

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-001793-MR

GERALD GIBBINS

APPELLANT

v. APPEAL FROM WHITLEY CIRCUIT COURT
HONORABLE JERRY D. WINCHESTER, JUDGE
ACTION NO. 92-CR-00036

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

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

EMBERTON, SENIOR JUDGE: This appeal from the denial of appellant's CR 60.02 motion for relief from a 1994 judgment sentencing him to a total of fifty years' imprisonment upon his conviction for murder and first degree robbery represents but the latest in a series of unsuccessful collateral attacks upon that judgment. Finding no error in the trial judge's assessment that the relief appellant sought by way of the current motion has been repeatedly denied by final rulings of this Court and

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 KRS 21.580.

the Supreme Court of Kentucky, we affirm the denial of appellant's current motion.

After a jury convicted Gibbins of capital murder and first-degree robbery, he waived his right to jury sentencing and agreed to imposition of a sentence of thirty years on the murder conviction and twenty years on the robbery conviction to be run consecutively. In affirming his conviction on direct appeal, the Supreme Court concluded that Gibbins had waived the right to assert complaints "with regard to the sentencing phase which was never held." Commencing in 1999, Gibbins embarked upon series of collateral attacks which included a previous CR 60.02 motion and a CR 60.03 motion which were resolved by non-published opinions of this Court. The thrust of his complaints in those proceedings was the discovery of new evidence showing his factual innocence to the charges. In this latest motion, Gibbins alleges that he could not have raised his current complaints in previous motions and couches them in terms of ineffective assistance of counsel. Like the trial court, we are convinced that there is absolutely no merit to his latest motion.

The oft-cited analysis of the proper method of attacking a criminal conviction set out in Gross v. Commonwealth²

² 648 S.W.2d 853, 856 (Ky. 1983).

is dispositive of the arguments advanced in this appeal:

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 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.

CR 60.02 was enacted as a substitute for the common law writ of coram nobis. The purpose of such a writ was to bring before the court that pronounced judgment errors in matter of fact which (1) had not been put into issue or passed on, (2) were unknown and could not have been known to the party by the exercise of reasonable diligence and in time to have been otherwise presented to the court, or (3) which the party was prevented from so presenting by duress, fear, or other sufficient cause.

There is nothing advanced in this proceeding that was not, or could not have been, presented in Gibbins' previous attacks on his conviction and therefore the trial court correctly denied relief without a hearing.

The judgment of the Whitley Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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