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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2006-CA-000551-MR

LEO SPURLING — APPELLANT

v.

APPEAL FROM LYON CIRCUIT COURT
HONORABLE BILL CUNNINGHAM, JUDGE
ACTION NO. 88-CR-00074

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: TAYLOR AND WINE, JUDGES; PAISLEY,[1] SENIOR JUDGE.

WINE, JUDGE: Leo Spurling appeals the February 15, 2006 judgment of the Lyon Circuit Court denying his motion to vacate, set aside, or correct a sentence pursuant to Kentucky RCr 11.42 and Kentucky CR 60.02(d) (e) & (f). Spurling alleges in June 1989 a Lyon County jury was misinformed as to the length of a sentence he had received for a

[1] Senior Judge Lewis G. Paisley sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

previous murder conviction on September 13, 1983. Both parties concede there is no dispute as to the facts which this Court must consider in determining whether the motions pursuant to RCr 11.42 or CR 60.02 should have been granted. Having considered those facts and the record from below, we affirm the trial court's judgment.

In September 1983, Spurling was convicted in Jefferson County under indictment 83-CR-0328 of one count of murder, two counts of wanton endangerment in the first degree, and of being a persistent felony offender in the second degree. The jury fixed his punishment at 20 years for murder, enhanced to life as a result of the PFO enhancement.[2]

While serving time in the penitentiary, Spurling was again charged with murder. He was subsequently indicted and tried in Lyon County under indictment 88-CR-0074 in June 1989. The jury fixed his punishment at 150 years in the penitentiary on one count of murder. During the "truth and sentencing" phase,[3] the prosecutor introduced evidence that Spurling had previously been convicted of two separate homicides and received a 10-year and life sentence. Further, in his closing remarks, the prosecutor told the jury, "Apparently, 10 years and life in prison didn't do much good."

On April 27, 1992, Spurling filed a post-conviction motion for relief under RCr 11.42 as to the convictions under 83-CR-0328, alleging his murder conviction had

[2] On April 1, 1982, Spurling received a 10-year sentence for first-degree manslaughter out of Jefferson County under indictment 79-CR-1047.

[3] KRS 532.055.

been illegally enhanced by the PFO II charge.[4] Initially, the Jefferson County trial judge granted the motion, then later, on October 1, 1992, granted the Commonwealth's motion to reconsider and reinstated the life sentence. Spurling then in March 1993, filed a post-conviction motion for relief pursuant to CR 60.02. That motion was denied on May 26, 1993. In May 2002, Spurling filed a supplemental CR 60.02 motion. In June 2002, Jefferson Circuit Court Judge Denise Clayton, who was not the trial judge in 1993, granted the motion to set aside the life sentence pursuant to *Berry* and *Offutt*. She acknowledged Spurling had failed to appeal the earlier orders of October 1, 1992, or May 26, 1993.

Spurling filed the first motion to vacate the judgment in indictment 88-CR-0074 from Lyon Circuit Court under RCr 11.42. That motion filed in June 1997 was denied by the trial court. Subsequently, the Kentucky Court of Appeals affirmed the trial court and the Kentucky Supreme Court denied discretionary review.

Thereafter, on October 6, 2005, Spurling then filed the post-judgment motion for relief which is now the subject of this appeal. Spurling argues because the jury, which sentenced him for this third homicide conviction, was given incorrect information about the sentences under indictment 83-CR-0328 (Jefferson County), the 150-year sentence for indictment 88-CR-0074 (Lyon County) should be set aside.

On February 15, 2006, the trial judge summarily denied the motion to vacate.

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[4] Pursuant to the rulings in *Offutt v. Commonwealth*, 799 S.W.2d 815 (Ky. 1990) and *Berry v. Commonwealth*, 782 S.W.2d 625 (Ky. 1990), the Kentucky Supreme Court declared that capital offenses are not subject to enhancements under KRS 532.080, the PFO statute.

Contrary to the appellant's position, the failure of the trial court to specifically address the Commonwealth's objection to a second motion pursuant to RCr 11.42 is not an implied concession that successive motions pursuant to RCr 11.42 are procedurally acceptable. Rather it appears from the February 15, 2006 order, the lower court only addresses the motion in the context of CR 60.02.

As outlined in the Commonwealth's brief, on June 24, 1997, Spurling filed a post-conviction relief motion pursuant to RCr 11.42. At that time he was well aware of the *Offutt* issue as he had raised it twice in post-conviction motions filed in April 1992 and March 1993 for indictment 83-CR-0328 (Jefferson County). He failed to appeal any adverse rulings in that case, waiting until May 2002 to file a supplemental CR 60.02 motion. Had he timely appealed those decisions, it is clear under *Offutt* he would have been successful in setting aside the life sentence enhancement imposed under 83-CR-0328 (Jefferson County). Then he could have raised the current grounds for post-judgment relief in his first RCr 11.42 motion filed in indictment 88-CR-0074 from Lyon County. Where the defendant's motion is merely one of successive motions only stating grounds that were raised or could have been raised, denial of the motion will not be reviewed on appeal. *Hampton v. Commonwealth*, 454 S.W.2d 672 (Ky. 1970). Spurling should not receive a benefit from his lack of diligence by now being allowed to file a second post-conviction motion in indictment 88-CR-0074.

Spurling's successive attacks in separate indictments pursuant to RCr 11.42 are not unlike those against previous felony convictions used for subsequent persistent felony offender (PFO) enhancements where a defendant has been convicted of one or

more felonies and he is required to raise issues about the validity of those felonies at or before the time he is tried as a PFO. *Alvey v. Commonwealth*, 648 S.W.2d 858 (Ky. 1983). *Graham v. Commonwealth*, 952 S.W.2d 206 (Ky. 1997). Spurling could not have been expected to raise the *Offutt* issue during his trial in June 1989 as *Offutt* was not decided until April 1990. However, having properly raised it in 1992 and 1993, the failure to perfect an appeal bars him from raising it again in this action. Further, Spurling cannot seek refuge under RCr 11.42(10)(a) as the predicate relief was available more than three years before he filed the current post-judgment motion. Thus, the RCr 11.42 motion in this action may be time barred as well as successive.

The lower court did address the challenge pursuant to CR 60.02. Such a ruling is reviewed for an abuse of discretion. *Gross v. Commonwealth*, 648 S.W.2d 853 (Ky. 1983). CR 60.02 is not a separate avenue of appeal. Rather it can only be utilized when the defendant is entitled to extraordinary relief. *McQueen v. Commonwealth*, 948 S.W.2d 415 (Ky. 1997). Spurling asserts his claim pursuant to CR 60.02(d) (e) & (f). As already opined by this Court, because he could have raised this issue in 1997, he is precluded from doing so now pursuant to any provision under CR 60.02.

Even if Spurling was entitled to seek relief pursuant to CR 60.02, the record is devoid of any evidence nor are there any legal grounds to support the motion. Pursuant to section (d) no fraud is demonstrated. At the time of the closing, the prosecutor properly relied upon the judgment from 83-CR-0328 which reflected a punishment of a life sentence for the convictions of murder and PFO II. Under section (e) the prior

judgment upon which the conviction was based was not reversed or vacated. Rather the conviction for murder was affirmed and only the punishment changed.

Finally, contrary to the appellant's contention, the imposed term of years, admittedly not permitted under KRS 532.080 and KRS 532.035 is not of a constitutional magnitude as set out in the cases relied upon by the appellant. In *United States v. Tucker*, 404 U.S. 443, 92 S. Ct. 589, 30 L. Ed. 2d 592 (1972), the Court remanded the case for sentencing because two of three prior convictions had been vacated. In *Perdue v. Commonwealth*, 916 S.W.2d 148 (Ky. 1996), the prosecutor incorrectly advised the defendant had been convicted of four counts of murder, when in fact the convictions were for manslaughter. In *Cook v. Commonwealth*, 129 S.W.3d 351 (Ky. 2004), the defendant was never even "convicted" as the sentencing was passed indefinitely.

The appellant's argument that somehow "misinformation" about a life sentence would outweigh the reality of three felony convictions for homicide and two felony convictions for first-degree wanton endangerment does not reach the level of an extraordinary nature as set out in CR 60.02(f). Under KRS 532.035 the penalty for capital offenses is death, a life sentence, or not less than 20 years. The penalty imposed by the Lyon County jury falls within those parameters. At the time of sentencing in 1989, the information supplied to the jury was neither misleading nor incorrect as it was presumed valid. *Commonwealth v. Gadd*, 665 S.W.2d 915 (Ky. 1984).

Accordingly, the judgment of the Lyon Circuit Court denying the appellant's post-conviction motions for relief is affirmed.

ALL CONCUR.

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