

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-002259-MR

GARY DEAN VAUGHN

APPELLANT

v. APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE GREGORY A. LAY, JUDGE
ACTION NO. 03-CR-00201

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** *

BEFORE: VANMETER, JUDGE; BUCKINGHAM,¹ SENIOR JUDGE; MILLER,²
SPECIAL JUDGE.

BUCKINGHAM, SENIOR JUDGE: Gary Dean Vaughn appeals from an
order of the Laurel Circuit Court denying his motion for a new
trial under CR³ 61.02. Because Vaughn was procedurally precluded
from seeking relief in the manner he chose, we affirm.

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 Retired Judge John D. Miller, sitting as Special Judge by assignment of the
Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

³ Kentucky Rules of Civil Procedure.

The crimes committed by Vaughn occurred on July 17, 2003. On May 12, 2004, a Laurel County jury found Vaughn guilty of the offenses of first-degree assault, first-degree robbery, first-degree arson, and of being a first-degree persistent felony offender (PFO I). The court subsequently sentenced Vaughn to life in prison on each of the three principal counts, with the sentences to run concurrently. The Kentucky Supreme Court affirmed his conviction on direct appeal in an opinion that became final on July 7, 2005.⁴

On July 21, 2005, Vaughn filed a motion to vacate his conviction and sentence pursuant to RCr⁵ 11.42. The trial court denied the motion in an order it entered on September 14, 2005. Vaughn did not appeal from that order.

On September 26, 2005, Vaughn filed a motion for a new trial pursuant to CR 61.02. In his motion, he argued that palpable error occurred in the underlying action. Prior to the court's ruling on this motion, Vaughn filed a motion to vacate his conviction and sentence pursuant to CR 60.02. On October 19, 2005, the court entered an order denying Vaughn's motion for a new trial under CR 61.02. Vaughn's CR 60.02 motion was pending at that time.

⁴ See 2004-SC-462-MR.

⁵ Kentucky Rules of Criminal Procedure.

In addressing Vaughn's CR 61.02 motion, the court concluded that CR 61.02 was synonymous with RCr 10.26. The court further found that there was no palpable error affecting Vaughn's substantial rights and warranting a new trial. This appeal by Vaughn followed.

On appeal, Vaughn raises several arguments. These include: that the indictment was insufficient to charge him with PFO, that the PFO sentencing was conducted improperly, that the indictment was insufficient because it omitted reference to some essential elements of several offenses, and that his convictions of both robbery and assault constituted double jeopardy. Regardless of the merits of any of these arguments, we must affirm the trial court's order denying Vaughn's motion for the reasons set forth below.

First, CR 61.02 and RCr 10.26 are not mechanisms for obtaining post-conviction relief. Rather, those rules allow palpable error that was insufficiently raised or preserved to serve as grounds for relief in a motion for a new trial filed pursuant to RCr 10.06 or in a direct appeal. Since Vaughn's time for filing an RCr 10.06 motion for a new trial had passed long before he filed this motion, his motion for a new trial was untimely and could have been denied by the trial court for this reason alone.

Second, Vaughn's attempt to obtain relief in this fashion was not allowed by the rules governing post-conviction relief. In Gross v. Commonwealth, 648 S.W.2d 853, 856 (Ky. 1983), the Kentucky Supreme Court stated that "(t)he structure provided for attacking the final judgment of a trial court in criminal cases 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." As Vaughn has utilized post-conviction attacks on his conviction by direct appeal, RCr 11.42, and CR 60.02, his belated attempt to obtain a new trial in the manner he employed was improper.

Finally, we note that even if the trial court and this court had treated Vaughn's motion as one under CR 60.02, he would not have been entitled to relief because the grounds asserted were grounds that could have been raised in his direct appeal or in his RCr 11.42 motion. Thus, he is precluded from raising them in this manner. See Gross, 648 S.W.2d at 856.

The order of the Laurel Circuit Court is affirmed.⁶

ALL CONCUR.

⁶ We have not addressed the basis of the trial court's order denying Vaughn's motion. However, we "may affirm the trial court for any reason sustainable from the record." See Kentucky Farm Bureau Mut. Ins. Co. v. Gray, 814 S.W.2d 928, 930 (Ky.App. 1991).

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