

Commonwealth Of Kentucky

Court Of Appeals

1998-CA-000783-MR

JOHN HARVEY TAYLOR

APPELLANT

v. APPEAL FROM ROCKCASTLE CIRCUIT COURT
HONORABLE DANIEL J. VENTERS, JUDGE
ACTION NO. 83-CR-00032

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

* * * * *

BEFORE: BUCKINGHAM, EMBERTON, AND SCHRODER, JUDGES.

BUCKINGHAM, JUDGE. John Harvey Taylor (Taylor) appeals from an order of the Rockcastle Circuit Court denying his motion to modify, amend or vacate his sentence brought pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42 and 13.04, Kentucky Rule of Civil Procedure (CR) 60.02, and Kentucky Revised Statutes (KRS) 532.070 and 532.110. We affirm.

On March 14, 1984, a jury convicted Taylor of murder and recommended a sentence of life in prison. At the conclusion of the trial, the court entered a document entitled Trial Verdict and Judgment describing the trial proceeding, setting out the

jury verdict, and postponing entry of a final judgment and sentence pending review of a presentence investigation report (PSI). On March 21, 1984, Taylor's attorney filed a motion for judgment notwithstanding the verdict (J.N.O.V.) and a motion for a new trial.

On April 6, 1984, Taylor appeared in circuit court with his attorney for the sentencing hearing. At that time, the trial judge afforded Taylor an opportunity to comment on the contents of the PSI and the imposition of sentence.¹ The trial court then sentenced Taylor to life in prison consistent with the jury's recommendation. In September 1985, the Kentucky Supreme Court affirmed the conviction on direct appeal in an unpublished opinion. Taylor v. Commonwealth, 84-SC-1045-MR (rendered September 5, 1985).

In September 1986, Taylor filed a post-conviction motion pursuant to RCr 11.42 challenging his conviction in which he raised several issues including ineffective assistance of counsel and the improper admission into evidence of several statements he had made to the police. In November 1986, the trial court denied the RCr 11.42 motion in an order addressing each of the issues presented in the motion. On June 12, 1987, this court affirmed the circuit court's denial of the RCr 11.42 motion. Taylor v. Commonwealth, 86-CA-2671-MR (unpublished).

On June 20, 1987, Taylor filed a motion for modification of sentence under KRS 532.070 seeking a reduction in

¹The hearing also included arguments on Taylor's motions for a J.N.O.V. and new trial.

his sentence. The trial court denied the motion as untimely stating that it no longer had jurisdiction. In October 1987, Taylor filed a motion to vacate the judgment pursuant to CR 60.02 based on newly-discovered evidence. The trial court summarily denied the CR 60.02 motion.

In May 1992, Taylor filed a second motion to vacate the judgment pursuant to CR 60.02, wherein Taylor again alleged that he had received ineffective assistance of counsel. On May 18, 1992, the trial court denied the motion because the issues raised in the motion had already been rejected by the Kentucky Supreme Court and Court of Appeals in their opinions on the earlier motions. On December 29, 1993, this court affirmed the order of the circuit court denying the motion because it was a successive motion that raised no new issues. Taylor v. Commonwealth, 92-CA-1442-MR (unpublished).

On January 16, 1998, Taylor filed a motion to modify, amend or vacate his sentence pursuant to RCr 11.42, RCr 13.04, CR 60.02, KRS 532.070, and KRS 532.110. In the motion, Taylor argued that the final judgment entered in April 1984 was void ab initio because it was entered outside a ten-day jurisdictional time period following the conviction. He also requested appointment of counsel and an evidentiary hearing. In a four-page order, the trial court denied the motion on both procedural and substantive grounds and also denied his request for appointment of counsel and an evidentiary hearing. This appeal followed.

In Gross v. Commonwealth, Ky., 648 S.W.2d 853 (1983), the Kentucky Supreme Court established the procedure for appellate review in criminal cases. The court stated that the structure for appellate review "is not haphazard and 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 should be aware, and utilize CR 60.02 only for extraordinary situations not otherwise subject to relief by direct appeal or by way of RCr 11.42. Id. More recently, in McQueen v. Commonwealth, Ky., 948 S.W.2d 415, 416, cert. denied, ___ U.S. ___, 117 S. Ct. 2535, ___ L. Ed. 2d ___ (1997), the supreme court reaffirmed the procedural requirements set out in Gross when it said:

A defendant who is in custody under sentence or on probation, parole or conditional discharge, 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. RCr 11.42(3); Gross v. Commonwealth, supra, at 855, 856. The obvious purpose of this principle is to prevent the relitigation of issues which either were or could have been litigated in a similar proceeding. . . . 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.

See also Commonwealth v. Gross, Ky., 936 S.W.2d 85, 88 (1997).

In the case sub judice, Taylor's current motion is procedurally barred under the successive motions principle. Taylor has brought a direct appeal and also has filed several

post-judgment motions under RCr 11.42, CR 60.02, and KRS 532.070. The current appeal involves his second RCr 11.42 motion and his third CR 60.02 motion. Taylor included a laundry list of court rules and statutes in an attempt to justify the trial court's exercise of jurisdiction over this collateral attack on his conviction. In any event, the issue presented in the current motion should have been raised in the initial RCr 11.42 motion or on direct appeal. In fact, this court found that a previous CR 60.02 motion by Taylor was procedurally barred as it was a successive motion. Thus, Taylor cannot utilize RCr 11.42 or CR 60.02 to circumvent established criminal appellate procedure and obtain repeated review of an issue he should have presented earlier.

In addition to the procedural bar, the trial court also dismissed the motion on the merits. We agree with the trial court that the final judgment was not void. Taylor's argument that the trial court lost jurisdiction to enter the April 1984 judgment and sentence because it occurred more than ten days after the jury convicted him on March 14, 1984, is simply in error.

A trial court generally does lose jurisdiction to modify a judgment after ten days. See, e.g., Commonwealth v. Marcum, Ky., 873 S.W.2d 207, 211 (1994); Silverburg v. Commonwealth, Ky., 587 S.W.2d 241, 244 (1979). However, this principle applies only to a substantive modification or amendment of a final judgment. Id. See also Commonwealth v. Gross, supra. A court retains jurisdiction to modify an interlocutory or non-

final judgment. Commonwealth v. Bailey, Ky., 259 S.W.2d 49, 50 (1953). The March 14 judgment merely dealt with the trial proceeding, including the jury's verdict. The jury's sentence recommendation is advisory and not binding on the trial court. See Wombles v. Commonwealth, Ky., 831 S.W.2d 172, 176 (1992); KRS 532.070. In addition, Taylor filed timely motions for J.N.O.V. and a new trial following the jury trial. The March 14 judgment or order was not intended to be and did not constitute a final judgment for purposes of applying the ten-day jurisdictional time limitation. Therefore, the trial court had jurisdiction to enter the April final judgment and sentence.

Finally, Taylor argues that the trial court erred by failing to conduct an evidentiary hearing and appoint counsel to represent him on the motion. As the Kentucky Supreme Court noted in the recent case of Wilson v. Commonwealth, Ky., 975 S.W.2d 901, 904 (1998), with respect to RCr 11.42, a movant is not automatically entitled to an evidentiary hearing. An evidentiary hearing is not required on an RCr 11.42 motion where the issues raised in the motion are refuted on the record, or where the allegations, even if true, would not be sufficient to invalidate the conviction. See also Sanborn v. Commonwealth, Ky., 975 S.W.2d 905, 909 (1998); Harper v. Commonwealth, Ky., 978 S.W.2d 311, 314 (1998). Furthermore, before a movant is entitled to a hearing on a CR 60.02 motion, "he must affirmatively allege facts which, if true, justify vacating the judgment and further allege special circumstances that justify CR 60.02 relief." Gross v. Commonwealth, 648 S.W.2d at 856.

Similarly, a person is not entitled to appointment of counsel for purposes of RCr 11.42 where the substantive claim is refuted on the face of the record or appointment of counsel would be futile. Commonwealth v. Stamps, Ky., 672 S.W.2d 336, 339 (1984); Maggard v. Commonwealth, Ky., 394 S.W.2d 893, 894 (1965). In addition, a movant has no entitlement to counsel on a CR 60.02 motion. Gross, 648 S.W.2d at 857. Taylor's allegation that the trial court lacked jurisdiction to issue the April 6 judgment is refuted on the record, and the motion clearly was procedurally barred; therefore, he was not entitled to either an evidentiary hearing or the appointment of counsel.

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

ALL CONCUR.

BRIEF FOR APPELLANT:

John Harvey Taylor, Pro Se
Burgin, Kentucky

BRIEF FOR APPELLEE:

A. B. Chandler III
Attorney General

Rickie L. Pearson
Assistant Attorney General
Frankfort, Kentucky