

Commonwealth Of Kentucky
Court of Appeals

NO. 2007-CA-000523-MR

JAMES HIGHTOWER

APPELLANT

v. APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE R. JEFFREY HINES, JUDGE
ACTION NO. 03-CR-00342

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: COMBS, CHIEF JUDGE; ACREE AND THOMPSON, JUDGES.

ACREE, JUDGE: James Dale Hightower appeals an order of the McCracken Circuit Court denying his motion pursuant to Kentucky Rules of Civil Procedure (CR) 60.02 to vacate his judgment of conviction. Because we find no error, we affirm the trial court's denial of Hightower's motion.

On September 17, 2003, a McCracken County grand jury indicted Hightower on one count each of first-degree attempted rape, kidnapping, and being a persistent felony offender in the second degree (PFO II). Hightower subsequently entered a plea

of guilty to these charges without benefit of an agreement with the Commonwealth. On February 25, 2004, the trial court sentenced Hightower to 10 years for attempted rape and 20 years for kidnapping, enhanced to life imprisonment by virtue of his status as a PFO II.

On October 29, 2004, Hightower filed a motion in the trial court seeking to set aside his conviction pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42. The trial court denied the motion in an order entered November 19, 2004. This Court affirmed that ruling. (*Hightower v. Commonwealth*, No. 2004-CA-002543-MR).

On January 23, 2007, just short of three years after his sentencing, Hightower filed a motion pursuant to CR 60.02 challenging the constitutionality of his conviction. In reality, Hightower was challenging the sufficiency of the evidence available to support his convictions. On February 5, 2007, the McCracken Circuit Court entered an order denying his motion. He then took this appeal to bring the same challenges to us. His appeal fails for several reasons.

First, claims under CR 60.02 must be raised within one year under CR 60.02(a), (b), and (c), and for all other grounds within a reasonable time. Since there has been no change in the law or the facts relevant to his conviction since the day it was entered, it is impossible for this Court to deem the delay justifiable. It is untimely by almost two years.

Second, Hightower expressly waived any objection concerning the sufficiency of the evidence by voluntarily entering a plea of guilty. It is well-settled that a plea of guilty waives all defenses, other than that the indictment charged no offense. *Mattingly v. Commonwealth*, 878 S.W.2d 797, 798 (Ky.App. 1993).

A defendant who elects to unconditionally plead guilty admits the factual accuracy of the various elements of the offenses with which he is charged. By such an admission, a convicted appellant forfeits the right to protest at some later date that the state could not have proven that he committed the crimes to which he pled guilty.

Taylor v. Commonwealth, 724 S.W.2d 223, 225 (Ky.App. 1986).

Third, a CR 60.02 motion is not a substitute for appeal. An alleged error that reasonably could have been presented on direct appeal cannot be raised by a motion filed pursuant to CR 60.02. See *Cinnamon v. Commonwealth*, 455 S.W.2d 583, 584 (Ky. 1970); *McQueen v. Commonwealth*, 948 S.W.2d 415, 416 (Ky. 1997). Finally, CR 60.02 is not intended as an additional opportunity to re-litigate the same issues which were considered in an RCr 11.42 or other prior proceeding such as his prior petition for writ of *habeas corpus*. *Id.*

For the foregoing reasons, the order of the McCracken Circuit Court, denying Appellant's CR 60.02 motion is affirmed.

ALL CONCUR.

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