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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002483-MR

TIMOTHY EUGENE MULLINS

APPELLANT

v. APPEAL FROM BOYD CIRCUIT COURT
HONORABLE C. DAVID HAGERMAN, JUDGE
ACTION NO. 95-CR-00124

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: COMBS, CHIEF JUDGE; JOHNSON AND MINTON, JUDGES.

JOHNSON, JUDGE: Timothy E. Mullins has appealed, pro se, the order of the Boyd Circuit Court entered on November 4, 2003, denying his CR¹ 60.02 motion to vacate his sentence pursuant to judgment entered May 10, 1996. Mullins raises several grounds to this Court in support of his motion, but none justifies the extraordinary relief requested. Further, too much time has elapsed since judgment was entered against Mullins for him to

¹ Kentucky Rules of Civil Procedure.

raise issues through CR 60.02. Having concluded that the trial court did not abuse its discretion by denying Mullins relief, we affirm.

On December 21, 1995, Mullins was indicted by a Boyd County grand jury on one count of murder², one count of burglary in the first degree³, and one count of theft by unlawful taking.⁴ The charges arose from events occurring on October 21, 1995, when Mullins and four other men unlawfully entered the home of Roger White, resulting in White's being beaten to death and robbed of cash, credit cards, checks, and various items of personal property. On May 2, 1996, Mullins entered a plea of guilty to all three counts. Mullins was sentenced on May 10, 1996, to a maximum prison term of life without the possibility of parole for 25 years on the murder conviction, 20 years on the conviction for burglary in the first degree, and five years on the conviction for theft by unlawful taking, all to run concurrently by operation of law. Mullins filed a motion for shock probation on August 16, 1996, which the trial court denied on August 19, 1996.

² Kentucky Revised Statutes (KRS) 507.020.

³ KRS 511.020

⁴ KRS 514.030.

On May 10, 1999, Mullins timely filed an RCr⁵ 11.42⁶ motion claiming, among other things, that his guilty plea was not entered voluntarily and that he received ineffective assistance of counsel.⁷ On May 13, 1999, the trial court denied his motion. The trial court ruled that the motion was not timely filed;⁸ regardless, it found that "every ground stated in support of the motion is defeated by unequivocal matters in the record. Accordingly, the movant is not entitled to a hearing."⁹ On June 4, 1999,¹⁰ Mullins appealed the trial court's order denying his RCr 11.42 motion. This Court affirmed the trial court's order in its Opinion rendered on May 12, 2000, even though the trial court had erred in finding that Mullins's RCr 11.42 motion was not timely filed. This Court determined that the trial court correctly found that there was no merit to the

⁵ Kentucky Rules of Criminal Procedure.

⁶ RCr 11.42(1) provides:

A prisoner in custody under sentence . . . who claims a right to be released on the ground that the sentence is subject to collateral attack may at any time proceed directly by motion in the court that imposed the sentence to vacate, set aside or correct it.

⁷ Mullins also argued in his RCr 11.42 motion that his sentence was arbitrary, in violation of his due process rights, and that the Commonwealth failed to advise him of the type of penalty it would seek at trial.

⁸ The motion had to be filed within three years after the final judgment becomes final as required by RCr 11.42(10).

⁹ The trial court cited Stanford v. Commonwealth, 854 S.W.2d 742 (Ky. 1993), in support of its decision.

¹⁰ Case No. 1999-CA-001307-MR.

claims, as they were refuted by the record, and that it did not err in denying Mullins a full evidentiary hearing. Mullins sought discretionary review with the Supreme Court of Kentucky on June 12, 2000, which was denied on February 14, 2001.¹¹

Thereafter, on November 3, 2003, Mullins filed a pro se motion¹² to vacate judgment pursuant to CR 60.02(e) and (f).¹³ Mullins argued his sentence should be reduced from life imprisonment without the possibility of parole for 25 years to a term of imprisonment of 15 years because two of his co-defendants were given 15-year sentences, one was given a 20-year sentence and one was given a 30-year sentence. On November 4, 2003, the trial court denied his motion, stating that the grounds set forth were a "rehash of arguments" which were rejected in Mullins's RCr 11.42 motion and the remaining arguments did not "state a claim upon which relief can be

¹¹ Case No. 2000-SC-000472-D.

¹² Mullins also filed a motion for an order granting him in forma pauperis status pursuant to KRS 453.190 and KRS 31.110(2)(b), appointing him counsel, and for an evidentiary hearing.

¹³ CR 60.02 (e) and (f) provides:

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) the judgment is void, or has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (f) any other reason of an extraordinary nature justifying relief. The motion shall be made within a reasonable time

granted." The trial court found that Mullins's motion lacked "even a shred of merit."¹⁴ This appeal followed.

Mullins claims that the trial court erred in denying his CR 60.02 motion¹⁵ to his prejudice and denied him due process of law for two reasons. First, he claims that the trial court erroneously denied him an evidentiary hearing and failed to find that his sentence was improper, violating his constitutional rights. Mullins claims that the Commonwealth offered him a sentence recommendation of 30 years, in exchange for his guilty plea. However, there is a signed plea agreement of record showing a recommendation for exactly the sentence that the trial court gave Mullins. Mullins further argues that the trial court only spoke briefly to him before pronouncing sentence on the same day as he entered his guilty plea, denying him the

¹⁴ Mullins then filed another motion for an order granting him in forma pauperis status pursuant to KRS 453.190 and KRS 31.110(2)(b), appointing him counsel. The trial court granted the motion by order entered November 17, 2003. However, the Department for Public Advocacy filed a motion with this Court that it be allowed to withdraw as counsel for Mullins pursuant to KRS 31.110(2)(c) and this Court granted the motion by order entered March 23, 2004. This Court then allowed Mullins to file a pro se brief.

¹⁵ In order for us to address these claims, it is necessary for us to review Mullins's CR 60.02 motion, which appears to include the following claims: (1) that the trial court did not follow the recommendations in the plea bargain, which he claims was an agreement that the Commonwealth would recommend a 30-year sentence for his guilty plea, but he instead was given a life sentence, with possibility of parole in 25 years; (2) that he was not aware of the consequences of his guilty plea and the trial court did not discuss his guilty plea with him before accepting it; (3) that there was no mitigating evidence or pre-sentence investigation report presented to the trial court prior to the sentencing hearing; and (4) that his sentence was much longer than that of his co-defendants and that there was not enough evidence to convict him of the murder. While Mullins set out his arguments in six points, essentially he had four arguments.

opportunity to withdraw his guilty plea. However, the record reflects that Mullins entered his guilty plea eight days before his sentencing and that during the plea process, the trial court asked Mullins a series of questions, which he answered verifying that his plea was knowingly and voluntarily made.

Second, Mullins argues that the trial court erred in finding that his remaining arguments did not state a claim upon which relief could be granted and that his motion lacked even a shred of evidence. He claims that he was denied individualized sentencing because he received a greater sentence than his four co-defendants. There is no merit to this argument because the sentences of the five defendants involved in this case ranged from imprisonment of 15 years to life imprisonment with possibility of parole in 25 years. Further, he argues that the trial court, by not allowing him an opportunity to speak on his own behalf at sentencing, denied him his right to allocution. The record shows that the trial court gave Mullins and his counsel an opportunity to make statements on his behalf and to present any information in mitigation of punishment. It is also of record that the trial court gave due consideration to the pre-sentence investigation report,¹⁶ the nature and circumstances

¹⁶ There is evidence in the record that the trial court suspended sentencing pending the preparation of a pre-sentence investigation report. There is further evidence that Mullins was made aware of the contents of the pre-sentence investigation report and that he did not wish to controvert them.

of the crime, and the history, character, and condition of Mullins.

A guilty plea is valid if it represents a voluntary and intelligent choice to waive the several trial-related constitutional rights and the record affirmatively establishes this knowing waiver.¹⁷ In reviewing the plea proceedings, it is clear that Mullins understood the substance and consequences of his plea and that he understood that the Commonwealth's sentencing recommendation would be as set out in the plea agreement. Besides his self-serving allegations, there is no other evidence that Mullins did not understand or that he was misinformed of the consequences of his guilty plea.

In Gross v. Commonwealth,¹⁸ the Supreme Court of Kentucky set forth a detailed, sequential procedure governing post-conviction proceedings. "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."¹⁹ The Supreme Court then held in McQueen v. Commonwealth,²⁰ that a criminal defendant must first bring a direct appeal when available, and only then should he utilize

¹⁷ Boykin v. Alabama, 395 U.S. 238, 242, 89 S.Ct. 1709, 1711-12, 23 L.Ed.2d 274 (1969); Centers v. Commonwealth, 799 S.W.2d 51, 54 (Ky.App. 1990).

¹⁸ 648 S.W.2d 853 (Ky. 1983).

¹⁹ Id. at 856.

²⁰ 948 S.W.2d 415 (Ky. 1997).

the provisions of RCr 11.42 by addressing every error of which he was (or should have been) aware.²¹ The Court emphasized that CR 60.02²² relief is "special, extraordinary relief" and "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."²³

Thus, Mullins must demonstrate why he is entitled to such extraordinary relief.²⁴ He has failed to meet this burden since all of the claims raised in his CR 60.02 motion were either addressed in his RCr 11.42 motion and were denied, or could have been addressed in the prior attack on his judgment, as they were apparent at the time. Consequently, he is not allowed to raise the issues again in a subsequent CR 60.02 motion.

Additionally, Mullins failed to exercise due diligence in pursuing these claims. CR 60.02 requires that the motion

²¹ McQueen, 948 S.W.2d at 416.

²² The Court in Gross, 648 S.W.2d at 856, stated:

Rule 60.02 is part of the Rules of Civil Procedure. It applies in criminal cases only because Rule 13.04 of the Rules of Criminal Procedure provides that "the Rules of Civil Procedure shall be applicable in criminal proceedings to the extent not superseded by or inconsistent with these Rules of Criminal Procedure."

²³ McQueen, 948 S.W.2d at 416.

²⁴ Gross, 648 S.W.2d at 856.

shall be made within a "reasonable time."²⁵ More than seven years had passed since Mullins pled guilty when he filed the CR 60.02 motion. This period of delay is not reasonable under the circumstances and it does not comply with the requirements of CR 60.02. Mullins filed a RCr 11.42 motion attacking this judgment, in which he could have raised, or in some cases did raise, the present issues. Absent evidence of extraordinary circumstances, we cannot conclude that seven years qualifies as a reasonable time.

The decision on whether to grant relief under CR 60.02 "is one that is generally left to the sound discretion of the trial court[.]"²⁶ As such, we have examined whether the trial court abused its discretion in denying Mullins's CR 60.02 motion. Given the circumstances, particularly the issues raised and the lengthy delay before this motion was filed, we conclude that it was not an abuse of discretion for the trial court to deny Mullins's motion, as he did not properly invoke the provisions of CR 60.02.

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

ALL CONCUR.

²⁵ Ray v. Commonwealth, 633 S.W.2d 71, 73 (Ky.App. 1982).

²⁶ Schott v. Citizens Fidelity Bank & Trust Co., 692 S.W.2d 810, 814 (Ky.App. 1985).

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