

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000930-MR

ROBERT ANTHONY ANDERSON

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE SUSAN SCHULTZ GIBSON, JUDGE
ACTION NO. 88-CR-000805

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** *

BEFORE: CLAYTON AND VANMETER, JUDGES; KNOFF,¹ SENIOR JUDGE.

VANMETER, JUDGE: Robert Anthony Anderson appeals from the Jefferson Circuit Court's order denying his motion for post-conviction relief pursuant to

¹ Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

RCr² 11.42 and CR³ 60.02. For the following reasons, we affirm.

As a result of a search of their home pursuant to a search warrant, Anderson and his brother were both indicted for sale or possession with intent to sell marijuana and trafficking in a controlled substance (cocaine). Anderson ultimately pled guilty to the charges and was sentenced in November 1988 to five years' imprisonment, probated for five years. The charges against his brother were subsequently dismissed. In any event, over eight years after being sentenced, Anderson filed a motion for post-conviction relief pursuant to CR 60.02 alleging that he had been indicted by an improperly-selected grand jury. The circuit court denied Anderson's motion, and this court affirmed that decision on appeal.

In August 2003, over six years after his first motion for post-conviction relief, and nearly fifteen years after he was sentenced, Anderson filed a second motion for post-conviction relief, pursuant to RCr 11.42 and CR 60.02, which is the subject of the matter *sub judice*. The circuit court denied Anderson's motion in January 2005, and Anderson subsequently moved the court to set aside its 2005 order on the ground that it was not properly entered. In April 2007, the circuit court denied Anderson's motion to set aside its 2005 order. However, having found that the order had never been properly entered, the circuit court ordered its entry. This appeal followed.

²

² Kentucky Rules of Criminal Procedure.

³ Kentucky Rules of Civil Procedure.

Anderson argues that the circuit court erred by failing to hold an evidentiary hearing regarding the allegations in his motion for post-conviction relief. To the extent that Anderson based his motion upon RCr 11.42, we disagree.

RCr 11.42(1) directs that in order to proceed under the rule, one must be “[a] prisoner in custody under sentence or a defendant on probation, parole or conditional discharge[.]” Here, since Anderson was released from supervision under probation on December 31, 1991, he was not eligible to proceed under RCr 11.42 when he filed his motion in August 2003. Accordingly, the circuit court did not err by failing to hold an evidentiary hearing in that regard.

Next, Anderson argues that the circuit court erred by denying his motion for post-conviction relief insofar as he proceeded under CR 60.02. We disagree.

As is applicable here, CR 60.02 permits a court to relieve a party from a final judgment or order when there has been a “fraud affecting the proceedings, other than perjury or falsified evidence;” or for “any other reason of an extraordinary nature justifying relief.” A motion made based upon these grounds “shall be made within a reasonable time[.]” CR 60.02.

Anderson’s affidavit asserts that at his brother/co-defendant’s suggestion, the two retained the same attorney, Hollis Searcy, to represent them regarding the criminal charges. Searcy had previously represented Anderson’s brother regarding several other criminal charges. Anderson states that while both

he and his brother signed waivers regarding Searcy's multiple representation, the circuit judge was nevertheless "quite concerned about what he perceived to be a conflict of interest in Mr. Searcy representing" both brothers. Indeed, the court's calendar reflects that the "Court admonishes defense counsel as to representing both deft. requests bar ruling. Pass all motions to 8/12/88 @ 9:30 for hearing."

Thereafter, Searcy allegedly informed Anderson that while he was going to withdraw from representing him in the matter *sub judice*, he would continue to represent Anderson's brother in the matter, as well as Anderson in two other criminal matters which had arisen in the interim. Anderson asserts that Searcy referred the matter *sub judice* to his former associate and friend, J. Michael Smithers, who substituted as Anderson's counsel. Nevertheless, Anderson alleges that it was

Searcy who continued to advise me on this case, while he continued his representation of me on the other pending cases. He made all of the financial arrangements, including paying Mr. Smithers, and negotiated my plea with David Fuller, the Assistant Commonwealth Attorney.

Anderson contends that he ultimately pled guilty at the "urging" of his brother and Searcy, who guaranteed Anderson that he would get probation while his older brother, a convicted felon, would "be spared from going to jail for ten years."

Anderson essentially argues that he was afforded the ineffective assistance of counsel, and that Searcy and/or Smithers perpetrated a fraud on the court by leading the court to believe that Smithers had substituted as counsel when

in fact Searcy was actively representing him. Anderson also argues that he should be permitted to withdraw his guilty plea as a result of these alleged irregularities. However, given that the facts upon which Anderson bases his motion were in place at the time he pled guilty, we hold that his 2003 motion for CR 60.02 relief was not filed within a reasonable time when it was filed over six years after his first motion for post-conviction relief, and nearly fifteen years after he was sentenced. As such, the trial court did not err by failing to grant his motion for relief.

The Jefferson Circuit Court's order is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

James C. Nicholson
Louisville, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Gregory C. Fuchs
Assistant Attorney General
Frankfort, Kentucky