

RENDERED: MAY 20, 2005; 2:00 p.m.  
NOT TO BE PUBLISHED

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2004-CA-000049-MR

PAUL WILLIAM LEWIS

APPELLANT

v. APPEAL FROM HARLAN CIRCUIT COURT  
HONORABLE JAMES L. BOWLING, JR., JUDGE  
INDICTMENT NO. 89-CR-00073

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: HENRY AND VANMETER, JUDGES; MILLER, SENIOR JUDGE.<sup>1</sup>

HENRY, JUDGE: Paul William Lewis appeals from a November 18, 2003 order of the Harlan Circuit Court denying his motion for relief pursuant to CR<sup>2</sup> 60.02(f). We affirm, but for different reasons than those set forth by the trial court.

The facts of this case pertinent to this appeal are as follows: Lewis was arrested for robbery on August 8, 1989. At

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<sup>1</sup> 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.

<sup>2</sup> Kentucky Rules of Civil Procedure.

that time, he was on parole from a 26-year sentence for previous convictions in Jefferson and Hardin counties. On August 24, 1989, the Kentucky Department of Corrections revoked Lewis' parole and ordered him to serve the remainder of his 26-year sentence. Lewis remained in the Harlan County Detention Center awaiting trial on the 1989 robbery charge. While awaiting trial, Lewis was charged with attempted escape, possession of dangerous contraband, and with being a first degree persistent felony offender. He was subsequently tried and convicted of the robbery charge in the Harlan Circuit Court on October 11, 1989.

In late 1990, Lewis was transferred to the Luther Lockett Correctional Complex to serve the remainder of his original 26-year sentence. However, the Harlan Circuit Court failed to provide Lockett with certified copies of the judgment sentencing Lewis to 17 years' imprisonment as a result of the robbery conviction, as required by KRS<sup>3</sup> 431.215(1). On February 1, 1992, Lewis completed service of his 26-year sentence and was released. He had not completed his 17-year sentence for the 1989 robbery conviction, and Lockett officials were apparently unaware of this conviction. Moreover, no detainers were lodged against Lewis with respect to the 1989 indictment for attempted escape, contraband, and PFO 1<sup>st</sup>.

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<sup>3</sup> Kentucky Revised Statutes.

After being released from Lockett, Lewis moved to Huntsville, Tennessee. On March 16, 1992, he was arrested on a fugitive warrant pertaining to the pending 1989 indictment for attempted escape, contraband, and PFO 1<sup>st</sup>. Kentucky officials had apparently become aware of their mistake soon after Lewis' release. Nevertheless, they never appeared in Tennessee to establish probable cause for extradition. As a result, the Tennessee court holding Lewis dismissed the fugitive charges.

On July 28, 2002, Lewis was again arrested in Huntsville, Tennessee on a fugitive warrant. This time he was extradited to Kentucky on August 1, 2002, and he has been imprisoned in various correctional facilities ever since, serving his 17-year sentence for his robbery conviction.<sup>4</sup>

On September 25, 2002, Lewis sought relief pursuant to CR 60.02(f) and made a written request for an evidentiary hearing and for appointment of counsel. On November 18, 2003, the trial court entered an order denying Lewis' petition for relief and overruling all pending motions. The trial court particularly held that Lewis' petition was not filed within a reasonable time. This appeal followed.

Lewis first generally contends that he is entitled to relief under CR 60.02 due to his being unlawfully incarcerated

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<sup>4</sup> On October 2, 2003, upon motion of the Commonwealth, the Harlan Circuit Court dismissed with prejudice the indictment relating to the attempted escape, contraband, and PFO 1<sup>st</sup> charges.

as a result of the Commonwealth reneging on a deal allegedly reached after his July 28, 2002 arrest to release him from enforcement of his 1989 robbery conviction, and because the Commonwealth has waived its right to enforce that conviction and should be estopped from doing so.

From our review of the record on appeal, we can find no indication that these arguments were presented to the trial court below in any of Lewis' numerous motions for relief from his conviction, nor does Lewis identify where these arguments are preserved in the record. "An appellate court will not consider a theory unless it has been raised before the trial court and that court has been given an opportunity to consider the merits of the theory." Shelton v. Commonwealth, 992 S.W.2d 849, 852 (Ky. App. 1998), citing Hopewell v. Commonwealth, 641 S.W.2d 744, 745 (Ky. 1982). "Regardless of the merits of this argument, these grounds, being different from those asserted in the court below, are not properly preserved for appellate review." Daugherty v. Commonwealth, 572 S.W.2d 861, 863 (Ky. 1978). Accordingly, we find that these issues are unpreserved for our review, and we will therefore not consider them.

We note, however, that if Lewis believes that he is being unlawfully incarcerated, his remedy is a petition for a writ against his prison warden and the Kentucky Department of Corrections. See, e.g., Kassulke v. Briscoe-Wade, 105 S.W.3d

403, 414 (Ky. 2003). Indeed, the Kentucky Supreme Court specifically advised Lewis of this fact in an unpublished decision, Paul William Lewis v. James L. Bowling, Jr., Special Judge, et al., No. 03-SC-165 (Ky., March 18, 2004), that was decided in the context of these very same facts and proceedings. In this decision, the Supreme Court explicitly ruled that the claims Lewis raises here may only be adjudicated in an original circuit court action against the Kentucky Department of Corrections, specifically the warden of the institution in which he is being held.

Lewis also contends that his conviction should be vacated because he was provided ineffective assistance of counsel and because his prosecution was "selective and vindictive," as a result of the prosecuting attorney being related by marriage to the victim of the crime.<sup>5</sup> Our courts have consistently held that CR 60.02 is intended to provide relief that is not available on direct appeal or under RCr<sup>6</sup> 11.42. Barnett v. Commonwealth, 979 S.W.2d 98, 101 (Ky. 1998); Gross v. Commonwealth, 648 S.W.2d 853, 856 (Ky. 1983). It is an established principle that this Court will not address an issue

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<sup>5</sup> Lewis has cited us to no authority supporting his theory that a "selective and vindictive" prosecution is grounds for post-conviction relief, and we have uncovered no authority supporting this argument in our own research. Accordingly, we focus our analysis here upon Lewis' ineffective assistance of counsel contentions only.

<sup>6</sup> Kentucky Rules of Criminal Procedure.

that was raised on direct appeal again in a post-conviction proceeding. See Brown v. Commonwealth, 788 S.W.2d 500, 501 (Ky. 1990).

Moreover, as a general rule, in order to attack a final judgment, a person must first directly appeal the judgment and then seek RCr 11.42 relief. Only then may that person seek relief under CR 60.02. Gross, 648 S.W.2d at 856. The reason that CR 60.02 relief typically should be sought last is because this rule "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." McQueen v. Commonwealth, 948 S.W.2d 415, 416 (Ky. 1997), citing RCr 11.42; Gross, 648 S.W.2d at 855-56. CR 60.02 was enacted as a substitute for the common law writ of coram nobis. Id. "The purpose of such a writ was to bring before the court that pronounced judgment errors in matter of fact which (1) had not been put into issue or passed on, (2) were unknown and could not have been known to the party by the exercise of reasonable diligence and in time to have been otherwise presented to the court, or (3) which the party was prevented from so presenting by duress, fear, or other sufficient cause." Id. (Citations omitted).

The ineffective assistance of counsel claims made by Lewis here were also raised immediately after his 1989 robbery

conviction in a motion for a new trial. The record is unclear as to whether or not Lewis raised these specific claims on direct appeal; however, Lewis' conviction was subsequently affirmed by this Court in 1992. On September 23, 2002, Lewis tendered a motion to vacate judgment pursuant to RCr 11.42 based upon the same grounds at issue here; he withdrew that motion, and filed the subject CR 60.02 motion in its place, when he discovered that a petition for relief under RCr 11.42 must be filed within three (3) years of a judgment becoming final. See 11.42(10).

The claims made by Lewis as to ineffective assistance of counsel are of the type typically raised in an RCr 11.42 proceeding. See Hibbs v. Commonwealth, 570 S.W.2d 642, 643 (Ky.App. 1978). Here, however, Lewis raised his claims in a motion for new trial immediately following his conviction. While it is unusual for a claim of ineffective assistance of counsel to be raised immediately following a trial, it is not entirely unheard of. See, e.g., id. Our Supreme Court has recently held that if a claim of ineffective assistance of counsel is raised on direct appeal, this issue is not to be tried again in subsequent post-conviction proceedings. Bowling v. Commonwealth, 981 S.W.2d 545, 549 (Ky. 1998), citing Brown, 788 S.W.2d at 501. It is not possible to determine from the record now before us whether Lewis raised his ineffective

assistance of counsel claims on direct appeal, but it is clear from the record that Lewis did raise these claims in his motion for a new trial.

As noted above, CR 60.02 was enacted as a substitute for the common law writ of coram nobis and actually served to codify that writ. Berry v. Cabinet for Families & Children ex rel. Howard, 998 S.W.2d 464, 467 (Ky. 1999); McQueen, 946 S.W.2d at 416. In Ford v. Commonwealth, 312 Ky. 718, 229 S.W.2d 470 (1950), it was held that the writ of coram nobis did not lie where it was based upon the same allegation of error as the defendant's motion for a new trial, which had been rejected by the trial court. Id. at 721 (Citations omitted). We find that this decision is applicable to Lewis' petition under CR 60.02(f) and consequently conclude that he is not entitled to relief under this provision given that the issues raised here were all raised following his conviction in a motion for a new trial.

The decision of the Harlan Circuit Court is affirmed.

ALL CONCUR.

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