

Commonwealth Of Kentucky

Court Of Appeals

1997-CA-001849-MR

AND

1997-CA-002957-MR

LARRY WAYNE WEATHERS

APPELLANT

v. APPEAL FROM MARION CIRCUIT COURT
HONORABLE WILLIAM HALL, JUDGE
ACTION NO. 94-CR-00033

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

* * * * *

BEFORE: BUCKINGHAM, EMBERTON, and SCHRODER, Judges.

BUCKINGHAM, JUDGE. Larry Weathers (Weathers) appeals from an order of the Marion Circuit Court denying his motion for a new trial and from an order seeking to impeach a witness who had testified at his trial. We affirm.

After a trial by jury, Weathers was convicted of second-degree criminal possession of a forged instrument and of being a first-degree persistent felony offender. He was sentenced to ten years in prison pursuant to the jury's

recommendation, and his conviction was affirmed by this court on direct appeal in November 1996. In February 1997, Weathers filed a motion for a new trial pursuant to Kentucky Rules of Criminal Procedure (RCr) 10.06 and 10.26. After holding a hearing, the trial court denied Weathers' motion in July 1997. In August 1997, Weathers filed a motion seeking to impeach a witness who had testified at trial concerning his prior felony convictions. This motion was denied by the trial court in October 1997. Weathers filed appeals from the orders of the trial court denying each motion. We conclude that the appeals may be disposed of on procedural grounds. See Priestley v. Priestley, Ky., 949 S.W.2d 594, 596 (1997), holding that an appellate court may decide a case on issues not raised by the parties if the court confines its review to the record.

Weathers' motion for a new trial was made pursuant to RCr 10.06 and RCr 10.26. RCr 10.06(1) provides in relevant part that "[t]he motion for a new trial shall be served not later than five (5) days after return of the verdict." RCr 10.26 is the familiar "palpable error rule," which provides as follows:

A palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.

As Weathers was convicted in April 1995 but did not file his motion for a new trial until February 1997, his motion for a new trial was untimely under RCr 10.06. The proper vehicle for

Weathers to have used to raise the issues set forth in his motion was an RCr 11.42 motion.¹ Furthermore, some of the issues should have been raised on his direct appeal. See Gross v. Commonwealth, Ky., 648 S.W.2d 853 (1983), which held that "[t]he 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." Id. at 856.

Weathers' claim for relief in his second motion is based on Kentucky Rule of Civil Procedure (CR) 43.07 which involves impeaching a witness. In this motion, Weathers sought to impeach the testimony of a deputy circuit clerk who had testified concerning the validity of Weathers' previous felony convictions. This motion was brought more than two years after Weathers' trial. CR 43.07 is clearly not a vehicle by which one can seek criminal post-conviction relief; it is merely a rule of trial procedure. Weathers is apparently seeking a new trial in order to recall the witness and impeach her testimony. We fail to see how Weathers could be entitled to a new trial on this issue; moreover, the motion should have been rejected due to its untimeliness. See RCr 10.06.

The orders of the Marion Circuit Court are affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Larry Wayne Weathers
Pro Se
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BRIEF FOR APPELLEE:

A. B. Chandler III
Attorney General
Shawn C. Goodpaster

¹ Most of the issues raised by Weathers concern allegations of ineffective assistance of counsel.

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