

Commonwealth of Kentucky
Court of Appeals

NO. 2006-CA-000701-MR

CURTIS DRIVER

APPELLANT

v. APPEAL FROM CRITTENDEN CIRCUIT COURT
HONORABLE C. RENE' WILLIAMS, JUDGE
ACTION NO. 03-CR-00003

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * **

BEFORE: ABRAMSON AND DIXON, JUDGES; HOWARD,¹ SPECIAL JUDGE.

DIXON, JUDGE: Curtis Driver, *pro se*, appeals the order of Crittenden Circuit Court denying post-conviction relief pursuant to Kentucky Rules of Civil Procedure (CR) 60.02.

¹ Special Judge James I. Howard completed this opinion prior to the expiration of his Special Judge assignment effective February 9, 2007. Release of the opinion was delayed by administrative handling.

Driver and his wife were foster parents for fifteen years. They have one adopted child, J.D., who had been in their care as a foster child. In January 2003, the Drivers' household included four foster children and J.D., then age 23. Driver was arrested on January 14, 2003, for fondling and receiving oral sex from his six year old foster child. Subsequently, J.D. alleged Driver had sexually abused her when she was eleven years old. On February 4, 2003, a Crittenden County grand jury indicted Driver on one count of first degree sodomy and two counts of first degree sexual abuse.

On May 15, 2003, Driver entered a plea of guilty to one count of second degree sodomy and one count of first degree sexual abuse pursuant to an agreement with the Commonwealth.² Driver appeared in open court with private counsel and signed a “Motion to Enter Guilty Plea”³ as well as a three page “Order on Guilty Plea” which was also signed by the trial judge. On July 17, 2003, the trial court sentenced Driver to ten years on the sodomy charge and five years on the sexual abuse charge, with the sentences running consecutively for a total of fifteen years' imprisonment.

Sixteen months later, on November 19, 2004, Driver filed a *pro se* motion to vacate the trial court's judgment and sentence pursuant to Kentucky Rules of Criminal Procedure (RCr 11.42) alleging his guilty plea was involuntary due to ineffective assistance of counsel. The trial court granted Driver's requests for appointment of counsel and an evidentiary hearing. On May 26, 2005, while represented by counsel,

² The Commonwealth agreed to drop the charge of first degree sexual abuse of J.D.

³ The “Motion to Enter Guilty Plea” was an Administrative Office of the Courts (AOC) 491 form. Driver also signed an AOC-491.1 form: “Commonwealth's Offer on Plea of Guilty.”

Driver filed a *pro se* supplement to his RCr 11.42 motion. In the supplementary motion Driver alleged additional instances of ineffective assistance of counsel, that he was incompetent at the time of his guilty plea, and that double jeopardy protection prohibited a conviction for sodomy and sexual abuse.

The trial court held a hearing on the motion on June 9, 2005. On June 15, an agreed order signed by Driver's counsel was entered amending the final judgment to reflect the factual finding that Driver engaged only in oral sex with the victim and no other penetration of the victim occurred. The agreed order also dismissed Driver's pending RCr 11.42 motion and supplementary motion.

On November 28, 2005, Driver filed a *pro se* motion for relief pursuant to CR 60.02 alleging the trial court erred 1) by not suppressing his confession, 2) by not ordering a psychiatric evaluation, 3) by not disqualifying the Commonwealth's Attorney, and 4) by subjecting him to double jeopardy. The trial court denied Driver's motion for CR 60.02 relief without appointing counsel or holding an evidentiary hearing. The trial court issued a well-reasoned opinion and order detailing the basis for its ruling. It is from this order that Driver appeals.

Driver contends the trial court erred by: 1) denying the CR 60.02 motion because the claims were raised or could have been raised in Driver's RCr 11.42 motion, 2) failing to order a psychiatric evaluation, 3) failing to suppress his confession, 4) finding the CR 60.02 motion was not brought within a reasonable time, 5) failing to disqualify the Commonwealth's Attorney, and 6) allowing Driver's conviction in violation of his right to be free from double jeopardy. After a review of the record, we find all of

Driver's claims to be meritless; accordingly, we shall only summarily address his arguments.

This Court reviews the denial of a CR 60.02 motion for abuse of discretion by the trial court. *Brown v. Commonwealth*, 932 S.W.2d 359, 362 (Ky. 1996) (citation omitted). Procedurally, a movant must first utilize RCr 11.42 to “state *all* grounds for holding the sentence invalid of which the movant has knowledge. Final disposition of the motion shall conclude *all* issues that could reasonably have been presented in the same proceeding.” *Gross v. Commonwealth*, 648 S.W.2d 853, 856 (Ky. 1983) (quoting RCr 11.42(3)). Thereafter, a movant may request extraordinary relief pursuant to CR 60.02, but may not rehash arguments that were or should have been raised in a RCr 11.42 motion. *Id.* It is well-settled that a guilty plea “waive[s] all defenses other than that the indictment charges no offense.” *Quarles v. Commonwealth*, 456 S.W.2d 693, 694 (Ky. 1970) (citation omitted). And by voluntarily and intelligently pleading guilty, a movant forfeits the opportunity to attack the sufficiency of the evidence against him. *Taylor v. Commonwealth*, 724 S.W.2d 223, 225 (Ky. App. 1986).

The record does not contain a video recording of Driver's guilty plea. However, Driver and his attorney both signed the motion and order to plead guilty which acknowledged the waiver of Driver's constitutional rights. Furthermore, in its order, the trial judge acknowledged that Driver appeared in open court with counsel and entered his plea knowingly, intelligently, and voluntarily. As a result, we find no infirmity in Driver's guilty plea proceeding.

After a thorough review of the record before us, it is apparent Driver's arguments are conclusory, repetitive, and have no basis in fact. All of Driver's claims either were raised or should have been raised in his RCr 11.42 proceeding, which was dismissed pursuant to an agreed order that expressly delineated his culpability.

Furthermore, the trial court specifically addressed each of Driver's claims in its order denying CR 60.02 relief; consequently, the trial court did not abuse its discretion.

For the reasons stated herein, the order of Crittenden Circuit Court is affirmed.

ALL CONCUR.

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