

Commonwealth of Kentucky

Court of Appeals

NO. 2005-CA-002578-MR

ROBERT A. EAGLER

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MARTIN F. MCDONALD, JUDGE
ACTION NO. 04-CR-001113

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: DIXON, HOWARD AND THOMPSON, JUDGES.

HOWARD, JUDGE: Robert Eagler (hereinafter Eagler) appeals from the denial by the Jefferson Circuit Court of his CR 60.02 motion to vacate his conviction on two counts of sodomy in the third-degree and two counts of unlawful transaction with a minor in the second-degree. For the reasons stated below, we affirm.

The factual background of this case is as follows. On April 12, 2004, Eagler was indicted by the Jefferson County Grand Jury on two counts of sodomy in the second-degree and two counts of unlawful transaction with a minor in the second-degree.

The charges stem from allegations that Eagler performed oral sex on two male minors, as well as providing them with alcohol and marijuana. Eagler pled guilty, under an *Alford* plea, to two amended counts of sodomy in the third-degree and the two counts of unlawful transaction with a minor on October 20, 2004. He was subsequently sentenced to five years on each sodomy count and one year on each count of unlawful transaction with a minor, with all sentences to run concurrently for a total sentence of five years.

Eagler filed a motion for shock probation, which was denied by an order entered June 22, 2005. He then filed a motion to vacate his conviction, under CR 60.02, alleging ineffective assistance of counsel at the time of his guilty plea. Specifically, he alleged that his attorney failed to investigate the case, coerced him into pleading guilty and failed to advise the court of his “unstable mental condition.” Eagler also sought an evidentiary hearing and the appointment of counsel to assist him on that motion. On November 10, 2005, the Jefferson Circuit Court denied Eagler’s CR 60.02 motion, holding that these claims should have been brought under RCr 11.42, rather than CR 60.02. This appeal followed.

Eagler argues that his claims are of an “extraordinary nature” and thus, a CR 60.02 motion is an appropriate procedure by which to present them. CR 60.02(f) does indeed authorize a court to set aside a judgment, under certain circumstances, for “any other reason of an extraordinary nature justifying relief.” Eagler also correctly points out that *pro se* litigants are granted some deference in the construction of pleadings. *See Case v. Commonwealth*, 467 S.W.2d 367 (Ky. 1971). However, this

deference does not give even *pro se* litigants the right to ignore the proper procedure for seeking post-conviction relief. As succinctly stated by the trial court, that procedure is, “First, the defendant must file a direct appeal.^[1] Next, he must avail himself of RCr 11.42.”

RCr 11.42(1) states,

A prisoner in custody under sentence or a defendant on probation, parole or conditional discharge 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.

It has long been established that RCr 11.42 is the appropriate vehicle for a claim of ineffective assistance of counsel. *Hall v. Commonwealth*, 429 S.W.2d 359 (Ky. 1968); *Salisbury v. Commonwealth*, 556 S.W.2d 922 (Ky.App. 1977).

Eagler cites *Gross v. Commonwealth*, 648 S.W.2d 853 (Ky. 1983), in support of his contention that he is allowed to proceed on his CR 60.02 motion without first filing an RCr 11.42 motion. In fact, *Gross* holds exactly the opposite, and details the proper procedure which must be followed for post-conviction relief:

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 for relief that is not available by direct appeal and not available under RCr 11.42. . . .

Next, we hold that a defendant is required to avail himself of RCr 11.42 while in custody under sentence or on probation,

¹ A direct appeal was not available to Eagler because he waived that right by pleading guilty.

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. . . . 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. 648 S.W.2d at 856, 857 (emphasis in original).

For reasons that he does not explain, Eagler asserts that “there were no RCr 11.42 issues and as there were no RCr 11.42 ineffective assistance of counsel issues, then next logical step was to file the CR 60.02, which the Movant rightfully did.” In fact, Eagler's claim is precisely that his counsel was ineffective, and such assertion could and should have been brought by an RCr 11.42 motion. The circuit court specifically directed him that this was the appropriate way to proceed. Upon remand, an 11.42 motion remains available to him.

Accordingly, we agree with the trial court that *Gross* does not permit a defendant to choose whether to file under RCr 11.42 or CR 60.02. Eagler must file an RCr 11.42 motion and raise any and all issues available to him by that means. For the reasons set forth above, the order of the Jefferson Circuit Court denying the Appellant's CR 60.02 motion is affirmed.

ALL CONCUR.

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