

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-002220-MR

MARK COLE

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE DOUGLAS M. STEPHENS, JUDGE
ACTION NO. 86-CR-00139

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** * * *

BEFORE: McANULTY AND SCHRODER, JUDGES: AND HUDDLESTON, SENIOR
JUDGE.¹

SCHRODER, JUDGE. This is an appeal from an order of the Kenton
Circuit Court denying the appellant's pro se motion for
extraordinary relief pursuant to CR 60.02(f). Because the
issues raised herein should have properly been raised in either
appellant's direct appeal or the appellant's motion pursuant to
RCr 11.42, we affirm.

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

Mark Cole was found guilty of assault in the first degree and assault in the second degree in 1987, following a jury trial. With the verdict, the jury made the recommendation that the two sentences be run concurrently. However, at sentencing, the trial court sentenced Mr. Cole to twenty years for the first-degree assault charge and ten years for the second-degree assault charge, to be run consecutively. Mr. Cole filed a direct appeal, which was denied. Mr. Cole subsequently filed a motion pursuant to RCr 11.42, alleging ineffective assistance of counsel; that motion was also denied. Mr. Cole appealed, and this Court affirmed. In 2002, Mr. Cole filed the present motion, seeking relief pursuant to CR 60.02(f). Mr. Cole argues that his right to a fair trial was violated where the trial court allowed the jury to hear testimony regarding parole eligibility and where it failed to inform the jury that their recommendation as to sentencing was not necessarily going to be followed by the court.

CR 60.02(f) provides relief from a final judgment where the basis for relief is of an "extraordinary nature." Mr. Cole argues that the failure to inform the jury that the court would not be bound by their sentencing recommendation amounts to an extraordinary circumstance warranting relief, as contemplated by CR 60.02(f). The Kentucky Supreme Court, in Gross v. Commonwealth, Ky., 648 S.W.2d 853, 856 (1983), explained that CR 60.02 provides for "relief that is not available by direct appeal and not available under RCr 11.42." In the present case,

both a direct appeal and a RCr 11.42 motion have been filed, denied, and appealed. The factual basis of the present appeal was known and available to Mr. Cole at the time of sentencing, and should have been raised in one of the previous appeals. CR 60.02 is available only to raise those issues that cannot be raised in other proceedings. McQueen v. Commonwealth, Ky., 948 S.W.2d 415 (1997). Relief under CR 60.02 is, therefore, not available.

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

ALL CONCUR.

BRIEF FOR APPELLANT: Mark Cole, <i>Pro Se</i> LaGrange, Kentucky	BRIEF FOR APPELLEE: Albert B. Chandler, III Attorney General J. Gary Bale Assistant Attorney General Frankfort, Kentucky
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