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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2006-CA-001560-MR

ERNEST ARNAZE ROGERS — APPELLANT

v.

APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE EDWIN M. WHITE, JUDGE
ACTION NO. 04-CR-00225

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: MOORE AND WINE, JUDGES; BUCKINGHAM,[1] SENIOR JUDGE.

WINE, JUDGE: Ernest Arnaze Rogers ("Rogers") appeals, *pro se*, from the Christian Circuit Court's denial of his CR 60.02 motion for post-conviction relief. Rogers argues he was under the influence of medication, which negatively affected his ability to reason at the time of his guilty plea. Further, Rogers argues he received ineffective assistance of counsel when his defense attorneys turned against him in getting a plea agreement from the Commonwealth. Finding no error, 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.

Rogers was indicted on July 27, 1994, for murder, robbery in the first degree, attempted murder, three counts of kidnapping, and attempted rape in the first degree. Rogers' co-defendant in these crimes was Nakia Dillard. On June 5, 1995, the Commonwealth filed notice of intent to seek the death penalty. Following a jury trial on September 22, 1995, Rogers was convicted of murder, robbery in the first degree, attempted murder, kidnapping, and attempted rape in the first degree. Notwithstanding the jury's inability to agree on a sentence for Rogers' murder conviction, he received a sentence of 80 years' imprisonment for the balance of the charges. The court declared a mistrial on the penalty phase for the murder charge and rescheduled a new hearing date. Then on February 28, 1996, following a penalty phase for the murder conviction, Rogers was sentenced to death.

Rogers appealed and the Kentucky Supreme Court reversed and remanded his convictions. *Rogers v. Commonwealth*, 992 S.W.2d 183 (Ky. 1999). On July 14, 2003, Rogers moved to enter an *Alford* plea pursuant to a plea agreement with the Commonwealth whereby he received a sentence of life imprisonment for murder, 20 years for robbery in the first degree, and 20 years for kidnapping, with all sentences to run concurrent. The trial court accepted the plea and imposed the recommended sentence.

On April 7, 2006, Rogers filed a motion to vacate pursuant to CR 60.02(e) and (f). Specifically, Rogers argued that he was under the influence of medication, which affected his ability to reason at the time he entered a guilty plea and further, his attorneys did not have his best interest in mind when they negotiated the plea agreement with the

Commonwealth. Upon reviewing Rogers' plea, the trial court denied his motion on June 6, 2006. This appeal followed.

CR 60.02 is for relief that is not available by direct appeal and not available collaterally under RCr 11.42. *Gross v. Commonwealth*, 648 S.W.2d 853, 856 (Ky. 1983). CR 60.02 is not intended to afford individuals an additional opportunity to relitigate issues that have already been presented in an earlier direct appeal or collateral attack or present new issues that could have been raised in those proceedings. *McQueen v. Commonwealth*, 948 S.W.2d 415, 416 (Ky. 1997); RCr 11.42(3). And CR 60.02 should only be used to provide relief when the movant demonstrates why he or she is entitled to the special, extraordinary relief provided by the rule. *Gross*, 648 S.W.2d at 856. Finally, claims under CR 60.02(e) & (f) must be raised within a reasonable time.

As a preliminary matter, we note that we are unable to review the video tape of Rogers' guilty plea proceedings as it has not been certified into the record. In *Commonwealth v. Thompson,* 697 S.W.2d 143, 145 (Ky. 1985), the Kentucky Supreme Court warned: "We will not engage in gratuitous speculation as urged upon us by appellate counsel, based upon a silent record. It has long been held that, when the complete record is not before the appellate court, that court must assume that the omitted record supports the decision of the trial court." *See also Moody v. Commonwealth*, 170 S.W.3d 393, 398 (Ky. 2005). Because the trial court relied on the video tape of Rogers' guilty plea proceedings in finding that Rogers' plea was sufficient and none of his rights violated, we will assume the trial court's findings are accurate.

Rogers asserts he was under the influence of medication that affected his ability to reason at the time of his guilty plea. However, the trial court noted that, under

oath, Rogers indicated to the court during his plea that he was only on blood pressure medication and it did not impair his judgment. Rogers' argument before this Court is directly contradicted by his own statements in entering his guilty plea. Thus, we find no abuse of discretion by the trial court.

In addition, Rogers' signature appears boldly at the bottom of the plea agreement indicating that he understood what rights he was giving up and the ramifications of his plea of guilty. Rogers also signed the Commonwealth's plea offer pursuant to *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970). Rogers does not argue he was forced or coerced into signing either of these documents. Therefore, we find no abuse of discretion in the trial court's denying Rogers' motion to vacate.

Further we find no evidence to support Rogers' contentions that his three attorneys somehow did not have his best interest in mind when negotiating his plea agreement with the Commonwealth. Rogers' contentions stem from a hearing held July 13, 2003, prior to the entry of his *Alford* plea. The newly-appointed trial judge met in chambers with counsel on both sides in order to familiarize himself with the case and the plea offer. At one point when discussing what part of the record should be sealed, the trial judge stated, "The press is going to scream bloody murder when they find out about it." Rogers contends that the trial judge said, "**Rogers** is going to scream bloody murder. . . ." (Emphasis added). He alleges this statement indicates some conspiracy against him. However, after reviewing the tape, it is clear that the judge said "press," not "Rogers." Also, defense counsel told the judge that Rogers understood the plea agreement in its entirety as they had been over its terms several times. In fact, Rogers

had three attorneys representing him on July 14, 2003, and they discussed the plea agreement with Rogers for over two hours prior to the plea being entered. One of Rogers' attorneys even noted that one of Rogers' suggested changes to the plea had been adopted. Nothing said at the hearing even remotely suggests defense counsel foreclosed any better terms Rogers may have received in the plea agreement.

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

ALL CONCUR.

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