

RENDERED: SEPTEMBER 9, 2005; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2004-CA-002191-MR

BRUCE HORTON

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE STEPHEN K. MERSHON, JUDGE
INDICTMENT NO. 02-CR-002099

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: KNOPF AND TACKETT, JUDGES; ROSENBLUM, SENIOR JUDGE.¹

KNOPF, JUDGE: Bruce Horton appeals from an order of the Jefferson Circuit Court denying his motion pursuant to CR 60.02 for modification or reduction of his sentence. He asserts that the trial court erred by failing to consider the merits of his allegations of ineffective assistance of counsel and newly discovered evidence. Finding no error, we affirm.

¹ Senior Judge Paul W. Rosenblum 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 September 30, 2002, a Jefferson County grand jury indicted Horton on one count each of possession of a handgun by a convicted felon,² wanton endangerment in the first degree,³ and being a persistent felony offender in the first degree (PFO I).⁴ Thereafter, on December 17, 2002, Horton entered an unconditional guilty plea to possession of a handgun by a convicted felon and wanton endangerment. The Commonwealth agreed to drop the PFO I charge in exchange for the plea.

At that hearing, Horton told the Court, under oath, that on July 13, 2002, he was in possession of a .38 caliber Bersa handgun and that he entered the home of Linda Horton while in possession of that weapon. He also acknowledged that he had previously been convicted of a felony, and that he was under a domestic violence order to stay at least 1,000 feet away from Ms. Horton, when he entered her house and threatened her with the weapon. Pursuant to the agreement with the Commonwealth, the court sentenced Horton to five years on the handgun-possession count and ten years on the wanton endangerment count, to run concurrently for a total of ten years.

² KRS 527.040, a class C felony.

³ KRS 508.060, a class D felony.

⁴ KRS 532.080.

On August 26, 2003, Horton filed a motion to vacate the judgment pursuant to RCr 11.42. However, the trial court subsequently ordered the motion dismissed, without prejudice, at Horton's request. On August 5, 2004, Horton filed a motion for modification or reduction of his sentence pursuant to CR 60.02(f). After considering the Commonwealth's response, the trial court denied the motion on September 24, 2004. This appeal followed.

Horton first argues that his trial counsel was ineffective by advising him to plead guilty unconditionally. He contends that the indictment charging him with PFO I was defective in that it improperly used two prior enhanced felonies to support a persistent felony offender status. While Horton acknowledges that the PFO I charge was dropped as part of his plea agreement, he asserts that the defective charge was improperly used as leverage to obtain his guilty plea. He complains that his trial counsel failed to advise him that he could enter a conditional guilty plea and retain his right to challenge the PFO I charge. Horton also submitted an affidavit from Linda Horton, in which Ms. Horton denies that she saw Horton with a handgun on July 13, 2002. Horton argues that this evidence constitutes substantial grounds for setting aside his conviction on the handgun-possession charge.

We find no merit to any of Horton's allegations. Even if Horton's challenge to the PFO I charge were valid, his unconditional guilty plea waived all defenses except that the indictment charged no offense.⁵ Moreover, the dismissal of the PFO I charge renders moot any objection to the sufficiency of the evidence supporting that charge.⁶

Nor can Horton recast this argument as an ineffective assistance claim against his trial counsel. CR 60.02 is not a separate avenue of appeal to be pursued in addition to other remedies, but is available only to raise issues which cannot be raised in a direct appeal or in a RCr 11.42 proceeding.⁷ A CR 60.02 movant must affirmatively allege facts which, if true, justify vacating the judgment and further allege special circumstances that justify this extraordinary relief.⁸ Horton alleges no specific circumstances which would justify raising the issue of ineffective assistance of counsel at this time.

Finally, Horton asserts that the affidavit tendered by Linda Horton constitutes additional grounds for relief under CR

⁵ Quarles v. Commonwealth, 456 S.W.2d 693, 694 (Ky. 1970); Centers v. Commonwealth, 799 S.W.2d 51, 55 (Ky.App. 1990).

⁶ See Hack v. Commonwealth, 449 S.W.2d 762 (Ky. 1970).

⁷ Land v. Commonwealth, 986 S.W.2d 440, 442 (Ky. 1999); McQueen v. Commonwealth, 948 S.W.2d 415, 416 (Ky. 1997); Gross v. Commonwealth, 648 S.W.2d 853, 856 (Ky. 1983).

⁸ Gross v. Commonwealth, *supra* at 856.

60.02. But during his guilty plea, Horton admitted to being in possession of a handgun. The trial court questioned Horton at length before accepting his plea and found that Horton's guilty plea was knowing and voluntary. Furthermore, Horton presents nothing, other than conjecture, to challenge the Commonwealth's other evidence against him on the handgun-possession charge. Consequently, the trial court properly denied his motion for CR 60.02 relief without a hearing.

Accordingly, the order of the Jefferson Circuit Court denying Horton's motion for relief under CR 60.02 is affirmed

ALL CONCUR.

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