

RENDERED: OCTOBER 15, 2004; 10:00 a.m.  
NOT TO BE PUBLISHED

**Commonwealth Of Kentucky**  
**Court of Appeals**

NO. 2003-CA-001503-MR

DANIEL LACY

APPELLANT

V. APPEAL FROM BULLITT CIRCUIT COURT  
HONORABLE JOHN W. POTTER, SPECIAL JUDGE  
INDICTMENT NO. 89-CR-00002

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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

MINTON, JUDGE: Twelve years ago, an opinion of the Kentucky Supreme Court held that the Bullitt Circuit Court did not abuse its discretion when it denied Daniel Lacy's motion to withdraw his guilty plea upon his claim that the record failed to show that he had made a voluntary and intelligent waiver of his right to counsel. Now, in this appeal, Lacy attempts to use CR<sup>1</sup> 60.02 to collaterally attack the judgment by raising the same issue that the Supreme Court rejected before. We hold that the law

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<sup>1</sup> Kentucky Rules of Civil Procedure.

prohibits Lacy from relitigating under CR 60.02 an issue already decided on direct appeal.

Lacy is serving a maximum sentence of twenty years for first-degree robbery enhanced as a second-degree persistent felony offender. He pled guilty to these offenses on the same day his case was set for jury trial in the Bullitt Circuit Court, June 28, 1990. The text of the unpublished Kentucky Supreme Court opinion from Lacy's direct appeal<sup>2</sup> succinctly summarizes the procedural background leading up to the judgment of conviction and sentence as follows:

Lacey was originally indicted on January 26, 1989 and was represented by Gene Osselmeier. He entered a plea of Not Guilty. In March, Osselmeier was granted permission to be relieved as counsel. In November the court entered an order stating that Lacey would be represented by Terry Geoghegan, who in December requested a continuance. On May 4, 1990, Lacey filed a pro se motion to suppress his pretrial identification. He also, in June, filed a pro se motion to dismiss. It appears from the record that Lacey was still represented by Attorney Geoghegan at this time. On June 18, 1990, Geoghegan was permitted to withdraw as counsel. On June 25, Lacey filed a written request for disposition of the pending charges pursuant to K.R.S. 500.110. His case came on for trial on June 28 and the record indicates that he declined the appointment of counsel, choosing to represent himself. A jury was selected but

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<sup>2</sup> Daniel Scott Lacey v. Commonwealth, 90-SC-968-MR (finality endorsed March 5, 1992). Appellant's name is spelled "Lacey" in the Kentucky Supreme Court opinion. In the appeal to this court, his name is spelled "Lacy."

prior to opening statements, there was a guilty plea colloquy after which the trial judge accepted Lacey's plea of guilty. On September 10, Lacey filed a pro se motion to withdraw his guilty plea. On October 22, a hearing was held regarding the motion to withdraw the guilty plea at which Lacey was represented by attorney Rebecca Murrell. The trial judge denied the motion to withdraw the guilty plea and this appeal followed.

On August 12, 2002, Lacy filed a motion to modify the judgment. The circuit court appointed counsel for Lacy, who supplemented Lacy's CR 60.02 motion. On July 8, 2003, the circuit court entered its opinion and order denying CR 60.02 relief. In so denying, the circuit court stated:

The case is now before the Court on a Motion under CR 60.02 to shorten the sentence because it is no longer equitable and for other extraordinary reasons.

In essence, Mr. Lacy argues that his sentence is too harsh, particularly when viewed against the progress he has made while incarcerated. This is not a ground cognizable under CR 60.02.

This appeal followed.

In his *pro se* Brief on appeal, Lacy asserts that the circuit court erred in finding that he was not entitled to relief under CR 60.02. In support of this assertion, Lacy makes the same argument that he unsuccessfully made on the prior appeal: the original guilty plea was not voluntarily made; and the judgment based on this guilty plea should be set aside

because the waiver of the right to counsel before entering the plea was not knowing, intelligent, and voluntary.

In Gross v. Commonwealth,<sup>3</sup> the Kentucky Supreme Court laid out the procedure for appellate review in criminal cases. The Supreme Court stated that the structure for appellate review is not haphazard or overlapping.<sup>4</sup> A criminal defendant must first bring a direct appeal when available, then utilize RCr<sup>5</sup> 11.42 by raising every error of which he should be aware.<sup>6</sup> CR 60.02 should be utilized only for extraordinary situations not subject to relief by direct appeal or by way of RCr 11.42.<sup>7</sup> The Supreme Court reaffirmed the procedural requirements set out in Gross in its opinion in McQueen v. Commonwealth<sup>8</sup>:

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

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<sup>3</sup> Ky., 648 S.W.2d 853 (1983).

<sup>4</sup> *Id.*, at 856.

<sup>5</sup> Kentucky Rules of Criminal Procedure.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> Ky., 948 S.W.2d 415 (1997).

either were or could have been litigated in a similar proceeding.<sup>9</sup>

On direct appeal, the Kentucky Supreme Court stated:

The sole issue is whether his guilty plea should be set aside because he was not represented by counsel at the time it was entered. Lacey's appellate counsel now argues that the trial judge abused his discretion and violated due process and the Sixth Amendment to the Federal Constitution by refusing to permit Lacey to withdraw his guilty plea because the record does not establish that Lacey voluntarily and intelligently waived his right to counsel.

In affirming the circuit court's denial of Lacy's motion to withdraw his guilty plea, the Supreme Court found that "Lacey voluntarily and intelligently waived his right to counsel. His guilty plea was knowingly and voluntarily entered, and the trial judge did not abuse his discretion in refusing to permit Lacey to withdraw his guilty plea," and that furthermore, "(t)here is no basis to determine that his waiver of counsel was anything but knowingly, intelligently and voluntarily given." Since Lacy has unsuccessfully presented this argument in prior proceedings, he is barred from raising this issue again. This is the law of the case.<sup>10</sup> The circuit court did not err in denying Lacy's CR 60.02 motion.

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<sup>9</sup> *Id.*, at 416.

<sup>10</sup> See Commonwealth v. Schaefer, Ky., 639 S.W.2d 776, 777-78 (1982).

The judgment of the Bullitt Circuit Court is affirmed.

ALL CONCUR.

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