

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2003-CA-000981-MR

DAMON D. CROFT

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE STEPHEN K. MERSHON, JUDGE  
INDICTMENT NO. 99-CR-002534

COMMONWEALTH OF KENTUCKY

APPELLEE

### OPINION

### AFFIRMING

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BEFORE: BARBER, SCHRODER AND TAYLOR, JUDGES.

BARBER, JUDGE: Damon Croft appeals from an order of the Jefferson Circuit Court, entered April 10, 2003, which denied his motion filed pursuant to Kentucky Rules of Civil Procedure (CR) 60.02 to vacate the judgment and sentence for his 1996 conviction for first-degree possession of a controlled substance. We affirm.

The Jefferson County Grand Jury, on October 28, 1996, indicted Croft for first-degree possession of a controlled

substance, operating a motor vehicle while under the influence, possession of alcohol by a minor and failure to secure a child in a child restraint system. These charges stemmed from a search and seizure of Croft and his vehicle by officers of the Jefferson County Police Department conducted while Croft was stopped at a sobriety checkpoint at the intersection of River Road and Zorn Avenue in Louisville, Kentucky on July 4, 1996. During this traffic stop, the police officers found Croft to be in possession of 1.3 grams of cocaine.

On January 31, 1997, Croft entered into a plea agreement with the Commonwealth. Under the terms of this plea agreement, Croft entered a guilty plea to possession of a controlled substance in the first degree. The Commonwealth, in exchange for Croft's guilty plea, dismissed the remaining charges of the indictment, recommended a prison sentence of 18 months and agreed to take no stand concerning probation. The trial court subsequently accepted Croft's plea of guilty to first-degree possession of a controlled substance and sentenced Croft to 18 months imprisonment. This prison sentence, however, was ordered to run consecutively with a three-year prison sentence Croft received on a separate indictment in Jefferson Circuit Court. Both prison sentences were probated for a period of two years. However, on August 14, 1998, the trial court revoked Croft's probation as to the 18-month prison sentence

after finding that Croft violated the terms of his probation.<sup>1</sup> The trial court ordered Croft to serve the original 18 months in prison.

On January 8, 2003, almost six years after entering his guilty plea to possession of cocaine in the first degree, Croft filed a motion pursuant to CR 60.02 to vacate the judgment that convicted him of first-degree possession of a controlled substance.<sup>2</sup> In his motion, Croft asserted that his trial counsel provided ineffective assistance by not filing a motion to suppress the cocaine found during the July 4, 1996 search and seizure. Moreover, Croft alleged that his trial counsel coerced him into entering a guilty plea to the charge of possessing a controlled substance. The trial court summarily denied Croft's CR 60.02 motion. This appeal followed.

On appeal, Croft argues that the trial court abused its discretion by denying his CR 60.02 motion. Croft also contends that the trial court erred by not holding an evidentiary hearing prior to denying his CR 60.02 motion. We reject these arguments.

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<sup>1</sup> The Jefferson Circuit Court also revoked Croft's probation as to the three-year sentence.

<sup>2</sup> Croft also filed a CR 60.02 motion to vacate the judgment that sentenced him to three years in prison, which the Jefferson Circuit Court also denied. Croft appealed the denial of that motion to this Court in case number 2003-CA-000350. Since Croft filed a separate appeal with this Court concerning the trial court's denial of his CR 60.02 motion with respect to the three-year prison sentence, we shall only address the issues Croft presents concerning the denial of his CR 60.02 motion with respect to his conviction and sentence for first-degree possession of a controlled substance.

In Gross v. Commonwealth, Ky., 648 S.W.2d 853 (1983), the Kentucky Supreme Court established the procedure for appellate review in criminal cases. The Supreme Court stated that the structure for appellate review is not haphazard or overlapping. Id., at 856. A criminal defendant must first bring a direct appeal when available, then utilize RCr 11.42 by raising every error of which he should be aware. Id. CR 60.02 should be utilized only for extraordinary situations not subject to relief by direct appeal or by way of RCr 11.42. Id. The Supreme Court reaffirmed the procedural requirements set out in Gross in its opinion in McQueen v. Commonwealth, Ky., 948 S.W.2d 415, 416 (1997):

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(2); 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.

In this case, Croft concedes that he failed to file a motion to vacate his judgment under RCr 11.42. Croft asserts that he failed to file an RCr 11.42 motion to address the

alleged ineffective assistance of his trial counsel because of "his then lack of familiarization in the science of criminal law and how it would have applied to him." RCr 11.42 requires Croft to assert his claims for relief within three years of his final judgment or be deemed to have waived these claims. Obviously, if Croft believed that his trial counsel rendered ineffective assistance or coerced him into entering a guilty plea, Croft knew it at the time his plea was entered or soon thereafter. Ignorance of the law underlying his claim does not excuse the delay because, after all, everyone is presumed to know the law. Oppenheimer v. Commonwealth, Ky., 305 Ky. 147, 151, 202 S.W.2d 373, 375 (1947).

Against these facts, Croft's invocation of CR 60.02 is without merit. Gross and McQueen clearly establish that CR 60.02 does not provide a litigant with a second chance to seek the relief that is available pursuant to RCr 11.42. "Final disposition of [a] motion [under RCr 11.42] or waiver of the opportunity to make it, shall conclude all issues that reasonably could have been presented in that proceeding." Gross, 648 S.W.2d at 857. It is clear to us that Croft could and should have brought his allegations of ineffective assistance of counsel within the time allowed by RCr 11.42. His waiver of that opportunity precludes his resort to CR 60.02 now.

Additionally, even if Croft properly invoked CR 60.02, he failed to exercise due diligence in pursuing his claim. Under CR 60.02, a motion must be filed within a reasonable time if the motion is based upon an extraordinary reason justifying the relief sought. Here, Croft waited until January 8, 2003 to file his CR 60.02 motion with the trial court. In Gross, our Supreme Court held that it was not an abuse of discretion for a trial court to deny a CR 60.02 motion as not being filed within a "reasonable time" when the motion was filed five years after the conviction. Gross, 648 S.W.2d at 858. Here, Croft waited approximately six years after the date of his conviction to file this CR 60.02 motion with the trial court. Accordingly, we believe that a delay of six years is not reasonable and fails to not comply with CR 60.02 requirements. Thus, the trial court did not err in denying Croft's CR 60.02 motion.

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

ALL CONCUR.

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