

RENDERED: October 8, 2004; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2003-CA-002612-MR

EDWARD EARL MARTIN

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE THOMAS J. KNOFF, JUDGE
ACTION NO. 92-CR-001753

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: COMBS, CHIEF JUDGE; GUIDUGLI, JUDGE; AND MILLER, SENIOR JUDGE.¹

COMBS, CHIEF JUDGE: Edward Earl Martin appeals from an order of the Jefferson Circuit Court of March 17, 2003, which denied his motion pursuant to CR² 60.02 to modify his sentence. We affirm.

¹ Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

² Kentucky Rules of Civil Procedure.

In 1992, Martin was indicted on numerous felony charges related to his alleged involvement in several robberies. A jury convicted him of two counts of first-degree robbery, first-degree burglary, first-degree assault, third-degree criminal mischief, and of being a first-degree persistent felony offender. On November 12, 1992, he was sentenced to serve 220 years in prison.

Martin's conviction was affirmed on direct appeal by the Kentucky Supreme Court on September 30, 1993. Three years later, Martin sought to vacate his sentence pursuant to RCr³ 11.42 and CR 60.02(e) and (f). On May 5, 1998, this Court affirmed the order of the trial court denying Martin's request for post-conviction relief.

On February 7, 2003, more than ten years following his conviction, Martin filed a motion for extraordinary relief pursuant to CR 60.02. As grounds for the motion, he recited that the trial court had ordered that he undergo a psychiatric evaluation prior to trial. He claimed that he had not been evaluated and that the court had failed to conduct a hearing to determine whether he was competent to stand trial. He asked that a psychiatric evaluation at last be performed to be followed by a new sentencing hearing. Alternatively, he

³ Kentucky Rules of Criminal Procedure.

requested that his sentence be modified to a term not to exceed twenty years in prison.

The same judge who had presided over Martin's trial in 1992 considered his current CR 60.02 motion. In denying the requested relief, the trial court found as follows:

Martin's entire motion is based upon the alleged fact that he did not receive the court-ordered psychiatric examination prior to trial to evaluate his competency. The record contains a court order entered on April 16, 1992, ordering Kentucky Correctional Psychiatric Center (KCPC) to conduct an evaluation as to Martin's competency to stand trial. The report was to be sent to his defense counsel, Catherine J. Rao, who would then request a competency hearing or waive said right.

On May 6, 1992, the defense gave notice that it might introduce expert testimony at trial relating to Martin's mental status. A court order was entered on May 18, 1992, requiring the defense to turn over a copy to the Commonwealth of any expert's report it elected to use at trial. No competency hearing was requested or held, and no expert testimony regarding Martin's mental status was introduced at trial.

Contrary to Martin's assertions, he was evaluated by KCPC pursuant to the April 16, 1992 order. The evaluation took place in the jail rather than as an inpatient at KCPC and was conducted on May 13, and May 19, 1992. A competency report, dated May 27, 1992, was sent to defense counsel (as evidenced by Martin's Exhibit #3 to his motion), which found that Martin met the criteria for competency. Martin also had a CT scan performed at University Hospital, which was negative. Based upon said report and test result, it was reasonable for

Martin's counsel to forego a competency hearing request in this case.

In this appeal, Martin argues that the record establishes that a competency hearing was not conducted as mandated by KRS⁴ 504.100(3). He contends that the statutory provisions mandating a competency hearing cannot be waived. He cites Thompson v. Commonwealth, Ky., 56 S.W.3d 406 (2001), as authority entitling him to the remand of his case to the trial court with directions that it conduct a retrospective competency hearing.

This Court applies the standard of abuse of discretion in reviewing a trial court's ruling on a motion pursuant to CR 60.02. White v. Commonwealth, Ky.App., 33 S.W.3d 83 (2000). After searching the record, we are unable to find any abuse of discretion by the court in denying Martin's motion for relief from his sentence.

At the outset, we note our agreement with the Commonwealth that Martin's motion -- filed more than ten years after his conviction -- was not filed within a reasonable time as contemplated by the rule. Gross v. Commonwealth, Ky., 648 S.W.2d 853 (1983). Martin's claim was known to him at the time of his conviction and concerns matters that he should have raised in his direct appeal or (at the latest) in his motion

⁴ Kentucky Revised Statutes.

pursuant to RCr 11.42. Id.; McQueen v. Commonwealth, Ky., 948 S.W.2d 415 (1997).

CR 60.02 is not intended as an additional avenue to re-litigate claims which should have been raised in a more timely fashion. Additionally, it is not "available for mere judicial errors or mistakes." McMillan v. Commonwealth, Ky.App., 717 S.W.2d 508, 509 (1986). Martin's claim that he was denied due process is founded solely on the failure of the trial court to conduct a competency hearing. We agree with Martin that the trial court was required by KRS 504.100(3) to conduct a hearing to determine whether he was competent to stand trial. However, we believe that the error was harmless in the context of this case.

Martin has failed to allege that he was actually incompetent at the time of his trial. There was no medical evidence to contradict the conclusion of Dr. Robert Noonan that he was indeed competent. The record discloses that Martin denied any history of mental illness or any psychiatric treatment prior to his 1992 conviction and sentence. Martin has failed to establish that he was prejudiced in any way by the failure of the trial court to conduct a competency hearing. Thus, the error was harmless and cannot serve as a predicate for invoking the extreme remedy of CR 60.02. Mills v. Commonwealth, Ky., 996 S.W.2d 473, 486 (1999).

The order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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