

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-002178-MR

WILLIAM LANE THOMPSON

APPELLANT

v. APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE FRED A. STINE, V, JUDGE
INDICTMENT NO. 83-CR-00177

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

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

DYCHE, JUDGE: The opinion of the trial court correctly and adequately sets out the applicable facts and law in this case.

We therefore adopt that opinion as our own:

On May 2, 2005, Defendant filed a pleading entitled "Petition for Writ Venire Facias De Novo" asking the Court to vacate his sentence and conduct a sentencing hearing pursuant to K.R.S. 532.025. In

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.

support of his Petition, Defendant claims that he was:

"precluded and/or denied by the trial court his statutory and procedural right to present mitigating evidence to the Court and/or a capital sentencing jury pursuant to *K.R.S. 532.025(1)* as mandated, being charged with Murder under *K.R.S. 507.020(2)*; resulting in a structural error of first magnitude which abdicated Mr. Thompson's 6th, 8th and 14th Amendment, U.S. Constitutional Rights as herein specifically averred.

(Petition: p.3)

The Commonwealth filed a Response on May 2, 2005 asking that the Petition be dismissed as improperly brought. Specifically, the Commonwealth argues that the Defendant's claim of jurisdiction pursuant to *C.R. 60.03* is incorrect because *C.R. 60.03* states that "relief shall not be granted in an independent action if the ground of relief sought has been denied in a proceeding by motion under Rule 60.02, or would be barred because not brought in time under the provisions of that rule." (Response: p.1) The Commonwealth also argues that Defendant's claim of jurisdiction pursuant to *C.R. 81* is equally insufficient as Defendant's writ does not constitute one of the common law writs authorized by the rule. Further, the Commonwealth argues that this particular Petition was not filed as an original action as required by the rule.

FACTUAL BACKGROUND

The Court has reviewed the Defendant's Petition, the Commonwealth's Response and the Defendant's "Traverse and Objection to Response", carefully reviewed the file and

being otherwise fully and sufficiently advised, the Court finds as follows:

On or about November 5, 1983, the Defendant was Indicted by a grand jury in the Campbell Circuit Court for the Murder of Cecil Browning. On June 19, 1984, the Defendant filed a Petition to enter a plea of guilty and entered a plea of guilty to the charge of Murder. The record reveals that Defendant understood his right to persist in a not guilty plea and knowingly and intelligently entered a plea of guilty. (Petition to Enter Plea of Guilty) The Defendant was also afforded the opportunity to make statements in his own behalf and to present any and all information in mitigation of punishment and further, the Defendant, after questioning by the Court, waived his right to have a Presentence Investigative Report prepared. The Defendant was sentenced to a term of life 'in [the] Kentucky Bureau of Corrections". (Judgment and Sentence on Plea of Guilty) The record further reflects that the Defendant did not appeal his conviction nor has he filed a motion for relief pursuant to RCr 11.42. The record further reflects that in 1995, the Defendant filed a motion for a lower sentence or, in the alternative, for a new penalty hearing pursuant to RCr 10.02 alleging violations of the 5th, 6th, 8th, and 14th Amendments to the U.S. Constitution. On August 14, 1995, the Defendant's motion was denied by the Hon. Leonard J. Kopowski, Circuit Judge, as there appeared to be "no legal or equitable or factual basis for which the Court to grant the Motion of the Defendant." (Order: 8/14/95)

ANALYSIS

Gross v. Commonwealth, 648 S.W.2d 853 (Ky. 1983) is instructive.² *Gross* discussed issues relating to the use of C.R. 60.02

² Contrary to Defendant's contention, *Cardine v. Commonwealth*, 102 S.W.3d 927 (Ky. 2003) does not limit *Gross* in any way.

when used by a criminal defendant to review the proceedings in his criminal case. As part of its analysis, the Supreme Court noted that:

"the structure provided in Kentucky in 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 C.R. 60.02."

(emphasis in original) *Gross*, 648 S.W.2d at 856. In explaining more fully, the Supreme Court made clear that

"the proper procedure for a defendant aggrieved by a judgment in a criminal case is to directly appeal that judgment, stating every ground of error which it is reasonable to expect that he or his counsel is aware of when the appeal is taken. . . . Next, we hold 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. *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 C.R. 60.02 which are 'issues that could reasonably have been presented' by RCr 11.42 proceedings.*"

Id at 857. In other words, in order for a defendant to be entitled to raise any issues via *C.R. 60.02*, the Defendant must avail himself of the opportunity of a direct appeal and a collateral attack on his sentence via *RCr 11.42*. Further, even if the Defendant has availed himself of these opportunities, he may be prevented from raising them via *C.R. 60.02* because they could or should have been raised in via direct appeal or *RCr 11.42*.

In the instant matter, the record is devoid of any evidence that the Defendant pursued a direct appeal from his plea of guilty and sentence. It is equally devoid of any evidence that Defendant pursued a collateral attack pursuant to *RCr 11.42*. Therefore, he has waived jurisdiction in this Court to consider *C.R. 60.02* relief. Further, while he may have filed a motion in 1994 or 1995 asking that the Court review his sentence, there is no indication in the record that the Court made any determination as to whether jurisdiction existed to consider it. Instead, the Court simply considered the issues raised and denied the Defendant's motion.³ Consequently, this Defendant has not exhausted his prior available legal remedies and therefore is precluded from raising any issues via *C.R. 60.02*.

Additionally, *C.R. 60.02*

"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

³ As pointed out by the Commonwealth, the Defendant requested a new penalty hearing pursuant to *RCr 10.02* in his prior motion and raised the 5th, 6th, 8th and 14th Amendment questions raised here.

affirmatively allege facts which, if true, justify vacating the judgment and further allege special circumstances that justify *C.R. 60.02* relief". *Gross*, 648 S.W.2d 856.

Gross, 648 S.W.2d at 857. In the instant matter, Defendant has not demonstrated why he is entitled to this "special, extraordinary relief. In his Petition, the Defendant alleges a variety of errors yet does not explain why these errors were not raised via direct appeal and/or via *RCr 11.42*. There is no doubt that these issues could have been raised by direct appeal or *RCr 11.42*. Further, Defendant has not adequately explained why he should be relieved from his waiver of a Presentence Investigative Report and why, having once been given the opportunity, he should be permitted to present evidence or make statements in mitigation a second time. It is of no moment that the Defendant entered a plea of guilty and saved the Court the expense and inconvenience of a trial. Defendant had every right to go to trial and knowingly and intelligently waived that right. In short, the record is utterly devoid of any demonstration by the Defendant that he is entitled to this kind of relief and equally devoid of any specific facts which justify vacating the judgment or the equivalent of special circumstances entitling him to *C.R. 60.02* relief.⁴ For this reason, the Defendant's motion should be denied.

Finally, the Defendant plead guilty on June 19, 1984, and was sentenced on June 21, [1]984. Aside from the fact that these issues could have been raised on direct

⁴ The first three (3) grounds specified in *C.R. 60.02* may be raised "not more than one year after the judgment." *C.R. 60.02* Regarding the last three (3) grounds raised in the rule, there is no evidence of fraud in the record and the judgment is not void leaving only "any other reason of an extraordinary nature justifying relief." *C.R. 60.02(f)*

appeal or via *RCr 11.42*, Defendant has proffered no special circumstances why he should be permitted to proceed twenty-one (21) years after his sentencing or why the relief he requests would not have been available via direct appeal or *RCr 11.42*. As noted by the Supreme Court in *Gross*, "C.R. 60.02 is enacted as a substitute for the common law writ of *coram nobis*." *Id* at 856. The rule was not enacted to extend the scope of the original writ nor did it add additional grounds of relief. *Id*. A reading of the rule and the purpose of the original writ make it abundantly clear that Defendant's allegation of error may not be raised via any kind of petition or motion at this late date. Therefore, his petition should be denied.

Therefore and for the reasons cited above:

IT IS HEREBY ORDERED that Defendant's motion is **DENIED** for lack of jurisdiction as waived as, untimely raised and for failure to set forth any special circumstances justifying C.R. 60.02 relief.

The order of the Campbell Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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