

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000945-MR

LARRY R. SMITH

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE MARY C. NOBLE, JUDGE
ACTION NO. 98-CR-00374

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: COMBS, CHIEF JUDGE; KELLER, JUDGE; BUCKINGHAM,¹ SENIOR JUDGE.

KELLER, JUDGE: In this post-conviction action, Larry Ray Smith has appealed from the Fayette Circuit Court's April 13, 2006, order denying his motion to reconsider its earlier order denying his motion to vacate pursuant to CR 61.02 and RCr 10.26. 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.

In April 1998, the Fayette County grand jury indicted Smith on two counts of incest pursuant to KRS 530.020 (a Class C felony) and for being a persistent felony offender in the second degree pursuant to KRS 532.080 (a Class B felony). The incest charges stemmed from the allegations that Smith had engaged in deviate sexual intercourse with his stepson, D.B., on February 8, 1998, and between January and February of 1998. Because the original indictment incorrectly indicated that the PFO II charge was a Class C felony, the circuit court entered an Agreed Order on April 15, 1998, amending the heading of the indictment to reflect that the PFO II charge was actually a Class B felony. Following a jury trial, Smith was convicted on both counts of incest and sentenced to 10 years' imprisonment on each count, enhanced to 12 ½ years by the PFO II conviction. The sentences were ordered to be served consecutively for a total of 25 years. On direct appeal, the Supreme Court affirmed Smith's conviction in an unreported opinion rendered August 26, 1999.² In that appeal, Smith raised arguments concerning the sufficiency of the evidence and prosecutorial misconduct.

While his direct appeal was pending, Smith filed a motion to modify the final judgment to limit his sentence to 20 years pursuant to KRS 532.110. The motion was denied on June 16, 1999. The Supreme Court's opinion affirming Smith's conviction became final that September, and in November, Smith filed an RCr 11.42 motion alleging ineffective assistance of counsel. In this motion, Smith attacked his trial attorney's failure to investigate, to object to the Commonwealth's Attorney's questions, to investigate his competency, and to challenge his 25-year sentence. Counsel was appointed, and an

² 98-SC-0936-MR.

evidentiary hearing was scheduled for October 1, 2001. Prior to the hearing, Smith filed a *pro se* motion pursuant to CR 60.02(3) and (f), attacking both the constitutionality of his sentence, as it exceeded the maximum aggregate sentence allowed by KRS 532.110, as well as the use of his prior felony conviction to support the PFO II charge.

At the October 1, 2001, hearing, the circuit court permitted Smith to argue the merits of his RCr 11.42 motion as well as his CR 60.02 motion. Two days later, the circuit court entered an order denying all issues raised by both motions, except the issue concerning whether the sentences should run concurrently or consecutively. The parties filed briefs on this issue, and the circuit court later ruled in the Commonwealth's favor, finding *Cardwell v. Commonwealth*, 12 S.W.3d 672 (Ky. 2000), to be dispositive. Smith appealed from both of those orders, which the Court of Appeals affirmed in an opinion rendered July 25, 2003.³ In those consolidated appeals, the Court addressed Smith's arguments concerning ineffective assistance of counsel and his sentence.

While his appeal was pending before this Court, Smith filed another *pro se* motion pursuant to CR 60.02, arguing that his sentence did not conform to the law because the PFO statute was unconstitutional. The circuit court denied this motion on March 26, 2002, as it alleged insufficient grounds. On August 25, 2003, Smith filed a *pro se* motion to dismiss, also pursuant to CR 60.02, this time raising issues about the jury instructions, his attorney's failure to object to questions concerning his prior felony conviction, and the amendment of his PFO II charge from a Class C felony to a Class B felony. The circuit court denied this motion on October 27, 2003, noting that Smith had

³ No. 2001-CA-002781-MR and No. 2001-CA-002783-MR.

already had the opportunity to be heard under CR 60.02. While Smith appealed this ruling to the Court of Appeals, his appeal was eventually dismissed due to his failure to file a brief.⁴

In November 2004, Smith filed yet another *pro se* motion, this time citing substantial error under CR 61.02 and attacking both his indictment on incest charges as well as the amendment of the indictment. Finding no support in the record, the circuit court denied this motion on March 16, 2005. No appeal was taken from this order. On August 2, 2005, Smith moved the circuit court for a new trial pursuant to CR 10.26 and CR 61.02, again citing substantial error and again raising issues concerning the sufficiency of the evidence, ineffective assistance of his attorney, and the amendment of his PFO II charge on the indictment from Class C to Class B. Once again finding no basis in the record, the circuit court denied the motion on August 22, 2005. Smith's *pro se* appeal to the Court of Appeals was later dismissed, again due to his failure to file a brief.⁵

On November 2, 2006, Smith filed a *pro se* motion to vacate pursuant to CR 61.02 and RCr 10.26, arguing (again) that the circuit court improperly amended the indictment, that the indictment lacked dates for Count 2, and that the grand jury improperly modified the elements of the incest statute, rendering it unconstitutional. He requested that the original indictment be dismissed and that he be granted a new trial. Smith asserted that C. Shane Neal, an attorney he retained to seek a reduction of his

⁴ No. 2003-CA-002476-MR.

⁵ No. 2005-CA-001878-MR.

bond, should not have signed the Agreed Order amending the indictment, as Neal was no longer Smith's attorney when the order was entered. As before, the circuit court denied the motion, finding that Smith had not raised any meritorious issues. Rather than immediately appealing the order, Smith moved the circuit court to reconsider its ruling, this time arguing that Neal had not signed the Agreed Order, producing a letter from Neal in support of the motion. Smith later filed a notice of submission for final adjudication, again arguing that Neal's signature was forged on the Agreed Order. The circuit court denied Smith's motion to reconsider, and this appeal followed.

In his brief, Smith confines his argument to the issue of Neal's signature on the Agreed Order, asserting that the indictment and his sentence should be vacated. The Commonwealth argues that Smith waived this issue because he dropped it during a 2001 hearing. Furthermore, the Commonwealth argues that the motion was not filed within a reasonable time because Smith had known about the issue for several years before he brought it to the circuit court's attention.

We agree with the Commonwealth that Smith has waived his right to seek review of this issue. In several of his post-conviction motions, Smith attacked the amendment of the indictment. However, he either failed to appeal or failed to perfect his appeals from the multiple orders ruling on that particular issue. Furthermore, Smith raised the issue of the amendment during the October 2001 evidentiary hearing, specifically stating that his attorney had withdrawn by the time the Agreed Order was entered, but failed to raise or address that issue in his earlier post-conviction appeals to

this Court. In fact, Smith did not raise that issue again for almost two years, and then failed to challenge the circuit court's rulings through the appellate process. Smith's current twist on the argument, that Neal did not sign the Agreed Order, is immaterial. Smith had already been afforded the opportunity to challenge the amendment and, as then-Judge Noble explained, the indictment would have been amended to correct the obvious typographical error it contained concerning the felony classification of the PFO II charge.

For the foregoing reasons, the order of the Fayette Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Larry Ray Smith, *pro se*
Burgin, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Rickie L. Pearson
Assistant Attorney General
Frankfort, Kentucky