

RENDERED: July 16, 2004, 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2002-CA-001860-MR

GERALD RAMSEY

APPELLANT

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JOHN R. ADAMS, JUDGE
v. ACTION NO. 98-CR-00241

COMMONWEALTH OF KENTUCKY

APPELLEE

AND

NO. 2003-CA-002359-MR

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COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: GUIDUGLI AND KNOPF, JUDGES; AND EMBERTON, SENIOR JUDGE.¹

¹ Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

KNOFF, JUDGE. These consolidated appeals stem from the denial of Ramsey's motions for relief pursuant to RCr 11.42 and CR 60.02 from a 1999 judgment convicting him of possession of a handgun by a convicted felon and of being a persistent felon in the first degree. Our review of the record in light of the arguments presented discloses no error on the part of the trial court and we therefore affirm the denial of relief in each appeal.

Briefly stated, the facts which precipitated Ramsey's arrest and conviction occurred at approximately 1:30 a.m. on January 9, 1998, when a Lexington police officer, responding to a report that a suspicious man was looking into vehicles parked in the area of Alexandria Drive, stopped Ramsey as he attempted to leave the area. He was found to be in possession of two handguns when his subsequent aggressive conduct required a pat-down search. After a criminal history check disclosed that Ramsey had previously been convicted of a felony, he was indicted on the charges at issue in this appeal.

Prior to trial, several stipulations were reached regarding the evidence, one of which is relevant to these appeals. In order to avoid possible prejudice from telling the jury that the previous felony was an escape, it was stipulated that Ramsey was a convicted felon. Ramsey was ultimately sentenced to ten years' imprisonment upon his conviction for

possession of a handgun by a convicted felon, enhanced to fifteen years by virtue of the PFO I conviction. In his direct appeal to this Court, Ramsey argued that the trial court erred in refusing to give the jury a "choice of evils" instruction and raised a constitutional challenge to KRS 527.040, the statute prohibiting convicted felons from possessing handguns. While his direct appeal was pending, Ramsey filed a CR 60.02 motion challenging the constitutionality of the PFO statute. This Court consolidated the appeal from the denial of that motion with Ramsey's direct appeal and rendered an opinion affirming both appeals on June 15, 2001.

Ramsey thereafter filed an RCr 11.42 motion, again raising the constitutionality of KRS 527.040, as well as an argument concerning the sufficiency of the evidence to support the PFO conviction and allegations of ineffective assistance of counsel. The denial of that motion resulted in the first of these consolidated appeals. Next, while his RCr 11.42 appeal was pending, Ramsey filed a petition for writ of habeas corpus challenging the use of certain felonies to enhance his sentence. The denial of that relief by the Oldham Circuit Court was affirmed by this Court.

Finally, while both the RCr 11.42 appeal and the habeas corpus appeals were pending, Ramsey filed a second CR 60.02 motion challenging the denial of his pre-trial suppression

motion and the use of certain felonies to enhance. The Fayette Circuit Court's denial of this fourth post-conviction proceeding produced appeal number 2003-CA-002359, which has been consolidated with the RCr 11.42 appeal for resolution.

Before addressing the merits of these appeals, we note that the opinion of the Supreme Court of Kentucky in Gross v. Commonwealth² very clearly sets forth the structure to be utilized in attacking a final judgment of the trial court. The first step is to directly appeal the judgment, stating every ground it is then reasonable to present. Next, a defendant is required to avail himself of the procedure set out in RCr 11.42, as to any ground for relief of which he is or should be aware. Only after exhausting these remedies may a defendant resort to CR 60.02 and, in order to prevail, the movant must demonstrate why he is entitled to the extraordinary relief provided by that rule. A defendant is precluded from raising issues under CR 60.02 which could, and should, have been presented on direct appeal or via RCr 11.42. These appeals will be considered in light of the procedural constraints set out in Gross.

First, in appeal 2002-CA-001860, the RCr 11.42 appeal, Ramsey argues that he was denied a fair trial when the jury was allowed to hear evidence that he was a convicted felon. Because this is clearly a matter that should have been raised in his

² Ky., 648 S.W.2d 853 (1983).

direct appeal, our only comment is to state the obvious fact that Ramsey's previous felony conviction is an element of the offense with which he was charged and it was therefore properly presented to the jury.

As a subpart of this argument, Ramsey again challenges the constitutionality of KRS 527.040 as infringing on his right to bear arms. Not only was this issue raised and rejected in Ramsey's direct appeal for failure to notify the Attorney General, but the constitutionality of the statute as a valid exercise of the state's police power was long ago settled by the Supreme Court of Kentucky in Eary v. Commonwealth.³

Similarly, Ramsey's contention regarding the sufficiency of the evidence is foreclosed in this proceeding as it is a matter which could and should have been addressed in his direct appeal. Gross, supra.

Ramsey's complaints regarding the assistance rendered by his trial counsel focus upon: 1) the failure of the jury to take the derringer and .380 automatic pistol confiscated at the time of his arrest into the jury room during deliberations; 2) the failure of counsel to make a pre-trial motion to preclude the jury from hearing evidence of his prior felony conviction; 3) the failure of his counsel to advise him that he could testify at trial because KRE 609 precluded use of his previous

³ Ky., 659 S.W.2d 198 (1983).

felonies for impeachment; and 4) the failure of counsel to present mitigating evidence in the penalty phase. The short answer to these contentions is that they do not, singly or collectively, constitute ineffective assistance of counsel under the Strickland⁴ analysis. Moreover, even if one or more of the alleged shortcomings could be construed to be ineffective assistance, Ramsey failed to demonstrate that but for counsel's errors, there is a reasonable probability that the result of the trial would have been different.⁵

Here, not only has Ramsey failed to convince us of deficient performance, but he has failed to demonstrate even a remote possibility that any alleged action or inaction on the part of his counsel could have impacted the outcome of the trial. First, Ramsey's argument concerning the failure to take the guns in question into the jury room during deliberations is clearly frivolous, as is his contention regarding the lack of a pre-trial motion to preclude evidence of his status as a convicted felon. As previously noted, where that status is an element of the crime charged, there can be no error by informing the jury of that fact. Ironically in this case, it appears that every effort was made to mitigate the prejudicial impact on the

⁴ Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

⁵ Id. at 694.

jury by entering a stipulation so as not to allow the jury to hear that the felony was an escape.

Ramsey's third allegation of deficient performance is that counsel failed to advise him that he could testify without fear of impeachment because, under KRE 609, convictions more than ten-years old are not admissible for impeachment purposes. Again, Ramsey misapprehends the nature of the crime with which he is charged. Any failure to advise Ramsey of the impact of KRE 609 cannot constitute ineffective assistance of counsel because, even had Ramsey testified, the jury would have been aware of his status as a convicted felon because that fact had already been introduced as part of the Commonwealth's case in chief.

The last ineffective assistance allegation centers on counsel's failure to introduce mitigating evidence in the penalty phase, a matter clearly refuted by the record. Counsel did in fact offer mitigating evidence, although not in the form of the letters Ramsey refers to in his brief. All of these letters were written long after trial and certainly cannot be said to be of such magnitude as to create a reasonable probability that their introduction would have changed the result of the trial. Thus, we find no error in the denial of Ramsey's RCr 11.42 motion, as the only allegations properly

raised in that motion do not rise to the level of ineffective assistance of counsel.

Finally, as to appeal number 2003-CA-002359, Ramsey argues that the trial court erred in denying his motion to suppress the evidence against him and in allowing amendment of the indictment which resulted in improper double enhancement. Neither of these matters fall within the purview of CR 60.02 as both issues could and should have been raised in his direct appeal.

Accordingly, we affirm the orders of the Fayette Circuit Court denying his motions for relief pursuant to RCr 11.42 and CR 60.02.

ALL CONCUR.

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