RENDERED: FEBRUARY 1, 2008; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001999-MR

STEPHEN L. GRIDER — APPELLANT

v.

APPEAL FROM MONROE CIRCUIT COURT
HONORABLE EDDIE C. LOVELACE, JUDGE
ACTION NOS. 98-CR-00029, 98-CR-00030,
98-CR-00049, & 98-CR-00056

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; ACREE, JUDGE; HENRY,[1] SENIOR JUDGE.

HENRY, SENIOR JUDGE: Stephen L. Grider brings two issues to our attention in a *pro se* appeal from the denial of his motion seeking to vacate his twenty-year sentence of imprisonment after his plea of guilty. We find no error and affirm the decision of the Monroe Circuit Court.

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

This is Grider's second motion pursuant to Kentucky Rules of Civil Procedure (CR) 60.02. We previously affirmed the circuit court's denial of his first CR 60.02 motion in the unpublished case of *Grider v. Commonwealth,* 2004-CA-001054-MR, 2005 WL 3249414 (Ky.App. Rendered December 2, 2005) where the facts of the case were summarized as follows:

> Appellant was indicted by the Monroe County Grand Jury upon one count of first-degree burglary, first-degree robbery, first-degree wanton endangerment, kidnapping, receiving stolen property over three hundred dollars and second-degree escape. Appellant entered a guilty plea. On February 12, 2001, the Monroe Circuit Court entered a Judgment and Sentence on Plea of Guilty. Appellant was sentenced to twenty years' imprisonment.

Grider now brings two issues for our review: first, whether the trial court abused its discretion when it allowed him to enter a plea of guilty; and second, whether there was a double jeopardy violation when Grider entered a plea of guilty to the charges of robbery and wanton endangerment and was sentenced based upon both crimes.

The Department of Public Advocacy was initially appointed to represent Grider in this appeal. After a review of the record, the Department moved to be relieved from the case, indicating that the appeal was "not a proceeding that a reasonable person with adequate means would be willing to bring at his own expense." KRS 31.110(2)(c). Grider then proceeded with this appeal *pro se*.

A judgment may be vacated or corrected based upon "facts or grounds, not appearing on the face of the record and not available by appeal or otherwise, which were

not discoverable until after rendition of the judgment without fault of the parties seeking relief." *Barnett v. Commonwealth,* 979 S.W.2d 98, 101 (Ky. 1998)(internal citation omitted). Relief pursuant to CR 60.02 "is not a separate avenue of appeal to be pursued in addition to other remedies." *McQueen v. Commonwealth,* 948 S.W.2d 415, 416 (Ky. 1997).

Although Grider attempts to raise an issue in this CR 60.02 proceeding to the effect that his attorney "failed to hold the Commonwealth responsible," he has not claimed ineffective assistance of counsel pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42. Allegations that counsel provided ineffective assistance may not be raised for the first time by way of CR 60.02. *See Gross v. Commonwealth,* 648 S.W.2d 853, 856 (Ky. 1983). Our own review of the record does, however, indicate that the trial judge reviewed the entire matter with Grider prior to accepting the guilty plea. The colloquy covered in appropriate detail the facts, options and rights related to Grider's plea of guilty. We are convinced that Grider entered his guilty plea in a knowing and intelligent manner. Nothing in the record and nothing present in Grider's latest arguments sways us from that opinion. We accord great deference to decisions of the trial court on appeal, and we will not overturn those decisions except for a showing of abuse of discretion. *Brown v. Commonwealth,* 932 S.W.2d 359, 362 (Ky. 1996). The circuit court did not abuse its discretion in this matter.

Grider next asks us to review what he terms a double jeopardy violation. He argues that a single act comprised the basis for the robbery and wanton endangerment

charges and that, given the fact of this case, wanton endangerment is a lesser included offense and should not have been used to prosecute him. We disagree. The record reveals that Grider was sentenced to serve ten years for the robbery. He was also sentenced to serve three years for the charge of wanton endangerment, and those sentences were ordered to run concurrently. From a practical standpoint, Grider is not serving a single moment of additional time for the wanton endangerment conviction.

The applicable rule in our double jeopardy analysis was specified in *Blockburger v. United States,* 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306 (1932), holding that

> where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not.

A person is guilty of robbery in the first degree "when, in the course of committing theft, he uses or threatens the immediate use of physical force upon another person with intent to accomplish the theft,"and he is "armed with a deadly weapon" or "uses or threatens the use of a dangerous instrument upon any person who is not a participant in the crime." KRS 515.020(1). A person is guilty of wanton endangerment in the first degree "when, under circumstances manifesting extreme indifference to the value of human life, he wantonly engages in conduct which creates a substantial danger of death or serious physical injury to another person." KRS 508.060.

Robbery requires that a theft is being committed. Wanton endangerment does not. Wanton endangerment requires circumstances manifesting extreme indifference to the value of human life and wanton conduct which creates a substantial danger of death or serious physical injury. Robbery does not. In this case, Grider pointed a loaded gun at the victim. That wanton conduct created a substantial risk of death or serious physical injury. Our own review of the record indicates that Grider did in fact fire the weapon. The fact that the same weapon was used to intimidate the victim during the robbery does not cause wanton endangerment to be a lesser included crime as Grider argues. There were two distinct crimes. Each charge requires an element of proof that the other does not. Double jeopardy is not implicated in this case.

There was no error. The decision of the Monroe Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Stephen L. Grider, *pro se*
Fedonia, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Robert E. Prather
Assistant Attorney General
Frankfort, Kentucky