

RENDERED: May 5, 2006; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2005-CA-000412-MR

JAMES WALTERS

APPELLANT

v. APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE R. JEFFREY HINES, JUDGE
ACTION NO. 97-CR-00284

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: GUIDUGLI AND TAYLOR, JUDGES; EMBERTON, SENIOR JUDGE.¹

TAYLOR, JUDGE: James Walters brings this *pro se* appeal from a January 24, 2005, order of the McCracken Circuit Court denying a Ky. R. Civ. P. (CR) 60.02 motion to vacate his life sentence without the possibility of parole for twenty-five years upon a plea of guilty to murder and robbery. We affirm.

In October 1998, appellant pleaded guilty to murder and robbery in exchange for the Commonwealth recommending a

¹ Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

sentence of life imprisonment without parole for twenty-five years. Appellant and a codefendant killed a store clerk in the course of an armed robbery. Appellant pleaded guilty pursuant to a plea agreement, and the circuit court ultimately sentenced appellant in accordance with the Commonwealth's recommendation. Thereafter, appellant filed separate Ky. R. Crim. P. (RCr) 11.42 and CR 60.02 motions to vacate his sentence. By separate orders, the circuit court denied both motions. Appellant directly appealed the denial of his RCr 11.42 motion to the Kentucky Court of Appeals, and the appeal was affirmed in Appeal No. 2001-CA-001005-MR.

Subsequently, appellant filed a second CR 60.02 motion to vacate sentence. As grounds thereof, appellant attached an affidavit from his codefendant, Jason Brooks. Therein, Brooks stated that appellant "had nothing to do with the crime of robbery and murder" and that Brooks was forced by authorities to wrongly implicate appellant. On January 24, 2005, the circuit court entered an order denying the CR 60.02 motion, thus precipitating this appeal.

Appellant contends the circuit court committed reversible error by denying his CR 60.02 motion to vacate sentence. Appellant claims the affidavit from Brooks constituted newly discovered evidence under CR 60.02(b). We disagree.

Under CR 60.02(b), newly discovered evidence may justify relief from a judgment if such evidence could not have been discovered by due diligence in time to move for a new trial. There is no indication that this evidence was not discoverable at an earlier time. Moreover, the record indicates appellant confessed to the commission of the crimes and entered a guilty plea to the crimes. Brooks' affidavit does not impugn the voluntariness of appellant's guilty plea. Thus, we are of the opinion the affidavit does not constitute newly discovered evidence requiring appellant's sentence to be set aside.

Appellant also alleges other grounds that he insists entitle him to CR 60.02 relief. CR 60.02 is only available to raise allegations of error that could not have been raised by direct appeal or by RCr 11.42 motion. Gross v. Commonwealth, 648 S.W.2d 853 (Ky. 1983). We believe appellant's remaining contentions of error could and should have been raised by direct appeal or by RCr 11.42 motion. Thus, we decline to reach the merits of such allegations.

We view appellant's remaining contentions as moot.

For the foregoing reasons, the judgment of the McCracken Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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