

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000704-MR

DALE LOUIS BROWN

APPELLANT

v. APPEAL FROM LARUE CIRCUIT COURT
HONORABLE LARRY D. RAIKES, JUDGE
ACTION NO. 88-CR-00038

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: COMBS, CHIEF JUDGE; GUIDUGLI AND SCHRODER, JUDGES.

GUIDUGLI, JUDGE: Dale Louis Brown appeals from findings of fact, conclusions of law and judgment of the LaRue Circuit Court denying his motion for relief from judgment pursuant to CR 60.02(f) and RCr 10.26. Brown raises numerous claims in support of his contention that the trial court erred in refusing to vacate his conviction and sentence. For the reasons stated herein, we affirm the order on appeal.

On June 5, 1988, the LaRue County Grand Jury indicted Brown on charges of murder, first-degree arson, second-degree

criminal mischief, and second-degree criminal trespass. The charges arose from the Sheriff's investigation which determined that Brown went to the home of Jerry Thomas Howard where he shot Howard in the abdomen with a shotgun. Howard died as a result of the wound. It was alleged that Brown then set fire to Howard's house and left the scene. A few hours later, Brown told his uncle that he had killed Howard, and evidence was found connecting Brown to the killing.

The matter proceeded to trial on the murder and arson charges. The jury returned the verdict of guilty as to each count, and Brown was sentenced to a total of 300 years in prison. A judgment was entered reflecting the verdict and sentence.

Brown filed a direct appeal to the Kentucky Supreme Court, which affirmed the conviction on September 6, 1990. During the pendency of the appeal, Brown filed a petition for writ of habeas corpus in the United States District Court. The petition subsequently was voluntarily dismissed.

On January 11, 1991, Brown filed a motion with the LaRue Circuit Court seeking to vacate the sentence pursuant to RCr 11.42. Brown appealed the denial of that motion to this Court. On June 26, 1992, a panel of this Court affirmed the circuit court's denial of the motion to vacate. On January 13, 1993, the Kentucky Supreme Court denied discretionary review.

Brown filed a second petition for writ of habeas corpus on April 16, 1997. The petition was dismissed the following year, and Brown appealed to the United States Court of Appeals for the Sixth Circuit. That appeal was denied on March 17, 1999, whereupon Brown sought discretionary review before the United States Supreme Court. The motion for discretionary review was denied on October 4, 1999.

On November 5, 2003, Brown filed a pro se motion pursuant to CR 60.02(f) and RCr 10.26 seeking relief from judgment. As a basis for the motion, he argued that the trial court improperly allowed evidence at trial of an illegal search and arrest; that a juror should have been disqualified; that another juror had improper contact with witnesses; that palpable error was committed when the court refused to honor the jury's request for parole eligibility records; and, that he was denied effective assistance of counsel due to a conflict of interest.

Upon considering the motion, the circuit court concluded that it had no jurisdiction to consider the request for RCr 10.26 relief, as such relief is available only on motion for a new trial or by an appellate court on appeal. On the remainder of Brown's arguments, the court found that CR 60.02 is not intended as an additional opportunity to relitigate issues which were presented or could have been presented on direct appeal or by way of RCr 11.42 proceedings. It further found

that Brown failed to allege any facts which, if true, would justify vacating the judgment and failed to allege special circumstances justifying CR 60.02 relief. The circuit court denied the motion for relief under RCr 10.26 and CR 60.02, and this appeal followed.

Brown now argues that the circuit court committed reversible error in denying his motion for relief from judgment. He maintains that he was denied due process of law and equal protection by the summary dismissal of his motion, because the CR 60.02 motion was made within a reasonable time pursuant to the rule and because the issues raised were previously unknown to him and could not have been addressed in prior proceedings. He argues that he is entitled to an evidentiary hearing, and seeks to have the order of the LaRue Circuit Court reversed and the matter remanded for further proceedings.

RCr 10.26 states:

A palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.

The circuit court correctly determined that RCr 10.26 was not a proper avenue for relief since the matter was not before the court on a motion for a new trial. Arguendo, if the claim of

palpable error had been raised in a motion for a new trial, or even if this Court considers the claim de novo,¹ Brown has failed to prove the existence of palpable error affecting his substantial rights. While he makes a broad assertion that palpable error occurred when the circuit court refused to provide the jury with parole eligibility records, this claim is not supported by reference to case law or statutory law and there is no basis for concluding that Brown is entitled to a finding of palpable error. Brown has presented nothing on this issue other than make a bald, unsupported assertion of palpable error. Accordingly, we find no error on this issue.

On the remaining arguments in support of Brown's motion for CR 60.02 relief, the circuit court found that CR 60.02 is not intended to relitigate issues which could have been presented on direct appeal or via RCr 11.42, and that Brown has failed to allege any facts which would justify vacating the judgment under the "extraordinary nature justifying relief" language of CR 60.02.² These conclusions are well-reasoned and proper.

¹ We may consider a claim of palpable error even though it is not preserved for appellate review, and have done so herein. See generally, Commonwealth v. Erickson, Ky.App., 132 S.W.3d 884 (2004).

² "On motion a court may, upon such terms as are just, relieve a party or his legal representative from its final judgment, order, or proceeding upon the following grounds: ...any...reason of an extraordinary nature justifying relief." CR 60.02(f).

The Kentucky Supreme Court stated in McQueen v. Commonwealth, Ky., 948 S.W.2d 415, 416 (1997), 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.

Brown prosecuted a direct appeal to the Kentucky Supreme Court, and later sought RCr 11.42 relief. He was required to raise the instant issues, if at all, via one of these proceedings. The basis for this requirement is well-established and is geared toward increasing judicial economy and bringing finality to the proceedings.³ CR 60.02 is not a separate avenue of appeal, but is available only to raise issues which cannot be raised in other proceedings.⁴ As the issues which Brown now raises could have been raised more than a decade ago on direct appeal or via

³ McQueen, 948 S.W.2d at 416.

⁴ McQueen, Id.

RCr 11.42, the circuit court properly denied his motion for CR 60.02 relief.

For the foregoing reasons, we affirm the findings of fact conclusions of law, and judgment of the LaRue Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Dale Louis Brown, Pro Se
LaGrange, KY

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General

Perry T. Ryan
Assistant Attorney General
Frankfort, KY