

RENDERED: June 18, 1999; 10:00 a.m.
 NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court Of Appeals

NO. 1996-CA-003269-MR

DANNY R. MATTHEWS

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JOHN R. ADAMS, JUDGE
ACTION NO. 95-CR-00647

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING
*** * * * *

BEFORE: DYCHE, JOHNSON AND KNOPF, JUDGES.

JOHNSON, JUDGE: Danny R. Matthews (Matthews) appeals from an order of the Fayette Circuit Court entered on November 18, 1996, which denied Matthews' Kentucky Rules of Civil Procedure (CR) 60.02 motion to vacate a judgment. Matthews pled guilty to two counts of theft by deception over \$100 in violation of Kentucky Revised Statutes (KRS) 514.040 and received two four-year prison sentences to run concurrently with each other. Matthews argues that he should be relieved of the judgment of conviction claiming

that he was justified when he committed the acts of theft. We affirm.

Around 11:00 p.m. on the evening of October 30, 1991, Matthews was arrested on the charge of trafficking in marijuana within 1,000 yards of a school. Police searched Matthews' house and found several small bags of marijuana and various drug paraphernalia. They found a marijuana cigarette in the left pocket of Matthews' pants and \$450 in large bills in Matthews' checkbook case with a deposit slip.

According to Matthews, that same evening he was approached by Detectives Jerry Staed and Mike Bosse, narcotics detectives for the Lexington-Fayette Urban County Government Division of Police, and asked to become a confidential informant to work on a case in which a Jessamine County deputy sheriff and his nephew were being investigated for drug trafficking. Matthews agreed and met with the nephew several times while wearing a wire transmitter which recorded the conversations on audiotape. Matthews purchased four ounces of marijuana from the nephew on one occasion and they discussed a purchase of at least 50 pounds of marijuana from the deputy sheriff.

Matthews alleged that on November 20, 1991, the nephew and a man in a Jessamine County deputy sheriff's uniform stormed into his home and held him at gunpoint. Matthews alleged that the man in the deputy sheriff's uniform told him that he knew about him being a confidential informant, that Matthews would not make it to trial because he was going to blow Matthews' head off

and then tell others that Matthews had resisted arrest, and that no one would question the shooting since Matthews was on parole. Matthews claimed that he feared for his life and after considering all the reasonable alternatives available, he decided to leave town.

Over the next sixteen days, Matthews wrote twenty-eight checks for over \$100 and eight checks for under \$100 knowing that his bank account contained insufficient funds with which to honor these checks. He claimed he wrote these checks in order to purchase merchandise which could be pawned for cash. He claimed that after he pawned the purchased items he went immediately to the Greyhound bus station and purchased a ticket for the first bus leaving town. He eventually settled in Mobile, Alabama, and remained there for nearly four years until he was arrested and returned to Kentucky. Upon his return to Fayette County, Matthews was indicted on 36 counts for theft by deception, one count of trafficking in a controlled substance within 1,000 yards of a school and being a persistent felony offender in the first degree. On August 25, 1995, Matthews pled guilty to two felony counts of theft by deception and the remaining charges were dismissed. On September 26, 1995, Matthews was sentenced to two four-year terms of imprisonment to run concurrently with each other.

On June 12, 1996, Matthews filed a motion for the release of documents pursuant to Kentucky Rules of Criminal Procedure (RCr) 7.02(3). Matthews expressly waived his privilege

of confidentiality as an informant and requested the audiotape recordings of his confidential informant work and any documents related to his meetings with the Jessamine County deputy sheriff and the nephew which occurred in November 1991. He stated that he needed these documents to appeal a Parole Board decision and to prepare a CR 60.02 motion. By order dated June 18, 1996, the trial court stated that the requested items were not evidence in Matthews' case and it had no authority to order their release.

On October 24, 1996, Matthews filed a motion under CR 60.02(e) and (f) which provide in pertinent part as follows:

On motion a court may, upon such terms as are just, relieve a party or his legal representative from its final judgment, order, or proceeding upon the following grounds: . . . (e) . . . it is no longer equitable that the judgment should have prospective application; or (f) any other reason of an extraordinary nature justifying relief. . . .

Matthews argued that he should be relieved of the judgment of conviction because the circumstances surrounding his case justified his acts of writing checks when there were insufficient funds. In conjunction with his CR 60.02 motion, Matthews also filed a motion to enter evidence to support his justification claim, i.e., any audio tapes or documents of him serving as a confidential informant in November 1991. The Commonwealth responded that the facts given by Matthews did not constitute a reason of an "extraordinary nature" and, furthermore, Matthews was aware of all of these circumstances when he entered his guilty plea which waived the right to bring any defense to the

charges. Matthews protested that "being hunted and having his life threatened by a corrupt, drug trafficking Deputy Sheriff" were circumstances of an extraordinary nature, and he claimed that if the trial court would inspect evidence of his short tenure as a confidential informant, it would better understand the extraordinary nature of his circumstances. The trial court denied Matthews' motions. This appeal followed.

Matthews argues that his actions in writing the checks were justified, and that "it is no longer equitable that the judgment should have prospective application" and that the circumstances amount to a "reason of an extraordinary nature". The Commonwealth's initial response in its brief is that the justification defense is not available to Matthews since the allegations were known to him at the time he chose to enter the guilty plea and that by entering a guilty plea he waived the right to bring all defenses. In his reply brief, Matthews adds the argument that his guilty plea was coerced because he had no choice but to plead guilty when the Commonwealth failed to comply with its obligation to disclose exculpatory evidence of him having served as a confidential informant, when the police refused to release the tapes and documents in question, and when his counsel refused to defend him at trial without physical evidence to support his justification claim.

In Gross v. Commonwealth, Ky., 648 S.W.2d 853 (1983), the Supreme Court addressed the issue of collateral attacks on criminal judgments as follows:

The structure provided in Kentucky for attacking the final judgment of a trial court in a criminal case is not haphazard and overlapping, but is organized and complete. That structure is set out in the rules related to direct appeals, in RCr 11.42, and thereafter in CR 60.02. CR 60.02 is not intended merely as an additional opportunity to raise Boykin defenses. It is for relief that is not available by direct appeal and not available under RCr 11.42. The movant must demonstrate why he is entitled to this special, extraordinary relief. Before the movant is entitled to an evidentiary hearing, he must affirmatively allege facts which, if true, justify vacating the judgment and further allege special circumstances that justify CR 60.02 relief.

CR 60.02 was enacted as a substitute for the common law writ of coram nobis. The purpose of such a writ was to bring before the court that pronounced judgment errors in matter[s] of fact which (1) had not been put into issue or passed on, (2) were unknown and could not have been known to the party by the exercise of reasonable 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 other sufficient cause. Black's Law Dictionary, Fifth Edition, 487, 1444.

In Harris v. Commonwealth, Ky., 296 S.W.2d 700 (1956), this court held that 60.02 does not extend the scope of the remedy of coram nobis nor add additional grounds of relief. We held that coram nobis "is an extraordinary and residual remedy to correct or vacate a judgment upon facts or grounds, not appearing on the face of the record and not available by appeal or otherwise, which were not discovered until after rendition of judgment without fault of the party seeking relief."

* * * *

We hold that the proper procedure for a defendant aggrieved by a judgment in a criminal case is to directly appeal that judgment, stating every ground of error which

it is reasonable to expect that he or his counsel is aware of when the appeal is taken.

Next, we hold that a defendant is required to avail himself of RCr 11.42 while in custody under sentence or on probation, parole or conditional discharge, as to any ground of which he is aware, or should be aware, during the period when this remedy is available to him. Final disposition of that motion, or waiver of the opportunity to make it, shall conclude all issues that reasonably could have been presented in that proceeding. The language of RCr 11.42 forecloses the defendant from raising any questions under CR 60.02 which are "issues that could reasonably have been presented" by RCr 11.42 proceedings.

Id. at 856-857 (emphasis in original).

As Gross indicates, Matthews' claims concerning the justification defense and evidence to support that defense were not proper for a CR 60.02 motion since those "issues . . . could reasonably have been presented" in an RCr 11.42 motion. Furthermore, any claim of ineffective assistance of counsel would have to be addressed by a motion pursuant to RCr 11.42. Matthews' CR 60.02 motion is without merit. We affirm the judgment of the Fayette Circuit Court.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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