

RENDERED: SEPTEMBER 22, 2006; 2:00 P.M.  
NOT TO BE PUBLISHED

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

NO. 2005-CA-001610-MR

JOEY HART

APPELLANT

v.

APPEAL FROM MCCRACKEN CIRCUIT COURT  
HONORABLE R. JEFFREY HINES, JUDGE  
ACTION NO. 97-CR-00340

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: ABRAMSON AND VANMETER, JUDGES; KNOPF,<sup>1</sup> SENIOR JUDGE.

VANMETER, JUDGE: Joey Hart appeals pro se from an order entered by the McCracken Circuit Court denying his motion seeking CR 60.02 relief. We affirm.

In April 1999, Hart pled guilty to charges of murder and robbery. He was sentenced to concurrent terms amounting to life imprisonment without the possibility of parole for twenty-five years. Some two years later, Hart filed a pro se motion seeking RCr 11.42 relief. The motion was denied and this court

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<sup>1</sup> Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

affirmed on appeal.<sup>2</sup> Hart then filed the underlying pro se motion in June 2005, seeking relief pursuant to CR 60.02(f). The trial court denied the motion and this appeal followed.

CR 60.02(f) permits relief from a final judgment only if there is a "reason of an extraordinary nature justifying relief." In a criminal case, the rule permits only that relief which was not available either by direct appeal or under RCr 11.42.<sup>3</sup>

Here, Hart's CR 60.02(f) motion alleged that his guilty plea was not entered knowingly and voluntarily, in part because he was under the influence of certain prescription medications and counsel failed to inform the trial court of that fact. However, as this allegation certainly was known to Hart when he raised the issue of ineffective assistance of counsel as part of his RCr 11.42 proceeding, his failure to raise the allegation as part of that proceeding resulted in its waiver.<sup>4</sup> The trial court did not err by subsequently rejecting Hart's CR 60.02(f) claim that he was afforded ineffective assistance of counsel for this or other reasons.

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<sup>2</sup> *Hart v. Commonwealth*, No. 2002-CA-002323-MR, unpublished opinion rendered on October 15, 2004.

<sup>3</sup> *McQueen v. Commonwealth*, 948 S.W.2d 415 (Ky. 1997) (citing *Gross v. Commonwealth*, 648 S.W.2d 853 (Ky. 1983)).

<sup>4</sup> *Gross*, 648 S.W.2d at 857.

Next, Hart contends that his constitutional rights were violated when the prosecutor's indictment failed to adequately inform him whether he was being charged with intentional or with wanton conduct. However, any such claim was waived when Hart entered his guilty plea.<sup>5</sup> Further, any ineffective assistance of counsel claim relating to this allegation is one that could and should have been raised in Hart's RCr 11.42 proceeding. The trial court did not err by rejecting Hart's claim for relief on this ground. Given our conclusions to this point, it is clear that the trial court did not err by failing to appoint counsel to represent Hart in the proceeding below.<sup>6</sup>

The court's order is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Joey Hart, Pro se  
Sandy Hook, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo  
Attorney General of Kentucky

Rickie L. Pearson  
Assistant Attorney General  
Frankfort, Kentucky

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<sup>5</sup> See *Bush v. Commonwealth*, 702 S.W.2d 46, 48 (Ky. 1986).

<sup>6</sup> *Gross*, 648 S.W.2d at 857.