

Commonwealth of Kentucky
Court of Appeals

NO. 2008-CA-002227-MR

JEFFREY CHINN

APPELLANT

v. APPEAL FROM OHIO CIRCUIT COURT
HONORABLE RONNIE C. DORTCH, JUDGE
ACTION NO. 03-CR-00202

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: MOORE AND WINE, JUDGES; HARRIS,¹ SENIOR JUDGE.

MOORE, JUDGE: Jeffrey Chinn appeals the Ohio Circuit Court's order denying his CR² 60.02 motion to vacate the judgment against him. After a careful review

¹ Senior Judge William R. Harris, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

² Kentucky Rule of Civil Procedure.

of the record, we affirm because Chinn could have raised his claims in his previously filed RCr³ 11.42 motion.

Chinn entered a guilty plea to the charges of: (1) manufacture of methamphetamine – 1st offense – firearm enhanced; (2) possession of anhydrous ammonia in unapproved container with intent to manufacture methamphetamine – 1st;⁴ (3) trafficking in marijuana, eight ounces to less than five pounds – 1st offense – firearm enhanced; (4) cultivation of marijuana, five or more plants – 1st offense – firearm enhanced; and (5) possession of drug paraphernalia – 1st offense – firearm enhanced. He was sentenced to serve: twenty years of imprisonment for the manufacturing of methamphetamine conviction; ten years of imprisonment for the possession of anhydrous ammonia in an unapproved container with intent to manufacture methamphetamine conviction; ten years of imprisonment for the cultivation of marijuana conviction; five years of imprisonment for the trafficking in marijuana conviction; and one year of imprisonment for the possession of drug paraphernalia conviction. All of these sentences were ordered to run concurrently for a total sentence of twenty years of imprisonment.

Chinn subsequently filed a motion to vacate, set aside, alter, amend or correct his sentence pursuant to RCr 11.42. That motion was denied by the circuit court. He attempted to appeal the denial of that motion, but this Court dismissed his appeal on the basis that his notice of appeal was untimely filed.

³ Kentucky Rule of Criminal Procedure.

⁴ The judgment does not specify whether this “1st” means “1st offense” or something else.

Chinn then moved to vacate the judgment against him pursuant to CR 60.02. He alleged that, pursuant to *Kotila v. Commonwealth*, 114 S.W.3d 226 (Ky. 2003),⁵ which was decided approximately two months before he was arrested, a defendant could not be found guilty of manufacturing methamphetamine unless that defendant was found to possess all of the chemicals or equipment necessary for such manufacture. Chinn contended that because he was found to be in possession of only some of the things necessary to manufacture methamphetamine, his conviction for manufacturing methamphetamine should be vacated. He argued that his guilty plea was not knowing and voluntary because his attorney told him that he was “liable for prosecution regarding manufacturing and the Movant’s attorney based this on the charging by the Commonwealth and the Ohio Circuit Court’s interpretation of the prevailing statute.” The circuit court denied Chinn’s CR 60.02 motion.

Chinn now appeals, again alleging that, pursuant to *Kotila*, he was not eligible to be prosecuted for manufacturing methamphetamine because he did not have all of the chemicals and all of the equipment necessary to manufacture the drug.

On appeal, we review the denial of a CR 60.02 motion for an abuse of discretion. “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

⁵ We pause to note that *Kotila* was subsequently reversed by *Matheney v. Commonwealth*, 191 S.W.3d 599 (Ky. 2006). We point this out only for clarification purposes and do not rely on it for our analysis.

allege[s] special circumstances that justify CR 60.02 relief.” *White v.*

Commonwealth, 32 S.W.3d 83, 86 (Ky. App. 2000) (internal quotation marks and citation omitted).

In his motion brought in the circuit court, Chinn alleged that he was entitled to relief under CR 60.02(e) and (f), which state as follows:

On motion a court may, upon such terms as are just, relieve a party or his legal representative from its final judgment, order, or proceeding upon the following grounds: . . . (e) the judgment is void, or has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (f) any other reason of an extraordinary nature justifying relief. . . .

Chinn’s CR 60.02 motion was properly denied by the circuit court because he could have raised the claims he brought in his CR 60.02 motion in his prior RCr 11.42 motion.

“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 v. Commonwealth*, 948 S.W.2d 415, 416 (Ky. 1997) (internal quotation marks omitted). Civil Rule 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.* In the present case, because Chinn could have raised his claims in his RCr 11.42 motion, his CR 60.02 motion fails.

Accordingly, the order of the Ohio Circuit Court is affirmed.

ALL CONCUR.

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