

RENDERED: June 17, 2005; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2004-CA-001460-MR

RANDALL F. JOHNSON

APPELLANT

v. APPEAL FROM GALLATIN CIRCUIT COURT
HONORABLE ANTHONY W. FROHLICH, JUDGE
ACTION NO. 02-CR-00017

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** *

BEFORE: COMBS, CHIEF JUDGE; GUIDUGLI, JUDGE; AND MILLER, SENIOR JUDGE.¹

GUIDUGLI, JUDGE: Randall F. Johnson appeals from an order of the Gallatin Circuit Court denying his pro se CR 60.02 motion. Johnson contends that the circuit court erred in failing to grant him post-conviction relief based upon the recent Kentucky Supreme Court decision of Kotila v. Commonwealth.² We believe

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

² 114 S.W.3d 226 (Ky. 2003).

the circuit court properly denied his CR 60.02 motion and thus, we affirm.

Johnson was indicted by a Gallatin Grand Jury on March 25, 2002, of manufacturing methamphetamine, first degree (KRS 218A.1432), and of being a persistent felony offender in the second degree (KRS 532.080(2)). He entered a not guilty plea and was appointed a public advocate to represent him. The public advocate filed several discovery motions and a motion for Johnson to undergo a psychological evaluation. The Commonwealth responded to the discovery motions and the psychological evaluation report determined Johnson to be "criminally responsible" relative to the current charges. Based upon the evaluation and the discovery supplied to counsel, the public advocate entered plea negotiations with the Commonwealth.

On October 18, 2002, Johnson entered a guilty plea to one count of manufacturing methamphetamine. The PFO II charge was dismissed. Thereafter, on October 31, 2002, the circuit court entered an amended final judgment and sentence of imprisonment sentencing Johnson to thirteen (13) years.³ Following sentencing, Johnson petitioned for shock probation on two separate occasions, but his motions were denied.

On July 14, 2003, Johnson filed a motion entitled "Motion to Vacate, Set Aside or Correct Sentence Pursuant to RCr

³ The original judgment entered October 18, 2002, sentenced Johnson to ten (10) years, but this clearly was a clerical mistake.

11.42 And/Or CR 60.02(f).” In his motion he alleged his counsel was ineffective. Specifically, Johnson alleged he pled guilty “due to the coercion and misrepresentation of the [P.A.]... .” Included in his filings was a newspaper article dated June 13, 2003, which referred to the Kotila decision rendered by the Kentucky Supreme Court. The newspaper article stated “[a] defendant charged with manufacturing methamphetamine must have all the necessary equipment or ingredients, the Kentucky Supreme Court said in a split decision Thursday.” No response was filed by the Commonwealth and no evidentiary hearing was held in the matter. On September 24, 2003, Senior Judge Stan Billingsly entered an order denying Johnson’s RCr 11.42 motion. No appeal was taken.

Approximately six (6) months later, on March 19, 2004, Johnson filed a “Motion To Vacate Judgment Pursuant to CR 60.02(e) and (f) Based Upon Kentucky Supreme Court Ruling In Kotila v. Commonwealth.” In this motion, he argued that his sentence should be vacated and that he was entitled to a dismissal of the charge since he had not possessed all the equipment or ingredients necessary to manufacture methamphetamine. The Commonwealth responded to this motion by filing a memorandum of law in opposition to his motion. On the same day the Commonwealth’s response was filed (May 10, 2004),

the Gallatin Circuit Judge, Anthony W. Frohlich, entered an order denying Johnson's CR 60.02 motion. This appeal followed.

On appeal, Johnson contends the circuit court erred by 1) failing to hold an evidentiary hearing, 2) failing to appoint counsel, 3) failing to grant him 60.02 relief, 4) failing to follow Kotila, and 5) failing to grant him equitable relief. In that we believe Johnson's arguments to be meritless, we shall only summarily address his contentions. The standard of review relative to a denial of a CR 60.02 motion is whether the trial court abused its discretion.⁴ CR 60.02 is an extraordinary remedy and, absent an abuse of discretion, a circuit court's denial of relief will be affirmed.⁵ In this case, Johnson entered a guilty plea to the charge of manufacturing methamphetamine. And a guilty plea waives all defenses except that of the indictment not charging an offense.⁶ By admitting guilt, Johnson forfeited the right to contest the sufficiency of the evidence to convict him.⁷ In addition, Johnson raised the issue of the insufficiency of the evidence in his RCr 11.42 motion. That motion was denied and not appealed. Issues that are raised or should be raised in an RCr 11.42 motion cannot be

⁴ Brown v. Commonwealth, 932 S.W.2d 359, 362 (Ky. 1996). Gross v. Commonwealth, 648 S.W.2d 853, 858 (Ky. 1993).

⁵ Barnett v. Commonwealth, 979 S.W.2d 98, 102 (Ky. 1998).

⁶ Hughes v. Commonwealth, 875 S.W.2d 99 (Ky. 1994).

⁷ Taylor v. Commonwealth, 724 S.W.2d 223 (Ky.App. 1986).

presented later in a CR 60.02 motion.⁸ While the record does not contain the video tape of his plea, the judgment of guilt entered by the court on October 18, 2002, does indicate that Johnson was properly advised of his constitutional rights, represented by counsel and knowingly and voluntarily entered a guilty plea to manufacturing methamphetamine. Also, the order entered February 18, 2004, directing the destruction of evidence specifically listed anhydrous ammonia, pseudoephedrine powder, Prestone starting fluid, lithium batteries and other ingredients necessary in the manufacturing of methamphetamine to be destroyed. Based upon the record, Johnson's motion was subject to summary dismissal, so counsel and/or an evidentiary hearing were unnecessary and the motion was properly denied.

For the foregoing reasons, the Gallatin Circuit Court's order denying Johnson's CR 60.02 motion is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Randall F. Johnson
LaGrange, KY

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General

Todd D. Ferguson
Assistant Attorney General
Frankfort, KY

⁸ Gross, supra; McQueen v. Commonwealth, 948 S.W.2d 415 (Ky. 1997).