

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2009-CA-000444-MR

JAMES EDWARD GEORGE, JR.

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE PAMELA R. GOODWINE, JUDGE  
ACTION NO. 01-CR-00532

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: LAMBERT AND THOMPSON, JUDGES; KNOPF,<sup>1</sup> SENIOR JUDGE.

KNOPF, SENIOR JUDGE: James Edward George, Jr., proceeding *pro se*, appeals from an order of the Fayette Circuit Court denying his motion for post-conviction relief filed pursuant to Kentucky Rules of Civil Procedure (CR) 60.02. After our review, we affirm.

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<sup>1</sup> 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.

## Facts and Procedural History

On December 4, 2001, George was sentenced to twenty-five years in prison after a Fayette County jury found him guilty of terroristic threatening (two counts), kidnapping, first-degree sodomy (six counts), first-degree rape (five counts), second-degree assault, and being a second-degree persistent felony offender. The convictions stemmed from an incident in which George had held his girlfriend captive in their apartment for five days. On appeal, the Supreme Court of Kentucky affirmed George's conviction as to all charges but one<sup>2</sup> in an unpublished decision that became final on December 18, 2003.<sup>3</sup>

On August 18, 2006, George, proceeding *pro se*, filed a motion to vacate his conviction pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42. In that motion, George alleged ineffective assistance of counsel along with a number of other trial errors. An attorney from the Department of Public Advocacy was subsequently appointed to represent George, and she filed a supplement to George's motion on January 18, 2007. This supplement also included grounds for post-conviction relief under RCr 10.02, RCr 10.06, and CR 60.02(e) and (f). The circuit court denied George's motion in an order entered on May 24, 2007. We affirmed the decision on appeal in an opinion rendered on September 19, 2008.<sup>4</sup>

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<sup>2</sup> The Supreme Court reversed George's second-degree assault conviction because of an evidentiary error. That charge was consequently dismissed on remand.

<sup>3</sup> *George v. Commonwealth*, Case No. 2001-SC-1067-MR.

<sup>4</sup> *George v. Commonwealth*, Case No. 2007-CA-001365-MR.

On February 11, 2009, George filed another motion for post-conviction relief – this time pursuant to CR 60.02(d), which addresses “fraud affecting the proceedings, other than perjury or falsified evidence.” George alleged that his trial counsel had perpetrated fraud upon the proceedings in a number of ways, all of which revolve around an indictment dismissal hearing that took place on October 19, 2001. George first alleged that his trial counsel had committed fraud during the hearing by advising the trial judge: (1) that the victim in the subject incident had told him that she had written letters to the Commonwealth retracting many of her allegations against George; and (2) that the substance of those letters had been confirmed by the Commonwealth. According to George, those letters did not exist and the victim had instead told his counsel that she *would* write them. George also alleged that his counsel had committed fraud by telling the trial court that he had hoped that the victim would be in attendance at the hearing even though he had apparently failed to tell her about it. George argued that the victim would have attended the hearing were it not for his counsel’s failure to tell her when it was taking place. George finally complained that his counsel had also failed to correctly advise him when the hearing was taking place.

Along with his motion, George tendered an affidavit from the victim in the subject incident in which she indicated that she had told George’s trial counsel and the Commonwealth’s Attorney that George had not raped or sodomized her. She also indicated that she had told George’s counsel that she

would write letters to this effect but ultimately did not do so because her crime victims' advocate told her that it "would not do any good." The victim also indicated that George's counsel did not inform her of the date of the indictment dismissal hearing and that she would have attended it had she known.

The circuit court denied George's motion without a hearing in an order entered on February 17, 2009. In doing so, the court relied on multiple grounds. It first found that George had failed to file his motion within a reasonable time following entry of the judgment being challenged, as required by CR 60.02, since it was done so eight years after final judgment was entered.<sup>5</sup> The court also concluded that the issues raised by George could have been presented in his earlier RCr 11.42 motion and, therefore, relief under CR 60.02 was precluded. As to the merits of the issues raised by George, the court concluded that none of his assertions amounted to fraud affecting the proceedings. George subsequently filed the present appeal.

### **Analysis**

On appeal, George contends that the circuit court erred by denying his CR 60.02 motion for post-conviction relief. A party moving for relief under CR 60.02 has the burden of showing why he is entitled to this "special, extraordinary" relief. *McQueen v. Commonwealth*, 948 S.W.2d 415, 416 (Ky. 1997).

Accordingly, "[b]efore the movant is entitled to an evidentiary hearing, he must

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<sup>5</sup> We question this basis for the circuit court's denial of George's motion since the motion was filed only a few months after the opinion denying his RCr 11.42 appeal was rendered. However, because the court provided other grounds for its decision, we need not dwell on this issue.

affirmatively allege facts which, if true, justify vacating the judgment and further allege special circumstances that justify CR 60.02 relief.” *Gross v. Commonwealth*, 648 S.W.2d 853, 856 (Ky. 1983). “Given the high standard for granting a CR 60.02 motion, a trial court’s ruling on the motion receives great deference on appeal and will not be overturned except for an abuse of discretion.” *Barnett v. Commonwealth*, 979 S.W.2d 98, 102 (Ky. 1998). Thus, we must determine if the circuit court abused its discretion by denying George’s CR 60.02 motion.

In conducting our review, we note that the interrelationship between RCr 11.42 and CR 60.02 is an important consideration in this case. As noted by our Supreme Court in *Gross v. Commonwealth, supra*, “[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*, 648 S.W.2d at 856. Under this structure:

[a] defendant who is in custody under sentence or on probation, parole or conditional discharge, is required to avail himself of RCr 11.42 as to any ground of which he is aware, or should be aware, during the period when the remedy is available to him. Civil Rule 60.02 is 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*, 948 S.W.2d at 416; *see also Barnett*, 979 S.W.2d at 101. “In summary, CR 60.02 is not a separate avenue of appeal to be pursued in addition to other

remedies, but is available only to raise issues which cannot be raised in other proceedings.” *McQueen*, 948 S.W.2d at 416.

The circuit court concluded that the issues raised by George in his CR 60.02 motion could have been raised in his earlier RCr 11.42 proceeding. We agree. RCr 11.42(3) provides that any motion filed under that rule “shall state all grounds for holding the sentence invalid of which the movant had knowledge” and that “[f]inal disposition of the motion shall conclude all issues that could reasonably have been presented in the same proceeding.” All of the issues raised in George’s CR 60.02 motion could have and should have been raised during the earlier RCr 11.42 proceedings. Furthermore, all of George’s complaints lack substantive merit and fail to “justify vacating the judgment[.]” *Gross*, 648 S.W.2d at 856.

For example, in his RCr 11.42 motion, George complained that his trial counsel was ineffective for failing to secure the victim’s presence at the indictment dismissal hearing after she had apparently retracted many of her prior allegations regarding her captivity and sexual assault. He essentially raises the very same complaint in his CR 60.02 motion, only this time he alleges that his counsel had committed fraud by telling the trial court that he had hoped that the victim would be in attendance at the hearing even though he had failed to tell her about it. This issue certainly could have been raised during the earlier RCr 11.42 proceedings. Moreover, we fail to see how this conduct constitutes fraud that

would entitle George to relief from his judgment and sentence. *See Gross*, 648 S.W.2d at 856.

George also complains that his trial counsel had conveyed fraudulent information to him before the indictment dismissal hearing by initially telling him that the hearing would take place on October 12, 2001, even though Fayette County courts were not in session on that day. He also alleges that his counsel had subsequently told him that he would “try” to get the hearing set for October 19, 2001, even though court records reflect that the hearing was already set for that date as of October 10, 2001. We again fail to see how these facts, even if true, constitute fraud that would merit vacatur of George’s convictions. A hearing on George’s motion to dismiss took place on October 19, 2001, and the circuit court was made fully aware of the fact that the victim had recanted many of her allegations. The incident of which George complains is meaningless in light of these facts, and even assuming that it were an issue of note it could have and should have been raised beforehand.

George also asserts that his trial counsel committed fraud upon the proceedings by advising the trial judge that the victim had written letters to the Commonwealth even though she had actually told counsel that she *would* write those letters. George also insists that his counsel committed fraud by advising the court that the Commonwealth had confirmed what was in the letters. According to George, by making these assertions, his trial counsel was implying that the Commonwealth had letters from the victim but was refusing to provide them in

discovery. Even assuming that this is true, we again fail to see how such conduct would merit the “special, extraordinary” relief afforded by CR 60.02. Indeed, if anyone could raise a complaint with respect to this type of conduct, it would be the Commonwealth. Moreover, the record reflects that the Commonwealth did acknowledge prior to trial that the victim had made oral representations recanting many of her allegations against George. George again provides nothing of substance to demonstrate how he was prejudiced by this incident and – more importantly – why it would entitle him to relief from judgment under CR 60.02. Furthermore, we again believe that this complaint – if it could be seen to have any validity at all – should have been presented in George’s RCr 11.42 motion.

### **Conclusion**

For the foregoing reasons, the order of the Fayette Circuit Court denying James Edward George, Jr.’s motion for RCr 60.02 post-conviction relief is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

James Edward George, Jr., *pro se*  
West Liberty, Kentucky

BRIEF FOR APPELLEE:

Jack Conway  
Attorney General

Joshua D. Farley  
Assistant Attorney General  
Frankfort, Kentucky