RENDERED: FEBRUARY 27, 2004; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001646-MR

ROBERT POWELL — APPELLANT

v.

APPEAL FROM CALDWELL CIRCUIT COURT
HONORABLE BILL CUNNINGHAM, JUDGE
ACTION NO. 95-CR-00050

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: GUIDUGLI, McANULTY AND TAYLOR, JUDGES.

GUIDUGLI, JUDGE. Robert Powell ("Powell") appeals from an order of the Caldwell Circuit Court denying his motion for CR 60.02 relief. We affirm.

On December 5, 1995, Powell pled guilty in Caldwell Circuit Court to the charge of second-degree burglary. On February 6, 1996, he received a sentence of 10 years in prison. The sentence was probated for 5 years, the terms of which

provided, in relevant part, that Powell would not use illegal drugs or commit another offense.

On November 3, 1998, the trial court rendered an order revoking Powell's probation. The revocation was based on Powell's marijuana use and a conviction for additional offenses arising from shoplifting and fighting.[1]

On April 5, 1999, Powell filed pro se motions pursuant to RCr 13.04 and RCr 60.02 to amend, modify or vacate the sentence. As a basis for these motions, he maintained that the sentence constituted cruel and unusual punishment because its duration was excessive and beyond that necessary to protect the public interest. He also argued that his release would make space available in prison for someone more worthy of incarceration. On June 3, 1999, the circuit court rendered an order denying the motion. On August 30, 1999, Powell filed a pro se motion seeking pre-release probation. That motion was denied by way of an order rendered on September 5, 1999. On August 1, 2001, Powell was paroled. The parole subsequently was revoked.[2]

On May 9, 2003, Powell filed an CR 60.02 motion seeking to alter, amend or vacate his judgment. He again argued that his original judgment and sentence constituted cruel and

[1] The appellate record does not reveal the nature of the offenses.
[2] Again, the appellate record does not indicate why Powell's parole was revoked.

unusual punishment because his offenses were drug-related and not so egregious as to justify long-term imprisonment. On May 16, 2003, the motion was denied, and this appeal followed.

Powell's sole claim of error is that his judgment and sentence violates the constitutional prohibition against cruel and unusual punishment. He maintains that his conviction arose solely from his addiction to drugs, and argues that the trial court committed reversible error in denying his CR 60.02 motion to alter, amend, or vacate the judgment. He seeks an order reversing the circuit court's denial of his motion, and remanding the matter for further proceedings.

We have closely examined Powell's argument, and find no error in the order on appeal. The Commonwealth makes a number of persuasive arguments as to why the order should be affirmed. First the Commonwealth contends that Powell was bound by the civil rules and case law to attack the judgment, if at all, first by direct appeal, then by way of RCr 11.42, and if unsuccessful, via CR 60.02. See generally Gross v. Commonwealth, Ky., 648 S.W.2d 853 (1983), in which the Kentucky Supreme Court directly addressed this issue. Gross restated that RCr 11.42 is not a substitute for direct appeal, and that CR 60.02 is not a substitute for RCr 11.42. Clay v. Commonwealth, Ky., 454 S.W.2d 109 (1970); Perkins v. Commonwealth, Ky., 382 S.W.2d 393 (1964). Since Powell did not

avail himself of both direct appeal and RCr 11.42 before moving for CR 60.02 relief, the trial court correctly denied his motion for relief. This fact, taken alone, forms a sufficient basis for affirming the order on appeal.

Arguendo, even if CR 60.02 was the appropriate mechanism for seeking relief, we would nevertheless find no error in the denial of Powell's motion. CR 60.02(f), which formed the basis for Powell's motion, provides that the motion "shall be made within a reasonable time". CR 60.02. Powell was sentenced on February 6, 1996, and filed the instant motion for relief on May 9, 2003. This period of more than seven years does not constitute "reasonable time". If Powell, for example, had been made aware of exculpatory evidence for the first time in 2003, the delay might be regarded as reasonable under the circumstances. The argument that he now asserts, however, that his punishment is cruel and unusual, could have been made at any time after the judgment and sentence. As such, it cannot be said that a delay of seven years is reasonable, and accordingly we would find no error in the denial of his motion, even if it had been preceded by a direct appeal and motion for RCr 11.42 relief.

Lastly, even if Powell had availed himself of a direct appeal and had sought RCr 11.42 relief, and even if his CR 60.02 motion had been brought within a reasonable period of time, the

facts at bar (and the corpus of his claim of error) do not entitle him to extraordinary relief. Without entering into a protracted analysis of constitutional law in general, and cruel and unusual punishment in particular, suffice it to say that Powell has failed to provide a legal basis in support of the proposition that his incarceration constitutes unconstitutional cruel and unusual punishment. We need not reach this issue, however, as the aforementioned arguments in support of the trial court's order are persuasive. Similarly, we find as moot the Commonwealth's argument that Powell is collaterally estopped from re-litigating his claim.

For the foregoing reasons, we affirm the order of the Caldwell Circuit Court denying Powell's motion for CR 60.02 relief.

ALL CONCUR.

BRIEF FOR APPELLANT, PRO SE:

Robert Powell
Central City, KY

BRIEF FOR APPELLEE:

A. B. Chandler
Attorney General

James Havey
Assistant Attorney General
Frankfort, KY