

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001945-MR

JAMES LANG

APPELLANT

v. APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE WILLIAM J. WEHR, JUDGE
INDICTMENT NO. 84-CR-00131

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: DYCHE, KNOPF, AND TACKETT, JUDGES.

DYCHE, JUDGE: In 1984 James Lang was sentenced on multiple counts of first degree robbery, enhanced by a further charge of persistent felony offender. His sentence on one of the indictments (No. 84-CR-131) was forty years' imprisonment. This was later amended to a thirty-five year sentence in 1990. In August 2003 Lang sought relief pursuant to CR 60.02 (e) to have his sentence on No. 84-CR-131 amended to twenty years, which he claimed was the number of years arrived at during plea bargain

negotiations. The Campbell Circuit Court denied Lang's motion, "for the reasons stated in the Commonwealth's response filed herein," on August 18, 2003, and he appeals. We affirm.

Lang takes great offense at the trial court's "parroting the Commonwealth's position." He claims that this constitutes an abuse of discretion and that he was entitled to relief pursuant to his motion. We disagree. The Commonwealth's response to Lang's motion urged the trial court to deny relief on several grounds, viz., that he was time-barred, that Lang had filed no less than six post-conviction motions, and that he failed to meet the criteria for CR 60.02 (e) relief.

The record supports each of the Commonwealth's positions and refutes those of appellant. CR 60.02 requires that the motion "be made within a reasonable time." What constitutes a reasonable time is a matter that addresses itself to the discretion of the trial court. Gross v. Commonwealth, 648 S.W.2d 853, 858 (Ky. 1983). The trial court did not abuse its discretion in finding that Lang had waited an unreasonable amount of time to file this motion. Ray v. Commonwealth, 633 S.W.2d 71, 73 (Ky.App. 1982).

Secondly, CR 60.02 is available only to raise issues which cannot be raised in other proceedings. McQueen v. Commonwealth, 948 S.W.2d 415, 416 (Ky. 1997); Gross, supra. Lang has had numerous opportunities, both on direct appeal and

by means of the many RCr 11.42 motions filed by him or on his behalf, to present this issue. In fact, the record before us is marked "Sixth Appeal." Lang cannot then employ CR 60.02 "as a separate avenue of appeal to be pursued in addition to other remedies." McQueen, supra at 416.

Lastly we agree with the trial court that Lang does not qualify for CR 60.02 (e) relief. That section of the rule is available to grant relief on the ground that "the judgment is void, or has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application." Lang's sole basis for his request for relief is that he was not sentenced for the underlying robbery before that sentence was enhanced under our recidivist statute. "While as a *pro forma* matter this kind of explicit exactitude may be the better practice, in [Lang]'s case the failure of the court to memorialize the necessary predicate of its actions worked no harm." Hulett v. Commonwealth, 834 S.W.2d 688, 690 (Ky.App. 1992).

The judgment of the Campbell Circuit Court is affirmed.

ALL CONCUR.

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BRIEF FOR APPELLEE:

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