

Commonwealth Of Kentucky
Court of Appeals

NO. 2004-CA-000197-MR

THOMAS MITCHELL

APPELLANT

v.

APPEAL FROM ROWAN CIRCUIT COURT
HONORABLE WILLIAM B. MAINS, JUDGE
ACTION NO. 88-CR-00033

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** * * *

BEFORE: BARBER, BUCKINGHAM, AND HENRY, JUDGES.

HENRY, JUDGE: On November 8, 1988, Thomas Mitchell pleaded guilty to first degree robbery, first degree assault, and to being a second degree persistent felony offender and was sentenced to life imprisonment. In October, 1989 the Supreme Court affirmed his conviction and sentences. Since that time, Mitchell has pursued various state and federal post-conviction remedies, all unsuccessfully. He has now filed this CR 60.02 motion alleging that he entered an impermissible plea pursuant

to North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed. 2d 162 (1970).

In March 1993, Mitchell filed his first of a series of motions for post-conviction relief, an RCr 11.42 motion that was denied by the circuit court. In 1997, Mitchell filed a petition for writ of habeas corpus in the Federal Court that was dismissed. The dismissal was affirmed on appeal. In 2000, Mitchell continued his relentless pursuit of post-conviction relief. He filed a CR 60.02 motion that was denied and affirmed on appeal. Subsequently he filed for leave to file a successive Federal habeas corpus petition that on August 2, 2002 was denied. While his Federal motion was pending, in March 2002, Mitchell filed a state habeas corpus action complaining that the circuit court failed to make findings of fact and conclusions of law concerning his pre-trial motions. The petition was dismissed and no appeal was filed. On November 4, 2002 Mitchell filed a petition for writ of Mandamus in this court that was denied.

The present CR 60.02 motion was filed on October 31, 2003. Mitchell alleged that he entered an Alford plea that was impermissible under RCr 8.08 and RCr 8.12 and requested that his conviction be vacated. The circuit court denied the motion and this appeal followed.

Mitchell filed his CR 60.02 motion well beyond the one-year time limitation applicable to all sections of the rule other than Cr 60.02(d)(e), and (f).¹

Mitchell after fifteen years of filing unsuccessful motions for post-conviction relief, contends that his plea was neither a guilty plea nor a not guilty plea and therefore the court was not authorized to accept his plea. Although he relies on Commonwealth v. Hillhaven Corp., 687 S.W. 2d 545 (Ky. App. 1985), where the court held that a plea of nolo contendere is not authorized under our criminal rules, he states that his plea was entered pursuant to North Carolina v. Alford, supra, and concludes that as in Hillhaven, it was not a guilty plea. The circuit court properly pointed out that an Alford plea is a guilty plea and is a criminal conviction. Pettitway v. Commonwealth, 860 S.W.2d 766 (Ky. 1993). The record refutes any contention that Mitchell intended to enter an Alford plea and instead demonstrates that he knowingly entered a conditional guilty plea, preserving the right to appeal the circuit court's denial of certain pre-trial motions. There is no mention of any Alford plea by the court, counsel or Mitchell. He entered a conditional guilty plea explicitly authorized under RCr 8.09.

¹ Under subsection (f), the motion must be filed within a reasonable time and relief is granted only when there is a showing of extraordinary circumstances. "CR 60.02 is not a separate avenue of appeal to relitigate issues which were or could have been raised in a motion under RCr 11.42." Land v. Commonwealth, 986 S.W.2d 440, 442 (Ky. 1999).

During the fifteen years that have passed since Mitchell entered his plea, the trial court, the Federal courts, and this court have endured numerous unsuccessful motions and appeals filed by Mitchell without mention of the contention now raised. His latest attempt under CR 60.02(f) cannot be considered filed within a reasonable time.

The order of the Rowan Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Thomas Mitchell
Fredonia, Kentucky

BRIEF FOR APPELLEE:

Samuel J. Floyd, Jr.
Frankfort, Kentucky