

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-002145-MR

THOMAS LEE SHIFFLETT

APPELLANT

v.

APPEAL FROM BOYLE CIRCUIT COURT
HONORABLE STEPHEN M. SHEWMAKER, JUDGE
ACTION NO. 80-CR-000097

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

* * * * *

BEFORE: BUCKINGHAM, KNOX, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: Thomas Lee Shifflett (Shifflett) appeals pro se from an order of the Boyle Circuit Court entered on August 13, 1997, denying his motion for relief brought pursuant to Kentucky Rule of Civil Procedure (CR) 60.02(e) and (f). After reviewing the record and the applicable law, we affirm.

On August 3, 1980, Shifflett and an accomplice went to the residence of Joe Horky to burglarize it. After arriving at the residence, the two defendants broke in and stole several items including a rifle and carrying case, silverware, binoculars, and a knapsack. They took the items to a wooded area near the house and waited several hours. Eventually, Joe Horky

returned home and discovered the burglary. When he went outside in search of the perpetrators, he discovered Shifflett and began to exchange gunfire with him. During the gun battle, Shifflett shot and killed Horky. Shifflett then took Horky's wallet, some money, and a handgun from the lifeless body.

In October 1980, the Boyle County Grand Jury indicted Shifflett for murder in the first degree, robbery in the first degree, burglary in the first degree, and theft by unlawful taking over \$100. Over the next several weeks, Shifflett's attorney engaged the prosecutor in plea negotiations.

On October 23, 1981, Shifflett changed his not guilty plea and entered a plea of guilty pursuant to a plea agreement with the Commonwealth to an amended charge of manslaughter in the first degree, robbery in the first degree, burglary in the first degree, and theft over \$100. Under the plea agreement, the Commonwealth recommended sentences of twenty (20) years for manslaughter, ten (10) years for robbery, ten (10) years for burglary, and five (5) years for theft, with the sentences for manslaughter, robbery, and burglary to run concurrently with each other but consecutively to the sentence for theft, for a total sentence of twenty-five (25) years. In December 1981, the trial court entered a judgment on the guilty plea and sentenced Shifflett to twenty-five (25) years in prison consistent with the Commonwealth's recommendation and the plea agreement.

In January 1985, Shifflett filed a motion to alter, amend or vacate judgment pursuant to Kentucky Rule of Criminal

Procedure (RCr) 11.42. In this motion, Shifflett raised several issues challenging his guilty plea, including failure of the trial judge to fully inform him of the charges and to establish a factual basis for the plea, an alleged double jeopardy violation related to charging him with robbery, burglary, and theft arising from the same incident, and ineffective assistance of counsel related to pretrial procedures and an alleged erroneous promise by his attorney on the sentence he would receive. The trial court denied this motion. On appeal, this Court affirmed the trial court's denial of the motion, stating all of Shifflett's complaints clearly were refuted by the record. Shifflett v. Commonwealth, 85-CA-1000-MR (unpublished opinion rendered February 28, 1986). Shifflett did not seek discretionary review of this Court's opinion by the Kentucky Supreme Court.

In August 1997, Shifflett filed the current motion for relief pursuant to CR 60.02(e) and (f). In the motion, Shifflett sought to have the conviction and sentence for theft under Indictment No. 80-CR-097 vacated on the grounds that double jeopardy under the Fifth Amendment of the United States Constitution and Section 13 of the Kentucky Constitution barred a conviction for both robbery and theft. The trial court denied the motion without a hearing. This appeal followed.

Shifflett raises two arguments, both of which represent variations on the same theme involving a double jeopardy violation related to his convictions for robbery in the first degree and theft over \$100. First, he contends that the trial

court erred by allowing him to plead guilty to both robbery and theft because convictions on both violated the Double Jeopardy Clause of the Fifth Amendment and Section 13. Second, he contends that he received ineffective assistance of counsel because his attorney allowed him to plead guilty to, and did not properly advise him about, the double jeopardy violation created by the plea to both robbery and theft. Both of these arguments are without merit.

Shifflett's CR 60.02 motion is procedurally barred. In Gross v. Commonwealth, Ky., 648 S.W.2d 853 (1983), the Kentucky Supreme Court established the requisite appellate procedure in criminal cases. The Court held that a defendant must first avail himself of RCr 11.42 when that remedy is available, and then utilize CR 60.02 only for issues that could not have reasonably been presented by way of RCr 11.42. Id. at 856-57. More recently, the Court said in McQueen v. Commonwealth, Ky., 948 S.W.2d 415, 416 (1997), cert. denied, ___ U.S. ___, 117 S. Ct. 2325, ___ L. Ed. 2d ___ (1997):

A defendant who is in custody under sentence . . . is required to avail himself of RCr 11.42 as to any ground of which he is aware, or should be aware, during the period when the remedy is available to him. Civil Rule 60.02 is not intended merely as an additional opportunity to relitigate the same issues which could "reasonably have been presented" by direct appeal or RCr 11.42 proceedings.

Shifflett has already brought an RCr 11.42 motion that even included a double jeopardy claim based on the same grounds as

those raised in the current CR 60.02 motion. Shifflett was aware of the double jeopardy issue and actually raised it in the prior RCr 11.42, so he cannot raise it again in a CR 60.02 motion either directly or on the basis of an ineffective assistance of counsel claim. The trial court did not err in denying the CR 60.02 motion.

For the foregoing reasons, we affirm the order of the Boyle Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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