

RENDERED: OCTOBER 6, 2006; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2005-CA-002341-MR

JAMES MITCHELL HASKINS

APPELLANT

v. APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE EDWIN M. WHITE, JUDGE
ACTION NO. 99-CR-00204

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: TAYLOR AND WINE, JUDGES; BUCKINGHAM,¹ SENIOR JUDGE.

BUCKINGHAM, SENIOR JUDGE: James Mitchell Haskins appeals from an order of the Christian Circuit Court denying his CR² 60.02 motion to vacate his convictions and sentences for criminal offenses and for being a first-degree persistent felony offender (PFO I). His argument focuses on whether he was properly convicted of PFO. 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 Kentucky Rules of Civil Procedure.

On July 16, 1999, a Christian County grand jury indicted Haskins on charges of first-degree trafficking in a controlled substance (cocaine), two counts of trafficking in a simulated controlled substance, and PFO I. On October 20, 1999, Haskins entered into a plea agreement with the Commonwealth whereby he would plead guilty to all charges and would be sentenced to five years on the first charge, 12 months on each of the other primary charges, with these sentences to be served concurrently with each other, and 10 years on the PFO I charge, with the latter sentence to be served in lieu of the five-year sentence. He pled guilty on the same day. On February 23, 2000, the circuit court sentenced Haskins to ten years in prison pursuant to the plea agreement.

On August 13, 2003, Haskins filed a motion to vacate the court's final judgment pursuant to CR 60.02. In his motion, Haskins alleged that his trial counsel failed to properly investigate and advise him that one of the underlying felony convictions that supported the PFO charge was invalid. He asserts that had he been properly advised of the invalid underlying felony conviction, he would not have pled guilty but would have insisted on a trial.

The indictment charging Haskins with PFO I alleged that he had been previously convicted of flagrant nonsupport and first-degree possession of a controlled substance (cocaine).

Haskins alleges that his prior conviction for flagrant nonsupport was invalid. He asserts in his brief that his "basic claim is that this 1991 Flagrant Non-Support conviction was a misdemeanor that had been enhanced to a felony" and that using that conviction in support of the PFO I charge here amounts to "double enhancement" which, he claims, is improper. He contends that he would not have pled guilty to the PFO charge had he been properly advised by his trial counsel and that, therefore, counsel's performance was deficient.

In denying Haskins's CR 60.02 motion, the trial court noted that Haskins had not followed through with his earlier attempt to attack the validity of the judgment wherein he was convicted of flagrant nonsupport based on a guilty plea. Further, the court noted that Haskins had pled guilty to the trafficking charge in the indictment in this case and had agreed to an enhanced sentence based upon his PFO I status. The court also stated that Haskins was mistaken in his belief that his flagrant nonsupport conviction was based on a misdemeanor charge that had been amended to a felony. Finally, the court held that any claim for ineffective assistance of counsel should have been raised by way of an RCr³ 11.42 motion, which was then time-barred.

³ Kentucky Rules of Criminal Procedure.

We agree with the trial court that any claim regarding ineffective assistance of counsel could only have been brought pursuant to RCr 11.42 and that this claim may not be brought pursuant to CR 60.02. See Gross v. Commonwealth, 648 S.W.2d 853, 856 (Ky. 1984); Meredith v. Commonwealth, 312 S.W.2d 460, 462 (Ky. 1958); Spears v. Commonwealth, 253 S.W.2d 570, 572 (Ky. 1952). Haskins responds that he could not have brought an RCr 11.42 motion seeking the relief he seeks herein because he did not learn of counsel's deficient conduct until after the time for filing an RCr 11.42 motion had passed. Thus, Haskins seeks relief pursuant to CR 60.02(f).

We reject Haskins arguments and affirm the trial court for several reasons. First, Haskins has not demonstrated that his prior flagrant nonsupport conviction is invalid. The cases he cites in his brief are distinguishable. Furthermore, he has not pursued directly attacking the prior conviction. Rather, he has attempted to attack the prior conviction by seeking post-judgment relief in this case.

In Alvey v. Commonwealth, 648 S.W.2d 858 (Ky. 1983), the Kentucky Supreme Court stated as follows:

In situations such as this, where a defendant has been convicted of one or more felonies and is subsequently tried and convicted as a persistent felon based on the earlier convictions, this jurisdiction requires him to raise any issues about the validity of those earlier convictions at the

time he is tried as a persistent felon. If he does not, he is precluded from contesting the validity of the earlier convictions in subsequent post-conviction proceedings.

Id. at 859. See also Logsdon v. Scroggy, 595 F.Supp. 626, 627 (W.D. Ky. 1984), and Commonwealth v. Jones, 704 S.W.2d 203, 204 (Ky. 1986). In short, Haskins was precluded from attacking the validity of the prior convictions supporting the PFO charge by way of CR 60.02 in this case.

Haskins also argues that the other prior conviction used to convict him of PFO I was also invalid. That conviction was for possession of a controlled substance (cocaine). Citing Grimes v. Commonwealth, 698 S.W.2d 836 (Ky. 1985), he argues that the prior conviction for possession should not have been used to enhance his sentence under the PFO statute because it was "based upon the same class of offense that the basis for the underlying offenses." Haskins does not further explain his argument, and we find nothing in the Grimes case that persuades us that the possession charge could not have been used to support the PFO indictment herein.

Finally, Haskins argues that the court erred in not granting him an evidentiary hearing. In Gross, supra, the Kentucky Supreme Court held that those seeking relief from a judgment under CR 60.02 are not entitled to an evidentiary hearing unless they "affirmatively allege facts which, if true,

justify vacating the judgment and further allege special circumstances that justify CR 60.02 relief." Id. at 856. Under this standard, Haskins was not entitled to an evidentiary hearing, and the trial court properly denied his motion for one.

The order of the Christian Circuit Court is affirmed.

ALL CONCUR.

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