

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001219-MR

ERIC BURNS

APPELLANT

v. APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE EDWIN M. WHITE, JUDGE
ACTION NO. 87-CR-00078

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: COMBS, CHIEF JUDGE; MINTON AND VANMETER, JUDGES.

COMBS, CHIEF JUDGE: Eric Burns appeals from an order of the Christian Circuit Court denying his motion for relief (filed pursuant to CR¹ 60.02) from a judgment of conviction. After our review of the record, we find no error. Thus, we affirm.

In March of 1987, Burns was cited by a state game warden for fishing without a proper license. Burns murdered the game warden and then shot a witness to the crime. Police quickly connected Burns to the crimes. In April 1987, he was

¹ Kentucky Rules of Civil Procedure.

indicted on three felony counts including capital murder, attempted murder, and first-degree robbery.

After a four-day jury trial held in September 1988, Burns was convicted of all the charges against him. He was sentenced to life imprisonment without parole for twenty-five years. He appealed to the Supreme Court of Kentucky, which affirmed his conviction.

In April 1992, Burns filed a motion to vacate pursuant to RCr² 11.42, contending that defense counsel had failed to provide him with effective assistance. In a thorough opinion, the Christian Circuit Court denied relief. We affirmed that order in 1993.

Burns filed a second RCr 11.42 motion in September 1997. He once again alleged that he was entitled to relief based upon ineffective assistance of counsel. In affirming the trial court's order denying relief, we held as follows:

Burns has also brought new allegations of ineffective counsel in the second RCr 11.42 motion. Nevertheless, Burns was aware of all the facts and all of the issues raised in his latest motion when he filed his first motion. Because all of the complaints presented in the current motion could or should have been presented in the earlier motion, the second RCr 11.42 [motion] is subject to dismissal as a successive motion barred by RCr 11.42(3). As a result, the trial court did not err in dismissing Burns' RCr 11.42 motion without a hearing.

² Kentucky Rules of Criminal Procedure.

Opinion at 7.

In 2003, Burns filed a motion for relief from judgment pursuant to CR 60.02 based upon his contention that defense counsel had failed to protect his rights. The trial court denied the motion, and this appeal followed.

Burns argues that the trial court abused its discretion by failing to grant his motion for relief. We disagree.

In Gross v. Commonwealth, Ky., 648 S.W.2d 853 (1983), the Supreme Court of Kentucky addressed the nature of post-conviction relief and the operation of the provisions of CR 60.02. The Supreme Court observed as follows:

[T]he 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.

Next, we hold that a defendant 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 this remedy is available to him. Final disposition of that motion, or waiver of the opportunity to make it, shall conclude all issues that reasonably could have been presented in that proceeding. The language of RCr 11.42 forecloses the defendant from raising any questions under CR 60.02 which are "issues that could reasonably have been presented" by RCr 11.42 proceedings.

Id. at 857.

CR 60.02 is not intended merely as an additional opportunity to raise Boykin defenses. It is for relief that is not available by direct appeal and not available under RCr 11.42. The movant must demonstrate why he is entitled to this special, extraordinary relief. Before 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.

Id. at 856.

The record before us indicates that Burns filed a direct appeal to the Supreme Court of Kentucky immediately following his conviction. In addition, he has filed at least two motions for relief pursuant to RCr 11.42. The allegations contained in his current motion were raised or should have been raised in his direct appeal or by way of RCr 11.42. They do not entitle him to an evidentiary hearing nor do they merit relief pursuant to the provisions of CR 60.02. Additionally, the provisions of CR 60.02 must be invoked within a reasonable time. The passage of some fifteen years in this case certainly raises the question that Burns failed to act in timely fashion in filing this motion. The trial court did not abuse its discretion in denying the motion.

We affirm the order of the trial court.

ALL CONCUR.

BRIEF FOR APPELLANT:

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