

RENDERED: December 23, 2004; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2004-CA-0000783-MR

ROBERT ANTHONY MILLER

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE F. KENNETH CONLIFFE, JUDGE
ACTION NO. 95-CR-002129

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: KNOPF AND TACKETT, JUDGES; EMBERTON, SENIOR JUDGE.¹

KNOPF, JUDGE: On April 17, 1996, Robert Anthony Miller entered an Alford² plea of guilty to charges of first degree murder,³

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

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

³ KRS 507.020.

first degree robbery,⁴ and tampering with physical evidence.⁵ In exchange for the plea of guilty, the Commonwealth agreed not to present evidence of aggravating factors which would render Miller eligible for the death penalty. Otherwise, the plea was "open" in that it left sentencing on the murder charge up to the trial court. The Commonwealth recommended sentences for the robbery and tampering charges of twenty and five years, respectively. After accepting the guilty plea and considering the pre-sentence investigation, arguments of counsel, and statements offered by the victim's family, the trial court sentenced Miller to life in prison.

In June of 1999, Miller filed a *pro se* motion pursuant to RCr 11.42 and CR 60.02, seeking to set aside his conviction. He asserted that his guilty plea was not knowing and voluntary. The trial court denied the motions in an opinion and order entered on July 26, 1999. On appeal, this Court affirmed the trial court's order.⁶ Thereafter, the Kentucky Supreme Court denied Miller's motion for discretionary review.

On February 26, 2004, Miller filed another *pro se* motion to set aside his conviction pursuant to CR 60.02(e) and

⁴ KRS 515.020.

⁵ KRS 524.100.

⁶ Robert Anthony Miller v. Commonwealth, No. 1999-CA-002432-MR (Not-to-be-Published Order rendered August, 31, 2001).

(f).⁷ He asserted that his trial counsel had misled him about the sentence he would receive after pleading guilty. The trial court denied the motion without a hearing on March 22, 2004, and this appeal followed. Finding no error, we affirm.

CR 60.02 is meant to provide relief which is not available by direct appeal or under RCr 11.42.⁸ CR 60.02 is available only to raise those issues that cannot be raised in other proceedings.⁹ In his CR 60.02 motion, Miller asserts that his trial counsel misled him into pleading guilty by assuring him that the Commonwealth had agreed to a maximum sentence of twenty years. Because this issue could have been raised in the prior RCr 11.42 proceeding, it cannot be raised under CR 60.02(f).¹⁰

Moreover, as noted by this Court in its previous opinion, Miller was fully advised of his Boykin¹¹ rights at his guilty plea and he voluntarily accepted the open guilty plea knowing that the trial court could impose any sentence short of

⁷ Miller also based his motion on RCr 10.26. However, the palpable error rule provides a means of reviewing unpreserved error, not an independent basis for a motion.

⁸ Gross v. Commonwealth, 648 S.W.2d 853, 856 (Ky., 1983); Barnett v. Commonwealth, 979 S.W.2d 98, 101 (Ky., 1998).

⁹ McQueen v. Commonwealth, 948 S.W.2d 415, 416 (Ky., 1997).

¹⁰ Id.

¹¹ Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969).

the death penalty. Thus, even if the matter were properly presented, the record clearly refutes Miller's claims and he was not entitled to a further evidentiary hearing.¹²

Accordingly, the order of the Jefferson Circuit Court denying Miller's CR 60.02 motion is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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¹² Fraser v. Commonwealth, 59 S.W.3d 448 (Ky., 2001).