

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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001505-MR

CHESTER DUNCAN

APPELLANT

v.

APPEAL FROM BELL CIRCUIT COURT
HONORABLE JAMES L. BOWLING, JUDGE
ACTION NO. 90-CR-00087

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION AFFIRMING

** ** * ** * ** *

BEFORE: CLAYTON AND DIXON, JUDGES; GRAVES, SENIOR JUDGE.¹

GRAVES, SENIOR JUDGE: Chester Duncan appeals from an order of the Harlan Circuit Court denying his motion for post-conviction relief. We affirm.

Duncan was convicted by a jury in 1991 of one count of first-degree sodomy and two counts of first-degree sexual abuse against his minor step-children. He

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

was sentenced to a total of 50 years imprisonment, and the Supreme Court of Kentucky denied any relief on his direct appeal.

In May 1993, Duncan filed a motion for post-conviction relief pursuant to RCr² 11.42 in which he alleged that he received ineffective assistance of counsel during the trial proceedings. The motion was ultimately denied by the trial court, and the trial court's decision was affirmed by this Court upon appeal. *See* Case No. 96-CA-000524-MR.

In October 1998 Duncan filed a motion for post-conviction relief pursuant to CR³ 60.02 in which he alleged various irregularities in connection with the prior RCr 11.42 proceedings. The motion for relief was denied, and the trial court's decision was affirmed by this Court in Case No. 2001-CA-000956-MR. *See Duncan v. Commonwealth*, 2003 WL 22024889 (Ky.App. Aug. 23, 2003).

On June 7, 2005, Duncan filed the present motion captioned “Motion for Correction of Errors Under - 61.02 The Substantial Error Rule, and RCr 10.26 for a New Trial.” On April 23, 2007, Duncan filed a motion captioned “Motion for New Trial Under RCr 10.26 Palpable Error.” On July 10, 2007, the trial court entered an order denying the motions. This appeal followed.

We agree with the circuit court that Duncan's motions raise issues which could have been or should have been litigated in the appellant's prior post-conviction

² Kentucky Rules of Criminal Procedure.

³ Kentucky Rules of Civil Procedure.

proceedings, and thus are not reviewable in the present proceedings. In *Gross v. Commonwealth*, 648 S.W.2d 853 (Ky. 1983), the Kentucky Supreme Court explained that the structure of post-conviction review is not haphazard or overlapping. *Id.* at 856. It held that a criminal defendant must first bring a direct appeal when available, then utilize RCr 11.42 by raising every error of which “he is aware, or should be aware, during the period when this remedy is available to him.” *Id.* at 857. CR 60.02 may then be used in extraordinary circumstances not otherwise subject to relief by direct appeal or by way of RCr 11.42 . *Id.* at 856.

In the present appeal Duncan raises issues relating to (1) the trial court's failure to give a lesser included offense to the sodomy charge; (2) the trial court's failure to instruct the jury upon concurrent or consecutive sentencing; (3) ineffective assistance of counsel for failure to object to the foregoing; and (4) the lack of specificity in the indictment as to when the criminal conduct occurred. Each of these arguments could reasonably have been raised in either the prior RCr 11.42 proceedings or the prior CR 60.02 proceeding. As such, these grounds for relief are not properly brought in the present motions for post-conviction relief under CR 61.02 and RCr 10.26 (which are not proper rules under which to collaterally attack a judgment in any event).

For the foregoing reasons the judgment of the Harlan Circuit Court is affirmed.

ALL CONCUR.

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