

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000735-MR

ROBERT GARLINGER

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE IRV MAZE, JUDGE
ACTION NOS. 03-CR-001900 AND 05-CR-001564

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: DIXON AND NICKELL, JUDGES; KNOPF,¹ SENIOR JUDGE.

NICKELL, JUDGE: Robert Garlinger, *pro se*, appeals from the Jefferson Circuit Court's denial of his successive CR² 60.02 motion for post-conviction relief. We affirm.

¹ Senior Judge William L. Knopf 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.

² Kentucky Rules of Civil Procedure.

Garlinger was indicted on July 28, 2003, for rape in the first degree,³ two counts of sodomy in the first degree,⁴ and two counts of sexual abuse in the first degree.⁵ The Commonwealth provided discovery and defense counsel filed numerous pleadings on Garlinger's behalf. On May 17, 2005, Garlinger was re-indicted on the above charges and three additional counts of incest.⁶ All of the charged offenses stemmed from sexual acts committed by Garlinger against his daughter while she was between the ages of eight and nine. Shortly after the second indictment was issued, Garlinger entered into a plea agreement with the Commonwealth whereby the original indictment would be dismissed as would the incest charges, the rape and sodomy charges would be amended to third degree,⁷ and the Commonwealth would recommend a total sentence of fourteen years' imprisonment. A final judgment of conviction and sentence comports with the plea agreement was entered on August 8, 2005.

On September 22, 2006, Garlinger filed a CR 60.02 motion seeking post-conviction relief. He alleged ineffectiveness of counsel, insufficiency of the evidence, and challenged the credibility of the Commonwealth's witnesses. The

³ KRS 510.040, a Class A felony.

⁴ KRS 510.070, a Class A felony.

⁵ KRS 510.110, a Class D felony.

⁶ KRS 530.020, a Class C felony.

⁷ KRS 510.060 and KRS 510.090, both Class D felonies.

trial court denied the motion in February 2008 and Garlinger appealed. However, he failed to prosecute the appeal.

On April 18, 2008, Garlinger filed a motion for relief pursuant to RCr⁸ 11.42, again arguing ineffectiveness of counsel and insufficiency of the evidence. The trial court denied this motion on April 24, 2008. No appeal was taken from that denial.

On February 16, 2009, Garlinger sent a letter to the trial judge raising the same complaints stated in his earlier motions for post-conviction relief regarding trial counsel and his convictions. The trial court treated this letter as a second CR 60.02 motion and denied it on February 26, 2009. This appeal followed.

We review the denial of a CR 60.02 motion for an abuse of discretion. *Brown v. Commonwealth*, 932 S.W.2d 359, 362 (Ky. 1996); *Gross v. Commonwealth*, 648 S.W.2d 853, 858 (Ky. 1983). “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). Motions under CR 60.02 are “not intended merely as an additional opportunity to relitigate the same issues which could ‘reasonably have been presented’ by direct appeal or RCr 11.42 proceedings.” *McQueen v. Commonwealth*, 948 S.W.2d 415, 416 (Ky. 1997) (citations omitted). CR 60.02 “is not a separate avenue of appeal to be pursued in addition to other remedies, but

⁸ Kentucky Rules of Criminal Procedure.

is available only to raise issues which cannot be raised in other proceedings.” *Id.* Garlinger has previously raised the exact claims of ineffective assistance of counsel he raises before this Court. The trial court denied his request for relief on these grounds twice and Garlinger failed to avail himself of his right to appeal from those adverse judgments. Therefore, we cannot say the trial court abused its discretion in denying Garlinger’s successive motion which alleged no new grounds for the relief he sought.

Therefore, for the foregoing reasons, the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Robert Garlinger, *pro se*
Sandy Hook, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Todd D. Ferguson
Assistant Attorney General
Frankfort, Kentucky