

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001140-MR

WILLIE R. UNDERWOOD

APPELLANT

v. APPEAL FROM HOPKINS CIRCUIT COURT
HONORABLE CHARLES W. BOTELEER, JR., JUDGE
INDICTMENT NO. 93-CR-00091

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: TACKETT AND TAYLOR, JUDGES; HUDDLESTON, SENIOR JUDGE.¹

HUDDLESTON, SENIOR JUDGE: Willie R. Underwood appeals *pro se* from an order of Hopkins Circuit Court, denying his motion made pursuant to Kentucky Rules of Civil Procedure (CR) 60.02.

Because we agree with the circuit court that Underwood's claims should have been raised under Kentucky Rules of Criminal Procedure (RCr) 11.42, and that under that rule his claims are not timely raised, we affirm the order.

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

On June 28, 1994, Underwood entered a plea of guilty to murder, first degree robbery and first degree burglary. A judgment was entered on June 29, 1994, sentencing Underwood to life on the murder charge without a possibility of parole until he has served a minimum of 25 years. He received sentences of 20 years on the other two charges, to be served consecutively with each other but concurrently with the life sentence.

On May 5, 2004, almost ten years later, Underwood filed a motion pursuant to CR 60.02(e) and (f), alleging that his plea of guilty had been involuntary due to ineffective assistance of counsel. He made two specific claims: (1) that his counsel had failed to ask for an independent psychiatric evaluation to support a defense of extreme emotional disturbance or mental illness, and (2) that his counsel had been under the influence of drugs.² The circuit court denied his motion, stating that "[a] review of the motion fails to reveal any allegation that would provide a basis for relief under CR 60.02. Also, movant's allegations that could properly be considered under RCr 11.42(10) are not timely raised."

We agree with the circuit court that Underwood was not entitled to relief under CR 60.02(e) or (f). Claims of

² Underwood made this latter claim based on his counsel's disbarment on July 29, 2000 due to his conviction of several criminal offenses, including second degree manslaughter, first degree possession of a controlled substance, and misdemeanor charges of possession of drug paraphernalia and of marijuana. See Kentucky Bar Assoc. v. Embry, 31 S.W.3d 925 (Ky. 2000).

ineffective assistance of counsel can and should be made under RCr 11.42.

We quote from Gross v. Commonwealth:³

The structure provided in Kentucky for attacking the final judgment of a trial court in a criminal case is not haphazard and overlapping, but is organized and complete. That structure is set out in the rules related to direct appeals, in RCr 11.42, and *thereafter* in CR 60.02. CR 60.02 is not intended merely as an additional opportunity to raise *Boykin*^[4] defenses. It is for relief that is not available by direct appeal and not available under RCr 11.42. The movant must demonstrate why he is entitled to this special, extraordinary relief.⁵

Underwood has nonetheless urged us to construe his pleadings liberally. But if we treat Underwood's CR 60.02 motion as a motion made pursuant to RCr 11.42, his claims are time-barred because that rule specifies that such motions must be filed within three years after the judgment becomes final. The Rule does provide an exception if the motion alleges and movant proves that the facts upon which the claim is predicated were unknown to him and could not have been ascertained by the exercise of due diligence.⁶ Underwood has failed to offer any

³ 648 S.W.2d 853 (Ky. 1983).

⁴ 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969). In Boykin, the U.S. Supreme Court held that a constitutionally-valid guilty plea must be knowing, voluntary and intelligent and may not be presumed from a silent record.

⁵ Gross v. Commonwealth, *supra*, note 3, at 856.

⁶ See Ky. R. Crim. Proc. (RCr) 11.42(10)(a).

explanation as to why it has taken him almost ten years from the date of entry of the final judgment, and almost four years from the date of Embry's disbarment, to file his motion. There is no evidence in the record that Embry was under the influence of drugs at the time Underwood entered his guilty plea. Surely, Underwood himself would have had some indication at the time his plea was entered that his counsel was impaired, but he provides no evidence of this. The pertinent facts and claims were all presumably known to Underwood at the time he entered his plea, or shortly thereafter, but he nonetheless waited ten years to file this motion. Underwood has failed to meet the requirements to invoke the exception to the three-year time limitation under RCr 11.42.

As to the question of an evidentiary hearing, such a hearing is required only if the movant "affirmatively allege[s] facts which, if true, justify vacating the judgment and further allege[s] special circumstances that justify CR 60.02 relief."⁷ Underwood failed to allege such facts. Similarly, an evidentiary hearing upon a RCr 11.42 motion "is required if there is a material issue of fact that cannot be conclusively resolved, *i.e.*, conclusively proved or disproved, by an examination of the record."⁸ In addition to being time-barred,

⁷ Gross v. Commonwealth, *supra*, note 3, at 856.

⁸ Fraser v. Commonwealth, 59 S.W.3d 448, 452 (Ky. 2001) (citations omitted).

Underwood's claims are conclusively disproved by an examination of the record, which shows that his plea of guilty was voluntarily entered, and that the mental health evaluation by the independent examiner contained no indication that a mental health defense was feasible. As to his counsel's advice to plead guilty, the Kentucky Supreme Court has held that "an attorney may, after making an adequate investigation, in good faith and in the exercise of reasonable judgment, advise his client to plead guilty."⁹ This is particularly true in cases where a defendant could face the death penalty. Embry's advice "was a strategy tailored to avoid the death penalty, and it was a strategy that worked."¹⁰

Finally, as to Underwood's claim that he was entitled to counsel, we note that the constitutional right to appointed counsel does not generally extend to motions made pursuant to RCr 11.42¹¹ and CR 60.02.¹² Counsel must be appointed when requested if an evidentiary hearing is required on a RCr 11.42 motion.¹³ Because we agree that Underwood was not entitled to an

⁹ Quarles v. Commonwealth, 456 S.W.2d 693, 694 (Ky. 1970), citing Commonwealth v. Campbell, 415 S.W.2d 614, 616 (Ky. 1967).

¹⁰ Phon v. Commonwealth, 51 S.W.3d 456, 460 (Ky.App. 2001).

¹¹ See Fraser v. Commonwealth, supra, note 8, at 451.

¹² See Gross v. Commonwealth, supra, note 3, at 857.

¹³ Fraser v. Commonwealth, supra, note 8, at 453.

evidentiary hearing on his motion, the circuit court was not required to appoint counsel.

For the foregoing reasons, the order denying Underwood's CR 60.02 motion is affirmed.

ALL CONCUR.

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