

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001709-MR

MICHAEL R. PARRISH

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE ROGER L. CRITTENDEN, JUDGE
ACTION NO. 04-CR-00158

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: KELLER AND NICKELL, JUDGES; KNOPF,¹ SENIOR JUDGE.

KELLER, JUDGE: In this criminal post-conviction action, Michael R. Parrish, proceeding *pro se*, has appealed from the order of the Franklin Circuit Court denying his RCr 11.42 and CR 60.02 motions to vacate his conviction for cultivating marijuana. We affirm.

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.

On August 30, 2004, several Franklin County Sheriff's Office deputies went to Parrish's residence for a "knock and talk" to investigate an anonymous tip that a "grow" operation was taking place upstairs. After some discussion with Parrish and his girlfriend, the deputies obtained consent first to search the upstairs of the garage. They found no illegal substances in the garage. The deputies then obtained Parrish's consent to search his residence. At that point, Parrish admitted to having several marijuana plants in the house. The deputies seized the plants as well as the equipment used for the grow operation, including transformers, lights, and fertilizer. The Franklin County grand jury indicted Parrish for cultivating marijuana, five or more plants, pursuant to KRS 218A.1423.

Parrish, through counsel, moved to suppress the evidence seized during the warrantless search, claiming that his consent was illegally obtained and that he was unlawfully detained by the deputies. During the evidentiary hearing on the motion, the Commonwealth introduced evidence from Deputy Pat Melton, who testified that the discussion during which he obtained Parrish's consent lasted ten minutes. Similarly, Deputy Alvin Cummins testified that the conversation lasted ten minutes. However, Deputy Matt Green testified that he waited up to thirty minutes before he was called to the premises to help remove the evidence. On the other hand, Parrish testified that the conversation lasted up to an hour before the deputies obtained his consent. We note that the video recording of the hearing cut off during Deputy Cummins' testimony, but restarted at the beginning of Deputy Green's testimony. The recording cut off again

during Parrish's testimony and did not resume. The circuit court denied the motion to suppress, finding that the search was conducted pursuant to a valid and properly obtained consent. Shortly thereafter, Parrish entered an guilty plea pursuant to *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970). The circuit court accepted his plea and entered a judgment accordingly. Parrish was sentenced to one year in prison, probated for two years with the requirement that he abide by the recommendations in the PSI report. The final judgment was entered June 6, 2005.

Exactly one year later, Parrish filed two *pro se* motions, the first to vacate the judgment pursuant to CR 60.02 and RCr 11.42 and the second, for an evidentiary hearing. Collectively, he argued that the deputies presented false evidence at the suppression hearing, that they committed fraud in lying about the existence of evidence, and that his attorney was ineffective. In support, he offered new evidence in the form of an audio cassette of the police dispatch from the day of the search.

In its response, the Commonwealth argued that an illegal search and seizure cannot form the basis for post-conviction relief. The circuit court denied Parrish's motions, holding that a search must be challenged at the trial court level and any adverse ruling appealed. Although Parrish challenged the search, he failed to appeal the circuit court's ruling. Furthermore, the circuit court concluded that there was no basis for Parrish's ineffective assistance of counsel claim, noting that his attorney diligently sought to suppress the evidence and negotiated the minimum punishment for his offense. The circuit court also held that there was no need to conduct an evidentiary hearing, as the

record, including the earlier evidentiary hearing, was sufficient to allow the court to decide the issues raised in the motions. This appeal followed.

On appeal, Parrish agrees that the circuit court did not commit any error in denying his initial motion to suppress. He continues, however, to argue that the court made the decision based upon perjured and fraudulent testimony of the deputies and that it refused to consider the newly discovered evidence he submitted or issues of ineffective assistance of counsel. In response, the Commonwealth asserts that the circuit court did not abuse its discretion in denying Parrish's motions.

We shall first address Parrish's RCr 11.42 argument, which we hold must fail because Parrish has served out the term of his probated sentence. Pursuant to RCr 11.42(1):

A prisoner in custody under sentence or **a defendant on probation**, parole or conditional discharge who claims a right to be released on the ground that the sentence is subject to collateral attack may at any time proceed directly by motion in the court that imposed the sentence to vacate, set aside or correct it. (Emphasis added.)

In *Wilson v. Commonwealth*, 403 S.W.2d 710, 712 (Ky. 1966), the former Court of Appeals described RCr 11.42 as a “procedural remedy designed to give a convicted prisoner a direct right to attack the conviction under which he is being held.” Earlier, the same court held that, “RCr 11.42 does not provide, expressly or by implication, for the review of any judgment other than the one or ones pursuant to which the movant is being held in custody.” *Sipple v. Commonwealth*, 384 S.W.2d 332, 332 (Ky. 1964). We note that in the amended version of RCr 11.42(1) now in effect, the Legislature extended the

reach of the rule to permit those who are on probation, parole or conditional discharge to seek relief under the rule. In this case, Parrish was sentenced on June 6, 2005. Although he was still on probation when he filed his motion, that two-year period of probation has now ended. Therefore, Parrish may no longer seek relief pursuant to RCr 11.42, and we decline to review any issues raised under that Rule.

Next, we shall address the issues Parrish raised pursuant to CR 60.02, which survived the successful completion of his probated sentence. As he did below, Parrish argues that the deputies committed perjury and fraud in relation to their testimony about the “knock and talk”, which he claims is proven by the audio recording of the police dispatch. He states that the trial court misconstrued his argument, in that he was not contesting the actual suppression ruling, but rather the deputies' conduct that led to the ruling. The Commonwealth asserts that Parrish failed to establish any extraordinary grounds justifying CR 60.02 relief. We review such rulings for abuse of discretion.

Fortney v. Mahan, 302 S.W.2d 842, 843 (Ky. 1957); *White v. Commonwealth*, 32 S.W.3d 83, 86 (Ky.App. 2000).

We agree with the Commonwealth that Parrish is not entitled to CR 60.02 relief. The law of this Commonwealth is clear that an illegal search and seizure is not a proper basis for such relief. *Carter v. Commonwealth*, 450 S.W.2d 257 (Ky. 1970); *Stidham v. Commonwealth*, 444 S.W.2d 110 (Ky. 1969); *Wadsworth v. Commonwealth*, 505 S.W.2d 28 (Ky. 1968); *Dupin v. Commonwealth*, 404 S.W.2d 280 (Ky. 1966). While Parrish would urge this Court to decide that this issue has nothing to do with the circuit

court's ruling on the motion to suppress, in actuality it has everything to do with it. Parrish is attempting to attack the credibility of the deputies who testified at the suppression hearing and whose testimony ultimately led to the denial of the motion to suppress. We perceive no abuse of discretion in the circuit court's decision to deny Parrish's motion for CR 60.02 relief or to do so without an evidentiary hearing, as the record was sufficient to allow it to review the issues he raised in his motion.

For the foregoing reasons, the order of the Franklin Circuit Court denying Parrish's motions for CR 60.02 and RCr 11.42 relief is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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