

RENDERED: October 3, 2003; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2002-CA-000918-MR

DANNY WATTS

APPELLANT

v. APPEAL FROM THE FAYETTE CIRCUIT COURT
HON. LAURANCE B. VANMETER, JUDGE
INDICTMENT NO. 92-CR-00124

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: EMBERTON, CHIEF JUDGE; BAKER AND JOHNSON, JUDGES.

BAKER, JUDGE: Danny Watts (Watts) appeals, *pro se*, the denial of his Ky. R. Civ. P. (CR) 60.02 motion to vacate his sentence. Watts raises at least eight grounds in favor of his CR 60.02 motion. Several grounds raised issue with the validity of his guilty plea, while several others alleged ineffective assistance of counsel. None of these grounds justify the extraordinary relief requested. Further, too much time has elapsed since judgment was entered against Watts for him to collaterally attack the judgment through CR 60.02. We, therefore, affirm.

In February 1992, Watts was charged with five counts of Complicity to Commit Rape in the First Degree, one count of Kidnapping, one count of Robbery in the First Degree, and one count of Burglary in the First Degree. On March 20, 1992, Watts pled guilty to two counts of Complicity to Commit Rape. The other charges were dismissed under a plea agreement with the Commonwealth. Watts was then sentenced to twenty years in prison on each count, to run consecutively.

The charges arose from events occurring on December 14, 1991. Watts and another man approached a woman on a street in Lexington. The other man brandished a gun, and the two forced the woman into an alley. The other man proceeded to rape the woman while Watts stood by with the gun. Watts and the other man then forced the woman into a car. The other man raped and sexually assaulted the woman at a minimum of three other locations during the course of the ordeal, with Watts again looking on while holding the gun. Finally, Watts and the other man let the woman go.

Watts has challenged the judgment against him on four prior occasions during the more than eleven years since he pled guilty. On June 1, 1993, Watts filed a Ky. R. Crim. P. (RCr) 11.42 motion to vacate or set aside the judgment against him. He claimed that conviction of two counts of complicity to commit rape violated the double jeopardy clauses of the United States

and Kentucky Constitutions. The trial court denied this motion on the merits.

Then, on August 25, 1994, Watts filed a CR 60.02 motion to vacate his sentence of imprisonment. In this motion, Watts argued that he was denied effective assistance of counsel, that his guilty plea was not knowingly and intelligently entered, and that he did not have the requisite mental state to commit the crimes to which he plead guilty. The trial court also denied this motion on the merits.

On April 10, 1995, Watts filed a CR 60.03 motion. Watts claimed that CR 60.02 does not prevent a court from vacating a sentence on equitable grounds under CR 60.03, and that equitable grounds warranting the vacating of the judgment on one count of complicity to commit rape existed in his case. Watts also argued, again, that his guilty plea was not entered knowingly and intelligently. The trial court denied the motion, stating that CR 60.03 does not grant an independent ground for relief.

Finally, on December 5, 1995, Watts filed a Motion for Modification of Sentence claiming that Kentucky Revised Statute (KRS) 505.020 prevents him from being charged for multiple counts of the same offense. The trial court denied this motion on the merits as well.

In the current action, Watts seeks relief pursuant to CR 60.02 to vacate the judgment against him. In support of this motion, Watts argues: (1) that he had an insufficient mental state to be guilty of complicity due to intoxication at the time of the crime; (2) that his guilty plea was entered involuntarily and unknowingly because he did not have sufficient mental capacity to understand the proceeding; (3) that his plea was a violation of due process because he was incompetent to enter a guilty plea; and (4) that the trial court erred in not holding a competency hearing. Watts further makes several claims of ineffective assistance of counsel. He argues that counsel was ineffective for inducing him to plead guilty to a sentence of forty years when he claims a jury could only sentence him to twenty years; for not requesting a competency hearing; for failing to develop defenses; and for wishing to protect the victim, which in turn prejudiced counsel against Watts.

CR 60.02 "applies in criminal cases only because Rule 13.04 of the Rules of Criminal Procedure provides that 'the Rules of Civil Procedure shall be applicable in criminal proceedings to the extent not superseded by or inconsistent with these Rules of Criminal Procedure.'" Gross v. Commonwealth, Ky., 648 S.W.2d 853, 856 (1983). The relief sought under CR 60.02 must be "relief that is not available by direct appeal and not available under RCr 11.42." Id.

The sections of CR 60.02 on which Watts relies state as follows:

On motion a court *may*, upon such terms as are just, relieve a party or his legal representative from its final judgment, order, or proceeding upon the following grounds: . . . (f) any other reason of an *extraordinary nature* justifying relief. The motion shall be made within a *reasonable time* . . . (emphasis added).

The decision on whether to grant relief under CR 60.02 "is one that is generally left to the sound discretion of the trial court." Schott v. Citizens Fidelity Bank and Trust Co., Ky. App., 692 S.W.2d 810, 814 (1985). See also Gross, 648 S.W.2d at 858. As such, we examine whether the trial court abused its discretion in denying Watts' CR 60.02 motion.

Our Supreme Court notes that the process for attacking a final judgment "is set out in the rules related to direct appeals, in RCr 11.42, and *thereafter* in CR 60.02." Gross, 648 S.W.2d at 856. The Court further clarifies this process, stating, "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." McQueen v. Commonwealth, Ky., 948 S.W.2d 415, 416 (1997) (quoting RCr 11.42(3); Gross, 648 S.W.2d at 855-856).

All of the issues Watts raises in this CR 60.02 motion could "'reasonably have been presented' by direct appeal or RCr

11.42 proceedings.'" Id. Watts' claims involve facts that were apparent at the time the judgment was entered or were addressed in denying Watts' other motions collaterally attacking the judgment. There is no reason these issues could not have been raised in the prior attacks on his judgment.

Additionally, CR 60.02 requires that, "as a threshold to relief . . . 'the motion shall be made within a reasonable time.'" Id. (quoting CR 60.02). More than eleven years have passed since Watts pled guilty. He has filed several motions attacking this judgment during the last eleven years in which he could have raised, or in some cases did raise, the present issues. Absent evidence of extraordinary circumstances, eleven years cannot qualify as a "reasonable time."

CR 60.02 relief is characterized as "special, extraordinary relief." McQueen, 948 S.W.2d at 416. In a CR 60.02 motion, the "movant must demonstrate why he is entitled to" such serious relief. Id. Watts has not demonstrated any "reason of an extraordinary nature justifying relief." CR 60.02(f). Given the circumstances, particularly the lengthy delay before this motion was filed, we find it was not an abuse of discretion for the trial court to deny Watts' motion.

For the foregoing reasons the order of the Fayette Circuit Court dismissing Appellant Watts' CR 60.02 motion is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT - *pro se*:

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