

RENDERED: August 6, 2004; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-000451-MR

DEMOND R. WILLIAMS

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE REBECCA M. OVERSTREET, JUDGE
INDICTMENT NO. 96-CR-00932

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** * * *

BEFORE: BARBER, BUCKINGHAM, and MINTON, Judges.

MINTON, Judge. Demond R. Williams has appealed *pro se* from the order of the Fayette Circuit Court denying his post-conviction motion for CR¹ 60.02 relief from judgment. We now affirm because we conclude that the issues presented by Williams were either not properly raised under CR 60.02 or were insufficient to justify relief from judgment.

¹ Kentucky Rules of Civil Procedure.

Williams was convicted by a Fayette County jury following a two-day trial in January 1998 of two counts of first-degree sodomy,² three counts of first-degree sexual abuse,³ and one count of second-degree sexual abuse,⁴ for which the circuit court followed the jury's recommendation and sentenced him to a maximum of 37 years' imprisonment.

At the time the charges arose, Williams lived across the backyard from L.B., a twelve year old child. The convictions stem from Williams's sexual assaults on L.B. on two occasions in Williams's home in June 1996 when Williams was 18 years old.

On the first occasion, Williams invited L.B. to Williams's house to watch television. While seated together on a couch, Williams began stroking L.B.'s hair and legs. As the contact intensified, Williams stripped off his own clothing, applied hair grease to his penis, put some hair grease in L.B.'s hand and forced L.B. to apply it to his penis. He then removed L.B.'s clothing. Eventually, Williams rubbed his penis over L.B.'s body, touching L.B.'s penis and between L.B.'s buttocks. He pushed his penis against L.B.'s lips, and he attempted to penetrate L.B.'s anus with his penis.

² KRS 510.070.

³ KRS 510.110.

⁴ KRS 510.120.

On the second occasion, Williams came to L.B.'s house to apologize for his earlier misconduct. He then invited L.B. to his house ostensibly to help fix him up with a date with a girl. Once inside Williams's residence, Williams pulled L.B. to his bedroom where he pushed L.B. onto the bed and removed L.B.'s clothing. Williams then removed his own clothing, put on a condom, and mounted L.B. from the rear attempting to penetrate L.B.'s anus with his penis. After the condom broke, L.B. pushed Williams away. Williams mounted L.B. again rubbing his penis back and forth between L.B.'s buttocks. A loud knock at the front door interrupted the sexual activity. Williams hurriedly dressed and instructed L.B. to do so, as well.

When Williams answered the door, he encountered L.B.'s mother. She testified that Williams appeared at the door sweating and wearing his pants inside out. L.B. went home with his mother. Eventually, L.B. told his mother about both episodes with Williams. She confronted Williams and the police were called. The police took L.B. to the University of Kentucky Medical Center where he was examined for sexual abuse by Dr. Ralph Alvarado, a resident assigned to pediatrics. At trial, both L.B. and Dr. Alvarado testified as to the events.

Williams directly appealed his conviction to the Kentucky Supreme Court, arguing the insufficiency of the evidence adduced at trial to support the conviction; the

improper admission of Dr. Alvarado's hearsay statements as to what L.B. told him about the episode on June 29, 1996; the failure of the trial court to grant a mistrial for a statement by L.B.'s mother that Williams "had been locked up" previously; the failure of the trial court properly to instruct the jury; the failure of the trial court to permit introduction of L.B.'s school records; and the improper introduction of DNA evidence. The Kentucky Supreme Court affirmed the conviction in an unpublished opinion. Williams then collaterally attacked the judgment by motion under RCr⁵ 11.42, alleging again the insufficiency of the evidence to convict, the withholding of evidence by the prosecution, the prosecutor's misconduct during the trial, and the ineffective assistance of defense counsel. The circuit court summarily denied RCr 11.42 relief without an evidentiary hearing. This Court affirmed the trial court in an unpublished opinion rendered July 12, 2002.

The case of Gross v. Commonwealth⁶ discusses the process for attacking a final judgment of a trial court in a criminal case under CR 60.02 and explains its purpose. CR 60.02 provides a procedure for relief that is not available by direct appeal nor available under RCr 11.42. In order to succeed, the movant must show entitlement to the special, extraordinary

⁵ Kentucky Rules of Criminal Procedure.

⁶ Ky., 648 S.W.2d 853 (1983).

relief provided by CR 60.02.⁷ The proper procedure is first for direct appeal from the judgment, stating every ground it is reasonable to then present.⁸ Next, a defendant is required to avail himself of RCr 11.42 relief as to any ground of which he is or should be aware.⁹ A movant is precluded from raising issues under CR 60.02 which could reasonably have been presented on direct appeal or in a RCr 11.42 motion. The standard for review of an appeal involving a CR 60.02 motion is whether the trial court abused its discretion.¹⁰

Williams argues that the circuit court erred in denying CR 60.02 relief for two errors in the trial proceeding. He argues that Dr. Alvarado was impermissibly allowed to answer inflammatory hypothetical questions based upon facts that were not in evidence and that Williams was impermissibly prohibited from participating in the sentencing phase of the trial. Williams does not claim that new information has come to light to support these arguments. He simply cites the trial record in support of his argument, and he does not offer explanation as to why he did not raise them on direct appeal or in his RCr 11.42 motion. Indeed, these are issues that Williams could have

⁷ *Id.* at 857.

⁸ *Id.*

⁹ *Id.*

¹⁰ Brown v. Commonwealth, Ky., 932 S.W.2d 359, 362 (1996).

raised, or previously did raise, in his direct appeal or his RCr 11.42 motion. He is procedurally barred from raising them now. The circuit court correctly denied the motion.

In addition to the procedural bar, Williams's claims lack substantive merit. Williams argues that Dr. Alvarado gave improper testimony based upon inflammatory hypothetical questions. Specifically, Williams argues that Dr. Alvarado answered a hypothetical question about the possibility that L.B. could have been mistaken in his belief that Williams's penis penetrated L.B.'s anus as Williams rubbed it back and forth between L.B.'s buttocks. Williams argues that L.B. made no allegation at trial of anal penetration and that the jury was misled by such questioning by the Commonwealth. The trial record actually proves otherwise. The jury heard L.B.'s testimony of multiple times during both occasions when Williams rubbed his penis between L.B.'s buttocks. Moreover, on June 27, 1996, Williams forced him to bend over while he attempted to insert his penis in L.B.'s anus. Dr. Alvarado testified in detail about what L.B. had told him. This hearsay evidence was approved by the Supreme Court on direct appeal. Dr. Alvarado testified that although L.B. stated that he was uncertain whether there was actual anal penetration, L.B. felt Williams ejaculate between his buttocks after which L.B. reported a stinging sensation around his anus. Dr. Alvarado told the jury

that in his opinion, it was possible for a person to perceive a sensation of penetration without actual entry into the anus.¹¹ This opinion evidence was properly admissible.¹²

As to the second alleged trial error, Williams states in his brief that "[he] was removed from the court room (sic) during his trial due to a few minor outburst (sic) during the closeing (sic) argument phase of his trial" and not allowed to return for the sentencing phase. RCr 8.28(2) provides that "[a] defendant who persists in engaging in disruptive conduct after being warned by the court that such conduct will cause him or her to be removed may be excluded from the courtroom." "Disruption of court proceedings and removal from the courtroom has been held to be a voluntary waiver of the right to be present at the trial."¹³ The trial record is replete with Williams's disruptive outbursts followed by admonitions, orders, and warnings from the trial judge. Ultimately, Williams was removed from the courtroom after he repeatedly spoke out during his counsel's closing argument. The trial record further discloses that the trial judge offered to Williams's counsel the opportunity for Williams to take the stand during the sentencing

¹¹ Penetration is not required for a conviction of first-degree sodomy. Bills v. Commonwealth, Ky., 851 S.W.2d 466, 469 (1993).

¹² Stringer v. Commonwealth, Ky., 956 S.W.2d 883, 889-890 (1997).

¹³ Scott v. Commonwealth,, Ky., 616 S.W.2d 39, 43 (1981), quoting Illinois v. Allen, 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970).

phase, but he declined that offer. Thus, we have no difficulty in concluding that Williams waived his right to be present during the sentencing phase of the trial.

Finally, Williams argues that the circuit court should have conducted an evidentiary hearing on his CR 60.02 motion. A movant is not entitled to a hearing on a CR 60.02 motion unless he "affirmatively alleges facts which, if true, justify vacating the judgment and further allege special circumstances that justify CR 60.02 relief."¹⁴ Since Williams did not affirmatively allege in his motion the existence of pertinent facts outside the trial record, and he did not argue in his brief the existence of new information that could have surfaced in an evidentiary hearing, the trial court did not err in failing to conduct an evidentiary hearing.

For the reasons stated above, the Fayette Circuit Court's order is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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¹⁴ McQueen v. Commonwealth, Ky., 948 S.W.2d 415, 416 (1997), *cert. denied*, 521 U.S. 1130, 117 S.Ct. 2535, 138 L.Ed.2d 1035 (1997) (*quoting* Gross v. Commonwealth, Ky., 648 S.W.2d 853 at 856).