

RENDERED: May 6, 2005; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000726-MR

ANTONIO JOHNSON

APPELLANT

v. APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE EDWIN M. WHITE, JUDGE
ACTION NO. 91-CR-00319

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 Christian Circuit Court denying appellant Antonio Johnson's motion seeking CR 60.02 relief from the judgment and sentence entered against him after he entered *Alford*² pleas to

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 Kentucky Revised Statutes 21.580.

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

first-degree arson and three counts of capital murder. For the reasons stated hereafter, we affirm.

Johnson was indicted on arson and capital murder charges involving his wife and two children. After entering *Alford* pleas in September 1992, he was sentenced in November 1992 to a total of forty years' imprisonment. In March 2004, after his attempts to obtain state habeas corpus relief failed, Johnson filed a motion seeking CR 60.02 relief. The circuit court denied the motion and this appeal followed.

Johnson's claims are raised pursuant to CR 60.02(d) and (f), which provide that a court may relieve a party from its final judgment upon grounds of

(d) fraud affecting the proceedings, other than perjury or falsified evidence; [or] . . .

(f) any other reason of an extraordinary nature justifying relief.

CR 60.02 further requires that any motion "shall be made within a reasonable time."

The Kentucky Supreme Court has consistently limited the availability of CR 60.02 relief in criminal cases, stating in *McQueen v. Commonwealth*³ 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.

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

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.

See also Land v. Commonwealth, 986 S.W.2d 440 (Ky. 1999).

Here, Johnson's claims may be summarized as alleging that his trial counsel provided ineffective assistance, that the evidence was insufficient to support the claims against him, that his trial counsel and the Commonwealth's Attorney tricked or defrauded Johnson and the trial court, and that his *Alford* pleas were inadequate as he had no opportunity to describe his lack of involvement in the events which led to the charges

against him. Johnson also claims that the trial court erred by failing to conduct an evidentiary hearing.

Although Johnson was not entitled to file a direct appeal after entering his *Alford* plea, each of his claims on appeal either was waived by the entry of his pleas, or could or should have been addressed in a motion for RCr 11.42 relief. Moreover, although Johnson claims that his counsel and the Commonwealth's Attorney failed to be candid with the trial court, he does not claim that evidence of such alleged wrongdoing came to light too late to be addressed pursuant to RCr 11.42. As it is clear that each of the claims Johnson raised below should have been addressed through other proceedings, rather than pursuant to CR 60.02, the trial court did not err by denying Johnson's motion seeking such relief. It follows, therefore, that the court did not err by failing to provide Johnson with an evidentiary hearing.⁴ In any event, even if the claims were properly raised, we could not say that the trial court abused its discretion by denying CR 60.02 relief in light of the eleven-year delay between the entry of the judgment and the filing of Johnson's motion seeking relief.

The court's order is affirmed.

ALL CONCUR.

⁴ *Gross*, 648 S.W.2d at 856.

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