

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001510-MR

CHARLES PLOUVIER

APPELLANT

v.

APPEAL FROM NELSON CIRCUIT COURT
HONORABLE LARRY D. RAIKES, JUDGE
INDICTMENT NO. 94-CR-00094

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: COMBS, DYCHE, AND KNOPF, JUDGES.

KNOPF, JUDGE. Charles Plouvier appeals from an order of the Nelson Circuit Court denying his motion for post-conviction relief filed pursuant to CR 60.02. We affirm.

On September 15, 1995, Plouvier was convicted of receiving stolen property over \$300.00 and of being a persistent felony offender in the first degree. He was sentenced to five years' imprisonment for receiving stolen property, enhanced to twenty years by the persistent felony offender conviction.

These convictions were affirmed by the Kentucky Supreme Court on direct appeal.¹ He then filed a motion for stay of execution of sentence pending appeal, which was denied. This denial was affirmed by this Court in an unpublished opinion² and the Supreme Court denied discretionary review on October 7, 1998.³

Plouvier next filed a motion pursuant to RCr⁴ 11.42 alleging denial of his right to a fair trial, denial of due process, prosecutorial misconduct, and improper use of a prior conviction during the sentencing phase of his trial. The trial court rejected the latter three arguments on the face of the record, and rejected the first argument after conducting a hearing. That decision was affirmed on appeal to this Court.⁵

Following the denial of his RCr 11.42 motion, Plouvier filed a CR 60.02 motion. In this motion, Plouvier alleged denial of due process due to a conflict of interest with his trial counsel, denial of a fair and impartial trial, and ineffective assistance of counsel in researching and challenging

¹ Plouvier v. Commonwealth, No. 95-SC-000869-MR (not-to-be-published opinion rendered April 24, 1997).

² Plouvier v. Commonwealth, No. 97-CA-002166-MR (not-to-be-published opinion rendered July 2, 1998).

³ Plouvier v. Commonwealth, No. 98-SC-000587-D.

⁴ Kentucky Rules of Criminal Procedure.

⁵ Plouvier v. Commonwealth, No. 98-CA-002349-MR (not-to-be-published opinion rendered November 24, 1999).

the prior convictions used to enhance his penalty through the persistent felony offender conviction. The trial court denied this CR 60.02 motion since these issues had either been previously decided or reasonably could have been brought in his RCr 11.42 motion. This Court affirmed the trial court's judgment on April 27, 2001.⁶

On April 9, 2003, Plouvier filed another CR 60.02 motion alleging that his trial counsel provided ineffective assistance by not objecting to the trial court's refusal to provide additional peremptory challenges during voir dire. The trial court, on April 24, 2003, denied Plouvier's CR 60.02 motion after finding that this issue should have been asserted in Plouvier's prior RCr 11.42 motion. This appeal followed.

On appeal, Plouvier argues that the trial court abused its discretion by denying this CR 60.02 motion. We find this argument to be without merit.

In Gross v. Commonwealth,⁷ 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.⁸ A criminal

⁶ Plouvier v. Commonwealth, No. 2000-CA-000991-MR (not-to-be-published opinion rendered April 27, 2001).

⁷ Ky., 648 S.W.2d 853 (1983).

⁸ Id., at 856.

defendant must first bring a direct appeal when available, then utilize RCr 11.42 by raising every error of which he should be aware.⁹ CR 60.02 should be utilized only for extraordinary situations not subject to relief by direct appeal or by way of RCr 11.42.¹⁰ The Supreme Court reaffirmed the procedural requirements set out in Gross in its opinion in McQueen v. Commonwealth:¹¹

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.

Here, Plouvier concedes that he failed to raise this additional ineffective assistance of counsel argument in his previous RCr 11.42 motion. RCr 11.42 clearly requires Plouvier to assert his claim for relief within three years of his final judgment or be deemed to have waived this claim. Obviously, if

⁹ Id.

¹⁰ Id.

¹¹ Ky., 948 S.W.2d 415, 416 (1997).

Plouvier believed that the trial court erred during jury selection and that trial counsel rendered ineffective assistance by failing to object to the trial court's error, Plouvier knew it at the time of his September 15, 1995, conviction or soon thereafter. Moreover, the record is clear that this CR 60.02 motion is Plouvier's third post-conviction challenge to his conviction. Successive motions raising claims that either have or should have been presented earlier cannot be reviewed on appeal.¹²

Against these facts, the trial court correctly determined that Plouvier'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."¹³ Because Plouvier should have brought his complaint concerning the alleged ineffective assistance of his trial counsel within the time allowed by RCr 11.42, his waiver of that opportunity precludes his resort to CR 60.02 now.

¹² Hampton v. Commonwealth, Ky., 454 S.W.2d 672 (1970).

¹³ Gross, 648 S.W.2d at 857.

For the aforementioned reasons, the judgment of the
Hardin Circuit Court is affirmed.

ALL CONCUR.

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