

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NOT TO BE PUBLISHED

**Commonwealth Of Kentucky**  
**Court of Appeals**

NO. 2005-CA-000487-MR

JOHN DEMARCO JOHNSON

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE GARY D. PAYNE, JUDGE  
ACTION NO. 97-CR-00279

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

\*\* \*\* \* \* \*

BEFORE: GUIDUGLI AND TAYLOR, JUDGES; EMBERTON, SENIOR JUDGE.<sup>1</sup>

EMBERTON, SENIOR JUDGE: This appeal from the denial of a CR 60.02 motion seeking relief from a judgment convicting appellant of wanton murder represents the third time this matter has been considered by the appellate courts of this Commonwealth. Because it is clear that appellant's motion advances no argument that has not already been raised or which could not have been

---

<sup>1</sup> 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 KRS 21.580.

raised in his previous proceedings, we affirm the denial of his CR 60.02 motion by the Fayette Circuit Court.

The facts of this case have been detailed in the opinion of the Supreme Court of Kentucky affirming appellant's direct appeal,<sup>2</sup> and in the opinion of this Court affirming the denial of his motion for RCr 11.42 relief.<sup>3</sup> Briefly stated, the facts that precipitated the charges against appellant occurred on November 28, 1996, when Jonathan Phillips, appellant's co-defendant at trial, along with Terry Burchett and Natasha Yates, a minor, set out in a car to purchase crack cocaine. After locating a street dealer and making a purchase, Phillips returned to the vehicle. Immediately, he became involved in an argument with appellant John Demarco Johnson, who had observed, but not participated in, the crack-cocaine transaction. Appellant threw a bottle toward Phillips causing their argument to erupt into a gunfight with Phillips and appellant firing numerous shots at each other. As Mr. Phillips drove away from the shootout, he noticed that Ms. Yates had been fatally wounded. There is no dispute that appellant fired the bullet that killed Ms. Yates.

The subsequent convictions of appellant and Phillips for the wanton murder of Ms. Yates were affirmed on direct

---

<sup>2</sup> Phillips and Johnson v. Commonwealth, 17 S.W.3d 870 (Ky. 2000).

<sup>3</sup> Johnson v. Commonwealth, 2001-CA-2477-MR (rendered October 11, 2002).

appeal. The denial of appellant's RCr 11.42 motion was affirmed on the basis that it was merely an attempt to relitigate matters adversely decided in his direct appeal by couching them in terms of ineffective assistance. So it is in this proceeding.

Appellant in this appeal again challenges the propriety of the instructions on wanton murder, the sufficiency of the evidence to sustain his conviction, and the effectiveness of the assistance rendered by his trial counsel. Notably absent is any explanation as to why these matters could not have been advanced in his prior post-conviction proceedings. The short answer is that his primary contentions have been addressed and there is no legitimate reason why his other issues could not have been included in his direct appeal or previous motion.

The trial judge in this case correctly ruled that appellant had shown no basis upon which he is entitled to invoke the extraordinary remedy provided by CR 60.02. The Court in Gross v. Commonwealth<sup>4</sup> settled any question as to the proper procedure for seeking relief from a judgment of conviction:

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* defenses. It is

---

<sup>4</sup> 68 S.W.2d 853, 856 (Ky. 1983).

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. Before the movant is entitled to an evidentiary hearing, he must affirmatively allege facts which, if true, justify vacating the judgment and further allege special circumstances that justify CR 60.02 relief.

A review of the record demonstrates that appellant has not and cannot meet these criteria.

The judgment of the Fayette Circuit Court denying appellant's CR 60.02 motion is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

John Demarco Johnson, Pro Se  
Eddyville, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo  
Attorney General of Kentucky

Ian G. Sonego  
Assistant Attorney General  
Frankfort, Kentucky