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NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2004-CA-002192-MR

GLEN LEE BEARD

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE STEPHEN P. RYAN, JUDGE
CIVIL ACTION NO. 92-CR-001999

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: GUIDUGLI AND JOHNSON, JUDGES; HUDDLESTON, SENIOR JUDGE.¹

HUDDLESTON, SENIOR JUDGE: On the evening of September 8, 1992, in Louisville, Kentucky, Glen Lee Beard shot and killed his estranged wife. He then went to her home, found his two daughters and shot them both in the head, leaving them for dead. After the shootings, Beard was quickly arrested. Within twenty-

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.

four hours of the shootings, a psychologist interviewed Beard in jail for approximately an hour and a half. In a report, the psychologist indicated that Beard understood the proceedings against him. On September 14, 1992, Beard was charged in an indictment with one count of murder, two counts of assault in the first degree, one count of attempted murder and one count of burglary in the first degree. On September 15, 1992, Beard pled guilty to all charges in Jefferson Circuit Court and was sentenced to a total of 150 years in prison.

On June 18, 1997, Beard filed a motion, pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42, to vacate the judgment finding him guilty and sentencing him to prison. In his motion, Beard alleged that he had been incompetent at the time he pleaded guilty and that his trial counsel knew this. According to Beard, his trial counsel rendered ineffective assistance by failing to request a competency hearing. The circuit court denied Beard's RCr 11.42 motion, and, in 1997-CA-002171-MR, an unpublished opinion, this Court affirmed the circuit court's decision.

On May 17, 1999, Beard moved to vacate the judgment and sentence pursuant to the Kentucky Rules of Civil Procedure (CR) 60.02. In his 1999 motion, Beard argued, among other things, that he had been incompetent in 1992 when he pleaded guilty. Thus, he insisted, his plea was involuntary. The

circuit court denied this motion as well. On appeal, this Court again affirmed the circuit court's decision.

On July 19, 2004, Beard filed a second CR 60.02 motion for relief once again arguing that he had not been competent when he pleaded guilty. As a consequence, he contended, he was entitled to a retrospective competency hearing. The circuit court again denied Beard's motion, and, once more, he has appealed to this Court.

On appeal, Beard points out that, in this Court's opinion in *Beard v. Commonwealth*, 1997-CA-002171-MR, we said that at the sentencing hearing, Beard appeared distraught. Focusing on this, Beard argues that the word "distraught" means "crazed" or "insane". So since this Court said he was distraught, Beard maintains that he was insane, and if he was insane, then he was obviously incompetent. Beard insists that, in 1997-CA-002171-MR, this Court determined that he was insane. What is more, not only does he claim this Court found that he was insane, he insists that we held that he had, in fact, been incompetent to stand trial. Since he was incompetent, his guilty plea was not voluntary.

In this Commonwealth, there exists a definite sequence for a criminal defendant to follow in order to challenge a judgment of conviction. First, the defendant may directly appeal to an appellate court. If unsuccessful, he may file with

the circuit court a motion to vacate the judgment and sentence pursuant to RCr 11.42 in which he may assert that his counsel rendered ineffective assistance. If that motion is denied, a defendant may then file a CR 60.02 motion² in which he can only raise issues that could not have been raised by direct appeal or in an RCr 11.42 motion.³ The disposition of a CR 60.02 motion is within the sound discretion of the circuit court.⁴

In *Beard v. Commonwealth*, 1997-CA-002171-MR, this Court stated unequivocally:

True enough, RCr 8.06 provides that "[i]f upon arraignment or during the proceedings there are reasonable grounds to believe that the defendant lacks the capacity to appreciate the nature and consequences of the proceedings against him, or to participate rationally in his defense, all proceedings shall be postponed until the issue of incapacity is determined as provided by KRS 504.100." Here, however, the record contradicts the notion that there were reasonable grounds for trial counsel to question appellant's competency. The record shows that within twenty-four hours of the shooting, appellant met for one and one-half hours with a psychologist who later indicated that appellant was able to "understand what was going on." Moreover, the videotape of the sentencing hearing shows that appellant acknowledged that he understood the charges, his rights and the judge's statements, and that although he was distraught there was no sign that he was incompetent. Because appellant has failed

² *Gross v. Commonwealth*, 648 S.W.2d 853, 856 (Ky. 1983).

³ *Id.*

⁴ *Id.* at 857.

to identify any objective evidence of incompetency, we find no basis for concluding that his counsel provided ineffective assistance by failing to request a competency hearing.

Beard has raised the issue of competency in both his RCr 11.42 motion and in his first CR 60.02 motion. Since he properly raised this issue in his RCr 11.42 motion, he was not entitled to raise it again in his two CR 60.02 motions.⁵

Furthermore, the test of competency is whether a criminal defendant has the substantial capacity to understand the nature and consequences of the proceedings pending against him and to reasonably participate in his defense.⁶ Given this definition, the fact that Beard was distraught during the sentencing hearing simply does not prove that he was incompetent. Thus, the circuit court did not abuse its discretion when it denied Beard's second CR 60.02 motion.

The order denying Beard's CR 60.02 motion is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

Gregory D. Stumbo
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⁵ *Id.*

⁶ *Dunn v. Commonwealth*, 573 S.W.2d 651, 655 (Ky. 1978).