

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001679-MR

ANTHONY WAYNE HAWKINS

APPELLANT

v. APPEAL FROM HARLAN CIRCUIT COURT
HONORABLE RON JOHNSON, JUDGE
ACTION NO. 93-CR-00059

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** **

BEFORE: COMBS, CHIEF JUDGE; GUIDUGLI AND SCHRODER, JUDGES.

COMBS, CHIEF JUDGE: Anthony Wayne Hawkins appeals from an order of the Harlan Circuit Court that denied his motion for post-conviction relief pursuant to CR 60.02.¹ We affirm.

On July 12, 1993, Joy Food Mart in Benham, Kentucky, was burglarized. Numerous cartons of cigarettes were taken along with seventy lottery tickets. On July 13, 1993, Anthony Hawkins tendered three of the stolen lottery tickets to a sales clerk at a convenient store in Lynch, Kentucky. Upon making

¹ Kentucky Rules of Civil Procedure.

payment of his winnings to Hawkins, the sales clerk was immediately advised by an official of the Kentucky Lottery Association that the tickets had been reported stolen. Following the instructions of the lottery official, the clerk obtained Hawkins's license plate number and telephoned local police. After an investigation, Hawkins was indicted by a Harlan County grand jury.

On March 3, 1994, Hawkins was tried by a jury, which found him guilty of criminal trespass and of unlawfully passing a lottery ticket. He was sentenced to forty-five days in jail for the trespass conviction and five-years' imprisonment for unlawfully passing a lottery ticket. The sentences were ordered to run concurrently. On appeal to this court, Hawkins's conviction for criminal trespass was vacated, but his conviction and sentence for unlawfully passing a lottery ticket were affirmed. We held that Hawkins's conviction for unlawfully passing a lottery ticket was supported by sufficient evidence.

On June 12, 2003, Hawkins filed a motion pursuant to the provisions of CR 60.02. In his motion, Hawkins contended that he had suffered a "substantial injustice of an extraordinary nature." First, he challenged the sufficiency of the evidence presented against him with respect to the allegation that he had unlawfully passed a lottery ticket. Hawkins contended that the Commonwealth had failed to present

any evidence of an intent to defraud, proving only that he had been in possession of the three stolen lottery tickets. Consequently, he argued that his conviction should not be permitted to stand. Second, he argued that the indictment of the grand jury had initially failed to state an offense and had been later improperly amended to his prejudice. Finally, he argued that the judgment should be vacated since he had received ineffective assistance of counsel both at trial and on direct appeal. RCr² 11.42. Hawkins's motion was denied by the trial court on July 25, 2003. This appeal followed.

Hawkins contends that the trial court abused its discretion by failing to grant him relief from his conviction and sentence. 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

² Kentucky Rules of Criminal Procedure.

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. The provisions of CR 60.02 are not fashioned to provide an additional opportunity to relitigate the same issues that could reasonably have been presented by direct appeal or through RCr 11.42 proceedings, which had to be brought within three years.

On appeal, Hawkins has abandoned any contention that he received ineffective assistance of counsel. His remaining arguments involve alleged trial errors that were originally subject to direct appeal but which now are not cognizable by means of a collateral attack on the judgment. Additionally, Hawkins failed to exercise due diligence in pursuing his claims. Under the provisions of CR 60.02, a motion must be filed within a reasonable time if the motion is based upon an extraordinary reason justifying the relief sought. Hawkins waited until June 2003 to file his CR 60.02 motion with the trial court. A delay of nearly nine years is not reasonable and does not comply with the clear requirements of CR 60.02. (We note that Hawkins has completed serving his five-year sentence.) The trial court did

not abuse its discretion by denying the motion as Hawkins failed to invoke the provisions of CR 60.02 in a timely fashion.

The order of the Harlan Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Anthony Wayne Hawkins, *pro se*
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BRIEF FOR APPELLEE:

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