RENDERED: SEPTEMBER 10, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000497-MR

JOHN P. HOFF — APPELLANT

v.

APPEAL FROM GREENUP CIRCUIT COURT
HONORABLE ROBERT B. CONLEY, JUDGE
ACTION NO. 03-CR-00137

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

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

WINE, JUDGE: John P. Hoff, *pro se*, appeals from the denial of his Kentucky Rule of Civil Procedure ("CR") 60.02 motion seeking to vacate his guilty plea and sentence for first-degree robbery on the grounds that he did not understand the implications of his plea. Specifically, he contends that he pled guilty without knowledge or understanding that he would be classified as a violent offender under

Kentucky Revised Statute ("KRS") 439.3401. Upon a review of the record, we affirm.

Hoff was indicted for first-degree robbery on November 20, 2003. On April 6, 2005, Hoff entered into a guilty plea to the offense of first-degree robbery. Same was accepted by the trial court and he was sentenced to serve ten years. Pursuant to KRS 439.3401, Hoff was required to serve 85% of his sentence for first-degree robbery before becoming eligible for parole.

Over three years later, on January 15, 2009, Hoff filed a motion for relief from final judgment pursuant to CR 60.02(e) & (f). He also filed motions for the appointment of counsel and for an evidentiary hearing. In the CR 60.02 motion, Hoff argued that the trial court "did not intend" for him to receive the 85% enhancement for violent offenders because KRS 17.165 requires a finding of death or serious physical injury to a victim before a defendant may be classified as a violent offender. He also argued that KRS 439.3401 requires that such finding be designated in the judgment.

The trial court denied Hoff's CR 60.02 motion without the appointment of counsel and without a hearing. Upon a review of the facts in the present case, it is quite clear why the trial court would summarily deny Hoff's motion.

KRS 439.3401,[1] is the statute which deals with parole eligibility for persons convicted of first-degree robbery. KRS 439.3401(l) states that persons

[1] In his brief, Hoff incorrectly cites KRS 17.165 as the controlling statute. It is readily apparent from the language he cites that he actually refers to KRS 439.3401.

convicted of first-degree robbery shall be considered violent offenders. KRS 439.3401(1) also states that the trial court "shall designate in its judgment if the victim suffered death or serious physical injury." However, this sentence merely means that a trial court shall make note of physical injury or death in its judgment, *if such injury or death occurs*. A finding of death or serious physical injury is not a prerequisite to classifying a person as a violent offender. *Fambrough v. Department of Corrections*, 184 S.W.3d 561, 563 (Ky. App. 2006) (The violent offender classification in KRS 439.3401 applies regardless of whether the victim suffered serious physical injury.). Clearly, Hoff is subject to the "85% rule" in KRS 439.3401 because he committed one of the offenses specifically enumerated in the statute -"Robbery in the first degree." *Benet v. Commonwealth*, 253 S.W.3d 528, 533 (Ky. 2008) (A defendant is automatically a violent offender at the time of his or her conviction of any offense specifically enumerated in KRS 439.4301, regardless of whether the final judgment contains any such designation.).

Hoff's next argument is that he was denied effective assistance of counsel because his attorney failed to explain to him that he would be required to serve 85% of his sentence if he pleaded guilty to first-degree robbery. We will not discuss the merits of this claim, however, as CR 60.02 is not the proper vehicle for claims which could have been raised by direct appeal or by a Kentucky Rules of Criminal Procedure ("RCr") 11.42 motion. *Gross v. Commonwealth*, 648 S.W.2d 853, 856 (Ky. 1983). *See also, 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).

Furthermore, Hoff did not raise ineffective assistance of counsel as a ground for relief in his original CR 60.02 motion before the trial court. Thus, the issue is not even properly before us for review as the trial court never had the opportunity to consider it. *Shelton v. Commonwealth*, 992 S.W.2d 849, 852 (Ky. App. 1998) ("An appellate court will not consider a theory unless it has been raised before the trial court and that court has been given an opportunity to consider the merits of the theory.").

Accordingly, we find the issues raised in Hoff's CR 60.02 post-conviction motion to be either without merit or not properly before us. Thus, we hereby affirm the Greenup Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

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