

Commonwealth of Kentucky
Court of Appeals

NO. 2014-CA-000802-MR

CHEROSCO L. BREWER

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE SUSAN SCHULTZ GIBSON, JUDGE
ACTION NO. 97-CR-002549

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE, CHIEF JUDGE; DIXON AND STUMBO, JUDGES.

DIXON, JUDGE: Cherosco L. Brewer appeals from the Jefferson Circuit Court's order denying his motion for post-conviction relief pursuant to CR 60.02. Finding no error, we affirm.

On January 9, 1998, Brewer was sentenced to five years' imprisonment pursuant to a plea agreement with the Commonwealth.¹ Thereafter, Brewer filed an RCr 11.42 motion to set aside his conviction due to ineffective assistance of counsel, which was denied by the trial court. Brewer appealed, and a panel of this Court vacated the trial court's order and remanded the case for an evidentiary hearing on Brewer's ineffective assistance claims.² After several delays, the evidentiary hearing was scheduled for August 15, 2005; however, Brewer failed to appear for the hearing. Brewer's attorney was present for the hearing and had no explanation for Brewer's absence. The trial court subsequently rendered an order dismissing Brewer's RCr 11.42 motion. One year later, Brewer filed a motion for belated appeal, which was denied by a panel of this Court in December 2006. This Court's order stated, in relevant part:

In his motion for belated appeal, Brewer claims that his attorney had withdrawn from the case on October 9, 2002, and failed to tell him when the September 2005 evidentiary hearing was going to be held. This allegation is contrary to the trial court's finding that counsel did, in fact, appear on Brewer's behalf. If further appears that Brewer, not his counsel, caused the neglect to his case by failing to show up at the hearing. Also, even though this Court, in an opinion rendered [February 13], 2002, remanded for a hearing on the RCr 11.42 motion, Brewer did not pursue this matter until April 2005 because he was on parole. Only when Brewer had been charged

¹ Brewer pled guilty to the following charges: trafficking in a controlled substance (cocaine) with a firearm, receiving stolen property valued over \$300, possession of drug paraphernalia with a firearm, carrying a concealed deadly weapon, operating a motor vehicle on suspended license, and speeding.

² *Brewer v. Commonwealth*, 1999-CA-001565-MR (Aug. 4, 2000) (Discretionary review denied; ordered not to be published Feb. 13, 2002).

with being a felon in possession of a handgun did Brewer seek to revive his RCr 11.42 motion. Given these facts, this Court cannot grant Brewer a belated appeal . . . as it appears that Brewer, by failing to appear at an evidentiary hearing that he personally requested, neglected his own RCr 11.42 motion.

Thereafter, Brewer filed successive *pro se* motions to set aside the September 2005, order that dismissed his RCr 11.42 motion. His most recent motion, filed pursuant to CR 60.02, was denied by the trial court in a written order rendered January 11, 2013. This appeal followed.

In *Gross v. Commonwealth*, 648 S.W.2d 853, 857 (Ky. 1983), the Kentucky Supreme Court outlined the availability of post-conviction relief as follows:

[A] defendant is required to avail himself of RCr 11.42 while in custody under sentence or on probation, parole or conditional discharge, as to any ground of which he is aware, or should be aware, during the period when this remedy is available to him. Final disposition of that motion, or waiver of the opportunity to make it, shall conclude all issues that reasonably could have been presented in that proceeding. The language of RCr 11.42 forecloses the defendant from raising any questions under CR 60.02 which are ‘issues that could reasonably have been presented’ by RCr 11.42 proceedings.

Here, Brewer’s CR 60.02 motion was an improper attempt to re-litigate the final disposition of his RCr 11.42 claims. “CR 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.” *McQueen v. Commonwealth*, 948 S.W.2d 415, 416 (Ky. 1997). We do not reach the merits of Brewer’s appeal

because his motion was untimely and alleged claims that should have been raised in an earlier proceeding. We conclude that the trial court did not abuse its discretion by summarily denying Brewer's CR 60.02 motion.

For the reasons stated herein, we affirm the order of the Jefferson Circuit Court.

ALL CONCUR.

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