

RENDERED: MARCH 26, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000323-MR

DANNY SHELLEY

APPELLANT

v.

APPEAL FROM PULASKI CIRCUIT COURT
HONORABLE PAUL E. BRADEN, JUDGE
ACTION NO. 02-CR-00094

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: KELLER AND VANMETER, JUDGES; GRAVES,¹ SPECIAL JUDGE.

GRAVES, SPECIAL JUDGE: Danny Shelley, *pro se*, appeals from an order of the Pulaski Circuit Court which denied his motion made pursuant to Kentucky Rules of Civil Procedure (CR) 60.02. We affirm.

¹ Retired Judge John W. Graves sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

Shelley was charged with murder for shooting Pulaski County Sheriff Sam Catron. The Commonwealth gave him notice of its intent to seek the death penalty based upon two aggravating circumstances: (1) that he committed the murder for the purpose of receiving money or other profit; and (2) that the murder was intentional and the sheriff was engaged at the time of the murder in the lawful performance of his duties. *See* KRS 532.025(2)(a)(4.) and (7.). Shelley thereafter entered into a plea agreement with the Commonwealth. Under the terms of the agreement, Shelley agreed to enter a plea of guilty to murder and to testify on behalf of the Commonwealth against two codefendants; in exchange, the Commonwealth agreed to recommend that he receive a sentence of life in prison without the possibility of parole for twenty-five years. Following a hearing, the trial court accepted his plea and sentenced him in accordance with the agreement on March 3, 2003.

On February 21, 2006, Shelley filed a motion to set aside his conviction and sentence pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42. He alleged that his guilty plea was involuntary due to ineffective assistance of counsel. Specifically, he asserted that his counsel was ineffective for advising him that he could be sentenced to death if found guilty; for failing to assert affirmative defenses; and for failing to seek suppression of evidence against him. On April 24, 2006, the trial court entered an order denying the motion without holding an evidentiary hearing. Shelley's subsequent appeal was dismissed as

untimely. The Kentucky Supreme Court denied his motion for discretionary review of the dismissal on August 15, 2007.

On October 22, 2008, Shelley filed a motion to vacate, amend and/or modify his sentence pursuant to CR 60.02. He argued that he was entitled to relief on numerous grounds, including ineffective assistance of counsel, that he lacked the mental state to commit murder, that the evidence was insufficient to convict him, that he was brainwashed into committing the crime, that his attorneys, the Commonwealth Attorney and the circuit court ignored, denied and neglected his mental and physical disabilities, and that he and others were subjected to offers and threats by the DEA and the FBI. The trial court denied the motion without a hearing, on the grounds that it did not raise any issues that could not or should not have been raised via either a direct appeal or in a motion pursuant to RCr 11.42. This appeal followed.

Shelley argues that his guilty plea was involuntary due to ineffective assistance of counsel and mental incompetence on his part. He contends that he was pressured into pleading guilty so that the Commonwealth could convict his co-defendants. He claims that the inmate legal aide who assisted in preparing his RCr 11.42 motion was under the influence of pain medications, and made no efforts to obtain records to support his claims; and that his attorneys prevented him from obtaining the necessary records to pursue his post-conviction action.

We review the denial of a CR 60.02 motion for an abuse of discretion. *White v. Commonwealth*, 32 S.W.3d 83, 86 (Ky. App. 2000). 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).

The Kentucky Supreme Court has emphasized 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.” *Gross v. Commonwealth*, 648 S.W.2d 853, 856 (Ky. 1983). The Court recently reiterated that CR 60.02 “is not intended to provide an avenue for defendants to relitigate issues which could have been presented in a direct appeal or an RCr 11.42 proceeding.” *Baze v. Commonwealth*, 276 S.W.3d 761, 765 (Ky. 2008).

Shelley’s allegations of ineffective assistance of counsel and an involuntary guilty plea either were or could have been raised in his RCr 11.42 motion. Shelley has not shown that any of his allegations, such as that of mental incompetence to enter a guilty plea, “were unknown and could not have been known to [him] by the exercise of reasonable diligence and in time to have been otherwise presented to the court” in his earlier motion. *Gross*, 648 S.W.2d at 856. The trial court did not, therefore, abuse its discretion in denying his motion.

Shelley’s allegation that the legal aide who assisted him in the preparation of his RCr 11.42 motion was incapacitated by his pain medications is not supported by the record. The RCr 11.42 motion was accompanied by a lengthy and highly-detailed memorandum that raised numerous grounds for relief.

[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. Final disposition of that motion, or waiver of the opportunity to make it, shall conclude all issues that reasonably could have been presented in that proceeding. 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.

Gross, 648 S.W.2d at 857. Shelley has provided no reasonable explanation for why he was unable to include the claims he is raising for the first time in his CR 60.02 motion in his earlier motion. They are therefore barred from our consideration.

Shelley also argues that he was entitled to an evidentiary hearing on his motion. Before a movant is entitled to such a 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.* Shelley’s motion did not allege such facts; the trial court did not therefore abuse its discretion in refusing to hold a hearing.

The order of the Pulaski Circuit Court denying Shelley’s CR 60.02 motion is therefore affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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