

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-001938-MR

RANDAL J. ROSTRON

APPELLANT

v. APPEAL FROM WHITLEY CIRCUIT COURT
HONORABLE PAUL E. BRADEN, JUDGE
ACTION NO. 07-CR-00173

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CAPERTON, LAMBERT AND NICKELL, JUDGES.

NICKELL, JUDGE: Randal Rostron, *pro se*, has appealed from the Whitley Circuit Court's denial of his motion for post-conviction relief pursuant to CR¹ 60.02 without first holding an evidentiary hearing. For the following reasons, we affirm.

¹ Kentucky Rules of Criminal Procedure.

The facts of this matter are largely undisputed. On September 11, 2007, Rostron robbed an auto parts store in Corbin, Kentucky. Rostron and his accomplice entered the store armed with handguns, locked the employees in a restroom, and took nearly \$2,300.00 in cash and over \$100.00 in checks from the business. On October 7, 2007, a Whitley County grand jury indicted Rostron on one count each of robbery in the first degree,² unlawful imprisonment in the first degree,³ and theft by unlawful taking over \$300.00.⁴ On January 22, 2008, the Commonwealth made an offer on a plea of guilty which Rostron accepted. He entered a plea to all counts that same day. On March 20, 2008, the trial court sentenced Rostron in accordance with the Commonwealth's offer to ten years' imprisonment for the robbery and five years' imprisonment each for the theft and unlawful imprisonment charges. The trial court ordered all of the sentences to be served concurrently for a total sentence of ten years. Rostron did not appeal from his conviction.

On January 14, 2009, Rostron filed a motion for post-conviction relief pursuant to CR 60.02 (e) and (f) requesting the trial court to amend his sentence. Rather than an amendment to the length of his sentence, Rostron sought an amendment of his conviction from robbery in the first degree to robbery in the

² Kentucky Revised Statutes (KRS) 515.020, a class B felony.

³ KRS 509.020, a Class D felony.

⁴ KRS 514.030, a Class D felony.

second degree.⁵ In support of his motion, Rostron contended he had been coerced into committing the crimes through “homosexual advances by his partner.” He admitted he was aware of the coercion prior to entering his guilty plea but stated he did not raise the issue out of shame. He did not deny his guilt in committing the crimes for which he stood convicted. Rostron indicated he wished to have his conviction amended so that he would serve less time in prison and be able to participate in additional programs while incarcerated. Because robbery in the first degree is classified as a violent offense under KRS 439.3401, Rostron must serve 85% of his sentence before being eligible for parole. However, robbery in the second degree is not classified as a violent offense, meaning Rostron would only be required to serve a maximum of 75% of his sentence before being eligible for release, barring any disciplinary infractions or other violations of law.

In addition to his motion for post-conviction relief, Rostron requested leave to proceed *in forma pauperis*, appointment of counsel, and an evidentiary hearing. The trial court summarily denied Rostron’s motion to amend his sentence on August 25, 2009, without convening an evidentiary hearing and without appointing counsel. This appeal followed.

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). To warrant relief, the trial court’s decision must have been “arbitrary, unreasonable, unfair, or unsupported by sound legal principals.” *Clark v. Commonwealth*, 223 S.W.3d 90,

⁵ KRS 515.030, a Class C felony.

95 (Ky. 2007). A trial court may grant relief under CR 60.02 only if a movant demonstrates “he is entitled to this special, extraordinary relief.” *Gross v. Commonwealth*, 648 S.W.2d 853, 856 (Ky. 1983). We will affirm the trial court's decision absent a “flagrant miscarriage of justice.” *Id.* at 858.

Before this Court, Rostron contends the trial court erred in failing to consider the mitigating evidence he proffered and in denying his motion for relief without holding an evidentiary hearing. We discern no error.

First, Rostron’s brief is devoid of any reference to the record or citation to any authority supportive of his position. He offers no argument or indication of how the trial court allegedly erred, merely stating an error or errors occurred. Rostron simply restates his contention that he was victimized as a child, thus making him more susceptible to coercion. Although he claims his realization of the childhood events have only “come to light due to psychiatric treatment he is receiving in prison,” he admits he “failed to produce this evidence prior to entering his guilty plea, in part because of fear of disclosing a history of being victimized by physical and sexual abuse to his wife.”

CR 60.02 is not a means of relitigating issues which could have been raised in other proceedings. *McQueen v. Commonwealth*, 948 S.W.2d 415 (Ky. 1997). Rostron had the opportunity to appeal his conviction and attack the judgment under RCr⁶ 11.42 if he believed it had been incorrectly entered. *Gross v. Commonwealth*, 648 S.W.2d 853, 855-56 (Ky. 1983). He did neither and is now

⁶ Kentucky Rules of Criminal Procedure.

foreclosed from attempting to raise this issue for the first time via CR 60.02. *Id.* at 857.

Further, Rostron clearly had the ability prior to sentencing to inform the trial court of the mitigating circumstances he now asserts as the basis for relief. It has long been held that CR 60.02 relief is unavailable in such situations as the purpose of the rule is to provide relief upon facts or grounds not appearing in the record and which were not, and could not have been, discovered until after the judgment was rendered through no fault of the movant. *Harris v. Commonwealth*, 296 S.W.2d 700 (Ky. 1956). Clearly, Rostron was aware of the mitigating conditions prior to sentencing. Thus, his motion for relief was improper.

Nevertheless, even if we were to ignore the above infirmities, Rostron has failed to show he is entitled to the extraordinary relief he seeks. Trial courts are without power to amend charges absent the consent of the Commonwealth, *Flynt v. Commonwealth*, 105 S.W.3d 415, 425, and amending a judgment of conviction to allow a defendant to have a shorter period of incarceration or so that he might have more “perks” while incarcerated is simply inappropriate. There is no legal or factual basis supporting Rostron’s request. The trial court clearly did not abuse its discretion in denying Rostron’s motion for relief.

Finally, Rostron asserts that the trial court should have granted him an evidentiary hearing on his CR 60.02 claims. “A movant is not entitled to a hearing on a CR 60.02 motion unless he affirmatively alleges facts which, if true, justify vacating the judgment and further allege[s] special circumstances that justify CR

60.02 relief.” *White*, 32 S.W.3d at 86 (citation and internal quotation marks omitted). There is no automatic entitlement to a hearing. *Stanford v. Commonwealth*, 854 S.W.2d 742, 744 (Ky. 1993). Only if there is an issue of fact that cannot be determined on the face of the record must the trial court allow an evidentiary hearing. *Id.* at 743-744. If the record refutes his claims of error, there is no basis for holding an evidentiary hearing. *Id.* at 743 (citing *Glass v. Commonwealth*, 474 S.W.2d 400, 401, (Ky. 1971)). The trial court correctly determined, based solely on the record, that Rostron’s CR 60.02 claims were not well-taken. Thus, because Rostron asserted no facts supportive of invalidating or amending his conviction, the circuit court did not err in disposing of Rostron’s motion without holding an evidentiary hearing.

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

ALL CONCUR.

BRIEF FOR APPELLANT:

Randal Rostron, *pro se*
Burgin, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

M. Brandon Roberts
Assistant Attorney General
Frankfort, Kentucky