

RENDERED: NOVEMBER 22, 2006; 10:00 A.M.  
NOT TO BE PUBLISHED

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

NO. 2006-CA-000304-MR

WILLIAM "COREY" HILLARD

APPELLANT

v.

APPEAL FROM NELSON CIRCUIT COURT  
HONORABLE LARRY D. RAIKES, JUDGE  
ACTION NO. 99-CR-00092

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: JOHNSON AND WINE, JUDGES; MILLER,<sup>1</sup> SPECIAL JUDGE.

WINE, JUDGE: William "Corey" Hillard appeals, *pro se*, from the Nelson Circuit Court's order entered September 16, 2002, denying his motion for CR 60.02 relief alleging rehabilitative progress and lack of evidence in the case against him. We affirm.

Based on allegations made by his sister-in-law, who was a minor child, Hillard was indicted on one count of sodomy in the first degree with a child under the age of twelve, six

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<sup>1</sup> 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.

counts of sodomy in the second degree with a child under the age of fourteen, and one count of rape in the second degree with a child under the age of fourteen. Separately, by information, Hillard was charged with wanton endangerment in the first degree. On July 7, 2000, Hillard pleaded guilty to the amended charge of sodomy in the second degree, six counts of sodomy in the second degree as originally charged, and one count of rape in the second degree. Pursuant to the Commonwealth's recommendation, the trial court sentenced Hillard to 20 years' imprisonment.

Hillard thereafter filed a CR 60.02 motion claiming that he had been rehabilitated through programs within the prison system. As such, Hillard requested that the court grant his CR 60.02 motion and probate him for the remainder of his sentence. Hillard further argued that his CR 60.02 motion should be granted based on the insufficiency of the Commonwealth's evidence against him. He contended that the victim's failure to give specific dates regarding when the sexual encounters occurred deprived him of an opportunity to present a defense as to his whereabouts during those times. Hillard further challenged the sufficiency of the Commonwealth's evidence against him, specifically arguing that: (1) there was no physical evidence that he was in fact in the particular area during several of the months the victim alleges she was

assaulted in the indictment; (2) the record was devoid of physical or scientific evidence confirming the victim's statements to police; (3) there were no witnesses to the alleged criminal events; and (4) there was no evidence overall to prove the charges in the indictment.

The trial court found that Hillard's arguments were not appropriate for review on a CR 60.02 motion. We agree. First, the trial court correctly concluded that it no longer had jurisdiction over Hillard's motion requesting probation. Except for shock probation, the trial court does not have jurisdiction to probate a defendant post-conviction. See Mullins v. Commonwealth, 956 S.W.2d 222 (Ky.App. 1997). Even then, the court cannot grant shock probation after 180 days following sentencing or delivery of the defendant to the institution. KRS 439.265. Second, the trial court concluded that Hillard's other grounds for relief were not properly raised under CR 60.02. A post-judgment motion made under CR 60.02 is for relief that is not available by direct appeal or under RCr 11.42, and the movant must demonstrate why he is entitled to this extraordinary remedy. Gross v. Commonwealth, 648 S.W.2d 853 (Ky. 1983). Also, a CR 60.02 motion cannot be used as a substitute for an RCr 11.42 motion. Id. The issues raised in Hillard's CR 60.02 motion in this case could have and should have been raised in an RCr 11.42 motion.

On appeal, Hillard again claims the trial court abused its discretion when it denied him substantive and procedural due process by denying his motion for an evidentiary hearing. He claims that his guilty plea was not voluntary but was coerced out of him by his attorney.

In reviewing the trial court's denial of a request for post-conviction relief without an evidentiary hearing, our inquiry is whether the motion states grounds for relief that could not be conclusively resolved from the face of the record, and which, if true, would invalidate the conviction. Baze v. Commonwealth, 23 S.W.3d 619, 622 (Ky. 2000). Hillard's CR 60.02 motion states that he was coerced into pleading guilty by his attorney but offers no evidence of such. Hillard implies in his brief the evidence in the case, if applied to applicable law, would have undoubtedly resulted in his acquittal. Thus, suggests Hillard, we can infer from the lack of physical and scientific evidence, that his attorney coerced him into pleading guilty. We strongly disagree with Hillard's position.

A knowing and voluntary plea of guilty waives any defense that a defendant may have except failure of the indictment to charge an offense. Bush v. Commonwealth, 702 S.W.2d 46 (Ky. 1986). Further, a claim of insufficient evidence must be made on direct appeal, not in a post-conviction motion. See Boles v. Commonwealth, 406 S.W.2d 853, 855 (Ky. 1966).

Accordingly, Hillard has waived any claim that there was insufficient evidence to convict him or that he would not have been able to put forth a defense because the victim could not specify the dates he had sexual contact with her. And because the record conclusively establishes that Hillard's plea was knowing and voluntary pursuant to Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1996), the trial court properly denied the motion for post-conviction relief.

For all of the reasons stated herein, we affirm the decision of the Nelson Circuit Court denying Hillard's *pro se* CR 60.02 motion.

ALL CONCUR.

BRIEFS FOR APPELLANT:

William "Corey" Hillard, *Pro*  
*Se*  
LaGrange, KY

BRIEF FOR APPELLEE:

Gregory D. Stumbo  
Attorney General of Kentucky  
  
Rickie L. Pearson  
Assistant Attorney General  
Frankfort, KY