RENDERED: MARCH 19, 2004; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001328-MR

MILFORD MARTIN APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE DOUGLAS M. STEPHENS, JUDGE
ACTION NO. 97-CR-00321

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: BARBER, BUCKINGHAM, AND MINTON, JUDGES.

BARBER, JUDGE. Milford Martin appeals pro se from an order of the Kenton Circuit Court, denying his motions made pursuant to CR 60.02 and RCr 10.26 for post-conviction relief, an evidentiary hearing and appointment of counsel. Because the issues raised by Martin do not entitle him to relief under CR 60.02, we affirm.

In 1997, following a jury trial, Milford Martin was convicted of first degree sodomy and sentenced to serve twenty

years. His conviction was affirmed by the Supreme Court of Kentucky. Martin thereafter made a motion to vacate, correct or set aside his sentence pursuant to RCr 11.42, claiming ineffective assistance of counsel. This motion was denied by the trial court. This Court affirmed the denial of the motion, and the Kentucky Supreme Court refused discretionary review. Martin then filed the CR 60.02 motion to vacate judgment that is the subject of the present appeal.

The events which led to Martin's sodomy conviction took place in 1991. The female victim told police that a man had followed her into the restroom of a bar and forced her to perform oral sex. In January 1992, the victim identified Martin in a lineup, but DNA test results were inconclusive and no charges were filed against him at that time. In 1997, when Martin was incarcerated at the Boone County Detention Center on an unrelated charge, the police arrived to question him further about the 1991 offense. They also had a search warrant to obtain a blood sample from Martin for further DNA testing. Martin informed them that he was represented by the counsel he had retained in 1991. He was permitted to use the telephone twice to contact an attorney, but he was unsuccessful. Martin made no statement to the police but he did provide the blood sample.

The police returned approximately three months later and Martin claims they told him that the DNA test results were positive and that the matter would be going before a grand jury the next morning. After signing a Miranda waiver form, Martin gave a statement to the police without counsel being present. He told them that the victim had agreed to perform oral sex in exchange for a packet of cocaine.

Martin argues that his statement to police should have been suppressed because it was obtained in violation of his due process rights. He claims that the police should not have questioned him without the attendance of his retained counsel, that the behavior of the police had been coercive and that as a result, his statement to them was not voluntary.

Martin's claim regarding the alleged involuntariness of his statement to the police may not be considered in a CR 60.02 motion. 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 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.

Martin could reasonably have raised this claim in his direct appeal, or in his RCr 11.42 motion. Martin argues that he is entitled to relief because he was not aware that his rights may have been violated until he himself began to study law. The only section of CR 60.02 under which Martin's claim could possibly be considered is CR 60.02(f), which permits relief for "any other reason of an extraordinary nature. . . ." Ignorance of the law is not a reason of sufficiently extraordinary nature, however, to justify relief pursuant to CR 60.02.

Furthermore, Martin himself states that he asked to speak with his attorney on the first visit of the police. He also admits that he signed a Miranda waiver form before giving the police his statement on their second visit. He was

therefore aware that making a statement to police without the presence of counsel had significant legal implications. He could have brought this to the attention of his trial attorney, or the attorney who represented him on appeal. "It is reasonable and necessary for counsel to place a certain reliance on its client." Baze v. Commonwealth, Ky., 23 S.W.3d 619, 625 (2000).

In regard to Martin's claim 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, Martin's claim is barred because it could have been raised on direct appeal or in his RCr 11.42 motion. Therefore, no evidentiary hearing was required.

There is no constitutional right to be represented by counsel in a post-conviction proceeding. Fraser v. Commonwealth, Ky., 59 S.W.3d 448, 451 (2001). Martin did not make a cognizable claim for relief pursuant to RCr 60.02, and therefore the trial court did not err in denying his motion to appoint counsel.

For the foregoing reasons, the order of the Kenton Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Milford Martin, Pro Se
LaGrange, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler III
Attorney General of Kentucky

Brian T. Judy
Assistant Attorney General
Frankfort, Kentucky