

RENDERED: July 8, 2005; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000396-MR

VINCENTE BERNARDO HELM

APPELLANT

v. APPEAL FROM DAVIESS CIRCUIT COURT
HONORABLE HENRY M. GRIFFIN III, JUDGE
INDICTMENT NOS. 95-CR-00002, 95-CR-00050,
95-CR-00127 AND 95-CR-00163

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** **

BEFORE: BARBER AND SCHRODER, JUDGES; AND HUDDLESTON, SENIOR
JUDGE.¹

HUDDLESTON, SENIOR JUDGE: In 1995, in Daviess Circuit Court,
Vincente Bernardo Helm was charged with numerous felonies in
four separate indictments, 95-CR-00002, 95-CR-00050, 95-CR-00127
and 95-CR-00163. On June 19, 1995, Helm entered a plea,

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

pursuant to North Carolina v. Alford,² to the felonies contained in the various indictments after accepting the Commonwealth's plea offer in which the prosecutor agreed to recommend that Helm serve an aggregate sentence of twenty years in prison.

On October 31, 1996, Helm filed a motion to vacate his conviction pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42, claiming that his trial attorney rendered ineffective assistance. Helm's motion was denied on December 12, 1996.

Some seven years later, on January 20, 2004, Helm filed a motion to vacate his conviction pursuant to Kentucky Rules of Civil Procedure (CR) 60.02(f). According to Helm, on June 19, 1995, he and his attorney met with the prosecutor and the trial judge in the judge's chambers for a status conference, which was on the record and was videotaped. During the conference, the prosecutor told the court, Helm and his counsel that he had previously offered Helm a ten-year sentence if Helm would plead guilty, but Helm had rejected his offer. Helm responded that the prosecutor had made no such offer, and, if the prosecutor had, Helm would have taken it. Based on this, Helm argued in his CR 60.02 motion that his trial attorney had failed to convey the Commonwealth's ten-year offer to Helm, thus rendering ineffective assistance.

² 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

In his CR 60.02 motion, Helm also argued that the information that was revealed during the conference had remained hidden for several years. And Helm insisted that he only became aware of this information, and aware of his trial attorney's ineffectiveness, after an institutional legal aide had reviewed the videotape of the conference in September 2004 and brought it to Helm's attention. In his motion, Helm acknowledged that a motion pursuant to CR 60.02(f) must be filed within a reasonable time and that the trial court has the discretion to determine what constitutes a reasonable time. But he insisted that in determining reasonableness, the trial court must consider how much time has passed from the date the error was discovered until the date on which the motion was filed, not how much time has passed since the defendant was convicted. Since Helm allegedly discovered his attorney's ineffectiveness in 2004, he reasoned, his motion was timely filed, although eight years had passed since he was convicted. In addition, since the information had remained hidden until 2004, Helm argued that he could not have raised his current allegation of ineffective assistance of counsel in his earlier RCr 11.42 motion. Thus, he claimed, it was appropriate for him to raise it in a CR 60.02 motion.

After determining that Helm had failed to raise the issue of ineffective assistance of counsel within a reasonable

time, Daviess Circuit Court summarily denied his CR 60.02 motion.

On appeal, Helm advances the same arguments that he presented below.

It is well-settled that a CR 60.02(f) motion must be filed within a reasonable time, and it is within the trial court's sound discretion to determine, on a case-by-case basis, what constitutes a reasonable time.³ In the present case, Helm has failed to show that the trial court abused its discretion when it determined that his motion was not filed within a reasonable time.

Furthermore, a criminal defendant cannot raise an issue such as ineffective assistance of counsel in a CR 60.02 motion if the issue could have been raised in an RCr 11.42 motion.⁴ Despite Helm's insistence to the contrary, he was aware of the information revealed during the status conference since not only was he present, he actively participated, as the videotaped record clearly shows. Thus, Helm was aware of his trial counsel's alleged ineffective assistance. Since Helm knew about this allegation in 1995, not only could he have raised it in his earlier RCr 11.42 motion, he was required to do so.⁵

³ Gross v. Commonwealth, 648 S.W.2d 853, 858 (Ky. 1983).

⁴ Id. at 857.

⁵ See Gross v. Commonwealth, supra, note 3.

Finally, according to the record, Helm appeared in court on April 7, 1995, for arraignment on the felony charges contained in indictment 95-CR-00127. The videotape of this arraignment hearing reveals that the Commonwealth conveyed to Helm personally a plea offer of ten years regarding the felony charges contained in indictments 95-CR-00002 and 95-CR-00050. At that time, Helm personally, expressly and vociferously rejected the Commonwealth's ten-year offer. Thus, the record unequivocally refutes Helm allegation that his trial counsel rendered ineffective assistance by failing to convey to Helm the Commonwealth's ten-year offer.

The order denying Helm's CR 60.02(f) motion is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Vincente Bernardo Helm, *pro se*
LaGrange, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Todd D. Ferguson
Assistant Attorney General
Frankfort, Kentucky