

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001648-MR

RANDY FITTS

APPELLANT

v. APPEAL FROM FULTON CIRCUIT COURT
HONORABLE CHARLES W. BOTELEL, JR., JUDGE
ACTION NO. 01-CR-00055

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: LAMBERT AND TAYLOR, JUDGES; HENRY,¹ SENIOR JUDGE.

HENRY, SENIOR JUDGE: Randy Fitts appeals from a judgment of the Fulton

Circuit Court denying his motion for post-conviction relief brought under

Kentucky Rules of Civil Procedure (CR) 60.02. The circuit court denied Fitts'

motion because the relief he sought, vacatur of his guilty plea to manslaughter and

¹ Senior Judge Michael L. Henry 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.

wanton endangerment because of ineffective counsel, had already been denied during a previous Kentucky Rules of Criminal Procedure (RCr) 11.42 post-conviction proceeding. After review, we affirm.

On June 27, 2001, shots fired by Fitts at another individual following an argument went astray and killed Antron Murphy, a ten-year-old child, in Fulton, Kentucky. The Fulton County grand jury subsequently indicted Fitts on one count of murder and six counts of first-degree wanton endangerment. On February 4, 2002, Fitts filed a motion to enter a guilty plea after reaching a plea agreement with the Commonwealth. Pursuant to the agreement, Fitts pled guilty to one count of first-degree manslaughter and one count of first-degree wanton endangerment. The Fulton Circuit Court accepted the plea agreement and, following a plea colloquy, convicted Fitts of the aforementioned offenses and sentenced him to 15 years' imprisonment.

On April 6, 2005, Fitts, proceeding *pro se*, filed an RCr 11.42 post-conviction motion to vacate, correct, or set aside his conviction because of ineffective counsel. This motion also included requests for the appointment of counsel and for an evidentiary hearing. Fitts specifically claimed that his attorney had failed to advise him that if he pled guilty to first-degree manslaughter, he would be considered a "violent offender" and required to serve 85% of his sentence before becoming eligible for parole pursuant to KRS 439.3401(1) and (3).

Fitts further alleged that his guilty plea was otherwise uninformed and unintelligent when made because of his attorney's "erroneous and incomplete advice and information." The circuit court found Fitts' arguments unpersuasive and denied his motion without appointing him counsel and without holding an evidentiary hearing. Fitts appealed to this Court, but the circuit court's decision was affirmed in an unpublished opinion rendered on July 7, 2006. *Fitts v. Commonwealth*, 2005-CA-001728-MR, 2006 WL 1867904 (Ky. App. July 7, 2006). Fitts' petition for rehearing was denied, as was his subsequent motion for discretionary review tendered to the Supreme Court of Kentucky.

On April 22, 2008, Fitts, proceeding *pro se*, filed another petition for post-conviction relief, in the form of a combined CR 60.02 and Kentucky Rules of Criminal Procedure (RCr) 10.26 motion, asking the Fulton Circuit Court to vacate, amend, or correct his judgment of conviction because of ineffective assistance of counsel prior to his plea agreement. Fitts once again alleged that his attorney had failed to advise him that if he entered into a guilty plea, he would be considered a "violent offender" and required to serve 85% of his sentence before becoming eligible for parole. Fitts also challenged the language of the plea agreement, claiming that it was ambiguous and failed to advise him that he would be classified as a "violent offender." He further contended that there was not a factual basis for his guilty plea since he denied having the intent to shoot anyone. The circuit court denied Fitts' motion without a hearing in an order entered on July 28, 2008, after finding that Fitts' allegations did not fit within the requirements for CR 60.02 or

RCr 10.26 relief. The court further found that the claims were actually RCr 11.42 allegations, which the court had previously rejected in Fitts' first RCr 11.42 proceeding. The present appeal followed.

On appeal, Fitts argues that this case should be remanded to the circuit court for an evidentiary hearing and consideration of the merits of his CR 60.02 claims.² Fitts concedes in his brief that, at first blush, his claims appear to be nothing more than an attempt to re-litigate his RCr 11.42 motion. However, he contends that because of his case's "complex and tortured procedural history," his claims were properly raised pursuant to CR 60.02(f), which allows for relief from a judgment for a "reason of an extraordinary nature justifying relief." Fitts particularly complains about the fact that he was never appointed counsel or provided with an evidentiary hearing during his RCr 11.42 proceeding and argues that this has brought him before this Court in a "unique procedural posture."

We review a trial court's denial of a CR 60.02 motion for post-conviction relief under an abuse of discretion standard. *Parrish v. Commonwealth*, 283 S.W.3d 675, 677 (Ky. 2009). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

Fitts contends that the circuit court's decision here was not supported by sound legal principles because it interpreted his CR 60.02 motion as a successive RCr 11.42 motion. Because of this, the court never reached the actual

² Fitts' appellate brief does not rely upon RCr 10.26 as an avenue for relief.

merits of his claims. Our courts have long held that CR 60.02 “is for relief that is not available by direct appeal and not available under RCr 11.42.” *Gross v. Commonwealth*, 648 S.W.2d 853, 856 (Ky. 1983). Accordingly, “a defendant is required to avail himself of RCr 11.42 while in custody under sentence or on probation, 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.” *Id.* at 857. “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.*

After reviewing Fitts’ claims for relief, it is clear that the circuit court’s characterization of his CR 60.02 motion as a successive RCr 11.42 motion was a correct one. In his CR 60.02 motion, Fitts once again argued that his attorney failed to properly advise him as to parole eligibility even though this same argument had been previously raised and rejected during the RCr 11.42 proceeding. Thus, it is not subject to re-litigation. *See McQueen v. Commonwealth*, 949 S.W.2d 70, 71 (Ky. 1997); *Gross*, 648 S.W.2d at 857; RCr 11.42(3) (“Final disposition of the [RCr 11.42] motion shall conclude all issues that could reasonably have been presented in the same proceeding.”). Fitts’ remaining arguments – that there was never a “meeting of the minds” between the parties as to his parole eligibility, that the plea agreement was ambiguous, and that there was no factual basis for his guilty plea – were not raised during his prior RCr 11.42 proceeding, but they are of a type that could have and should have been.

Therefore, he is not entitled to another opportunity to present them. *Gross*, 648 S.W.2d at 857; *Butler v. Commonwealth*, 473 S.W.2d 108, 109 (Ky. 1971); RCr 11.42(3).

We are of course aware that Fitts has proceeded *pro se* throughout the course of his post-conviction litigation. His arguments notwithstanding, he has failed to present persuasive authority to support his position that this fact somehow entitles him to an evidentiary hearing and substantive consideration of his CR 60.02 motion. Those claims were or could have been raised earlier since they all relate to issues surrounding his guilty plea. The circuit court did not abuse its discretion in denying Fitts' CR 60.02 motion for post-conviction relief.

The judgment of the Fulton Circuit Court is affirmed.

ALL CONCUR.

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