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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000032-MR

RONNIE FITTS — APPELLANT

v.

APPEAL FROM FULTON CIRCUIT COURT
HONORABLE CHARLES W. BOTELER, JR., JUDGE
ACTION NO. 02-CR-00068

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KELLER AND WINE, JUDGES; LAMBERT,[1] SENIOR JUDGE.

KELLER, JUDGE: Ronnie Fitts (Fitts) appeals from the trial court's denial of his motion for relief under Kentucky Rules of Civil Procedure (CR) 60.02 (e) and (f) and under Kentucky Rule of Criminal Procedure (RCr) 10.26. On appeal, Fitts argues that one of the jurors on his final sentencing jury was a first cousin of a

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

witness, thus invalidating the jury's sentence, and that his 40-year sentence exceeded the maximum possible sentence. For the reasons set forth below, we affirm.

FACTS

Fitts has previously been before this Court once and the Supreme Court of Kentucky twice on appeals related to his conviction. We base our brief summary of the facts on those Courts' prior opinions.

In 2002, a Fulton County jury found Fitts guilty of two counts of trafficking in a controlled substance in the first degree, second offense. The court sentenced Fitts to fifteen years' imprisonment on each count, to run consecutively for a total of thirty years. Fitts appealed that conviction and sentence arguing, in pertinent part, that the jury instructions in the sentencing phase were faulty. The Supreme Court agreed with that argument and reversed and remanded for a new sentencing hearing.[2]

On remand, a new jury sentenced Fitts to serve two consecutive twenty-year sentences, for a total of forty years. Fitts appealed that sentence arguing that it was vindictive and that his previous conviction for trafficking in 1992 could not be used to enhance his 2002 convictions. In 2005, the Supreme Court held that, because Fitts was sentenced by two different jury panels, there was no evidence of vindictiveness. Furthermore, the Supreme Court held that the trial court properly used Fitts's 1992 conviction to enhance his 2002 convictions.[3]

[2] *Fitts v. Commonwealth*, 2002-SC-1072, 2003 WL 22415742 (Ky. 2003).
[3] *Fitts v. Commonwealth*, 2004-SC-0653, 2005 WL 2674991 (Ky. 2005).

In 2006, Fitts filed a Kentucky Rule of Criminal Procedure (RCr) 11.42 motion asking the trial court to vacate his judgment of conviction and sentence. In support of his motion, Fitts argued that he received ineffective assistance of counsel, citing to a number of alleged errors by counsel during trial. In pertinent part, Fitts argued that counsel was ineffective with his questioning of a juror, Mabel Martin (Martin), during *voir dire* prior to his second sentencing hearing. According to Fitts, Martin lied when she stated that she did not know him but only "knew of him." Fitts stated that Martin is the sister of a former friend of his; that Martin's step-father filed a civil suit against him; that Martin "ran around with" his wife; and that Martin was biased against him because she blamed Fitts for her brother's drug use. Fitts argued that his counsel should have discovered these "facts" and removed Martin from the jury either through a peremptory challenge or for cause. The trial court summarily denied Martin's motion.

This Court affirmed the trial court's denial of Fitts's motion, holding as follows:

> Fitts argues that Martin, who sat on his sentencing phase re-trial on March 29, 2004, lied when she said she only "knew of" him. Furthermore, he claims that he informed trial counsel that she was lying and asked for her to be removed from the jury panel. There is, however, no evidence of this claim. Rather, the record of *voir dire* reflects that Martin did "know of him," but that she clearly answered in the affirmative when asked if she would be able to decide the case and be fair and impartial. The record does not reflect any conversation between Fitts and trial defense counsel during this exchange nor does his strike sheet reflect that he wanted Martin struck.

> Fitts goes on to make several inconsistent claims as to Martin's impact on the jury. We find no evidence of any of these claims on the record. Fitts has shown no deficient performance and no prejudice, therefore we can find no ineffective assistance of counsel as outlined in *Strickland*.

Fitts v. Commonwealth, 2006-CA-002504, 2007 WL 2566212, *2 (Ky. App. 2007).

Fitts did not appeal from this Court's 2007 opinion, choosing instead to file the motion to correct or modify the sentence currently before us. In that motion, Fitts argued his sentence exceeded the maximum allowable and that Martin was related to the Commonwealth's confidential informant, thus tainting the jury. In support of his second argument, Fitts offered the Affidavit of the confidential informant's daughter indicating that Martin and the confidential informant are first cousins. The trial court summarily denied Fitts's motion and it is from the order of denial that Fitts appeals.

STANDARD OF REVIEW

"The standard of review of an appeal involving a CR 60.02 motion is whether the trial court abused its discretion." *White v. Commonwealth,* 32 S.W.3d 83, 86 (Ky. App. 2000). To amount to an abuse of discretion, the trial court's decision must be "arbitrary, unreasonable, unfair, or unsupported by sound legal principals." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). Absent

a "flagrant miscarriage of justice," the trial court will be affirmed. *Gross v. Commonwealth*, 648 S.W.2d 853, 858 (Ky. 1983). CR 60.02 is not intended as an additional opportunity to re-litigate the same issues that could have been presented by direct appeal or RCr 11.42 proceedings. *McQueen v. Commonwealth*, 948 S.W.2d 415, 416 (Ky. 1997). The purpose of CR 60.02 is to provide relief which is not available by direct appeal or under RCr 11.42. *Gross v. Commonwealth*, 648 S.W.2d 853, 856 (Ky. 1983).

ANALYSIS

We begin our analysis by noting the overriding principle that

> [t]he structure . . . 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. 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.

Id. With this overriding principle and the preceding standard of review in mind, we address the issues raised by Fitts in the order set out above.

1. Juror Disqualification

As noted above, Fitts argues that Martin should have been disqualified because she is the first cousin of the Commonwealth's confidential informant. According to Fitts, Martin's familial relationship to the confidential informant is

"newly discovered information," and Martin's presence as a juror prejudiced the jury. The Commonwealth argues that Fitts should have raised this issue on one of his direct appeals or in his RCr 11.42 motion. We agree Fitts's appeal on this issue is not well taken.

CR 60.02 provides in pertinent part that:

> a court may, upon such terms as are just relieve a party or his legal representative from its final judgment, order, or proceeding upon the following grounds: . . . (b) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59.02; . . . (e) the judgment is void, or has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (f) any other reason of an extraordinary nature justifying relief.

Initially, we note that neither of Fitts's arguments falls within CR 60.02(e); therefore, we will not further address that provision of the Civil Rules. As to Fitts's argument that the relationship between Martin and the informant was newly discovered evidence, we note that those matters that the party knew of or could have known of prior to judgment with the exercise of due diligence are not proper subjects for CR 60.02(b) relief. *Board of Trustees of Policemen's and Firemen's Retirement Fund of City of Lexington v. Nuckolls*, 507 S.W.2d 183, 186 (Ky. 1974).

In his motion and in his argument before us, Fitts does not state when he discovered the familial relationship between Martin and the confidential informant or give any reason why evidence of that relationship could not have been

discovered before judgment. However, we note that, in his RCr 11.42 motion, Fitts sets out in detail his prior dealings with Martin and her relatives as well as the relationship between Martin and his wife. This information belies any argument by Fitts that he could not have timely discovered the familial relationship between Martin and the confidential informant and negates his argument that the relationship is newly discovered evidence. Because the familial relationship between Martin and the confidential informant is not newly discovered evidence, Fitts should have raised the issue in one of his direct appeals or in his RCr 11.42 action and is foreclosed from doing so now.

Furthermore, even if Fitts had established that Martin's familial relationship to the confidential informant was newly discovered evidence, he has failed to allege any facts that would entitle him to relief under CR 60.02 (b) or (f). As noted by this Court in its 2007 opinion, Martin admitted that she knew "of Fitts." However, Martin stated that her knowledge of Fitts would not impede her ability to render a fair verdict. *Fitts v. Commonwealth*, 2007 WL 2566212, *2 (Ky. App. 2007)(2006-CA-002504-MR). Martin's relationship to the confidential informant may have amounted to evidence of possible prejudice during the guilt phase of the trial, when the informant's credibility was at issue. However, such was not the case during the sentencing phase of the trial, because the informant did not testify. Absent that possibility of inherent prejudice, Fitts was required to put forth some evidence of actual prejudice, which he failed to do. Because Fitts has failed to set forth any evidence to support his claim that the familial relationship

between Martin and the confidential informant was newly discovered evidence or that said relationship resulted in any actual prejudice to him, we affirm the trial court's denial of Fitts's motion regarding the seating of Martin as a juror.

2. Length of Penalty

Fitts also argues that the penalty imposed, forty years, is more than what is statutorily permissible. As noted above, CR 60.02 is not designed to afford relief that could otherwise be obtained on direct appeal or through RCr 11.42. Because Fitts failed to pursue this issue in either his 2005 direct appeal or his 2007 RCr 11.42 motion, he is foreclosed from doing so via CR 60.02.

Furthermore, if Fitts had included this issue in his RCr 11.42 motion, he would not have been successful. Fitts is correct that Kentucky Revised Statute (KRS) 532.110(1)(c) states that

> [t]he aggregate of consecutive indeterminate terms shall not exceed in maximum length the longest extended term which would be authorized by KRS 532.080 for the highest class of crime for which any of the sentences is imposed. In no event shall the aggregate of consecutive indeterminate terms exceed seventy (70) years.

Fitts is also correct that KRS 532.080(6) provides for a maximum sentence of twenty to fifty years for a class A or class B felony and a maximum sentence of ten to twenty years for a class C or class D felony. Furthermore, Fitts correctly cites to *Commonwealth v. Durham*, 908 S.W.2d 119 (Ky. 1995), for the proposition that KRS 532.110(1) and KRS 532.080 "establish the maximum aggregate sentence for

a person convicted of multiple offenses, without regard to whether the penalties for those offenses have been enhanced." *Id.* at 121.

However, Fitts goes astray in his analysis. First, the enhancement in *Durham* refers to an increased sentence because of a defendant's status as a persistent felony offender. It does not refer to a change in felony class because a defendant has committed the same crime more than once. A jury convicted Fitts of being a repeat offender, not of being a persistent felony offender; therefore, the enhancement discussed in *Durham* does not apply to this case.

Second, the holding in *Durham* negates Fitts's argument, it does not support it. In *Durham,* the defendant pled guilty to two class D felonies and to being a persistent felony offender. The trial court sentenced Durham to five years on each of the underlying felonies and then enhanced each sentence to ten years because of Durham's status as a persistent felony offender. The court ordered Durham to serve the two ten-year sentences consecutively for a total of twenty years. Durham appealed and this Court reversed the trial court, holding that the maximum sentence was ten years. The Commonwealth appealed and the Supreme Court of Kentucky reversed this Court and reinstated the trial court's sentence. *Id.* at 120-21.

In its opinion, the Supreme Court first held that the aggregation limitations in KRS 532.110(1)(c) and KRS 532.080 apply to all defendants, whether they are persistent felony offenders or not. *Id.* at 121. Therefore, the

aggregation limits apply to Fitts, even though he was not adjudicated to be a persistent felony offender.

The Supreme Court then held that the maximum limitation in KRS 532.080 applies "without regard to whether the penalties" for the underlying sentences have been enhanced. *Id.* This does not mean that the trial court should ignore any enhancement when determining the maximum sentence. Rather, it means that the trial court should determine the maximum sentence, including any enhancements, then, if appropriate, reduce the total sentence so that it falls within the maximum sentence range. Fitts was convicted of two class B felonies and sentenced to the maximum for each felony, twenty years. The court ran the two sentences consecutively, for a total of forty years. Forty years falls within the maximum restriction in KRS 532.080(6)(a) of fifty years for a class B felony and is therefore, lawfully permissible.

CONCLUSION

Based on the preceding, and having reviewed the record and the arguments of Fitts and the Commonwealth, we affirm the trial court.

ALL CONCUR.

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