

Commonwealth Of Kentucky
Court of Appeals

NO. 2005-CA-001337-MR

RONNIE GRAY

APPELLANT

v. APPEAL FROM KNOX CIRCUIT COURT
HONORABLE RODERICK MESSER, JUDGE
INDICTMENT NO. 01-CR-00015

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: HENRY AND VANMETER JUDGES; BUCKINGHAM,¹ SENIOR JUDGE.

HENRY, JUDGE: Ronnie Gray appeals from an order of the Knox Circuit Court overruling his *pro se* motion for CR 60.02 post-conviction relief. Upon review, we affirm.

On February 9, 2001, the Knox County Grand Jury indicted Gray on charges of first-degree rape² and being a second-degree persistent felony offender.³ The basis of the rape

¹ Senior Judge David C. Buckingham 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 Pursuant to Kentucky Revised Statutes ("KRS") 514.040.

³ Pursuant to KRS 532.080.

charge was that Gray "engage[ed] in sexual intercourse with K.A.M., through the use of forcible compulsion," on July 15, 2000.

On January 15, 2003, the Commonwealth made a plea offer to Gray indicating that, in return for Gray's guilty plea as to both charges, it would agree to reduce the rape charge to third-degree rape⁴ and to recommend a total ten-year sentence of imprisonment. Gray agreed to these terms, and the plea agreement was filed on February 3, 2003. Gray subsequently appeared before the circuit court, where he pled guilty to the amended charge of third-degree rape and to being a second-degree persistent felony offender. On April 11, 2003, the circuit court entered a judgment convicting Gray of these charges and sentencing him to ten years' imprisonment, consistent with the Commonwealth's recommendation.⁵

On May 21, 2004, Dawn H. Snyder, the Corrections Program Administrator for the Kentucky Sex Offender Treatment Program, advised Gray that he was not eligible for the program because - after a review of his test results and file - he did "not appear to have the mental skills to complete sex offender treatment." The decision to deny Gray admission to the program was based upon KRS 197.410(2)(a), which provides that persons

⁴ Pursuant to KRS 510.060.

⁵ The sentence was set to run consecutively to a seven-year sentence previously imposed on Gray on June 25, 2002 in another case.

eligible for the sex offender treatment program do not include those who suffer from "mental retardation."

On April 22, 2005, Gray filed a motion to correct, modify, or vacate judgment pursuant to CR 60.02(e) and (f), generally alleging that his trial counsel provided ineffective assistance in failing to request that he undergo a mental examination and in allowing him to plead guilty even though he suffered from diminished mental capacity. On May 18, 2005, the circuit court issued an order overruling Gray's motion on the ground that he first should have sought relief pursuant to RCr 11.42 before resorting to CR 60.02. This appeal followed.

On appeal, Gray argues that the circuit court erred in not considering his CR 60.02 motion as an RCr 11.42 motion in light of his *pro se* status. We first note that our courts have consistently held that CR 60.02 is intended to provide relief that is not available on direct appeal or under RCr 11.42. See Barnett v. Commonwealth, 979 S.W.2d 98, 101 (Ky. 1998); Gross v. Commonwealth, 648 S.W.2d 853, 856 (Ky. 1983). Indeed, in Gross, our Supreme Court specifically concluded that "a defendant is required to avail himself of RCr 11.42 while in custody under sentence or on probation, parole or conditional discharge, as to any ground of which he is aware, or should be aware, during the period when this remedy is available to him." Gross, 648 S.W.2d at 857. It continued: "Final disposition of that motion, or

waiver of the opportunity to make it, shall conclude all issues that reasonably could have been presented in that proceeding. The language of RCr 11.42 forecloses the defendant from raising any questions under CR 60.02 which are 'issues that could reasonably have been presented' by RCr 11.42 proceedings." Id.; see also Land v. Commonwealth, 986 S.W.2d 440, 442 (Ky. 1999).

Accordingly, the trial court correctly concluded that Gray was required to proceed pursuant to RCr 11.42 before resorting to CR 60.02, as ineffective assistance of counsel claims are of the type typically raised in an RCr 11.42 proceeding. See Hibbs v. Commonwealth, 570 S.W.2d 642, 643 (Ky.App. 1978). However, in arguing for relief here, Gray acknowledges that a CR 60.02 motion was not the proper channel. He instead contends that the trial court erred in holding him to the same standards as an attorney and in not considering his motion as an RCr 11.42 petition. We are compelled to disagree. Kentucky's appellate courts have often rejected appeals in which an appellant chooses to first seek post-conviction relief under CR 60.02 before using RCr 11.42 - with no consideration given to whether the appellant is proceeding *pro se* or with the aid of an attorney. Consequently, we are not inclined to do otherwise here. We also note that while persons proceeding *pro se* are afforded more leniency as to certain legal matters than those represented by counsel, they are still obligated to comply with

the appropriate rules of procedure. Cf. Trodglen v. Griffith, 372 S.W.2d 795, 796 (Ky. 1963) ("A party, even though not represented by counsel, must comply with applicable procedural rules when proceeding by way of appeal or by original action in this Court.").

Thus, for the reasons set forth in this opinion, Gray's CR 60.02 claim is procedurally barred since the issues presented therein should have first been raised in an RCr 11.42 motion. The decision of the Knox Circuit Court is affirmed.

ALL CONCUR.

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