

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-000908-MR

ANTHONY J. WHEELER

APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE CHARLES L. CUNNINGHAM, JR., JUDGE
ACTION NO. 90-CR-002099

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: LAMBERT AND STUMBO, JUDGES; WHITE,¹ SENIOR JUDGE.

WHITE, SENIOR JUDGE: Anthony J. Wheeler appeals from an order of the Jefferson Circuit Court which denied his Kentucky Rules of Civil Procedure (CR) 60.02 motion to set aside his guilty plea and his motion for an evidentiary hearing.

We affirm.

¹ Senior Judge Edwin M. White 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.

Wheeler was indicted on November 27, 1990, for murder and first-degree robbery. He was eligible to receive the death penalty because the robbery charge qualified as an aggravating circumstance under KRS 532.025(2)(a)(2). Wheeler entered into an “open” plea agreement with the Commonwealth. In exchange for his plea of guilty, the Commonwealth agreed to recommend a sentence of life without parole for twenty-five years on the murder charge. The agreement provided that Wheeler could argue for any lesser sentence and that the court, after hearing the evidence in the sentencing phase, could impose a sentence of death if it determined that was the appropriate penalty. The agreement also stated that Wheeler had stipulated that the robbery charge was an aggravating factor under KRS 532.025(2)(a)(2).

At the hearing on his motion to enter a guilty plea, Wheeler changed his mind and decided that he would proceed to trial on the charges. Several months later, he told the court that he had changed his mind again and wanted to plead guilty to the charges. After discussing the matter at considerable length with Wheeler, his trial counsel, and the Commonwealth attorney, the circuit court ascertained that Wheeler was aware of the rights he was waiving by pleading guilty. Wheeler also initialed and signed AOC form 491.1 to that effect. He entered a plea of guilty to the murder charge, and an *Alford* plea² to the robbery charge, stating that he was innocent of the latter charge but wished to avoid the risk

² A plea pursuant to *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970), “permits a conviction without requiring an admission of guilt and while permitting a protestation of innocence.” *Wilfong v. Commonwealth*, 175 S.W.3d 84, 103 (Ky. App. 2004).

of going to trial. The circuit court sentenced Wheeler, in accordance with the Commonwealth's recommendation, to life without parole for twenty-five years on the murder charge and twenty years' imprisonment on the first-degree robbery charge, to be run concurrently for a total sentence of life without parole for twenty-five years. Final judgment was entered on September 25, 1991.

Since 1991, Wheeler has filed a motion pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42 and two motions pursuant to CR 60.02. In his RCr 11.42 motion, which he filed in 1996, Wheeler argued that his attorney had coerced him into pleading guilty even though he had acted in self-defense and that in consequence his guilty plea had been involuntary. He also argued that his trial counsel was ineffective for failing adequately to investigate his case or to prepare a defense. The circuit court denied the motion, stating "in light of the record . . . the Court finds nothing to support Mr. Wheeler's claim that this guilty plea was not knowingly and voluntarily made." Wheeler did not appeal from the denial of his motion.

Wheeler then moved the court to allow him to file a successive RCr 11.42 motion, arguing that he had been unable to present all of his arguments due to the ineffective assistance provided by his legal aide. The circuit court denied the motion on November 6, 1998. Wheeler did not appeal from the denial of the motion.

Then, two years later, on November 16, 2000, Wheeler filed his first motion pursuant to CR 60.02(e) and (f), in which he reiterated his argument that,

due to ineffective assistance of his legal aide, he had been unable to present all his claims in his original RCr 11.42 motion. The circuit court denied the motion.

Wheeler appealed the denial of the motion and was appointed legal counsel from the Department of Public Advocacy. The attorney was subsequently permitted to withdraw on the ground that the appeal was “not a proceeding that a reasonable person with adequate means would be willing to bring at his own expense.” This Court requested Wheeler to file a *pro se* brief, but he failed to do so, and his appeal was dismissed on September 12, 2001.

Almost four years later, on June 29, 2005, Wheeler filed a second CR 60.02 motion, arguing that his sentence was unlawful because the trial court had failed to find and designate in writing that it had found beyond a reasonable doubt the presence of a statutory aggravating circumstance. He was appointed counsel from the Department of Public Advocacy who filed a supplement to the motion, arguing that Wheeler had received ineffective assistance of counsel and that his guilty plea was not voluntary.

The circuit court initially scheduled an evidentiary hearing on the motion, but then canceled the hearing after the Commonwealth filed a motion to reconsider. It also denied the CR 60.02 motion. This appeal followed.³

In denying Wheeler’s CR 60.02 motion, the circuit court stated that the action was procedurally barred because the issues Wheeler was raising could

³ An attorney from the Department of Public Advocacy was appointed to represent Wheeler in his appeal, but withdrew after determining that it was “not a proceeding that a reasonable person with adequate means would be willing to bring at his own expense.” Wheeler thereafter filed a *pro se* brief.

and should have been brought in his previous post-conviction motions. The circuit court also stated that the motion was arguably untimely as it was filed many years after the final judgment, without any explanation for the delay. Finally, the trial court noted that Wheeler had signed the Commonwealth's Offer on a Plea of Guilty wherein he had stipulated that first-degree robbery of the victim is an aggravating factor under KRS 532.025. This appeal followed.

We review a trial court's denial of a CR 60.02 motion for post-conviction relief under an abuse of discretion standard. *Parrish v. Commonwealth*, 283 S.W.3d 675, 677 (Ky. 2009). "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).

We agree with the circuit court's determination that Wheeler's motion was procedurally barred and untimely.

The 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. 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 not intended merely as an additional opportunity to raise *Boykin* defenses. It 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. [Emphasis in original.]

Gross v. Commonwealth, 648 S.W.2d 853, 856 (Ky. 1983).

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 is available only to raise issues which cannot be raised in other proceedings.” *Id.*

Wheeler presented his arguments regarding ineffective assistance of counsel and the alleged involuntariness of his guilty plea in his RCr 11.42 motion and first CR 60.02 motion. The circuit court denied his request for relief on both occasions, yet Wheeler did not avail himself of the right to appeal from those earlier adverse judgments. The only argument not raised in his prior motions is the contention that the trial court failed to find beyond a reasonable doubt the presence of a statutory aggravating factor. A motion brought under CR 60.02(e) and (f) must be brought within a reasonable time. Wheeler waited almost fourteen years from the date of entry of the final judgment to raise this argument, and provided no explanation as to why it was not raised in his earlier motions. Under these circumstances, the trial court’s denial of his motion was not an abuse of discretion.

As to Wheeler’s contention that he was entitled to an evidentiary hearing, “[b]efore a 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.” *Gross*, 648 S.W.2d at 856. An evidentiary hearing was unnecessary because Wheeler’s claims are

procedurally barred and untimely. Furthermore, our review of the guilty plea proceedings in the record refutes his allegations.

The order of the Jefferson Circuit Court is therefore affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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