

RENDERED: JANUARY 18, 2008; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000421-MR

JEFFREY RUSSELL

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE GREGORY M. BARTLETT, JUDGE
ACTION NO. 02-CR-00070

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: DIXON, STUMBO AND WINE, JUDGES.

WINE, JUDGE: Jeffrey Russell appeals, *pro se*, from an order of the Kenton Circuit Court denying his motion for relief pursuant to CR 60.02. Finding no error, we affirm.

This case has a somewhat lengthy procedural history. In December of 1998, Russell seriously injured his then two-month-old daughter, K.R. Russell was indicted for criminal abuse in the first degree. He was released on bond on the condition he appear on May 8, 2001, for a pretrial hearing. After Russell failed to appear at the hearing and was arrested a few months later in Florida, he was indicted by a superseding indictment on the

additional charges of bail jumping in the first degree and assault in the first degree (relative to K.R.'s injuries). Russell pled guilty to the assault and bail jumping charges on June 28, 2002, and received a total sentence of eleven years. The trial court entered judgment on August 1, 2002, and sentenced Russell to eleven years in the penitentiary.

In his first post-conviction motion, Russell filed an RCr 11.42 motion asserting that his trial counsel was ineffective during the guilty plea proceedings. The trial court denied his motion on October 1, 2003. Russell appealed to this Court which affirmed the trial court's denial of his motion on May 6, 2005. The Kentucky Supreme Court denied discretionary review on August 17, 2005.

On December 20, 2006, Russell filed a second post-conviction motion, this time under CR 60.02, claiming that his guilty plea was not knowing, voluntary, and intelligent. On January 23, 2007, the trial court denied said motion finding that it was successive. This appeal followed.

On appeal, Russell argues he is entitled to relief because his guilty plea was not entered into voluntarily, knowingly, and intelligently. Russell also contends that he was entitled to an evidentiary hearing and appointment of counsel for his post-conviction motions.

CR 60.02 "allows a judgment to be corrected or vacated based upon facts or grounds, not appearing on the face of the record and not available by appeal or otherwise, which were not discovered until after rendition of judgment without fault of the parties seeking relief." *Barnett v. Commonwealth*, 979 S.W.2d 98, 101 (Ky. 1998), *quoting*

Davis v. Home Indemnity Company, 659 S.W.2d 185, 188 (Ky. 1983). CR 60.02 is not intended as an additional opportunity to relitigate the same issues that could “reasonably have been presented by direct appeal or RCr 11.42 proceedings.” See *McQueen v. Commonwealth*, 948 S.W.2d 415, 416 (Ky. 1997), *cert. denied*, 521 U.S. 1130, 117 S. Ct. 2535, 138 L. Ed. 2d 1035 (1997), *quoting* RCr 11.42(3). In order to be eligible for CR 60.02 relief, the movant must demonstrate why he is entitled to extraordinary relief. *Gross v. Commonwealth*, 684 S.W.2d 853, 856 (Ky. 1983). Moreover, for a movant to receive 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.*

“The standard of review of an appeal involving a CR 60.02 motion is whether the trial court abused its discretion.” *White v. Commonwealth*, 32 S.W.3d 83, 86 (Ky.App. 2000); *Brown v. Commonwealth*, 932 S.W.2d 359, 361 (Ky. 1996). Therefore, we will affirm the lower court’s decision unless there is a showing of some “flagrant miscarriage of justice.” *Gross*, 684 S.W.2d at 858. Further, where the appellant’s motion is merely one of successive motions only stating grounds that were raised or could have been raised in the prior motion, denial of the motion will not be reviewed on appeal. *Hampton v. Commonwealth*, 454 S.W.2d 672 (Ky. 1970).

Specifically, Russell contends, as he did in his RCr 11.42 motion, that his trial counsel failed to protect his liberty interest with effective pretrial motions and that his counsel failed to properly conduct an independent investigation outside of the

Commonwealth's discovery. This Court has already addressed these issues in reviewing Russell's RCr 11.42 motion. Therefore, we will not review these issues again.

Again, Russell presents no new arguments or facts in his CR 60.02 motion that were not already addressed by this Court. Accordingly, we affirm the Kenton Circuit Court's denial of Russell's CR 60.02 motion.

ALL CONCUR.

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