

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001337-MR

MARK W. WORTHINGTON

APPELLANT

v. APPEAL FROM GREENUP CIRCUIT COURT
HONORABLE LEWIS D. NICHOLLS, JUDGE
ACTION NO. 00-CR-00002

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * **

BEFORE: ABRAMSON AND TAYLOR, JUDGES; KNOPF,¹ SENIOR JUDGE.

KNOPF, SENIOR JUDGE: Appellant, Mark W. Worthington, pled guilty to one count of attempted murder, two counts of first-degree wanton endangerment, one count of first-degree assault, and one count of theft by unlawful taking. He received a sentence of fifteen years' imprisonment. The facts underlying Worthington's conviction were fully set forth by this Court on direct appeal, which affirmed the denial of his motion to set

¹ Senior Judge William L. Knopf, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

aside the guilty plea and we adopt them here. *Worthington v. Commonwealth*, No. 2001-CA-001777-MR(rendered November 1, 2002).

“Worthington and Phyllis Hay, who were divorced in 1997, have two children, Marcus and Eric. On November 29, 1999, at approximately 1:30 a.m., Worthington entered Phyllis's parents' home with the consent of her father, Herman Hay. Worthington found Phyllis sleeping on a mattress with their eight-year-old son, Marcus, and their six-year-old son, Eric. Worthington told Phyllis, “I've had enough, I'm going to kill you whore,” and then fired a shot at her. Phyllis's father then entered the room with a firearm, he and Worthington exchanged gunfire, and Worthington shot Herman several times.”

Thereafter, this Court, in an unpublished opinion, affirmed the denial of Worthington's motion for relief pursuant to RCr 11.42 where Worthington alleged that counsel was ineffective for failing to investigate a possible self-defense claim and for advising him to plead guilty. *Worthington v. Commonwealth*, Case No. 2004-CA-002473-MR(rendered March 3, 2006). On February 2, 2006, Worthington, *pro se*, filed a motion pursuant to KRS 439.3402(1) seeking exemption from his violent offender status that requires him to serve eighty-five percent of his sentence before he is eligible for parole. The basis of his motion is that he was a victim of domestic violence at the hands of his former father-in-law, Herman Hay. The trial court held a hearing and denied Worthington's motion. This appeal follows.

Worthington presents an issue that was known to him or could have been discovered prior to his direct appeal or his RCr 11.42 motion. He did not raise the issue of entitlement to an exception from his violent offender status in either of those appeals. The judgment itself reflected that Worthington qualified for violent offender status. He is now barred from attempting to relitigate an issue that could have reasonably been brought in his direct appeal or in his RCr 11.42 motion. *Gross v. Commonwealth*, 648 S.W.2d 853, 857 (Ky. 1983). Moreover, our review of the record indicates that Worthington's argument is utterly without merit.

Accordingly, the order of the Greenup Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Mark Worthington, pro se
West Liberty, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Courtney J. Hightower
Assistant Attorney General
Frankfort, Kentucky