

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NOT TO BE PUBLISHED

# Commonwealth of Kentucky

## Court of Appeals

NO. 2007-CA-000645-MR

RICKY RANDALL CAUSEY

APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE MARY C. NOBLE, JUDGE  
ACTION NO. 03-CR-00131

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: STUMBO AND TAYLOR, JUDGES; HENRY,<sup>1</sup> SENIOR JUDGE.

HENRY, SENIOR JUDGE: Ricky Randall Causey appeals pro se from an order of the Fayette Circuit Court which denied his motion to vacate sentence and judgment pursuant to Kentucky Rules of Civil Procedure (CR) 60.02(e) and (f). Because the motion is both procedurally barred and without merit, we affirm.

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<sup>1</sup> Senior Judge Michael 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.

Causey was indicted for theft by unlawful taking over \$300, and for being a persistent felony offender in the first degree. On February 28, 2003, he entered into a plea agreement. The Commonwealth agreed that, in exchange for a plea of guilty, it would recommend that Causey receive a sentence of one year on the theft charge, enhanced to ten years by the PFO charge. On March 4, 2003, the Fayette Circuit Court accepted and entered a judgment on the guilty plea.

At the sentencing hearing, which was held on March 21, 2003, Causey's attorney urged the court to grant Causey probation. After listening to his arguments, the circuit judge proposed a different sentence from that contained in the plea agreement. Under the court's proposal, Causey would receive a sentence of one year on the theft charge, enhanced to fifteen years by the PFO charge, but he would be granted probation for five years if he displayed good behavior, refrained from violating the law and entered drug court. The final judgment and sentence of probation reflecting this arrangement was entered on March 26, 2003. Almost three years later, Causey's probation was revoked at a hearing on March 10, 2006, on the grounds that he had entered guilty pleas to two charges of receiving stolen property over \$300. An order revoking probation and committing Causey to the Department of Corrections was entered on March 15, 2006.

On June 1, 2006, Causey filed a pro se motion to vacate the judgment of conviction and sentence pursuant to CR 60.02(e) and (f). As grounds for this motion, Causey claimed that he had received ineffective assistance of counsel on two occasions: first, when he was counseled to enter the guilty plea and second, when his counsel failed

to file a motion for shock probation following the revocation hearing. He also alleged that the circuit judge improperly insinuated herself into the plea bargaining process when she proposed probation and a sentence of fifteen years, thereby violating his constitutional rights.

We address first the propriety of using CR 60.02 to challenge the judgment in question. We agree with the Commonwealth that a motion pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42 could and should have been used to raise these issues.

The structure provided in Kentucky for attacking the final judgment of a trial court in a criminal case is not haphazard and overlapping, but is organized and complete. . . . CR 60.02 . . . is for relief that is not available by direct appeal and not available under RCr 11.42. The movant must demonstrate why he is entitled to this special, extraordinary relief.

*Gross v. Commonwealth*, 648 S.W.2d 853, 856 (Ky. 1983).

Under RCr 11.42, Causey was afforded three years from the date of entry of the final judgment on March 26, 2003, to raise his claim of ineffective assistance of counsel in regard to the guilty plea, and the judge's allegedly improper involvement in the plea bargaining process. He has provided absolutely no explanation as to why he failed to raise his claims during that period. Moreover, even if we show leniency to a prisoner proceeding pro se, and "do not impose on him the same standards as those applied to legal counsel[,]" *Commonwealth v. Miller*, 416 S.W.2d 358, 360 (Ky. 1967), under CR 60.02(e) and (f), claims must be brought within a "reasonable" time. Waiting for over three years to bring this motion when he was fully aware of what had occurred is not

reasonable. Obviously, Causey was more than willing to accept the circuit court's favorable offer of probation, and only initiated this action when, due to his own violations of the law, his probation was revoked. This action is therefore barred on procedural grounds. The only claim which is arguably timely is the one relating to his counsel's alleged failure to file a motion for shock probation, although as stated earlier this should have been raised in a motion made pursuant to RCr 11.42.

Causey has argued that we must nonetheless address the merits of his claims because the circuit court did so in its order denying his motion. We are not required to do so. "This Court will uphold a conviction where the trial court may have reached the correct result although for a wrong reason." *Hodge v. Commonwealth*, 116 S.W.3d 463, 470 (Ky. 2003). Furthermore, if we again adopt an attitude of leniency in light of his pro se status, and review these claims on the merits, we find no error in the circuit court's ruling.

In order to establish ineffective assistance of counsel, the movant must satisfy a two-part test by showing: (1) that counsel's performance was deficient and (2) that the deficiency resulted in actual prejudice affecting the outcome. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The two-prong Strickland test also applies to challenges to guilty pleas based on ineffective assistance of counsel. *See Hill v. Lockhart*, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). An appellant must show that the attorney's performance was deficient and that the attorney's ineffective performance affected the outcome of the plea process. *See id.* "In other

words, in order to satisfy the ‘prejudice’ requirement, the defendant must show that there is a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.” *Id. at 59; Sparks v. Commonwealth*, 721 S.W.2d 726, 728 (Ky.App. 1986).

Causey argues that the events to which he objects (the change in the sentence from ten to fifteen years and the court’s involvement in that change) occurred after he had signed the petition to enter the guilty plea, and after the guilty plea colloquy, rendering these inadequate proof of the voluntariness of his guilty plea. But the petition which he voluntarily executed stated as follows:

I also understand that if I plead “Guilty” the Court may impose the same punishment as if I had pleaded “Not Guilty”, stood trial and been convicted by a jury and that the Court need not accept any recommendations as to sentence that may be made by the Commonwealth; however, I understand that under RCr 8.10 I will be given the opportunity to withdraw my plea at the time of original sentencing if the Court does not accept the Commonwealth’s recommendation.

There is absolutely no indication that Causey was denied an opportunity to withdraw his guilty plea at the time of sentencing. He has also raised no credible argument as to how his counsel’s performance could possibly be considered deficient. Causey was facing a possible prison sentence of twenty years if he went to trial; he was willing to accept a sentence of ten years; and the court offered him the even more favorable prospect of probation for five years. If anything, his counsel would have been ineffective had he recommended against accepting the court’s proposal.

As to his contention that his counsel was ineffective for failing to file a motion for shock probation following the revocation proceedings, we can find no deficiency in counsel's performance in deciding such a motion would be futile when the court had just revoked Causey's probation.

Finally, Causey argues that the circuit court erred in failing to grant an evidentiary hearing on his motion. "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." *Gross*, 648 S.W.2d at 856. Causey has alleged neither facts nor special circumstances which would warrant an evidentiary hearing, and the circuit court did not therefore abuse its discretion in failing to grant one.

For the foregoing reasons, the order of the Fayette Circuit Court denying the motion made pursuant to CR 60.02 is hereby affirmed.

ALL CONCUR.

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