion. Appellant filed his notice of appeal on April 24, 2002. However, the running of the time to file a notice of appeal was terminated by appellant's motion to amend and make additional findings of fact pursuant to CR 52.02. CR 73.02(1)(e) states that the running of the time for appeal is terminated by a timely motion under Rule 52.02, and the full time for appeal commences to run upon entry and service of an order granting or denying the motion. The trial court entered an order denying appellant's CR 52.02 motion on April 1, 2002. The time for filing of notice of appeal then began running, and so the notice of appeal on April 24, 2002 was timely. University of Louisville v. Isert, Ky. App., 742 S.W.2d 571, 573-74 (1987). Therefore, we consider the merits of appellant's appeal.

Appellant's allegations as to ineffective assistance of counsel and the validity of his guilty plea may not be considered in a CR 60.02 motion. The language of RCr 11.42 forecloses defendants from using CR 60.02 to raise any issue which reasonably could have been presented in RCr 11.42 proceedings. Gross v. Commonwealth, Ky., 648 S.W.2d 853 (1983).

CR 60.02 is not intended as an additional opportunity to relitigate the same issues which could reasonably have been presented by direct appeal or RCr 11.42 proceedings. McQueen v. Commonwealth, Ky., 948 S.W.2d 415 (1997). CR 60.02 is not a separate avenue of appeal to be pursued in addition to other remedies, but is available only to raise issues which cannot be raised in other proceedings. Id. at 416. A CR 60.02 movant must demonstrate that he is entitled to this special, extraordinary relief. He must affirmatively allege facts which, if true, justify vacating the judgment and further allege special circumstances that justify CR 60.02 relief. Id.; Gross, 648 S.W.2d at 856.

Prior to the CR 60.02 motion, appellant brought a motion under RCr 11.42 in which he alleged his counsel was ineffective and his guilty plea was not voluntary. The motion was denied, and appellant did not appeal that order. As explained in Gross, appellant is not entitled to have those issues relitigated in this appeal of his CR 60.02 motion. Furthermore, appellant's claims that the Commonwealth Attorney extracted his guilty plea by duress and false promises could have been raised in earlier proceedings. Therefore, they may not be reviewed in a CR 60.02 action.

The court below carefully considered appellant's allegations. The court held evidentiary hearings on the claims

appellant made. We regard this, actually, as more consideration than appellant was entitled to under the circumstances. But the trial court's thorough review assures us that even if these issues had been correctly raised under CR 60.02, appellant established no basis for granting CR 60.02 relief. Appellant did not allege any special circumstances, and made no showing of the truth of his claim beyond assertions of misconduct by the Commonwealth Attorney. Further, the court concluded that appellant's guilty plea was entered willingly and that his counsels were effective. The trial court correctly denied relief pursuant to CR 60.02.

For the foregoing reasons, we affirm the order of the Pulaski Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Winston L. Wright, Pro se
LaGrange, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler III
Attorney General of Kentucky

Rickie L. Pearson
Assistant Attorney General
Frankfort, Kentucky