

RENDERED: FEBRUARY 4, 2011; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2009-CA-000917-MR

KEVIN WALKER

APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT  
v. HONORABLE CHARLES L. CUNNINGHAM, JR., JUDGE  
ACTION NO. 02-CR-001461

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: TAYLOR, CHIEF JUDGE; DIXON, JUDGE; ISAAC,<sup>1</sup> SENIOR  
JUDGE.

TAYLOR, CHIEF JUDGE: Kevin Walker brings this *pro se* appeal from a  
December 13, 2008, order of the Jefferson Circuit Court denying appellant's

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<sup>1</sup> Senior Judge Sheila Isaac sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

Kentucky Rules of Civil Procedure (CR) 60.02 motion to vacate his sentence of imprisonment. We affirm.

Appellant and a co-defendant, Lanelle Walker, were tried jointly by a jury in November 2004 on various charges arising from a robbery committed in 2002 in Louisville, Kentucky. In the guilt phase of trial, the jury found appellant guilty of facilitation to commit first-degree robbery, fleeing or evading police, and possession of a controlled substance. Before the penalty phase of trial, appellant and the Commonwealth reached a plea agreement as to sentencing. Pursuant to the plea agreement, appellant pleaded guilty to being a second-degree felony offender and was sentenced to an aggregate of ten years' imprisonment. His sentence was probated for a period of five years. No direct appeal was taken by appellant.

During the guilt phase of trial, Lanelle Walker, appellant's co-defendant, was also found guilty of first-degree robbery and possession of a controlled substance. Lanelle then proceeded to the penalty phase of trial and was sentenced to a total of ten years' imprisonment. Lanelle Walker pursued a direct appeal of his conviction to this Court in Appeal No. 2005-CA-001145-MR, which was affirmed.

Subsequently, Appellant violated the terms of his probation and his probation was revoked in 2008. Upon revocation, he was advised by the Jefferson Circuit Court to begin serving his ten-year prison term.

However, Lanelle Walker sought discretionary review of his conviction which was granted by the Kentucky Supreme Court in 2008. The

Supreme Court subsequently vacated and remanded the case to the Kentucky Court of Appeals for reconsideration of a recent modification of the law regarding juror strikes. The Court of Appeals then reversed and remanded the case to the Jefferson Circuit Court for a new trial. Upon remand, Lanelle reached a plea agreement with the Commonwealth. Under the terms thereof, Lanelle entered an *Alford* plea to first-degree robbery and possession of marijuana and was “released from detention” for time previously served. *See North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed. 2d 162 (1970).

After Lanelle’s successful appeal, appellant filed a “motion for equal application of court of appeals mandate” under CR 60.02(e). Therein, appellant argued:

The Commonwealth elected to try the defendant and co-defendant jointly, e.g., [Kentucky Rules of Criminal Procedures] RCr 9.16, RCr 9.30; thus, the prejudicial error that “the trial court erred in not striking a juror for cause,” is an error that also effectuated the violation of defendant’s substantial right to a fair trial.

Because defendant and co-defendant were tried jointly, the prejudice affecting the substantial rights [of] co-defendant cannot be separated from the prejudice that affected the substantial rights of defendant. In other words, this error was a “forced abortion of the basic trial process which rendered the trial fundamentally unfair,” resulting in a structural error that precludes any harmless error analysis, for prejudice is presumed as a matter of law, when the framework in which a trial proceeds is affected[.] . . . (Citations omitted.)

By a December 13, 2008, order, the circuit court denied appellant’s CR 60.02 motion. This appeal follows.

Appellant contends that the circuit court committed error by denying his motion under CR 60.02(e). He argues entitlement to CR 60.02 relief as “the judgment entered in this case . . . is no longer valid and it violates a constitutional right.” Appellant’s Brief at 4.

CR 60.02 is an extraordinary remedy, and defendant must make a substantial showing to be entitled to relief. *Ringo v. Com.*, 455 S.W.2d 49 (Ky. 1970); *Bryant v. Howell*, 170 S.W.3d 421 (Ky. App. 2005). The circuit court possesses broad discretion in ruling upon a CR 60.02 motion, and its decision will not be disturbed absent an abuse thereof. *Richardson v. Brunner*, 327 S.W.2d 572 (Ky. 1959). Under CR 60.02 subsection (e), relief may be granted where “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.”

Appellant’s judgment of conviction is not a “void” judgment as provided in CR 60.02(e). A void judgment is a judgment that “the trial court lacked jurisdiction of the subject matter or the parties or entered a judgment that was not within the powers granted to it by law.” 7 Kurt A. Philipps, Jr., *Kentucky Practice*, CR 60.02 (6<sup>th</sup> ed. 2005). Here, the trial court certainly possessed jurisdiction over the subject matter and over the person, and appellant’s judgment of conviction was certainly within the trial court’s authority. Moreover, appellant’s judgment of conviction has neither been satisfied, released, nor discharged. And, “a prior judgment upon which it is based” has not been reversed.

Appellant, nevertheless, believes that he is entitled to relief as “it is no longer equitable that the judgment should have prospective application.” *See* CR 60.02(e). In support thereof, appellant argues that the trial court failed to strike a juror for cause and that such error denied him a fair jury trial. He also cites to the Court of Appeals opinion in *Lanelle Walker v. Commonwealth*, Appeal No. 2005-CA-001145-MR. As previously mentioned, a panel of our Court reversed the conviction of his co-defendant, Lanelle Walker, because the trial court failed to strike a juror for cause.

However, it has long been established that CR 60.02 affords no relief from a trial court’s mistakes or errors of law. *James v. Hillerich & Bradsby Co.*, 299 S.W.2d 92 (Ky. 1956); *Wimsatt v. Haydon Oil Co.*, 414 S.W.2d 908 (Ky. 1967).

In the case at hand, the trial court committed a legal error by failing to strike a juror for cause. Such error is simply not within the preview of CR 60.02. Rather, appellant’s proper avenue of relief from such an error was to pursue a direct appeal of his conviction, as did his co-defendant. *See Wimsatt v. Haydon Oil Co.*, 414 S.W.2d 908 (Ky. 1967); *McQueen v. Com.*, 948 S.W.2d 415 (Ky. 1997). CR 60.02 relief cannot be substituted for a direct appeal of a conviction. *See Wimsatt*, 414 S.W.2d 908; *McQueen*, 948 S.W.2d 415 (Ky. 1997).

In sum, we hold that the circuit court did not err by denying appellant’s CR 60.02 motion to vacate. We view any remaining contentions as moot or without merit.

For the foregoing reasons, the order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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