

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2004-CA-000961-MR

JOHN M. GARDNER

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE ELLEN B. EWING, JUDGE  
ACTION NOS. 93-CR-001897 AND 94-CR-002098

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: BARBER, BUCKINGHAM, AND JOHNSON, JUDGES.

BARBER, JUDGE: Appellant, John M. Gardner (Gardner), appeals the Jefferson Circuit Court's denial of his motion for post-conviction relief, filed pursuant to CR 60.02. We affirm the trial court's ruling.

Gardner was convicted of five counts of sodomy in the first degree and three counts of rape in the first degree. He was also convicted of being a persistent felony offender. Gardner was sentenced to 185 years on all counts. Gardner's direct appeal to the Kentucky Supreme Court was affirmed.

Gardner then filed a motion to vacate judgment pursuant to RCr 11.42. This motion was denied by the trial court. This Court affirmed the trial court's ruling. Gardner filed a motion pursuant to CR 60.02 for post-conviction relief in March 2004. The trial court denied that motion on the grounds that Gardner was not entitled to file successive post-conviction motions on the same issue. The court held that the matters raised had previously been ruled upon in the direct appeal and the appeal of the denial of the RCr 11.42 motion. Gardner appeals the ruling of the circuit court.

In his motion Gardner claimed that there was an alleged unindicted co-conspirator who was never charged with the offenses for which Gardner was found guilty. Gardner asserted that if this co-conspirator had been indicted and tried, Gardner would not have been found guilty of the charged offenses. No evidence in the record supports that assertion. The record contains evidence linking Gardner with the charged offenses. The judgment was affirmed on direct appeal. Gardner also argues that there were discrepancies in the evidence which were not addressed by counsel or the court. The evidentiary issues have been before an appellate court both on direct appeal, and on appeal of the denial of Gardner's motion under RCr 11.42. The orders and judgment of the circuit court were affirmed on appeal. Lastly, Gardner asserts that the charge of persistent

felony offender was invalid. No evidence in the record supports that claim and Gardner provides no new evidence supporting his assertion.

The discrepancies in the evidence discussed by Gardner in the motion for post-conviction relief were previously addressed, in part if not as a whole, both in the earlier motion under RCr 11.42, and on direct appeal. Gardner also raised the issue of the invalidity of the PFO charge on direct appeal. The trial court's rulings on this issue were affirmed on appeal. This Court cannot readdress such matters in a later proceeding. McQueen v. Commonwealth, 949 S.W.2d 70, 71 (Ky. 1997).

Kentucky law holds that "the language of RCr 11.42 forecloses the defendant from raising any questions under CR 60.02 which are issues that were or could reasonably have been presented by RCr 11.42 proceedings." Gross v. Commonwealth, 648 S.W.2d 853, 855 (Ky. 1983). The issues raised in the underlying CR 60.02 motion were, or could have been, raised in the direct appeal and in the earlier post-conviction motion.

CR 60.02 "is not intended merely as an additional opportunity to re-litigate the same issues. . . ." McQueen v. Commonwealth, 948 S.W.2d 415, 416 (Ky. 1997). A movant must make a substantial showing of the necessity for extraordinary relief prior to such a motion being granted. Ringo v. Commonwealth, 455 S.W.2d 49, 50 (Ky. 1970). "Relief should not

be granted pursuant to CR 60.02 unless new evidence, if presented originally, would have with a reasonable certainty changed the result." Brown v. Commonwealth, 932 S.W.2d 359, 362 (Ky. 1996). Gardner claims that if the alleged co-conspirator had been tried with him, he would not have been convicted. We find no support for this claim in the record, or the facts in this case. Gardner raised both the issue of the validity of the PFO indictment, and the issue of claimed ineffective assistance of his counsel in allegedly overlooking necessary evidence on direct appeal and in his RCr 11.42 motion. The appellate courts found no reversible error in the judgments and orders of the circuit court. We conclude that the trial court correctly denied Gardner's CR 60.02 motion on the grounds that the issues had previously been raised and ruled upon.

Gardner objects to the trial court's denial of his request for an evidentiary hearing on his motion. Where a movant's allegations are refuted by the record, and no additional information is necessary, a court may properly deny a request for an evidentiary hearing. Commonwealth v. Stamps, 672 S.W.2d 336 (Ky. 1984). The trial court's determination whether to grant an evidentiary hearing will not be disturbed absent a showing of abuse of discretion. Land v. Commonwealth, 986 S.W.2d 440, 442 (Ky. 1999). No such showing was made here. The court's ruling is affirmed.

ALL CONCUR.

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