

RENDERED: AUGUST 21, 2009; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001071-MR

ROCKY D. GRAY

APPELLANT

v.

APPEAL FROM WEBSTER CIRCUIT COURT
HONORABLE C. RENÉ WILLIAMS, JUDGE
ACTION NO. 05-CR-00015

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: KELLER, STUMBO, AND VANMETER, JUDGES.

KELLER, JUDGE: Rocky Gray (Gray) appeals from the Webster Circuit Court's denial of his combined motions for relief under Kentucky Rules of Criminal Procedure (RCr) 11.42 and Kentucky Rules of Civil Procedure (CR) 60.02 and 60.03. Gray argues on appeal that his trial counsel was ineffective because he was unaware that Gray could be considered a persistent felony offender (PFO), and he failed to move for a directed verdict regarding that charge; he did not adequately

advise Gray regarding the potential penalties he faced; he failed to convince the trial court to suppress evidence seized by police; and he failed to object to a jury instruction regarding possession of a firearm. Gray also argues that the trial court erred when it did not suppress evidence seized by police; when it permitted the jury to determine that Gray was a persistent felony offender; and when it permitted the jury to consider enhanced penalties based on possession of a firearm. Finally, it appears that Gray may also be arguing that his counsel was ineffective on appeal. For the foregoing reasons, we affirm.

FACTS

We take the underlying facts from the Supreme Court of Kentucky's published opinion addressing the issues raised by Gray on direct appeal.

On February 19, 2005, Gray was pulled over by Deputy Steve Madden of the Webster County Sheriff's Department following several calls complaining of a van driving erratically. After refusing to take a sobriety test, Gray gave Deputy Madden consent to search the van, at which time Deputy Madden found drug paraphernalia including a hemostat with a marijuana cigarette, rolling papers, baggies, a digital scale, scooper, and ties. He also found several individually wrapped bundles of methamphetamine labeled with the weights on the bag, various pills including oxycontin and methadone, several packs of Sudafed, lithium batteries, and marijuana. In addition, he observed a pistol (with the serial number filed off) in the open center console of the van, which was within three to four feet of the bundled methamphetamine. While searching Gray's person, Deputy Madden found marijuana, two containers of methamphetamine, and \$1,527.00 in currency.

Gray v. Commonwealth, 233 S.W.3d 715, 716 (Ky. 2007).

Gray was charged with operating a motor vehicle under the influence of alcohol/drugs, second offense; possession of marijuana; carrying a concealed deadly weapon; possession of a controlled substance; trafficking of a controlled substance; defacing a firearm; use/possession of drug paraphernalia; and with being a persistent felony offender. Furthermore, under Kentucky Revised Statute (KRS) 218A.992, the Commonwealth sought enhancement of any sentence for the possession and trafficking charges based on Gray's possession of a firearm. Prior to trial, the Commonwealth dropped the possession of a concealed weapon charge. Following the guilt phase of the trial, the jury returned guilty verdicts on the possession of marijuana, trafficking in a controlled substance, possession of drug paraphernalia, and persistent felony offender charges. The jury returned not guilty verdicts on the operation of a motor vehicle under the influence and the defacing a firearm charges. Following the penalty phase of the trial, the jury recommended a sentence of 58 years, which the trial court imposed. The sentence included enhancements based on Gray's PFO status and his possession of a firearm.

Following trial, the court also entered an order of forfeiture regarding the drugs and money found on Gray's person and in his vehicle. Gray timely filed a motion for a new trial, arguing that he had not been competent to stand trial. The trial court overruled that motion and Gray then filed a direct appeal on February 16, 2006. On direct appeal, Gray argued that the court's forfeiture order violated Kentucky's forfeiture law and his right to due process. He also argued that the trial court erred by not finding him incompetent to stand trial.

On May 14, 2007, while his direct appeal was pending before the Supreme Court, Gray filed a *pro se* motion to vacate, correct or set aside judgment and sentence pursuant to CR 60.02(e) & (f). In his CR 60.02 motion, Gray argued that the trial court erred when it enhanced his sentence for possession of drug paraphernalia because of the jury's finding that he was a persistent felony offender; that the court erred by permitting evidence of his prior felony conviction in the guilt phase of his trial; that the court erred when it ordered his sentences to run consecutively; that prosecution under KRS 218A and 532.080 amounted to double jeopardy; and that the court erred when it permitted the jury to consider enhancement for possession of a firearm when the Commonwealth had dismissed the offense of carrying a concealed weapon and the jury found him not guilty of defacing a firearm. The court issued an order appointing a public defender to represent Gray on this motion.

On July 11, 2007, Gray filed a *pro se* motion to vacate judgment and sentence pursuant to CR 60.03. In that motion, Gray argued that the Commonwealth's attorney acted unethically when he handed a handgun to Gray during the trial; the court erred by "discharging" the jury for three days between the guilt and penalty phases of the trial; and the court erred by permitting the jury to determine whether he was a persistent felony offender when the Commonwealth failed to prove all of the elements of that offense. Gray stated that he did not want representation for this motion, and that he wanted to continue with this motion *pro se*.

On October 15, 2007, the Supreme Court issued its opinion in the direct appeal, finding no error on the part of the trial court.

On December 6, 2007, Gray, through court appointed counsel, filed a motion to convert his CR 60.02 motion to an RCr 11.42 motion to vacate judgment. In that motion, Gray argued that his trial counsel was ineffective because counsel failed to adequately advise him of the plea offer and to recognize Gray's mental incompetence. In support of his motion, Gray noted that the written plea offer from the Commonwealth stated that he faced an estimated maximum sentence of 22.5 years, rather than the actual 70 years he faced. Gray argued that, although he testified regarding his knowledge of the plea offer, that testimony was based on only a several second explanation by his counsel. As to his incompetence, Gray pointed to correspondence from a physician noting treatment for various mental conditions.

The trial court, on May 21, 2008, entered an order denying Gray's various motions. In doing so, the court noted that the following issues raised by Gray could have and should have been raised on direct appeal and were, therefore, not properly raised in any of his post-conviction motions: (1) the court erred by enhancing his possession of drug paraphernalia with the PFO charge; (2) evidence of the PFO charge was inappropriately introduced during the guilt phase of his trial; (3) the court erred when it accepted the jury's recommendation that his sentences run consecutively; (4) the court inappropriately enhanced his sentences based on the PFO charge and possession of a handgun; and (5) the court erred in

enhancing his sentences based on possession of a firearm because the jury found him not guilty of defacing a firearm and the Commonwealth dismissed the charge of possession of a concealed weapon. Furthermore, the court noted that the issue of Gray's status as a persistent felony offender was not introduced nor tried during the guilt phase of the trial; the court acted within its authority when it ran his sentences consecutively; there is a distinction between possession of a firearm and possession of a concealed weapon; and the jury's finding of not guilty on the charge of defacing a firearm was irrelevant to the issue of enhancement for possession of a firearm.

As to Gray's claims of ineffective assistance of counsel, the court found that Gray failed to set forth proof sufficient to meet the standard set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Specifically, the court determined that Gray's counsel was not deficient with regard to advising Gray about the plea offer and the potential consequences inherent in rejecting that offer. Furthermore, the court noted the Supreme Court had already determined that there was no reason for counsel or the court to suspect that Gray had any mental incapacity.

The court then found that Gray presented no evidence to support extraordinary relief under CR 60.02. Finally, the court found that Gray's CR 60.03 motion was filed prematurely and that he had not filed any evidence "that he was the victim of fraud, accident or mistake."

STANDARD OF REVIEW

We will set forth the appropriate standard of review and additional facts as necessary when analyzing the issues raised by Gray.

ANALYSIS

At the outset, we note 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. 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 not intended merely as an additional opportunity to raise *Boykin* defenses. It is for relief that is not available by direct appeal and not available under RCr 11.42. The movant must demonstrate why he is entitled to this special, extraordinary relief. Before the movant is entitled to an evidentiary hearing, he must affirmatively allege facts which, if true, justify vacating the judgment and further allege special circumstances that justify CR 60.02 relief.

Gross v. Commonwealth, 648 S.W.2d 853, 856 (Ky. 1983)(emphasis in original).

Gray raised the following issues before us: (1) that the trial court should have suppressed the evidence seized at the time of his arrest; (2) that the trial court erred when it permitted the jury to determine Gray was a persistent felony offender; and (3) that the trial court erred when it permitted the jury to consider enhanced penalties based on possession of a firearm. Those issues could have and should have been raised on direct appeal and were not proper issues under either CR 60.02 or RCr 11.42. Therefore, the trial court properly dismissed Gray's motions on those issues.

CR 60.03 provides that a person may file an independent action seeking relief from judgment on equitable grounds. Gray did not file an “independent action” under CR 60.03. Therefore, the trial court properly dismissed Gray’s CR 60.03 motion. Furthermore, we note that Gray has not argued before us the issues he raised in his CR 60.03 motion. “The function of the Court of Appeals is to review possible errors made by the trial court, but if the trial court had no opportunity to rule on the question, there is no alleged error for this court to review.” *Kaplon v. Chase*, 690 S.W.2d 761, 763 (Ky. App. 1985). Therefore, we will not address Gray’s CR 60.03 issues further.

In addition to the above, Gray argues that his trial counsel was ineffective because counsel was unaware that Gray could be considered a persistent felony offender; that counsel did not object to inclusion of the possession of a firearm charge in the jury instructions; and that counsel did not adequately advise him of the potential penalties he faced. Gray did not raise the first issue before the trial court; therefore, we need not address it. However, even if this issue were properly before us, we would hold in the Commonwealth’s favor. The record belies Gray’s assertion that his counsel was not aware of the persistent felony offender charge because that charge is contained in an exhibit to the Commonwealth’s offer on a plea of guilty, an offer Gray admitted he discussed with counsel.

Counsel’s alleged failure to object to a jury instruction regarding possession of a firearm is also refuted by the record. Counsel argued extensively

to the court that “blanket” instructions offered by the Commonwealth regarding possession of a firearm were inappropriate. The court held in Gray’s favor and included limiting language offered by Gray’s counsel. Furthermore, based on the evidence, the instruction was appropriate and any motion to exclude the instruction completely would have been futile. Counsel is not required to make useless objections and failure to do so is not ineffective assistance of counsel. *See Commonwealth v. Davis*, 14 S.W.3d 9, 11 (Ky. 1999). Finally, we note that neither the possession of a concealed weapon charge nor the defacing a firearm charge negates the possession of a firearm charge.

As to the third issue, Gray testified prior to trial that he was aware of the Commonwealth’s plea offer and that he was aware that, if found guilty, he faced a potential life sentence. Therefore, the record refutes Gray’s argument that he was not adequately advised of the potential penalties by counsel, and the trial court did not err in so finding.

Finally, as we previously noted, it appears that Gray is arguing that his counsel on appeal was ineffective. That issue was not raised before the trial court; therefore, we will not address it. *See Kaplon v. Chase*, 690 S.W.2d 761, 763 (Ky. App. 1985).

CONCLUSION

For the foregoing reasons, we affirm the trial court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Rocky D. Gray, *pro se*
Sandy Hook, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General

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