

Commonwealth of Kentucky

Court of Appeals

NO. 2003-CA-002165-MR

O'NEIL A. WALKER

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE KENNETH CONLIFFE, JUDGE
ACTION NO. 97-CR-001073

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, CHIEF JUDGE; MINTON, AND VANMETER, JUDGES.

VANMETER, JUDGE: O'Neil A. Walker appeals from an order of the Jefferson Circuit Court denying his motion for post-conviction relief pursuant to CR¹ 60.02. Walker claims that he is entitled to relief because the Commonwealth breached its plea agreement with him by objecting to probation though the agreement provided that the Commonwealth would not take a stand on the issue.

Because Walker clearly could have brought this claim in either a

¹ Kentucky Rules of Civil Procedure.

direct appeal or an RCr² 11.42 motion within the period provided under RCr 11.42(3), we affirm.

On April 30, 1997, Walker was indicted on two counts of first-degree robbery. Walker subsequently entered into a plea agreement with the Commonwealth under which he agreed to plead guilty to two counts of second-degree robbery. In exchange, the Commonwealth agreed to recommend a sentence of eight years on each conviction, to take no stand on probation, and to make no objection to transferring probation to Walker's home state of New York.

On January 22, 1998, the final sentencing hearing was held. Walker alleges that at this hearing the Commonwealth, contrary to the plea agreement, opposed probation. The trial court sentenced Walker in accordance with the plea agreement and denied probation.

On July 25, 2003, Walker filed a motion for post-conviction relief pursuant to CR 60.02 alleging that the Commonwealth had breached the initial plea agreement by objecting to probation during the sentencing hearing. On September 2, 2003, the trial court entered an order denying the motion. This appeal followed.

On this appeal Walker contends that he is entitled to post-conviction relief pursuant to CR 60.02 because the

² Kentucky Rules of Criminal Procedure.

Commonwealth failed to comply with the original plea agreement when it objected to probation at the sentencing hearing.

Walker's claim alleging that the Commonwealth breached the plea agreement may not be considered in a CR 60.02 motion. In *Gross v. Commonwealth, Ky.*, 648 S.W.2d 853 (1983), the Kentucky Supreme Court explained that the structure of post-conviction review is not haphazard or overlapping. *Id. at 856.* It held that a criminal defendant must first bring a direct appeal when available, then utilize 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." *Id. at 857.* 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. *Id. at 856.* More recently, in *McQueen v. Commonwealth, Ky.*, 948 S.W.2d 415 (1997), 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.

Id. at 416.

Walker could reasonably have raised the claim that the Commonwealth breached the plea agreement in a direct appeal or in a motion for post-conviction relief pursuant to RCr 11.42, if his allegation is that his counsel failed to object to the Commonwealth's improper argument. The issue does not amount to an extraordinary circumstance and, accordingly, may not be raised in the present CR 60.02 motion. As such, we will not address Walker's claim on the merits.

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

ALL CONCUR.

BRIEF FOR APPELLANT:

O'Neil A. Walker, pro se
Eddyville, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Natalie Lewellen
Assistant Attorney General
Frankfort, Kentucky