

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-000121-MR

ROBERT JOHNSON

APPELLANT

v. APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE LEONARD L. KOPOWSKI, JUDGE
ACTION NO. 90-CR-00292

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: COMBS, CHIEF JUDGE; BUCKINGHAM AND TACKETT, JUDGES.

BUCKINGHAM, JUDGE: Robert Johnson appeals from an order of the Campbell Circuit Court denying his CR¹ 60.02 motion to vacate the judgment sentencing him to prison for criminal offenses. We affirm.

As a result of a shooting incident that occurred on June 30, 1990, Johnson was indicted and pled guilty to the murder of James Herald and the attempted murder of Terry Schrode. Johnson, who was sixteen years old at the time of the

¹ Kentucky Rules of Civil Procedure.

crimes, entered into a plea agreement with the Commonwealth and was sentenced pursuant to that agreement to 40 years in prison for murder and 20 years in prison for attempted murder. The trial court ordered the sentences to run concurrently, and a final judgment was entered on June 10, 1991.

On August 14, 2002, Johnson filed a motion to vacate the judgment and sentence pursuant to CR 60.02. An evidentiary hearing was held, and on December 20, 2002, the trial court entered an order denying the motion. This appeal followed.

Johnson argues on appeal that (1) his guilty pleas were not entered knowingly, intelligently, and voluntarily in light of the facts surrounding the case, (2) he neither waived nor was advised of his right to jury sentencing under RCr² 9.84(2), and (3) the trial court erred in denying his motion on the ground that he could not raise issues that should have been raised under RCr 11.42. We agree with the trial court's reasoning that these issues are matters that could have been raised pursuant to a motion under RCr 11.42. Thus, Johnson's failure to raise the issues in an RCr 11.42 motion now precludes him from raising them under a CR 60.02 motion.

In McQueen v. Commonwealth, Ky., 948 S.W.2d 415 (1997), the Kentucky Supreme Court stated as follows:

² Kentucky Rules of Criminal Procedure.

The interrelationship between CR 60.02 and RCr 11.42 was carefully delineated in Gross v. Commonwealth, Ky., 648 S.W.2d 853 (1983). In a criminal case, these rules are not overlapping, but separate and distinct. 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. RCr 11.42(3); Gross v. Commonwealth, supra, at 855, 856. 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.

Id. at 416. Further, our supreme court noted in Gross v. Commonwealth, Ky., 648 S.W.2d 853 (1983), that CR 60.02 is not meant to give additional opportunities to raise Boykin defenses, such as those raised herein, but is intended for relief that is not available by direct appeal or by an RCr 11.42 motion. Id. at 856.

Had Johnson desired to attack his judgment and sentence collaterally by raising the issues he raised in his motion, he should have done so pursuant to an RCr 11.42 motion.³ Because CR 60.02 is available only to raise issues which cannot be raised in other proceedings, it was not available to Johnson

³ As the trial court stated in its order, Johnson may not now raise the issues under RCr 11.42 because they are time-barred. See RCr 11.42(10).

in this case. See McQueen, 948 S.W.2d at 416. Therefore, the trial court properly denied the motion.

The order of the Campbell Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Robert Johnson, *Pro Se*
Eastern Kentucky Correctional
Complex
West Liberty, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler III
Attorney General of Kentucky

David A. Smith
Assistant Attorney General
Frankfort, Kentucky