

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000846-MR

GARY DILLARD

APPELLANT

v.

APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE ANDREW C. SELF, JUDGE
ACTION NOS. 94-CR-00221 AND 94-CR-00433

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: TAYLOR AND THOMPSON, JUDGES; BUCKINGHAM,¹ SENIOR JUDGE.

TAYLOR, JUDGE: Gary Dillard brings this *pro se* appeal from an April 3, 2007, Order of the Christian Circuit Court denying his Ky. R. Civ. P. (CR) 60.02 motion to vacate his sentence of imprisonment. We affirm.

Appellant was convicted by a jury in January of 1995 upon one count of murder and three counts of first-degree wanton endangerment. He was ultimately

¹ Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

sentenced to life imprisonment on the murder charge and five years on each charge of wanton endangerment to be served concurrently with the life sentence. Appellant pursued a direct appeal to the Kentucky Supreme Court and his conviction was affirmed in Appeal No. 95-SC-166-MR, rendered on September 26, 1996. Subsequently, appellant filed several Ky. R. Crim. P. (RCr) 11.42 and CR 60.02 motions to vacate his sentence.² All of these motions were denied. Appellant then filed the instant CR 60.02 motion in the Christian Circuit Court again seeking to vacate his sentence. The circuit court summarily denied the CR 60.02 motion without an evidentiary hearing by order entered April 3, 2007. This appeal follows.

Appellant has raised four arguments for our review:

ARGUMENT I

TRIAL COURT ABUSED ITS DISCRETION AND DENIED APPELLANT THE PROCESS HE WAS DUE BY DENYING CR 60.02 RELIEF, ABSENT A FINDINGS [sic] OF FACTS [sic] AND CONCLUSION OF LAW.

ARGUMENT II

TRIAL COURT ABUSED ITS DISCRETION AND DENIED APPELLANT HIS SIXTH AMENDMENT RIGHTS, BY TRIAL COUNSEL RENDERING HIM INEFFECTIVE ASSISTANCE OF COUNSEL.

² The record reflects that since his conviction, appellant has filed at least one Ky. R. Crim. P. 11.42 motion and four Ky. R. Civ. P. 60.02 motions, including the instant case. The rulings on the previous motions denied the relief sought and all were appealed to this Court. Three of these appeals affirmed the trial court below and one appeal was dismissed as untimely.

ARGUMENT III

THE TRIAL COURT ABUSED ITS DISCRETION AND DENIED APPELLANT DUE PROCESS BY DENYING HIM A FAIR TRIAL WHEN THE COMMONWEALTH'S ATTORNEY WITHHELD FAVORABLE AND EXCULPATORY EVIDENCE FROM THE DEFENSE.

ARGUMENT IV

THE TRIAL COURT ABUSED ITS DISCRETION AND DENIED APPELLANT A FAIR TRIAL, WHEN THE COMMONWEALTH IMPROPERLY SHIFTED THE BURDEN TO THE DEFENSE, BY WITHHOLDING FAVORABLE EVIDENCE AND INFORMATION AND PERPETUATING FRAUD DURING THE PROCEEDINGS.

Appellant's Brief at i-ii.

It is well-established that a CR 60.02 motion is an extraordinary remedy. *Gross v. Com.*, 648 S.W.2d 853 (Ky. 1983). CR 60.02 is not a mechanism for relitigating issues that could have been raised by an RCr 11.42 motion or by direct appeal. *McQueen v. Com.*, 948 S.W.2d 415 (Ky. 1997). Thus, any issues that reasonably could have been presented in an RCr 11.42 motion or in a direct appeal are not proper grounds for relief under CR 60.02. *See Gross*, 648 S.W.2d 853. Moreover, to be entitled to an evidentiary hearing, a defendant must affirmatively allege facts that if true would entitle him to relief under CR 60.02.

In our case, appellant has previously filed numerous CR 60.02 and RCr 11.42 motions. The present CR 60.02 motion raises various issues including alleged deprivation of constitutional rights at trial, ineffective assistance of counsel, improper

conduct at trial by the Commonwealth Attorney, and other trial procedure errors. All of these issues could have been raised either on direct appeal or in a prior RCr 11.42 motion. Thus, we do not believe appellant has even remotely raised allegations of error that would justify relief under CR 60.02 at this time. Consequently, we hold that the circuit court properly denied appellant's CR 60.02 motion without an evidentiary hearing. *See Gross*, 648 S.W.2d 853.

For the foregoing reasons, the Order of the Christian Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Gary Dillard, *Pro Se*
Fredonia, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General

Perry T. Ryan
Assistant Attorney General
Frankfort, Kentucky