

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001785-MR

CHARLES SCOTT

APPELLANT

v. APPEAL FROM BOYLE CIRCUIT COURT
HONORABLE DARREN W. PECKLER, JUDGE
ACTION NO. 05-CR-00021

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * **

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

KNOPF, SENIOR JUDGE: Appellant, Charles Scott, pled guilty to third-degree burglary, theft by unlawful taking over \$300, and leaving the scene of an accident. The Boyle Circuit Court sentenced Scott to a total of two years' imprisonment on October 24, 2005. The trial court credited Scott with the 104 days he spent in custody prior to the commencement of his sentence. On June 26, 2006, Scott filed a motion pursuant to RCr

11.42 alleging that the sentence did not reflect the correct amount of credit for time

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.

served. The trial court denied the motion without an evidentiary hearing. This appeal follows.

The Commonwealth correctly notes that the issue of credit for time served is properly presented upon a motion pursuant to CR 60.02, rather than RCr 11.42. *Duncan v. Commonwealth*, 614 S.W.2d 701 (Ky.App. 1980). RCr 11.42 does not permit convicted defendants to try or retry “issues which could and should have been raised in the original proceedings when the competency, adequacy, and effectiveness of his own counsel are not in good faith questioned, and where the grounds of his motion are matters which must have been known to him at the time of trial.” *Id.* at 702 (quoting *Bronston v. Commonwealth*, 481 S.W.2d 666, 667 (Ky. 1972)). Scott is not challenging his sentence per se, but rather the extent of time he should be credited. Therefore, he is bound by the provisions of CR 60.02. *Id.* However, because Scott filed his motion within one year from his final judgment as required by CR 60.02 and to avoid further unnecessary litigation on this issue, we will consider the merits of his appeal as if it had been properly presented.

Relief under CR 60.02 is an extraordinary remedy left to the discretion of the trial court. *Gross v. Commonwealth*, 648 S.W.2d 853 (Ky. 1983). “Before the movant is entitled to an evidentiary hearing, he must affirmatively allege facts which, if true, justify vacating the judgment and further allege special circumstances that justify CR 60.02 relief.” *Id.* at 856. Scott has not alleged such circumstances. He does not specify how much credit he is allegedly entitled to beyond the bare assertion that he

“languished considerably longer than the time credited.” Moreover, this alleged error was known to Scott at the time of sentencing. Finally, Scott's inmate record card clearly demonstrates that he was credited with the correct amount of time served.

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

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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