

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000105-MR

STEVEN BRYANT

APPELLANT

v. APPEAL FROM CALDWELL CIRCUIT COURT
HONORABLE CLARENCE A. WOODALL, III, JUDGE
ACTION NO. 02-CR-00038

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: MOORE, NICKELL AND THOMPSON, JUDGES.

NICKELL, JUDGE: Steven Bryant, *pro se*, has appealed from the Caldwell Circuit Court's denial of his motion to set aside his judgment and sentence or alternatively, to modify the judgment and sentence pursuant to CR¹ 60.02 and RCr² 10.26. We affirm.

¹ Kentucky Rules of Civil Procedure.

² Kentucky Rules of Criminal Procedure.

Bryant and a co-defendant were indicted by a Caldwell County Grand Jury in 2002 for robbery in the first degree³ and assault in the first degree.⁴ Bryant elected to proceed to a jury trial. Upon submission, the jury indicated it was having difficulty reaching a unanimous verdict. Bryant then decided to enter a conditional guilty plea as to the charged offenses. Within the conditional plea, Bryant reserved the right to appeal from the trial court's pretrial denial of his motion to dismiss the indictment on the grounds of a violation of the Interstate Agreement on Detainers. Upon entry of his plea, the Commonwealth recommended a sentence of ten years' imprisonment on the robbery and eleven years' imprisonment on the assault. The trial court sentenced Bryant in accordance with the Commonwealth's recommendations and ordered the sentences to be served consecutively for a total sentence of twenty-one years.

Bryant directly appealed from his conviction to this Court based on his conditional plea. The appeal was transferred to the Supreme Court of Kentucky which affirmed the convictions in *Bryant v. Commonwealth*, 199 S.W.3d 169 (Ky. 2006).

While the direct appeal was pending, Bryant filed a motion for post-conviction relief pursuant to RCr 11.42. The trial court denied the motion without holding an evidentiary hearing. Bryant failed to timely file a notice of appeal from that denial. On October 20, 2008, Bryant filed the instant CR 60.02 motion for

³ KRS 515.020, a Class B felony.

⁴ KRS 508.010, a Class B felony.

relief. The trial court denied that motion on December 11, 2008. This appeal followed.

“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). The relief provided by CR 60.02 is only given under extraordinary circumstances, and the pursuit of such relief is not a substitute for an appeal or other remedies, but rather is intended as an avenue to raise issues which cannot properly be raised in other proceedings. *McQueen v. Commonwealth*, 948 S.W.2d 415 (Ky. 1997). Further, CR 60.02 was not “intended merely as an opportunity to relitigate the same issues which could ‘reasonably have been presented’ by direct appeal or RCr 11.42 proceedings.” *Id.* at 416. *See also Gross*, 648 S.W.2d at 856.

Bryant contends his simultaneous convictions for robbery and assault, both in the first degree, constituted a violation of the rule against double jeopardy and the trial court erred in failing to so find when it denied his motion for post-conviction relief. He argues that since the robbery and assault involved the same victim, the two crimes merged with the assault amounting to a lesser-included offense of the robbery and thus his conviction on both counts was erroneous. After

a careful review of the record and the law, we conclude Bryant's argument is without merit.

When presented with a claim of a double jeopardy violation, courts are required to "determine whether the act or transaction complained of constitutes a violation of two distinct offenses and, if it does, if each statute requires proof of a fact the other does not." *Commonwealth v. Burge*, 947 S.W.2d 805, 811 (Ky. 1996) (citing *Eldred v. Commonwealth*, 906 S.W.2d 694 (Ky. 1995)). If each charged crime requires proof of an element not contained within the other, the crimes do not merge and no double jeopardy violation occurs. *Id.* at 809.

The Supreme Court of Kentucky has examined this very issue in relation to concurrent charges of assault and robbery arising from the same course of conduct. See *Fields v. Commonwealth*, 219 S.W.3d 742 (Ky. 2007); *Grundy v. Commonwealth*, 25 S.W.3d 76 (Ky. 2000); *Taylor v. Commonwealth*, 995 S.W.2d 805 (Ky. 1996). In *Fields*, the Supreme Court was presented with a similar factual situation to the one at bar. In discussing whether a double jeopardy violation occurs when a defendant is convicted of both robbery and assault, the Court stated no such violation exists when, as here,

conviction of either the assault or the robbery of [the victim] required proof of an element not required to prove the other. The conviction of robbery required proof of a theft, which was not required to convict of assault. The conviction of assault required proof of a physical injury to [the victim], whereas the conviction of robbery required proof only that the Appellant used or threatened the use of physical force upon [the victim] while armed with a [firearm].

219 S.W.2d at 746. Just as in *Fields*, in the instant case the two crimes charged clearly required proof of different elements. Proof of serious physical injury was required to sustain the assault conviction, but such injury was not required under the robbery indictment. Further, to support a conviction for the robbery, the Commonwealth was required to prove intent to commit a theft, which is clearly not an element of assault. Thus, Bryant was charged with two separate and distinct crimes, meaning the merger doctrine does not apply and no double jeopardy violation occurred.

We note Bryant relies heavily on the holding in *Sherley v. Commonwealth*, 558 S.W.2d 615 (Ky. 1977), in support of his argument that the merger doctrine is applicable to this matter. However, because the holding in *Sherley* on the merger doctrine was overruled in *Dixon v. Commonwealth*, 263 S.W.3d 583 (Ky. 2008), his reliance thereon is misplaced. There was no error.

It appears Bryant has abandoned the remaining issue raised in his CR 60.02 motion before the trial court as it is not included in his brief to this Court. “Failure of appellant to discuss the alleged errors in its brief is the same as if no brief had been filed in support of its charges.” *R.E. Gaddie, Inc. v. Price*, 528 S.W.2d 708, 710 (Ky. 1975). Therefore, we will not discuss the other allegation of error as it is not properly before us for review.

Finally, the Commonwealth contends Bryant knew or should have known of the existence of his claim when he filed his direct appeal, his subsequent

RCr 11.42 motion, and his federal habeas corpus petition and he should therefore be prohibited from raising this issue at this juncture. However, because we have resolved this appeal on the merits of the claim presented, we need not comment on the Commonwealth's assertion.

For the foregoing reasons, the judgment of the Caldwell Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Steven Bryant, *pro se*
Eddyville, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Ken W. Riggs
Assistant Attorney General
Frankfort, Kentucky