

Commonwealth of Kentucky
Court of Appeals

NO. 2013-CA-001888-MR

MARTINE L. WALLACE

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE CHARLES L. CUNNINGHAM, JUDGE
ACTION NO. 04-CR-000126

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: ACREE, CHIEF JUDGE; COMBS AND MAZE, JUDGES.

MAZE, JUDGE: Martine Wallace appeals from the Jefferson Circuit Court's denial of his CR¹ 60.02 motion to vacate his 2005 conviction and sentence for robbery, burglary, and being a persistent felony offender (PFO). Wallace contends that the trial court never imposed the sentence for a 2000 felony, and therefore a

¹ Kentucky Rules of Civil Procedure.

sufficient basis for his 2005 PFO conviction did not exist. Observing no abuse of discretion on the part of the trial court in overruling Wallace's motion, we affirm.

On October 13, 2000, facing charges which included Escape and Assault in the third degree, Wallace pled guilty and received a total sentence of five years' imprisonment. The trial court probated the sentence for a period of three years, subject to Wallace's payment of restitution and fees and his compliance with terms including that he "refrain from further violation of the law in any respect[,] " "comply with all instructions and conditions imposed by ... Probation and Parole," and complete alcohol treatment. The Commonwealth stated that if Wallace completed probation without any violations, it would not object to a CR 60.02 motion to vacate the judgment of conviction and sentence.

Fifteen months after entry of this judgment, the Commonwealth filed a motion to revoke Wallace's probation based upon his admitted use of alcohol and non-compliance with treatment. Following these and other subsequent violations of his probation, the trial court decided against revocation. In 2005, according to the terms of the plea agreement, Wallace filed a CR 60.02 seeking revocation of his conviction and sentence. The Commonwealth objected and the trial court overruled Wallace's motion, both citing his several violations of the conditions of his probation since 2001. This Court affirmed, stating that the trial court had "accepted [Wallace's] pleas and entered a judgment of conviction and sentence...."

Wallace v. Commonwealth, No. 2005-CA-0025890MR, 2006 WL 3458109, *1

(Ky. App. 2006). The Court further reasoned that “[a]lthough the trial court did not revoke probation, Wallace’s actions were nonetheless violations. . . . [S]imply because the trial court was lenient and did not revoke probation does not mean that violations of the plea agreement did not occur.” *Id.* at *1-2.

In 2004, during the pendency of the aforementioned motions which culminated in our 2006 decision, a grand jury indicted Wallace on charges of burglary in the first degree, robbery in the first degree, and being a PFO. The Commonwealth based the latter charges on Wallace’s 2000 conviction. A jury convicted Wallace on all counts, and the trial court imposed a sentence of ten years’ imprisonment enhanced to twenty years due to his conviction as a PFO. The Supreme Court affirmed Wallace’s conviction and sentence in a 2006 unpublished opinion. *See Wallace v. Commonwealth*, 2006-SC-000042-MR (Ky. 2006). In this appeal, Wallace raised no issue regarding the basis for his PFO conviction.

In 2012, the Supreme Court rendered an opinion in the case of *Commonwealth v. Derringer*, 386 S.W.3d 123 (Ky. 2012), wherein the Commonwealth sought certification of the law on the question of whether a conviction for which a defendant was then on pretrial diversion could be used as a qualifier for a subsequent PFO charge. The Supreme Court answered the question in the negative, holding that “[a] prior felony conviction cannot form the basis of a PFO 2 charge unless a sentence for that conviction has been imposed” at the time the defendant committed the subsequent felony. *Derringer* at 126.

On June 12, 2013, Wallace filed the CR 60.02 motion which is the subject of this appeal. Citing *Derringer*, Wallace’s motion argued that his judgment of conviction and sentence was now “void, ... or it [was] no longer equitable that the judgment should have prospective application[.]” CR 60.02(e). Specifically, Wallace alleged that the trial court in 2000 “withheld rendition” of the judgment of conviction and sentence, but probated him. Based upon this, Wallace contended that, like the defendant in *Derringer*, an insufficient basis existed for his conviction as a PFO. Initially citing the fact that Wallace did not make this argument on direct appeal to the Supreme Court, the trial court went on to overrule Wallace’s motion on substantive grounds. He now appeals from that order.

“The decision as to whether to grant or to deny a motion filed pursuant to the provisions of CR 60.02 lies within the sound discretion of the trial court.” *Age v. Age*, 340 S.W.3d 88, 94 (Ky. App. 2011), citing *Schott v. Citizens Fidelity Bank and Trust Co.*, 692 S.W.2d 80 (Ky. App. 1985). Therefore, we will not disturb the trial court’s decision absent our determination that it was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

CR 60.02 is not intended merely as an additional opportunity to raise defenses. *Gross v. Commonwealth*, 648 S.W.2d 853, 856 (Ky. 1983). It is for relief that was not available by direct appeal and not available under RCr² 11.42. *Id.* CR 60.02 codified the common law writ of *coram nobis*, the purpose of which

² Kentucky Rules of Criminal Procedure.

was to bring to light errors “which (1) had not been put into issue or passed on, (2) were unknown and could not have been known to the party by the exercise of reasonable diligence and in time to have been otherwise presented to the court, or (3) which the party was prevented from so presenting by duress, fear, or other sufficient cause.” *Id.*, citing *Black's Law Dictionary, Fifth Edition*, 487, 1444. No such circumstances existed to justify Wallace’s present CR 60.02 motion.

Wallace’s motion asserts that the Supreme Court’s decision in *Derringer* changed the legal and equitable landscape of his case. This is not the case, as *Derringer* does not inform or alter our analysis. Nevertheless, as the trial court did, while expressing our concern regarding Wallace’s use of CR 60.02(e) to these ends, we briefly address the merits of his motion.

Wallace’s reliance upon *Derringer* as affecting his 2005 conviction and sentence is misplaced. *Derringer* concerned a defendant’s prior completion of pretrial diversion leading to the dismissal of the charges against him. Diversion, as the Supreme Court defined it, is “an interruption of prosecution” in which the trial court dismisses the charges and never imposes a sentence if a defendant complies with the conditions of diversion. *Derringer* at 126. The present case is easily distinguishable on at least one crucial fact: the trial court entered an order imposing the probated sentence. Accordingly, the result in *Derringer* is not compelled in this case. Neither that case nor any allegation of inequity can alter the fact that Wallace met the qualifications for PFO status under KRS³ 532.080.

³ Kentucky Revised Statutes.

Wallace failed to provide sufficient, and perhaps even timely, basis for relief under CR 60.02. Accordingly, the order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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