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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-002223-MR

RICHARD CROSLIN — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. CLARK, JUDGE
ACTION NO. 01-CR-00682

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, KELLER, AND MOORE, JUDGES.

CLAYTON, JUDGE: Richard Croslin, proceeding pro se, appeals from the August 5, 2010, order of the Fayette Circuit Court, which denied his motions for post-conviction relief pursuant to Kentucky Rules of Civil Procedure (CR) 60.02 (e) and (f); CR 60.03; and equitable reasons. For the reasons set forth, we affirm.

In March 2001, while serving sentences for second-degree robbery and second-degree forgery, Croslin escaped from the Blackburn Correctional Complex. Croslin claims that he walked off the Blackburn Correctional Complex to visit his ill mother, who was hospitalized and suffering from cancer. On June 26, 2001, he was indicted for escape in the second degree and persistent felony offender in the first degree (hereinafter "PFO I"). Croslin pled guilty to the charges on October 25, 2002, and was sentenced to one year on the escape charge, which was enhanced to ten years by the PFO I charge. These sentences were the minimum allowable on each charge.

Then, on January 24, 2005, he filed a pro se Kentucky Rules of Criminal Procedure (RCr) 11.42 motion, which was supplemented by appointed counsel as a combined RCr 11.42 and a CR 60.02 motion. Between them, they argued that he received ineffective assistance of counsel, that he was treated differently than the other escapees, and that enhancing the escape charge as a PFO I was cruel and unusual punishment. And, further, based on CR 60.02(e), the court should grant Croslin's motion pursuant to its equity power and find under CR 60.02(f) extraordinary circumstances existed to reduce the sentence.

On August 28, 2006, the trial court denied the motions, noting that with regard to the ineffective assistance of counsel, Croslin failed to demonstrate that, but for counsel's alleged errors, a reasonable probability existed that the results would have been different; that Croslin did not suffer a due process violation because the other parties who escaped were not treated differently except

as related to the differences in their circumstances under the PFO statutes; that no cruel and unusual punishment occurred because the sentence was within statutory constraints; and, finally, that Croslin misinterpreted the PFO statutes, which were appropriately used. Thus, on August 28, 2006, the trial court denied the motions. Subsequently, Croslin appealed from the denial, but the appeal was dismissed by our Court for failure to timely file a brief.

Next, on September 10, 2009, Croslin moved, pursuant to CR 60.02(a) through (f), to vacate, set aside or modify the sentence. Again, Croslin was allowed to proceed *in forma pauperis* and provided counsel. Counsel filed a motion to vacate or modify the sentence pursuant to CR 60.02(f), that is, extraordinary circumstances. The trial court denied this motion on February 9, 2010, because Croslin had failed to provide extraordinary circumstances, which would create a substantial miscarriage of justice, as required under the provision. Again, the court's order was appealed. And our Court dismissed this appeal for failure to timely file a brief.

Then, on May 12, 2010, Croslin filed a third motion to vacate the judgment based on CR 60.02(e) and (f), CR 60.03, and equitable reasons, which was denied by the trial court on August 5, 2010. The trial court observed that Croslin had already filed a CR 60.02(f) motion, which, at that time, not only stated no new grounds but was also on appeal to our Court. Next, after dismissal of the appeal on the earlier motion, Croslin filed a pro se motion to resubmit the last CR 60.02 motion. On November 17, 2010, the trial court denied it because the

defendant failed to demonstrate extraordinary circumstances under CR 60.02(f). It is from this order that Croslin now appeals.

A denial of a CR 60.02 motion is reviewed under an abuse of discretion standard. *White v. Commonwealth*, 32 S.W.3d 83 (Ky. App. 2000). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Sexton v. Sexton*, 125 S.W.3d 258, 272 (Ky. 2004), quoting *Commonwealth v. English,* 993 S.W.2d 941, 945 (Ky. 1999). With that standard in mind, we direct our attention to the case at hand.

Given the protracted nature of Croslin's case, we first take a look at the law as it relates to challenging a judgment and/or a sentence. In *Gross v. Commonwealth*, 648 S.W.2d 853 (Ky. 1983), the Kentucky Supreme Court set forth the procedure for challenging a final criminal judgment. To attack a final judgment of a trial court in a criminal case, an appellant must follow the procedural and substantive process delineated in the rules for direct appeals, for RCr 11.42 motions, and for CR 60.02 motions. So, to challenge a judgment, a defendant must first bring a direct appeal when available and state every ground of error of which he or his counsel is reasonably aware. *Id.* In the instant case, no direct appeal of the original proceeding was made. Next, a defendant must use RCr 11.42 to raise errors of which he is aware or should be aware during the period this remedy is available. *Id.* Once a defendant does so, the final disposition of or waiver of the

opportunity to make an RCr 11.42 motion shall conclude all issues that reasonably could have been presented in that proceeding. *Id*.

Continuing on with the analysis, we note that a CR 60.02 motion is available only in extraordinary situations not otherwise subject to relief by direct appeal or by way of RCr 11.42. *Id*. Moreover, CR 60.02 is not intended merely as an additional opportunity to raise RCr 11.42 issues or issues appropriate to direct appeal. In fact, CR 60.02 relief is not available by direct appeal or under RCr 11.42. Before the movant is entitled relief under CR 60.02, he or she must affirmatively allege facts which, if true, justify vacating the judgment and further allege special circumstances that justify CR 60.02 relief. *Id.* at 856.

But, CR 60.02 is not an additional opportunity to relitigate the same issues that have already been litigated or could have been litigated. *McQueen v. Commonwealth*, 948 S.W.2d 415, 416 (Ky. 1997). And, although we will discuss CR 60.03 below, it is significant to observe that the Kentucky Supreme Court has

indicated that these same exhaustion principles apply to motions under CR 60.03. *Bowling v. Commonwealth*, 163 S.W.3d 361, 366 (Ky. 2005).

In the present action, Croslin argues that CR 60.02(e) and (f), in addition to CR 60.03, are appropriate post-conviction remedies when a substantial miscarriage of justice has occurred. In the appeal, he makes three arguments – CR 60.02 is appropriate with CR 60.03; his counsel rendered ineffective assistance of counsel; and his guilty plea was unknowing, unintelligent, and involuntary. The

Commonwealth's response is that these issues have previously been raised for post-conviction relief and, therefore, are not cognizable.

In light of the standard of review, we are unable to discern any abuse of discretion by the trial court in denying Croslin's motion to vacate the sentence under CR 60.02(e) and (f), CR 60.03, and equitable reasons. The claims of ineffective assistance of counsel have already been brought and decided. The claims of incompetency with regard to the guilty plea have already been brought and decided. Hence, the issues presented by Croslin have already been litigated or should have been raised in an earlier motion.

Specifically, with regard to the CR 60.02(f) portion of Croslin's appeal, the trial court noted in its opinion and order that Croslin previously filed this motion, which the trial court has already denied. In the current motion, Croslin has asserted nothing new or provided different grounds under CR 60.02(f) supporting his motion.

Croslin also seeks relief under CR 60.03, which states:

> Rule 60.02 shall not limit the power of any court to entertain an independent action to relieve a person from a judgment, order or proceeding on appropriate equitable grounds. Relief shall not be granted in an independent action if the ground of relief sought has been denied in a proceeding by motion under Rule 60.02, or would be barred because not brought in time under the provisions of that rule.

Therefore, to obtain relief under CR 60.03, Croslin is required to establish appropriate equitable grounds, as defined in *Bowling*. *Id*. at 365. Therein, it was

observed that claimants seeking equitable relief through independent actions must meet three requirements. "Claimants must (1) show that they have no other available or adequate remedy; (2) demonstrate that movants' own fault, neglect, or carelessness did not create the situation for which they seek relief; and (3) establish a recognized ground - such as fraud, accident, or mistake - for the equitable relief." *Id.* (quoting *Campaniello Imports, Ltd. v. Saporiti Italia S.p.A.*, 117 F.3d 655, 662 (2nd Cir. 1997)). And, an independent action for equitable relief from a judgment is unavailable if the complaining party has, or by exercising proper diligence would have had, an adequate remedy in the original proceedings. *Bowling*, 163 S.W.3d at 365.

Here, Croslin failed to establish any of the necessary grounds to obtain relief under CR 60.03. Clearly, the language of the rule itself precludes Croslin's relief since he has already sought it under RCr 11.42, and several times under CR 60.02. Croslin's actions in leaving the prison without prior approval caused the predicament in which he finds himself. And finally, Croslin does not assert any recognized ground for equitable relief and, hence, we hold he cannot obtain relief under CR 60.03.

Therefore, we hold that the trial court did not abuse its discretion in denying Croslin's motion to vacate his sentence under CR 60.02, CR 60.03, or for equitable reasons and affirm the decision of the Fayette Circuit Court.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Richard Croslin, pro se
Otter Creek Correctional Center
Wheelwright, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General
Frankfort, Kentucky

Jeanne Anderson
Assistant Attorney General
Frankfort, Kentucky