

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001047-MR

CURTIS LEE MAYES

APPELLANT

v. APPEAL FROM SHELBY CIRCUIT COURT
HON. WILLIAM F. STEWART, JUDGE
ACTION NO. 77-CR-05192

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** * * *

BEFORE: BAKER, BARBER, AND JOHNSON, JUDGES.

BAKER, JUDGE. This is an appeal from a March 12, 2002, order of the Shelby County Circuit Court, denying appellant's request for relief pursuant to Ky. R. Civ. P. (CR) 60.02. We affirm.

These are the facts: In November 1972, appellant was brought before the Shelby Juvenile Court on the charge of murder. The juvenile court ordered an adjudication hearing for December 5, 1972. At the hearing, the court proceeded to hear

evidence. Appellant's counsel moved to dismiss the charge, and the court denied the motion. Appellant's counsel subsequently moved to commit appellant for psychiatric evaluation. The court denied this motion. Finally, appellant's counsel moved for a disposition hearing. The court sustained this motion and set the hearing for December 12, 1972.

At the disposition hearing, the county attorney moved to remand appellant to the jurisdiction of the Shelby County grand jury and to transfer the case to the jurisdiction of the Shelby Circuit Court. The juvenile court ordered the case transferred to the circuit court.

In the circuit court, appellant entered a guilty plea to the charge of voluntary manslaughter. The court accepted the plea and subsequently sentenced appellant to fifteen years imprisonment. In 1982, appellant filed a motion to vacate, set aside, or correct judgment pursuant to Ky. R. Crim. P. (RCr) 11.42. The circuit court denied this motion, and the circuit court's decision was affirmed by this court in appeal No. 82-CA-1991-MR. In September 1999, appellant filed a CR 60.02 motion. The circuit court denied the motion. This appeal follows.

A circuit court's decision to deny a CR 60.02 motion will not be disturbed absent an abuse of discretion. Barnett v. Commonwealth, Ky., 979 S.W.2d 98, 102 (1998). In addition, our

supreme court has clearly limited the applicability of CR 60.02 by stating:

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. 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. . . . In summary, 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. (Citations omitted).

McQueen v. Commonwealth, Ky., 948 S.W.2d 415, 416 (1997).

Appellant has raised two arguments to support his CR 60.02 motion: (1) that his Fifth Amendment double jeopardy protection was violated when he was convicted in circuit court after having participated in an "adjudication" hearing in juvenile court; and (2) that his counsel was ineffective for failing to challenge his transfer from juvenile to circuit court. Appellant previously raised ineffective assistance of counsel in his RCr 11.42 motion and is barred from relitigating this issue under CR 60.02. Id. Appellant argues that though he raised ineffective assistance of counsel in the past, however,

he did not raise this particular argument. McQueen, however, plainly states that an appellant is barred from raising in CR 60.02 issues that "were or could have been litigated" in a direct appeal 11.42 motion. Id. Since appellant could have raised this ineffective assistance of counsel argument in his 11.42, he is barred from relitigating it in this motion.

Appellant is also barred from raising his double jeopardy claim. His assertion does not allege any new or extraordinary circumstances entitling him to relief, and the ground that he now relies on should have been raised in his motion for RCr 11.42 relief. McQueen, 948 S.W.2d at 416. Based on the stated purpose of CR 60.02, as well as the strict standard with which the decisions of trial courts are reviewed, we do not believe that appellant is entitled to any relief.

Finally, though no need exists to dispose of this case on the merits of the double jeopardy claim, we agree with the circuit court that no adjudication of guilt was made, only a finding of probable cause as required to transfer jurisdiction.

For the foregoing reasons, the order of the circuit court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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