

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001083-MR

ROBERT JOHNSON

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ANN O'MALLEY SHAKE, JUDGE
INDICTMENT NO. 88-CR-001615

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * **

BEFORE: HENRY, McANULTY, AND MINTON, JUDGES.

HENRY, JUDGE: Robert Johnson appeals, pro se, from an order of the Jefferson Circuit Court denying his CR¹ 60.02 motion for relief from his judgment of conviction. We affirm.

In April, 1989, Johnson was convicted of raping a nine-year-old girl and criminally abusing a seven-year-old girl when they came to his door selling spices for a school project. He was sentenced to forty years' imprisonment. His conviction was affirmed on direct appeal to the Kentucky Supreme Court, and

¹ Kentucky Rules of Civil Procedure.

he then filed two sequential motions for relief under RCr² 11.42, both of which were denied. The denials were affirmed on appeal.

The circuit court denied CR 60.02 relief because Johnson has raised the issues he seeks to present here in his direct appeal and in his prior motions under RCr 11.42. This court will generally not reverse a circuit court's determination on a CR 60.02 motion unless we find an abuse of discretion. City-County Planning Comm'n v. Fayette County Fiscal Court, 449 S.W.2d 766 (Ky. 1974), citing Fortney v. Mahan, 302 S.W.2d 842 (Ky. 1957). The circuit court determined that Johnson raised no new claim in this motion. Our examination of the record confirms the circuit court's assessment. In this Court, Johnson raises only two issues: first, that a hearing should have been conducted by the trial court to determine the competency of the two child witnesses to testify, and second, that the circuit court ruled on this CR 60.02 motion prematurely because the Commonwealth did not file a response. Johnson cites no authority pertaining to the second argument nor does he indicate how he is prejudiced in any way by the failure of the Commonwealth to file a response. We decline to consider this argument, if it can be characterized as such. See, e.g., Pierson v. Coffey, 706 S.W.2d 409, 413 (Ky.App. 1986).

²Kentucky Rules of Criminal Procedure.

As to the first argument, CR 60.02 is provided as a vehicle to provide relief from a judgment in extraordinary circumstances, as where evidence becomes available after the judgment which could not have been discovered earlier, or where fraud has affected the proceedings, or where there is some "other reason of an extraordinary nature justifying relief". No such reason is present here, and the courts have reviewed Johnson's complaints about the competency of the child witnesses numerous times. As noted by the trial court CR 60.02 "is not intended merely as an additional opportunity to re-litigate the same issues which could 'reasonably have been presented' by direct appeal or RCr 11.42 proceedings". McQueen v. Commonwealth, 948 S.W.2d 415, 416 (Ky. 1997). As we find no abuse of discretion, the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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