

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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000902-MR

WILLIAM DALE DUNCAN

APPELLANT

v. APPEAL FROM MUHLENBERG CIRCUIT COURT
HONORABLE DAVID H. JERNIGAN, JUDGE
ACTION NOS. 97-CR-00105 & 98-CR-00038

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: GUIDUGLI and TAYLOR, JUDGES; EMBERTON, SENIOR JUDGE.¹

EMBERTON, SENIOR JUDGE: William Dale Duncan appeals from two April 8, 2004 orders of the Muhlenberg Circuit Court denying his motions for post-conviction relief. Appellant Duncan maintains that he was entitled to relief on the basis that the indictments underlying his convictions on two separate charges of escape and of being a first-degree persistent felon were defective and

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.

insufficient to support judgments based upon his guilty pleas to those offenses. He also maintains that the trial judge erred in denying his request for findings of fact and conclusions of law as to the denial of his post-conviction motions. Finding no error in the decision of the trial judge concerning any of the motions at issue in this appeal, we affirm.

On February 17, 1998, appellant entered a guilty plea to one count of escape and to being a second-degree persistent felon in exchange for the Commonwealth's offer to reduce the latter charge from one of first-degree persistent felony offender. In accordance with that plea, he was sentenced on March 9, 1998 to five years' imprisonment on the escape charge, enhanced to ten (10) years by virtue of the persistent felon conviction. That judgment also remanded appellant to jail. Approximately four days later, on March 13, 1998, appellant again escaped from jail and was subsequently indicted on charges of first-degree escape and PFO I. After entering a guilty plea to those charges, appellant was sentenced on June 15, 1998, to ten (10) years' imprisonment on the escape charge, enhanced to twelve (12) years pursuant to the first-degree PFO count. That sentence was ordered to run consecutively with the March 9, 1998, sentence.

On August 6, 1999, appellant filed an RCr 11.42 motion alleging that his appointed counsel had been ineffective

in, among other things, failing to move to quash an indictment which was allegedly void on its face. Appellant did not appeal from the order denying the RCr 11.42 motion. On April 5, 2004, appellant filed a CR 60.02 motion seeking relief from the same judgments on the basis that both indictments were fatally flawed in failing to sufficiently identify the prior felonies on which the PFO charges were predicated. The trial judge denied the CR 60.02 motion, as well as subsequent CR 59.05 motions and motions for specific findings on the denial of the CR 60.02 motion. A review of the record makes clear that there is no basis for disturbing the decision of the trial judge as to any of these motions.

First, the Commonwealth quite properly argues that the relief sought in the CR 60.02 motion is precluded by the rationale set out in Gross v. Commonwealth² regarding successive post-conviction motions:

The structure provided in Kentucky for attacking the final judgment of the trial court in a criminal case is not haphazard and overlapping, but organized and complete.[CR 60.02] is for relief that is not available by direct appeal and not available under RCR 11.42.

The Gross court made abundantly clear that final resolution of an RCr 11.42 motion, or the waiver of the opportunity to lodge such a motion, "forecloses the defendant from raising any

² 648 S.W.2d 853, 856 (Ky. 1983).

questions under CR 60.02 which are 'issues that could reasonably have been presented' by RCr 11.42 proceedings."³ Thus, because the alleged defects in the indictments was an issue raised in appellant's previous RCr 11.42 motion, the failure to appeal from the denial of that motion operates as a procedural bar to the prosecution of the CR 60.02 motions at issue in this appeal.

Furthermore, appellant waived the issue of defective indictments by his election to enter unconditional pleas of guilt to the charged offenses. It is very well-settled that the entry of an unconditional plea of guilt waives all defenses other than that the indictment failed to charge an offense.⁴ An indictment is sufficient if it "fairly informs the accused of the nature of the charged crime, without detailing the formerly 'essential' factual elements."⁵ The fact that an indictment is incomplete or defective does not mean it fails to charge an offense. Rather, failure to supply the factual underpinnings of the offense is precisely "the type of defect that can be cured at the trial level and must be raised by motion before trial in accordance with RCr 8.18."⁶

³ Id. at 857.

⁴ Centers v. Commonwealth, 799 S.W.2d 51 (Ky.App. 1990).

⁵ Thomas v. Commonwealth, 931 S.W.2d 446, 449 (Ky. 1996).

⁶ Id. at 450.

Accordingly, there was no error in the denial of appellant's CR 60.02 motions. Nor did he suffer prejudice in the failure of the trial judge to enter specific findings of fact and conclusions of law concerning the denial of those motions. The judgment of the Muhlenberg Circuit Court is therefore in all respects affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

William D. Duncan, Pro Se
Eddyville, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Janine Coy Bowden
Assistant Attorney General
Frankfort, Kentucky