

RENDERED: October 31, 2003; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-000539-MR

CURTIS LEE MAYES

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE F. KENNETH CONLIFFE, JUDGE
ACTION NO. 158164

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
Jefferson Circuit Court denying the appellant relief pursuant to
CR 60.02. The appellant, Curtis Lee Mayes, alleges that the

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.

jury instructions delivered at trial were inconsistent with the indictment, amounting to a constructive amendment of the indictment. Mr. Mayes further argues that his defense counsel's assistance was rendered ineffective by the failure to object to the jury instructions.

The appellant, Curtis Lee Mayes, was convicted in 1977 of the murder of Grace Noble during the commission of a jewelry store robbery. Since that conviction, Mr. Mayes has filed three motions pursuant to RCr 11.42. The first motion, filed in 1980, alleged improper waiver of his case from the juvenile court to the circuit court. That motion was denied; this Court affirmed the trial court's ruling. A second motion pursuant to RCr 11.42 was filed in 1981, in which Mr. Mayes claimed that his arrest was not based on probable cause. The trial court denied relief, and this Court affirmed. In 1984, Mr. Mayes filed a third motion under RCr 11.42, raising the issues of improper jury instructions and ineffective assistance of counsel. The trial court denied relief of this third motion, and this Court affirmed. In May of 2002, Mr. Mayes filed a motion pursuant to CR 60.02, seeking relief for extraordinary circumstances. The motion was denied and Mr. Mayes now appeals.

Mr. Mayes argues that the jury instructions delivered at trial were inconsistent with the indictment, warranting relief under CR 60.02(f). CR 60.02(f) provides relief from a

final judgment where the basis for relief is of an "extraordinary nature." Here, the jury was instructed on wanton murder where the indictment charged Mr. Mayes with intentional murder. Mr. Mayes argues that the alleged discrepancy between the jury instructions and the indictment was an improper amendment to the charge, amounting to an extraordinary circumstance, as contemplated by CR 60.02(f). Without addressing the merits of Mr. Mayes argument, his claim must fail because CR 60.02 relief is not available where the issues could have been raised on direct appeal.

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." Here, a direct appeal and three RCr 11.42 motions have been filed on behalf of Mr. Mayes. The arguments raised in the present appeal were presented in Mr. Mayes's third RCr 11.42 motion, the denial of which was affirmed by this Court. In Gross, our Supreme Court made it clear that a CR 60.02 motion was not intended merely as an additional opportunity to relitigate issues that could have been (or were) litigated in the direct appeal or the RCr 11.42 proceedings. Therefore, relief under CR 60.02 is not available.

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

ALL CONCUR.

BRIEF FOR APPELLANT:

Curtis Lee Mayes
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BRIEF FOR APPELLEE:

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