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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2003-CA-000183-MR

FLOYD COWAN

APPELLANT

v. APPEAL FROM PULASKI CIRCUIT COURT
HONORABLE WILLIAM T. CAIN, JUDGE
INDICTMENT NO. 94-CR-00114

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** * * *

BEFORE: COMBS, JOHNSON, AND MINTON, Judges.

MINTON, Judge: Floyd Cowan, *pro se*, appeals from an order of the Pulaski Circuit Court denying his CR¹ 60.02 motion to vacate his conviction. Cowan, who was a juvenile at the time of the commission of the offenses of which he was ultimately convicted

¹ Kentucky Rules of Civil Procedure.

in circuit court, argues that his conviction is void because the juvenile division of the Pulaski District Court failed to issue a written order transferring him to circuit court for trial as an adult. Because we conclude that the circuit court did not abuse its discretion in denying the motion, we affirm.

Cowan is now serving a maximum prison sentence of 30 years for attempted murder and first-degree robbery based upon a judgment of conviction and sentence imposed on December 28, 1995. On the day of his scheduled jury trial, Cowan appeared with counsel and entered an open plea of guilty to the charges in the indictment. During the plea colloquy with the trial court that day, Cowan's counsel stated that Cowan simply had no defense to the charges. The charges arose from an incident in Somerset on April 12, 1994, when Cowan--then slightly more than four months away from his eighteenth birthday--in the course of committing a theft, tried to kill the victim by stabbing her with a butcher knife. He was an adult by the time the grand jury indicted him on September 21, 1994.²

Prior to filing his first post-conviction motion, Cowan requested "transcripts" of the portions of the record he stated that he needed for an RCr³ 11.42 motion, including the

² Cowan's date of birth is August 30, 1976.

³ Kentucky Rules of Criminal Procedure.

record from the “[j]uvenile proceedings for transfer to adult court.” The circuit court granted the production by order entered June 26, 1998. On October 6, 1998, Cowan filed a *pro se* RCr 11.42 motion seeking relief from the judgment. Cowan raised a number of issues, but the validity of the transfer to circuit court was not among them. The circuit court subsequently denied the motion. This Court affirmed the circuit court’s denial in an unpublished opinion rendered August 20, 1999. The Kentucky Supreme Court denied discretionary review in an order dated December 9, 1999.

Again, before filing the CR 60.02 motion now under review, Cowan requested and received from the circuit court an order requiring the clerk to furnish him copies of the juvenile transfer hearing and transfer order. The order, entered July 31, 2002, specifically directed the juvenile clerk to produce to Cowan “a copy of the juvenile transfer hearing, judgment and any other evidence pertaining to said hearing at no cost to [Cowan].” On October 11, 2002, Cowan filed a motion to compel compliance with that production order, stating that the clerk’s production of records was again incomplete.

On December 16, 2002, Cowan filed the *pro se* CR 60.02 motion in which he argued that the judgment was void because the circuit court lacked jurisdiction due to the absence of a transfer order. Cowan’s argument is presumably based on the

absence of an actual written transfer order or a complete audiotape of the district court transfer hearing in whatever production the juvenile clerk had sent him. In an order entered December 18, 2002, the circuit court summarily denied Cowan's motion to compel and his CR 60.02 motion. In the order, the circuit court observed that Cowan had indeed received the complete juvenile record as requested. Cowan responded with a timely motion to set aside this order. He repeated his argument that the only production he had received from the clerk was an incomplete audio recording of the transfer hearing. He then requested an evidentiary hearing. The circuit court denied the motion on January 9, 2003. This appeal followed.

Relief from judgments under CR 60.02 is discretionary with the trial court. The standard of review on appeal is whether the trial court abused its discretion in denying relief.⁴ And, while the circuit court's terse order denying relief provides no insight into the circuit court's reasoning, ample grounds exist in the record to support the conclusion that the circuit court did not abuse its discretion.

It is undisputed that Cowan was a child at the time of the commission of the offenses. As such, he was entitled to a hearing in the juvenile division of the district court at which

⁴ Brown v. Commonwealth, Ky., 932 S.W.2d 359, 361 (1996).

he was also entitled to be represented by a lawyer. The district court was required to consider all of the statutory factors set forth in KRS 640.010 and to make specific findings thereon as a prerequisite to transfer to circuit court.⁵ However, since Cowan apparently did not challenge the validity of the juvenile transfer order in the original circuit court proceedings, he waived any challenge he might have had to the circuit court's judgment arising out of any failure of a written or oral transfer order to state explicit reasons for transfer.⁶ Having failed to preserve possible error by mounting a circuit court challenge, a possible collateral attack on the judgment of conviction by way of RCr 11.42 remained for Cowan as to any due process issues he might have had from alleged defects in the transfer process.⁷ However, Cowan did not question the due process or the fairness of his transfer to circuit court in his RCr 11.42 motion.

⁵ Harden v. Commonwealth, Ky.App., 885 S.W.2d 323, 324-25 (1994).

⁶ Schooley v. Commonwealth, Ky.App., 556 S.W.2d 912, 915-917 (1977) (holding that since circuit courts have general jurisdiction to try juvenile offenders if there has been a valid transfer order, then the question of whether there has been a valid transfer order from juvenile court is a due process question that can be waived by failure timely to assert it, rather than a jurisdictional question that can be raised at any time).

⁷ The court in Schooley recognized that different considerations apply to challenging the validity of the transfer order by collateral attack on the judgment of conviction, stating that "[t]here are errors which would require reversal on direct appeal but which do not justify vacating a judgment by a motion under RCr 11.42." *Id.* at 917.

The Supreme Court has further held that failure to assert the invalidity of the juvenile transfer order in the initial RCr 11.42 motion bars further litigation on this issue by successive RCr 11.42 motions.⁸ Accordingly, we hold that Cowan is barred from asserting the invalidity of the transfer order using the device of CR 60.02.

In Gross v. Commonwealth,⁹ the Supreme Court held that "the proper procedure for a defendant aggrieved by a judgment in a criminal case is to directly appeal that judgment, stating every ground of error which it is reasonable to expect that he or his counsel is aware of when the appeal is taken."¹⁰ RCr 11.42 "provides a vehicle to attack an erroneous judgment for reasons which are not accessible by direct appeal."¹¹ But, "[a] defendant is required to avail himself of RCr 11.42 while in custody under sentence or on probation, parole or conditional discharge, as to any ground of which he is aware, or should be aware, during the period when this remedy is available to him."¹² RCr 11.42(3) provides that "[t]he motion shall state all grounds for holding the sentence invalid of which the movant has

⁸ Crick v. Commonwealth, Ky., 550 S.W.2d 534, 535 (1977).

⁹ 648 S.W.2d 853 (1983).

¹⁰ *Id.* at 857.

¹¹ *Id.* at 856.

¹² *Id.*

knowledge. Final disposition of such a motion" or a waiver of the right to pursue that avenue of relief "shall conclude all issues that reasonably could have been presented in that proceeding."¹³ CR 60.02 affords relief that is not available by direct appeal or by RCr 11.42 and requires the movant to demonstrate why he is entitled to this special, extraordinary relief. Cowan has made no such demonstration.

In accordance with the comprehensive structure of Kentucky's post-judgment remedies, Cowan is precluded from raising any issue under CR 60.02 which "reasonably could have presented" in RCr 11.42 proceedings.

We note parenthetically that Cowan, who is now 27 years old and well beyond the dispositional power of the juvenile court, does not dispute that he had a transfer hearing in juvenile court over nine years ago and that he was represented by counsel at that hearing. Our review of the record discloses that during the guilty plea colloquy in circuit court, Cowan's counsel assured the circuit judge, who ultimately accepted the open plea, that he had represented Cowan ever since these charges arose and that there had been numerous hearings in juvenile court, including a six-hour transfer hearing at which much proof was taken and many motions made. The same circuit

¹³ *Id.* at 857.

judge who accepted the plea did not abuse his discretion in denying Cowan's CR 60.02 motion.

ALL CONCUR.

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