

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002530-MR

ROLAND GAZAWAY

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE THOMAS B. WINE, JUDGE
ACTION NO. 97-CR-001896

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** **

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

COMBS, CHIEF JUDGE: Roland Gazaway, *pro se*, appeals from an order of the Jefferson Circuit Court that denied his motion for post-conviction relief pursuant to CR¹ 60.02. We affirm.

In August 1997, Gazaway was indicted by a grand jury on charges of capital murder, assault, and burglary. The Commonwealth sought the death penalty. Following a four-day trial, a jury found Gazaway guilty on all three counts of the indictment.

¹ Kentucky Rules of Civil Procedure.

Upon advice of counsel, Gazaway elected to waive his right to jury sentencing and to permit the court to impose a sentence. He also agreed to waive his right to appeal any pretrial or trial issues. In exchange, the Commonwealth agreed to recommend a life sentence with parole eligibility after twelve years.

A lengthy and comprehensive sentencing hearing then took place. The trial court sentenced Gazaway as follows: terms of imprisonment of ten years on the burglary conviction; fifteen years on the assault conviction, to be served concurrently with the burglary conviction; and thirty years for the murder conviction, to be served consecutively as to the other two sentences. The total sentence extended to forty-five years, rendering Gazaway eligible for parole in twelve years. The final judgment and sentence were entered in December 1998.

In December 2001, Gazaway filed a motion pursuant to the provisions of RCr² 11.42, contending that he had been denied the effective assistance of counsel throughout his trial. The motion was denied by the trial court, and this court affirmed the denial in February 2003.

In November 2003, Gazaway filed a motion pursuant to the provisions of CR 60.02, again contending that he had been denied the effective assistance of counsel. He also alleged

² Kentucky Rules of Criminal Procedure.

that he was entitled to relief because he had been subjected to double jeopardy and because the trial court had failed to direct a verdict of acquittal. The trial court denied the motion summarily, and this appeal followed.

Gazaway argues that the trial court abused its discretion by failing to grant him relief from his conviction and sentence. Because he has failed to assert his claims in timely fashion, we are barred from reviewing them at this stage.

In Gross v. Commonwealth, Ky., 648 S.W.2d 853 (1983), the Supreme Court of Kentucky set forth a detailed, sequential procedure governing post-conviction proceedings. The Court held that a criminal defendant must first bring a direct appeal when available, and only then should he utilize the provisions of RCr 11.42 by addressing every error of which he was (or should have been) aware. The Court emphasized that the provisions of CR 60.02 apply only to extraordinary situations not otherwise subject to relief through direct appeal or RCr 11.42 proceedings. CR 60.02 is not intended merely as an additional opportunity to relitigate the same issues that could "reasonably have been presented" by direct appeal or through RCr 11.42 proceedings. McQueen v. Commonwealth, Ky., 948 S.W.2d 415, 416 (1997).

Gazaway has previously filed a motion pursuant to RCr 11.42 in which he should have raised all matters pertaining to

the alleged ineffectiveness of his trial counsel. Consequently, he is not allowed to raise the issue again in a subsequent CR 60.02 motion.

We are also unable to review Gazaway's argument regarding the court's refusal to direct a verdict and the contention that he was subjected to double jeopardy. Both of these issues involve alleged trial errors. As the previous panel of this court noted, Gazaway waived his right to appeal trial issues when he agreed to waive formal jury sentencing and to allow the trial court to determine his sentence. The consequences of the waiver have been established as the law of the case. Gazaway is prohibited from raising these alleged errors.

Finally, Gazaway failed to exercise due diligence in pursuing these 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. Gazaway waited until November 2003 to file this CR 60.02 motion with the trial court -- after the passage of nearly six years. That period of delay is not reasonable under the circumstances and does not comply with the requirements of CR 60.02. The trial court did not abuse its discretion by denying the motion since Gazaway failed timely and properly to invoke the provisions of CR 60.02.

The order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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