

Commonwealth of Kentucky
Court of Appeals

NO. 2008-CA-002240-MR

ROBERT T. DAVIES

APPELLANT

v. APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE KELLY MARK EASTON, JUDGE
ACTION NO. 06-CR-00090

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CAPERTON, LAMBERT, AND NICKELL, JUDGES.

LAMBERT, JUDGE: Robert Davies appeals *pro se* from the Hardin Circuit Court's November 14, 2008, order denying his motion to alter, amend, or vacate an order entered on October 21, 2008. That order denied his motion for post conviction relief under Kentucky Rules of Civil Procedure (CR) 60.02. After careful review, we affirm both of the trial court's orders denying relief.

On November 4, 2005, Davies' girlfriend, J.K., notified the Radcliff Police Department that Davies was fondling her twelve-year-old daughter, L.K. L.K. gave a statement to police indicating that in early July 2005, Davies began fondling her in the mornings after her mother left for work. During one incident, Davies "reached his hand inside her shorts and underwear and began fondling her vagina." When L.K. told Davies to stop, he did so and left the room. However, when asked how often this happened, L.K. described that it happened almost every morning, when Davies would get up around 5:00 or 5:30 a.m. to let the dog out. Davies would let the dog out of her room and then return and fondle her vagina, while she was asleep or pretending to be asleep. Finally, when she couldn't take it anymore, she would tell Davies to get out of her room and leave her alone.

On January 31, 2006, Davies was indicted on six counts of first-degree sexual abuse. On February 28, 2006, Davies, who was represented by counsel, appeared and entered a plea of not guilty, and the case was set for trial. However, after several months of delay, Davies received new counsel, and a new trial date of August 10, 2007, was set. On November 13, 2007, Davies again appeared with counsel and accepted the Commonwealth's recommendation for a plea of guilt on the charge of first-degree sexual abuse.

On March 18, 2008, Davies was sentenced in accordance with the terms of his plea agreement. He received a five-year sentence on counts one through three to run consecutively with a five-year probated sentence on counts

four through six, with said probation beginning when Davies served out or was paroled on the five years to serve.

On September 30, 2008, Davies filed a motion pursuant to CR 60.02(e) and (f), contending that his sentence should be set aside because it was “improper” or “unlawful.” Davies argued that the evidence was not sufficient to convict him of anything other than second-degree sexual abuse, a misdemeanor, because the victim was twelve years old and not *less* than twelve years of age.

The trial court denied Davies’ CR 60.02 motion on October 21, 2008, concluding that Davies’ arguments should have been raised on collateral attack pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42. Additionally, the trial court concluded that Davies’ argument was incorrect because the charges against him were not based on the victim’s age, but were based upon the fact that the victim was asleep at the time of the abuse, and thus the victim was considered physically helpless under Kentucky law. On November 14, 2008, the trial court issued an order denying Davies’ motion to alter, amend, or vacate the trial court’s October 21, 2008, order. This appeal now follows.

We review a trial court’s denial of a CR 60.02 motion for an abuse of discretion. *Richardson v. Brunner*, 327 S.W.2d 572, 574 (Ky. 1959) (internal citation omitted). To obtain an order for relief under CR 60.02, “a very substantial showing to merit relief” must be made. *Ringo v. Commonwealth*, 455 S.W.2d 49, 50 (Ky. 1970).

In his original motion to modify his sentence pursuant to CR 60.02, Davies argued that the plea bargain he entered into with the Commonwealth was unconscionable because the evidence was not sufficient to support a conviction for anything greater than second-degree sexual abuse. On appeal, Davies now argues that he received ineffective assistance of counsel when counsel negotiated an unconscionable plea bargain, and the trial court erred in denying his motion to modify pursuant to CR 60.02.

“The structure provided in Kentucky for attacking the final judgment of a trial court in a criminal case is not haphazard or 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.” *Gross v. Commonwealth*, 648 S.W.2d 853, 856 (Ky. 1983) (emphasis in original).

“The Kentucky Supreme Court has warned that because of the desirability of according finality to judgments, CR 60.02(f) relief must be invoked only with extreme caution, and only under the most unusual circumstances.” *Commonwealth v. Bustamonte*, 140 S.W.3d 581, 584 (Ky. App. 2004) (internal citation omitted). The purpose of CR 60.02 is to allow the trial court a method to correct errors in judgment upon a showing of “facts or grounds, not appearing on the face of the record and not available by appeal or otherwise, which were discovered after rendition of judgment without fault of the party seeking relief.” *Harris v. Commonwealth*, 296 S.W.2d 700, 701 (Ky. 1956). CR 60.02 is not intended as an additional opportunity to re-litigate the same issues which could

have reasonably been presented by direct appeal or RCr 11.42 proceedings.

McQueen v. Commonwealth, 948 S.W.2d 415, 416 (Ky. 1997), *cert. denied*, 521 U.S. 1130, 117 S.Ct. 2536, 138 L.Ed.2d 1035 (1997).

In the instant case, Davies should have challenged the validity of his plea agreement in an RCr 11.42 motion. Characterizing the same argument as ineffective assistance of counsel, an argument which was not presented to the trial court, is not the type of relief provided for under CR 60.02. *See Gross*, 648 S.W.2d at 857. (“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.”) (internal citation omitted). The trial court did not abuse its discretion in denying Davies’ motion for CR 60.02 relief on these grounds.

Davies also argues on appeal that his constitutional guarantee against double jeopardy was violated when he was sentenced to six counts of first-degree sexual abuse. However, Davies did not present this argument to the trial court and argues it now for the first time on appeal. Issues may not be raised for the first time on appeal. *Lawrence v. Risen*, 598 S.W.2d 474, 476 (Ky. App. 1980). Therefore, we decline to address this argument and note that it should have been properly raised in an RCr 11.42 motion before the trial court.

Finally, Davies argues that this Court should take judicial notice pursuant to Kentucky Rule of Evidence (KRE) 201 to determine whether the charges listed in each count of the indictment represent a cognizable offense under

KRS 510.110 and to determine whether each count in the indictment was “duplicitous.” Again, this issue was not raised before the trial court and is therefore not properly preserved for review by this Court.

Furthermore, KRE 201 governs only judicial notice of adjudicative facts. It would be improper for this Court to take judicial notice of whether an indictment contained “cognizable offenses.” Davies was charged with and entered a guilty plea to six counts of first-degree sexual abuse for each separate instance in which he subjected L.K. to sexual contact. The charges contained in Davies’ indictment were not improper. *See Combs v. Commonwealth*, 198 S.W.3d 574, 580 (Ky. 2006).

Accordingly, we affirm the Hardin Circuit Court’s order entered October 20, 2008, denying Davies’ CR 60.02 motion. Subsequently, we affirm the November 14, 2008, order denying Davies’ motion to alter, amend, or vacate the October 20, 2008, order.

ALL CONCUR.

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