

RENDERED: DECEMBER 2, 2005; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2004-CA-001054-MR

STEPHEN L. GRIDER

APPELLANT

APPEAL FROM MONROE CIRCUIT COURT
v. HONORABLE EDDIE C. LOVELACE, JUDGE
ACTION NOS. 98-CR-00029; 98-CR-00030; 98-CR-00049;
AND 98-CR-00056

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: TAYLOR AND VANMETER, JUDGES; POTTER, SENIOR JUDGE.¹

TAYLOR, JUDGE: Stephen L. Grider brings this *pro se* appeal from the April 5, 2004, order of the Monroe Circuit Court denying his Ky. R. Civ. P. (CR) 60.02 motion to vacate his twenty-year sentence of imprisonment upon his plea of guilty. We affirm.

Appellant was indicted by the Monroe County Grand Jury upon one count of first-degree burglary, first-degree robbery, first-degree wanton endangerment, kidnapping, receiving stolen

¹ Senior Judge John W. Potter 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.

property over three-hundred dollars and second-degree escape. Appellant entered a guilty plea. On February 12, 2001, the Monroe Circuit Court entered a Judgment and Sentence on Plea of Guilty. Appellant was sentenced to twenty years' imprisonment.

On March 19, 2004, appellant filed a motion pursuant to CR 60.02 entitled "Petition for Sentence Judgment *Nunc pro Tunc*." Appellant argued in the motion that:

One, for all relevant purposes the charge of burglary became the robbery under KRS 505.020(1)(c); and second, the Commonwealth may carve out of a single episode the most serious offense, but they are not allowed to punish a single episode as a multiple offense, without violating § 13 of the Kentucky Constitution.

The circuit court denied appellant's motion by order entered April 5, 2004.

Appellant subsequently filed a motion pursuant to CR 59.05 to alter, amend or vacate the April 5th order. Therein, appellant claimed that the court had misconstrued his argument when it denied the CR 60.02 motion. Appellant asserted that his argument was not that it was improper to convict him of both burglary and robbery, but that Kentucky Revised Statutes (KRS) 505.020 and the Double Jeopardy Clause of the Kentucky Constitution prohibit receiving separate terms of imprisonment for both offenses. The circuit court denied the motion. This appeal follows.

Appellant contends the circuit court erred by denying his motion to alter, amend or vacate. Appellant specifically argues that receiving a separate term of imprisonment for the robbery conviction and the burglary conviction violates the Double Jeopardy Clause contained in § 13 of the Kentucky Constitution.²

First-degree robbery is defined in KRS 515.020 as follows:

- (1) A person is guilty of robbery in the first degree when, **in the course of committing theft**, he uses or threatens the immediate use of physical force upon another person with intent to accomplish the theft and when he:
 - (a) Causes physical injury to any person who is not a participant in the crime; or
 - (b) Is armed with a deadly weapon; or
 - (c) Uses or threatens the immediate use of a dangerous instrument upon any person who is not a participant in the crime.
(Emphasis added.)
- (2) Robbery in the first degree is a Class B felony.

First-degree burglary is defined in KRS 511.020 as follows:

- (1) A person is guilty of burglary in the first degree when, **with the intent to commit a crime, he knowingly enters or remains unlawfully in a building**, and when in effecting entry or while in the

² Appellant is proceeding *pro se* on appeal, and it is difficult to understand his precise legal arguments. We have carefully reviewed his allegations of error and have attempted to address them appropriately.

building or in the immediate flight therefrom, he or another participant in the crime:

- (a) Is armed with explosives or a deadly weapon; or
 - (b) Causes physical injury to any person who is not a participant in the crime; or
 - (c) Uses or threatens the use of a dangerous instrument against any person who is not a participant in the crime. (Emphasis added.)
- (2) Burglary in the first degree is a Class B felony.

A review of the two statutes clearly reveals that first-degree burglary requires an element that is not required for first-degree robbery. Robbery requires that a theft is being committed; whereas, burglary requires that the person "knowingly enters or remains unlawfully in a building." As first-degree robbery and first-degree burglary each require proof of a fact that the other does not, the constitutional bar against double jeopardy was violated when appellant was sentenced to a separate term of imprisonment for each offense. See Tribbett v. Commonwealth, 561 S.W.2d 662 (Ky. 1978).

Appellant next contends the circuit court abused its discretion by denying his CR 60.02 motion without an evidentiary hearing. It is clear that before a movant is entitled to an evidentiary hearing under CR 60.02, "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, 648 S.W.2d 853, 856 (Ky. 1983). Appellant did not allege any facts or special circumstances that would justify the extraordinary relief afforded by CR 60.02. The circuit court addressed appellant's substantive argument and properly dismissed the motion without a hearing.

Appellant's final allegation is that the circuit court abused its discretion by not appointing counsel to pursue his CR 60.02 motion. A review of the record reveals that appellant's CR 60.02 motion was accompanied by a motion to proceed *in forma pauperis* but not by a motion seeking appointment of counsel. As no motion for appointment of counsel was filed, we cannot say that the circuit court erred by failing to appoint counsel.

For the foregoing reasons, the order of the Monroe Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Stephen L. Grider, *Pro Se*
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BRIEF FOR APPELLEE:

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