

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-000213-MR

SHANNON D. GRIFFITH

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE STEPHEN K. MERSHON, JUDGE
ACTION NO. 97-CR-003078

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BARBER, SCHRODER, AND TAYLOR, JUDGES.

TAYLOR, JUDGE. Shannon D. Griffith, pro se, has appealed from orders of the Jefferson Circuit Court entered on December 30, 2002, and January 21, 2003, denying in part his motion for post-conviction relief made pursuant to Ky. R. Civ. P. (CR) 60.02. In the first order, Griffith was granted relief on the claim that several of his sentences were improperly enhanced under the persistent felony offender statute (Kentucky Revised Statutes (KRS) 532.080)). In the second order, the circuit court

summarily denied the remainder of his claims, which consisted of allegations that he had received ineffective assistance of counsel, that he had entered an involuntary guilty plea, and that the Department of Corrections had illegally delayed his parole eligibility. Having concluded that the circuit court properly denied those portions of Griffith's CR 60.02 motion, we affirm.

On December 17, 1997, Griffith was indicted for first degree assault, wanton endangerment (four counts), criminal mischief (three counts), theft by unlawful taking under \$300, menacing, and persistent felony offender in the second degree. On Griffith's motion, the counts were severed. He was tried and found guilty before a jury on six counts. Griffith waived sentencing by the jury and pleaded guilty to the remaining counts. Judgment was entered on June 18, 1998. In accordance with his plea agreement, Griffith was sentenced to twenty years for the first degree assault, with the remainder of his sentences to run concurrently.

Four years later, on June 19, 2002, Griffith filed a motion to vacate sentence pursuant to CR 60.02. As grounds for the motion, he claimed that the sentences that were running concurrently with the twenty-year sentence for assault had been improperly enhanced. He also claimed that he had received ineffective assistance of counsel and had consequently made an

involuntary guilty plea because his attorney had failed to inform him that, as a violent offender, he would not be eligible for parole until he had served fifty percent of his sentence. He also claimed that the Department of Corrections had acted illegally in requiring him to serve fifty percent of his sentence prior to granting him a parole hearing because it was contrary to the terms of his plea agreement and the final sentencing order of the court.

On December 30, 2002, the circuit court entered an order granting only the portion of Griffith's motion concerning the incorrect enhancement of his sentences. The order did not affect his final sentence of twenty years and is not pertinent to the present appeal. The circuit court's order did not address Griffith's claims of ineffective assistance of counsel, involuntary guilty plea, and illegal sentencing by the Department of Corrections.

On January 13, 2003, Griffith filed a Motion for Reconsideration of the Judgment/Order Pursuant to CR 52.02, arguing the circuit court had resolved only part of his CR 60.02 motion. He also requested an evidentiary hearing.

On January 21, the circuit court summarily denied Griffith's motion without granting an evidentiary hearing. This appeal follows.

In Gross v. Commonwealth, Ky., 648 S.W.2d 853 (1983), the Kentucky Supreme Court explained that the structure of post-conviction review is not haphazard or overlapping. Id. at 856. It held that a criminal defendant must first bring a direct appeal when available, then utilize Ky. R. Crim. P. (RCr) 11.42 by raising every error of which he is aware, or should be aware, during the period when this remedy is available to him. Id. at 857. CR 60.02 may be used only in extraordinary circumstances not otherwise subject to relief by direct appeal or by way of RCr 11.42. Id. at 856. More recently, in McQueen v. Commonwealth, Ky., 948 S.W.2d 415 (1997), the Court reiterated the procedural requirements set out in Gross when it stated:

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.

In this case, Griffith could have brought his claims for ineffective assistance of counsel and involuntary guilty plea in a motion pursuant to RCr 11.42. Consequently, he is precluded from raising these issues by way of a CR 60.02 motion. Although the three-year limitations period for an RCr 11.42

motion had already expired by the time Griffith filed his 60.02 motion, RCr 11.42(10)(a) provides for later filing if the motion alleges, and the movant proves, that "the facts upon which the claim is predicated were unknown to the movant and could not have been ascertained by the exercise of due diligence. . . ." Griffith's motion made no such allegations.

Griffith's final claim, that the Department of Corrections improperly calculated his parole eligibility, is without merit.

The version of the violent offender statute in effect at the time of Griffith's sentencing stated, in relevant part, as follows:

A violent offender who has been convicted of a capital offense or Class A felony with a sentence of a term of years or Class B felony who is a violent offender shall not be released on parole until he has served at least fifty percent (50%) of the sentence imposed. Act of 1991, 1st Ex. Sess., ch.3, §1 (current version at KRS 439.3401(3)).

A "violent offender" was defined as:

any person who has been convicted of or pled guilty to the commission of a capital offense, Class A felony, or Class B felony involving the death of the victim, or rape in the first degree or sodomy in the first degree of the victim, or serious physical injury to the victim. Act of 1991, 1st Ex. Sess., ch.3, §1 (current version at 439.3401(1)).

Griffith's plea of guilty to second-degree persistent felony offender enhanced the first degree assault to a Class A felony, and consequently he met the statutory definition of a violent offender. See KRS 508.010(2); KRS 532.080(5); KRS 532.020(1)(d). As such, he must serve fifty percent of his sentence before becoming eligible for parole.

Griffith argues that the postponement of his parole eligibility is improper because he was never informed of the implications of the violent offenders statute by the court, either orally or in the final judgment. We note that the violent offenders statute did not (and does not) require that the final judgment specify that an individual was a violent offender or was subject to delayed parole. Nor is the court required to inform a defendant making a guilty plea of mandatory service of sentence before eligibility for parole. See Turner v. Commonwealth, Ky. App., 647 S.W.2d 500, 502 (1982).

Griffith also argues the Department of Corrections' application of the parole provisions of the violent offenders statute constitutes a breach of his plea agreement. He asserts that because no mention was made in the agreement of his status as a violent offender or of his delayed parole eligibility that there was a breach of such agreement. There is no requirement that this information be included in a plea agreement, nor does

its omission from the plea agreement mean that the imposition of the parole provisions of the statute are barred.

Finally, in regard to Griffith's argument that he should have been granted an evidentiary hearing on his motion, we note that "[b]efore the movant is entitled to an evidentiary hearing, he must affirmatively allege facts which, if true, justify vacating the judgment and further allege special circumstances that justify CR 60.02 relief." Gross, 648 S.W.2d at 856. Here, Griffith's claims of ineffective assistance of counsel and involuntary guilty plea were barred because the issues could have been raised in a motion pursuant to RCr 11.42. His claim against the Department of Corrections, regarding his parole eligibility, did not allege facts which would justify vacating the judgment and clearly does not merit relief pursuant to CR 60.02. Therefore, no evidentiary hearing was required.

For the foregoing reasons, the orders of the Jefferson Circuit Court are affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Shannon D. Griffith, pro se
West Liberty, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler III
Attorney General of Kentucky
Frankfort, Kentucky

Janine Coy Bowden
Assistant Attorney General
Frankfort, Kentucky