

RENDERED: OCTOBER 29, 2004; 10:00 a.m.  
NOT TO BE PUBLISHED

# Commonwealth of Kentucky

## Court of Appeals

NO. 2003-CA-001749-MR

ROBERT MICHAEL SMITH

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE THOMAS B. WINE, JUDGE  
ACTION NO. 90-CR-001880

COMMONWEALTH OF KENTUCKY

APPELLEE

### OPINION AFFIRMING

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BEFORE: BARBER, KNOPF, AND TACKETT, JUDGES.

KNOPF, JUDGE: Robert M. Smith appeals from an order of the Jefferson Circuit Court denying his motion for post-conviction relief pursuant to CR 60.02. Smith claims that he is entitled to relief because the Commonwealth breached its plea agreement with Smith by ultimately recommending a greater sentence than contained in his plea agreement with the Commonwealth. Because Smith could have brought this claim in the RCr 11.42 motion he filed in 1997, we affirm.

On October 17, 1990, Smith was indicted for capital murder, first-degree robbery, and two counts of first-degree burglary. On January 22, 1991, Smith entered a guilty plea pursuant to a plea agreement with the Commonwealth. Smith pled guilty to the charged offenses in exchange for the Commonwealth's recommendation that he be sentenced to life without parole for twenty-five years on the murder conviction and three ten-year sentences, to run concurrently, on the remaining convictions. Pursuant to the plea agreement, Smith also agreed to testify truthfully against his codefendant.

Smith testified at his codefendant's trial. However, on September 26, 1991, during Smith's final sentencing hearing, the Commonwealth took the position that Smith had not testified truthfully at his codefendant's trial. Accordingly, the Commonwealth recommended that the sentences for the convictions for first-degree robbery and two counts of first-degree burglary be increased to twenty-years instead of the ten-years as stated in the plea agreement. The trial court determined that Smith had not testified truthfully at trial, accepted the Commonwealth's revised recommendation, and imposed the increased sentences to run concurrently with Smith's sentence of life without possibility of parole for twenty-five years for the murder conviction.

On September 20, 1997, Smith filed a motion for post-conviction relief pursuant to RCr 11.42 motion alleging ineffective assistance of counsel on several grounds. The trial court denied the motion, and in an order entered on September 10, 1999, this Court affirmed.<sup>1</sup>

On April 18, 2002, Smith filed a motion for post-conviction relief pursuant to CR 60.02. The motion was subsequently supplemented by appointed counsel. On August 11, 2003, the trial court entered an order denying the motion. This appeal followed.

Smith contends that he is entitled to post-conviction relief pursuant to CR 60.02 because the Commonwealth failed to comply with the terms of the original plea agreement when it later recommended a greater sentence than provided for in the agreement.

However, Smith's claim alleging that the Commonwealth breached the plea agreement may not be considered in a CR 60.02 motion. In Gross v. Commonwealth<sup>2</sup> the Kentucky Supreme Court explained that the structure of post-conviction review is not haphazard or overlapping.<sup>3</sup> It held that a criminal defendant

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<sup>1</sup> See Smith v. Commonwealth, Case No. 1998-CA-001723-MR.

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

<sup>3</sup> Id. at 856.

must first bring a direct appeal when available, then use 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.<sup>4</sup> 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.<sup>5</sup> More recently, in McQueen v. Commonwealth,<sup>6</sup> 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.<sup>7</sup>

Smith's claim that the Commonwealth breached the terms of the 1991 plea agreement is not an extraordinary circumstance, and Smith could reasonably have raised the issue in his 1997 RCr 11.42 motion. We accordingly will not address Smith's claim on the merits.

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<sup>4</sup> Id. at 857.

<sup>5</sup> Id. at 856.

<sup>6</sup> Ky., 948 S.W.2d 415 (1997).

<sup>7</sup> Id. at 416.

In regard to Smith'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, Smith'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.

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

ALL CONCUR.

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