

Commonwealth Of Kentucky
Court of Appeals

NO. 2003-CA-001774-MR

RANDALL CARVER

APPELLANT

v. APPEAL FROM WARREN CIRCUIT COURT
HONORABLE JOHN D. MINTON, JR., JUDGE
ACTION NO. 89-CR-00563

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BUCKINGHAM, McANULTY, AND VANMETER, JUDGES.

McANULTY, JUDGE: Randall Carver appeals from an order of the Warren Circuit Court denying his pro se CR 60.02 motion. Carver was convicted following a jury trial in 1989 of receiving stolen property and of being a persistent felony offender (PFO). As found by the court below, the instant CR 60.02 motion was the second one filed by Carver. The court stated that he was attempting to relitigate the same issues concerning his conviction for being a persistent felony offender that he had raised in a number of post-conviction motions. The court held there still was no basis for granting a motion to vacate, the

court having previously heard evidence and made findings concerning Carver's allegations in his earlier motions.

On appeal, Carver argues that his PFO conviction was based on convictions which are invalid. He asserts there was no record of any response to his previous CR 60.02 motion, and he should have been appointed counsel and received an evidentiary hearing on the instant motion. We conclude that the trial court properly denied Carver's CR 60.02 as a successive motion for relief.

Carver's first CR 60.02 motion was filed in August 1994. While the record indeed reveals no response by the Commonwealth at that time, the CR 60.02 motion was reviewed and denied by the trial court. Carver had previously filed a motion to vacate pursuant to RCr 11.42. That motion was denied, following appointment of counsel and an evidentiary hearing, in 1993.

The standard of review concerning a trial court's denial of a CR 60.02 motion is whether the trial court abused its discretion. Brown v. Commonwealth, 932 S.W.2d 359, 362 (Ky., 1996). On appeal, Carver argues that the claim he raises now has not been presented to the courts before, as he has not disputed the elements of the underpinnings of the PFO charge before. We find it unnecessary to compare Carver's specific arguments of his past post-conviction motions since CR 60.02

does not permit him to continue challenging the basis of his conviction in successive petitions. Post-conviction proceedings follow a particular procedure in Kentucky. Gross v. Commonwealth, 648 S.W.2d 853 (Ky. 1983). CR 60.02 may be utilized only for extraordinary situations in which relief was not available on direct appeal or by RCr 11.42 proceedings. CR 60.02 is not intended as merely an additional opportunity to relitigate the same issues that could reasonably have been presented on direct appeal or through RCr 11.42 proceedings. McQueen v. Commonwealth, 948 S.W.2d 415, 416 (Ky. 1997).

In this case, Carver did not directly appeal his conviction. He filed his RCr 11.42 motion to vacate in which he raised challenges to his PFO conviction. In denying the motion, the trial court found in part that Carver should have attacked his PFO conviction by direct appeal. The court further found that Carver was inappropriately attempting to use RCr 11.42 for reviewing alleged trial errors.

Now, Carver brings a second CR 60.02 motion in which he attempts to raise issues which were available at the time of his judgment of conviction, or at least at the time of his first CR 60.02 motion. As a result, we agree with the trial court that Carver may not obtain review of the issues he wishes to raise now in a successive CR 60.02 motion.

Furthermore, we agree with the Commonwealth that the motion certainly failed to meet the requirement that it "shall be made within a reasonable period of time." It has been twelve years from the time of Carver's judgment until the initiation of the present CR 60.02 proceedings. We agree that Carver has shown no justification for waiting that many years before raising this precise issue in a CR 60.02 motion. Since Carver did not utilize CR 60.02 in a timely manner, the trial court had additional justification for denying the motion.

We conclude the trial court acted properly within its discretion in denying the CR 60.02 motion. The judgment of the court denying the CR 60.02 relief is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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