

RENDERED: MAY 13, 2005; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000672-MR

SAMUEL WHITE

APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE THOMAS B. WINE, JUDGE
ACTION NOS. 94-CR-001502 & 95-CR-001754

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: HENRY AND VANMETER, JUDGES; MILLER, SENIOR JUDGE.¹

VANMETER, JUDGE: This is a pro se appeal from an order entered by the Jefferson Circuit Court denying appellant Samuel White's motion seeking CR 60.02(a) and (f) relief from the judgment and sentence entered against him after he pled guilty to several charges. For the reasons stated hereafter, we affirm.

In June and July 1994, White was indicted on charges of criminal attempt to commit murder, first-degree assault,

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.

first-degree burglary, and two counts of first-degree stalking, all involving a single victim. He also was indicted as a first-degree persistent felony offender (PFO). Ultimately, in September 1996, White pled guilty to attempted murder, first-degree burglary, first-degree stalking, and first-degree PFO, and he was sentenced to a total of twenty-five years' imprisonment. The assault charge and a duplicative stalking charge were dismissed.

Some seven years later, in December 2003, White filed a pro se motion seeking to modify or correct his sentence pursuant to CR 60.02(a) and (f). The trial court denied the motion, stating that "case law and the record clearly refute each of" White's allegations and that in any event, CR 60.02(a) and (f) are inapplicable. This appeal followed.

CR 60.02(a) and (f) provide that a court may relieve a party from its final judgment upon grounds of

(a) mistake, inadvertence, surprise or excusable neglect; . . . or (f) any other reason of an extraordinary nature justifying relief.

CR 60.02 further requires that any motion relying on grounds (a), (b) or (c) must be brought within one year after entry of the judgment, while motions relying on the remaining grounds "shall be made within a reasonable time." As White's motion was filed more than seven years after the judgment was entered, it

is clear from the outset that he is not eligible for CR 60.02(a) relief.

The Kentucky Supreme Court has consistently limited the availability of CR 60.02 relief in criminal cases, stating in *McQueen v. Commonwealth*² as follows:

The interrelationship between CR 60.02 and RCr 11.42 was carefully delineated in *Gross v. Commonwealth, Ky.*, 648 S.W.2d 853 (1983). In a criminal case, these rules are not overlapping, but separate and distinct. A defendant who is in custody under sentence or on probation, parole or conditional discharge, is required to avail himself of RCr 11.42 as to any ground of which he is aware, or should be aware, during the period when the remedy is available to him. Civil Rule 60.02 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. RCr 11.42(3); *Gross v. Commonwealth, supra*, at 855, 856. The obvious purpose of this principle is to prevent the relitigation of issues which either were or could have been litigated in a similar proceeding. . . . In summary, CR 60.02 is not a separate avenue of appeal to be pursued in addition to other remedies, but is available only to raise issues which cannot be raised in other proceedings. . . .

Finally, as we pointed out in *Gross*, a CR 60.02 movant must demonstrate why he is entitled to this special, extraordinary relief. "Before the movant is entitled to an evidentiary hearing, he must affirmatively allege facts which, if true, justify vacating the judgment and further allege special circumstances that justify CR 60.02 relief." *Gross v. Commonwealth, supra*, at 856.

² 948 S.W.2d 415, 416 (Ky. 1997). See also *Gross v. Commonwealth*, 648 S.W.2d 853 (1983).

*See also Land v. Commonwealth.*³

White first asserts that the trial court erred by failing to grant CR 60.02 relief on his claim that the prohibition against double jeopardy was violated when he was charged with both attempted murder and first-degree assault arising out of the same circumstances, and when he twice was indicted for first-degree stalking involving the same circumstances. Although the assault charge later was dismissed, and the duplicative stalking charge was dismissed, White alleges that the multiple charges were made to coerce and intimidate him into entering a guilty plea to the remaining charges. However, by entering a guilty plea White waived any defenses or objections to the charges filed against him other than that the indictment charged no offense.⁴ Moreover, any contention that he was inadequately represented, and that his plea therefore was unknowingly or involuntarily made, could and should have been addressed in a motion seeking RCr 11.42 relief. Hence, this issue is not properly before this court on appeal.

White next contends that the trial court erred by failing to grant him relief on the ground that his PFO guilty plea was illegal because his sentence was imposed by the court

³ 986 S.W.2d 440 (Ky. 1999).

⁴ *Quarles v. Commonwealth*, 456 S.W.2d 693 (Ky. 1970).

rather than by a jury. See KRS 532.080. However, White is not entitled to relief on this ground since a defendant may knowingly and voluntarily waive any constitutional or statutory right in a plea agreement,⁵ and any such waiver is binding on the defendant.⁶

Finally, White asserts that the trial court erred by denying CR 60.02 relief without first conducting an evidentiary hearing regarding both his competency to enter a guilty plea and the other issues raised in his motion. However, as noted by the Commonwealth, the competency issue is not properly before this court on appeal since it was not raised during the CR 60.02 proceedings below. Moreover, as it is clear on the face of the record that White was not otherwise entitled to CR 60.02 relief, it follows that the court did not err by failing to provide him with an evidentiary hearing.⁷ In any event, we could not say that the trial court abused its discretion by denying CR 60.02 relief in light of the seven-year delay between the entry of the judgment and the filing of White's motion.

The court's order is affirmed.

ALL CONCUR.

⁵ *Johnson v. Commonwealth*, 120 S.W.3d 704 (Ky. 2003).

⁶ *Id.*

⁷ *Gross*, 648 S.W.2d at 856.

BRIEF FOR APPELLANT:

Samuel White, Pro Se
LaGrange, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Samuel J. Floyd, Jr.
Assistant Attorney General
Frankfort, Kentucky