RENDERED: May 7, 1999; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-002339-MR

JOHN BRENTON PRESTON — APPELLANT

v.

APPEAL FROM JOHNSON CIRCUIT COURT
HONORABLE STEPHEN FRAZIER, JUDGE
ACTION NO. 00-0-04824

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: GUDGEL, CHIEF JUDGE; GUIDULGI AND SCHRODER, JUDGES.

GUIDUGLI, JUDGE. John Brenton Preston (Preston) appeals the September 2, 1997, order entered by the Johnson Circuit Court denying his CR 60.02 motion. We affirm.

On August 25, 1964, appellant and Melvin Caldwell (Caldwell) were indicted by the Johnson County Grand Jury for the June 6, 1964, armed robbery of George B. Blaton. Following a jury trial in Johnson Circuit Court on January 25-27, 1965, appellant and Caldwell were both found guilty as charged and sentenced to life in prison. The then Court of Appeals of Kentucky affirmed appellant's conviction in an opinion rendered June 10, 1966. Preston v. Commonwealth, Ky., 406 S.W.2d 405

(1966). Preston's petition for rehearing was denied and the United States Supreme Court denied his petition for writ of certiorari on February 13, 1967.

In 1975, the Kentucky General Assembly enacted the Penal Code which changed the maximum sentence for armed robbery from life imprisonment to twenty years. KRS 515.020. Appellant filed his first CR 60.02 motion for relief before the Johnson Circuit Court on January 18, 1989. In his twenty page motion, Preston requested the court "to reduce movant's [Preston's] present life sentence to the maximum twenty (20) years imprisonment permitted by law." After several continuations and delays, some of which were a result of Preston being granted parole then having his parole violated, a hearing on his CR 62.02 motion was held before the court on June 25, 1990. Thereafter, on December 13, 1990, the trial court entered an order denying appellant's CR 60.02 motion. In its one page order, the court stated:

> THE [sic] Court has conducted extensive research of the issues raised by appellant. Even though the Court agrees with the applicant that his years of confinement is "enough punishment" for the crime of which he was convicted, the Court is unable to discern any rule of law empowering the Court to terminate the applicant's sentence.

No appeal was taken from this order.

Preston was again paroled but that parole release was violated and he was returned to prison. Thereafter the parole board determined that Preston would not be eligible for parole and must serve out his life sentence. Appellant then filed another CR 60.02 motion seeking exceptional and extraordinary

relief. This motion was certified by appellant as being mailed to the Johnson County Commonwealth's Attorney on February 15, 1996. A letter dated February 18, 1997, from Preston to Vickie Rice, the Johnson County Circuit Clerk, references the "enclosed motion under Civil Rule 60.02" and seeks to have the motion filed in forma pauperis. It is unclear from the record when the clerk received the letter and the CR 60.02 motion; however, the motion was not officially entered into the court record until September 16, 1997. On that date (September 16, 1997), the trial judge, having been made aware that the original motion had not been file stamped, ordered the CR 60.02 motion be filed. This matter is noted and of importance in that appellant's CR 60.02 motion was denied by order of the Johnson Circuit Court on August 29, 1997 (entered September 2, 1997), approximately 2-3 weeks before the motion was officially "file stamped."

However, it should also be noted that on May 1, 1997, the record reflects Preston filed a motion to "amend and supplement pending motion for exceptional and extraordinary relief under civil rule 60.02 to include judicial consideration of the fifteen (15) issues and allegations attached and appended hereto." (emphasis added). Thereafter, on July 25, 1997, Preston filed a motion for default judgment in which he again references his February 1997 "motion for exceptional and extraordinary relief under CR 60.02." In this motion he alleges that by certified mail dated February 5, 1997, he forwarded his CR 60.02 pleading to the court and seeks relief under his pending

CR 60.02 motion. Appellant appeals the court order entered September 2, 1997, denying his CR 60.02 motion.

Before we begin our discussion of the issues it should be noted that appellant was appointed counsel to pursue this appeal. Appellant's appointed counsel timely filed her brief on March 18, 1998. Preston also filed an appellant's brief, pro se, on March 3, 1998. Each brief raises the same four separate issues; however, the supporting arguments vary in the briefs. We will first examine appellant's argument that the court's order entered September 2, 1997, is void because of the procedural defect of not having the original motion "file stamped" until after the order was entered.

Appellant first argues that because of the "error" by the clerk, he was denied "due process of law both substantively and procedurally." Appellant's counsel questions whether or not the trial court even had jurisdiction over the matter. Appellant's arguments on this issue are without merit. First, it should be noted that the original motion was in the file, it was just not "file stamped." This situation most likely occurred due to appellant's failure to pay the required filing fee. As such, the circuit clerk could not enter the motion at the time it was originally received. Thereafter, on February 18, 1997, appellant sent a letter to the clerk indicating his indigency and requesting he be permitted to pursue this action in forma pauperis. Although there is no court order in the file granting the motion, the record does reflect the May 1, 1997 "motion to amend", the July 25, 1997 "motion for default judgment", and the

August 25, 1997 "motion to supplement" all of which reference the original CR 60.02 motion were properly "file stamped." As such, one must assume appellant's motion was granted. Pursuant to CR 5.05(4) if the motion to proceed in forma pauperis is granted, any matter filed shall be considered filed on the date it was tendered. Finally, in his order the trial judge specifically stated that he is addressing and denying appellant's motion for "exceptional and extraordinary relief and (CR) 60.02." Later in the order the trial court states, "[o]nce again the Movant is before the Court with a (CR) 60.02 motion." There is no doubt that the trial court was specifically addressing Preston's CR 60.02 motion and that all appellant's issues and arguments were reviewed and addressed by the court. The fact that the motion was not "file stamped" was a clerical error which the court properly addressed once the omission was brought to its attention. CR 60.01. Even if we were to find that the trial court committed error (which we do not) in this matter, it would be considered harmless in that no substantive rights were violated and Preston had been afforded his full panoply of constitutional rights before the court denied his motion.

Appellant's next three arguments can be addressed at the same time. Preston contends that the trial court erred in denying his CR 60.02 motion in holding that there was no legal authority upon which to grant the sought after relief. In conjunction with this error, appellant argues that his life sentence constitutes cruel, excessive and unusual punishment and violates the equal protection clause. Specifically, appellant

argues that his constitutional rights under the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution and Section Two, Three and Seventeen of the Kentucky Constitution were violated. We do not agree.

Although Preston makes a very moving and sympathetic argument that he is being singled out and is the victim of an antiquated law and resulting punishment, the facts do not support his position. It is true that the law under which he was sentenced in 1965 was changed in 1975 to reduce the maximum penalty from life imprisonment to twenty (20) years. Preston may be the only individual who will serve out the life imprisonment sentence imposed over thirty years ago. However, the law and sentence is not the only reason for this situation. Preston's own subsequent actions are primarily responsible for his predicament. Appellant has been paroled at least six (6) times (the first being in 1971 prior to the new law being enacted, the last in 1996 after he filed his first CR 60.02) and each time he violated his parole and was returned to prison. Additionally, he has numerous violations while in prison which have subsequently caused him to lose his privilege to be reconsidered for parole again. The sentence he received was constitutional at the time it was imposed and has been determined to be constitutional by this state's highest court. (Most recently in Land v. Commonwealth, a to be published opinion rendered February 19, 1999, 98-SC-000427-TG). In Land, a case similar in that a pre-penal code life sentence was imposed for the criminal offense of rape, the Supreme Court stated, in part:

> On several occasions this Court has addressed the constitutionality of a life sentence of life without the possibility of parole for rape authorized by the former KRS 435.090. As noted by Appellant in his brief, the decision in Workman v. Commonwealth, Ky., 429 S.W.2d 374 (1968), held that the imposition of life without the possibility of parole for rape was unconstitutional when imposed upon a juvenile; and questioned the logic of authorizing such a sentence for a rape conviction but not for a murder conviction. Id. at 377. However, the opinion specifically upheld the validity of imposing such a sentence upon an adult offender. Id. Moreover, in cases subsequent to Workman, the Court has consistently held that the sentence of life without the possibility of parole for rape imposed prior to the institution of the penal code is constitutional. McDonald v. Commonwealth, Ky., 569 S.W.2d 134 (1978), cert. denied, 439 U.S. 1119 (1979); Green v. Commonwealth, Ky., 556 S.W.2d 684 (1977); and Fryrear v. Commonwealth, Ky., 507 S.W.2d 144 (1974). Both McDonald and Green were decided after the adoption of the penal code, which removed the authorization of a sentence of life without the possibility of parole for any offense.[1] The Sixth Circuit has also rejected the argument that the sentence of life imprisonment without the possibility of parole imposed under the former law violated the federal constitution. Moore v. Cowan, 560 F.2d 1298 (6th Cir. 1977), cert. denied, 435 U.S. 929 and 436 U.S. 960 (1978).

Preston's sentence is not the problem. Preston's actions on the date the robbery was committed and his continuous failure to comply with the laws of this Commonwealth thereafter are the reasons he is serving out his sentence.

Even if we were to address the issue of whether or not the trial court erred in denying appellant's motion, we find no

[1]Effective July 15, 1998, the legislature reinstated a sentence of life without the possibility of parole as an alternative sentence in cases in which the defendant qualifies for the death penalty. KRS 532.030(1).

basis to reverse. Essentially the judge concluded that "[t]he Court has once again researched the law and cannot find any law which will empower the court to terminate the Movant's [Preston's] sentence." Neither appellant nor his counsel cite any statutory or case law authority which supports their contentions. Appellant was properly sentenced under the law in effect at the time he committed the armed robbery and the subsequent adoption of the Kentucky Penal Code, which imposes a different penalty range for this act, does not render appellant's sentence cruel and unusual. In light of the crime committed and the potential punishment available at the time it can hardly be said that the "punishment in question is of such character as to shock the general conscience and to violate the principles of fundamental fairness." Workman v. Commonwealth, Ky., 429 S.W.2d 374, 378 (1968). The fact that Preston repeatedly violated (six times) the privilege of parole is the reason he may be the only individual still incarcerated on this type of pre-penal code violation.

More important to the review of this action is the fact that this is a successive CR 60.02 motion. As such, the lower court and this Court need not review the merits of appellant's arguments. Preston filed his first CR 60.02 motion in January 1989. At that time he essentially raised the same issues he addressed in his second CR 60.02 motion filed February 1997. The first motion was denied and appellant did not appeal. In his motion to supplement his pending CR 60.02 motion, appellant stated:

> Regarding the Court's erroneous construction of the specific relief the petitioner sought in his prior petition, petitioner did not request the Court to "terminate" the sentence, or void the 1964 conviction. Instead, the relief sought then is precisely the same as the relief sought now - not to terminate the sentence or void the conviction, but to enter a quiet and unpublicized order reducing petitioner's draconian life sentence to a term of twenty [or more] years which represents the maximum punishment that can presently be assessed in Kentucky against one convicted of robbery. (emphasis original).

Preston admits that the relief sought in each of his CR 60.02 motions is "precisely the same."

As the Commonwealth points out in its brief, the purpose of CR 60.02 is to:

> ...bring before the court that pronounced judgment errors in matter of fact which (1) had not been put in issue or passed on, (2) were unknown and could not have been known to the party by the exercise of reasonably diligence and in time to have been otherwise presented to the court, or (3) which the party was prevented from so presenting by duress, fear, or sufficient cause. Gross v. Commonwealth, Ky., 648 S.W.2d 853, 856 (1983); McQueen v. Commonwealth, Ky., 948 S.W.2d 415, 416 (1997). In summary, CR 60.02 is not a separate avenue of appeal to be pursued in addition to other remedies, but is available only to raise issues which cannot be raised in other proceedings. McQueen, supra.

CR 60.02 motions are not intended merely as an additional opportunity to re-litigate the same issues which "reasonably have been presented" by direct appeal. McQueen, 948 S.W.2d at 416. The purpose underlying this construction of CR 60.02 is to prevent the re-litigation of issues which either were or could have been litigated in a similar proceeding. Id.

CR 60.02 is not a separate avenue of appeal to be pursued in addition to other remedies; it is available only to raise issues which could not have been raised in other proceedings. Id. Additionally, the movant must demonstrate why he is entitled to this special, extraordinary relief. Id. In this case, it is clear from the record and from Preston's own admission that his motion for relief is an attempt to re-litigate these same issues considered by the trial court in his first CR 62.02 motion. Merely invoking the provision of CR 60.02 does not automatically provide Preston with a new forum in which to present those same arguments and allegations that were considered earlier and rejected. In Gross, supra, the Court held that a defendant cannot be afforded a "second bite of the apple" by filing successive post-conviction relief motions. The substance of Preston's second CR 60.02 motion is essentially the same as the first. We find no error in the trial court's denial of appellant's CR 60.02 motion.

For the foregoing reasons, the order of the Johnson Circuit Court is affirmed.

ALL CONCUR.

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