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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000827-MR

AARON L. RUFFIN — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES D. ISHMAEL, JR., JUDGE
ACTION NO. 99-CR-01060

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON AND LAMBERT, JUDGES; ROSENBLUM,[1] SENIOR JUDGE.

DIXON, JUDGE: Appellant, Aaron Ruffin, *pro se,* appeals from an order of the Fayette Circuit Court denying his Motion in Vacatur pursuant to CR 60.02(e). Finding no error, we affirm.

In October 1999, Appellant pled guilty to first-degree assault, first-degree robbery, and third-degree assault. He was sentenced to a total of thirty years

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

imprisonment. In December 2001, Appellant filed a motion to vacate his conviction and sentence pursuant to RCr 11.42. Therein, he alleged, in part, that his trial counsel was ineffective for advising him to plead guilty to both the first-degree assault and first-degree robbery charges because both arose out of the same course of conduct and thus the conviction for both violated his double jeopardy rights. The trial court denied Appellant's motion without an evidentiary hearing and this Court subsequently affirmed the denial of RCr 11.42 relief in November 2003.

On January 5, 2004, Appellant filed a motion to vacate pursuant to CR 60.02, RCr 8.08 and RCr 10.26, essentially raising the same double jeopardy argument. The trial court denied the motion, as well as a subsequent motion to reconsider. No appeal was taken from the denial of CR 60.02 relief. On March 14, 2006, Appellant filed a second CR 60.02 motion, which was also denied. Again, no appeal was taken.

On March 30, 2007, Appellant filed his third CR 60.02 motion, which is the subject of this appeal. In denying the motion, the trial court noted, "The present motion is cumulative at best and raises claims which have already been considered, or which should have already been presented in prior motions, or which are totally without merit. There is no need for an evidentiary hearing as there are no factual disputes." Appellant thereafter appealed to this Court.

As he did in his RCr 11.42 motion and two prior CR 60.02 motions, Appellant argues to this Court that his double jeopardy rights were violated "when the Court, the Commonwealth and defense attorney in collusion permitted [him] to plead in

contract to the separate charges of First Degree Assault and First Degree Robbery, when as a matter of law those charges merged into one offense." Obviously, this claim has repeatedly been held to be without merit. This Court, in affirming the trial court's 2002 order denying RCr 11.42 relief held:

> Ruffin contends that his counsel rendered ineffective assistance in failing to cite the case of *O'Hara v. Commonwealth*, Ky., 781 S.W.2d 514 (1989), a case in which an assault conviction was reversed on the ground that it had merged into the robbery conviction. *Id.* at 516. Ruffin claims that this case was directly on point and that, had it been cited to the court, it would have resulted in the dismissal of the assault charge.
>
> The circuit court rejected Ruffin's argument on the ground that the *O'Hara* case was not applicable to these facts. More specifically, the court ruled that the case of *Taylor v. Commonwealth*, Ky., 995 S.W.2d 355 (1999), was on point. We agree. In that case convictions for both robbery and assault were affirmed on appeal, and the merger argument was rejected. *Id*. at 363. The *O'Hara* case was specifically distinguished from the facts therein. *Id.* at 359. The facts in the *Taylor* case are identical to the facts in the case *sub judice,* and we reject Ruffin's argument that counsel rendered ineffective assistance in this regard.

Ruffin v. Commonwealth, 2002-CA-001907-MR, slip op. at 1.

Actions under CR 60.02 are addressed to the "sound discretion of the court and the exercise of that discretion will not be disturbed on appeal except for abuse." *Brown v. Commonwealth*, 932 S.W.2d 359, 362 (Ky. 1996) (*Quoting Richardson v. Brunner*, 327 S.W.2d 572, 574 (Ky. 1959)). Further, issues which were raised or could have been raised in a previous RCr 11.42 motion are precluded from being raised in a CR 60.02 motion. *Gross v. Commonwealth*, 648 S.W.2d 853 (Ky. 1983); s*ee also McQueen*

v. Commonwealth, 948 S.W.2d 415 (Ky. 1997), *cert. denied*, 521 U.S. 1130 (1997). As Appellant has now raised the same double jeopardy claim in three prior post-conviction motions, we cannot conclude that the trial court abused its discretion in denying the instant motion. Clearly, the issue has been considered and found to be without merit.

The Fayette Circuit Court's order denying Appellant's motion for relief pursuant to CR 60.02 is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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