RENDERED: MARCH 24, 2017; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000796-MR

THOMAS ELZA, JR. APPELLANT

v.

APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE GREGORY A. LAY, JUDGE
ACTION NO. 03-CR-00251

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, NICKELL AND STUMBO, JUDGES.

STUMBO, JUDGE: Thomas Elza, Jr., *pro se*, appeals from an Order Overruling Movant's CR[1] 60.02 Motion To Vacate Judgment and Sentence rendered by the Laurel Circuit Court. Elza argues that the denial of relief constituted an abuse of discretion resulting in a fundamental miscarriage of justice. We find no error and AFFIRM the Judgment on appeal.

[1] Kentucky Rule of Civil Procedure.

On October 17, 2003, the Laurel County grand jury indicted Elza on one count each of murder, first-degree burglary, and kidnapping. The grand jury also indicted him on two counts each of retaliating against a witness and second-degree wanton endangerment. The indictment arose from Elza's admission that he broke into the home of Pauline Rey, who was the mother of his ex-girlfriend, and choked her to death in front of her two young grandchildren. Elza's former girlfriend, Crystal Rey, was present during the attack and attempted to stop Elza while simultaneously protecting her two children. After killing Pauline, Elza kidnapped Crystal by dragging her from the home as she pleaded for the safety of her children. Elza took her to a nearby wooded area, tied her to a tree, and left.

The Commonwealth sought the death penalty. On July 1, 2005, Elza entered guilty pleas to murder and first-degree burglary. In exchange for the plea, the Commonwealth moved to dismiss the other charges and recommended a concurrent sentence of life in prison on the murder count and 20 years for first-degree burglary. On August 1, 2005, the court sentenced Elza in accordance with the plea agreement.

On April 10, 2006, Elza filed a RCr[2] 11.42 motion to vacate the judgment in which he alleged ineffective assistance of counsel. In support of the motion, Elza argued that his plea of guilty was not voluntary and intelligent, and that it resulted from the ineffective assistance of counsel. Elza maintained that he was so intoxicated at the time of the murder that he could not have formed the requisite

[2] Kentucky Rule of Criminal Procedure.

intent to commit either the murder or the burglary. He argued that his counsel failed to inform him that his intoxication could provide a defense to the charges or possibly result in conviction of a lesser degree of homicide. Elza also moved for the appointment of an attorney and for an evidentiary hearing. On May 22, 2006, the court entered an order denying the RCr 11.42 motion without an evidentiary hearing.

Elza, *pro se*, prosecuted an appeal to a panel of this Court, arguing that he was improperly denied a hearing on the RCr 11.42 motion. That panel agreed with Elza and remanded the matter to the Laurel Circuit Court for a hearing.

The Commonwealth appealed to the Kentucky Supreme Court, arguing that Elza received effective assistance and that the Laurel Circuit Court did not err in denying Elza's request for a hearing. After considering the matter, the Supreme Court concluded that 1) Elza's guilty plea was voluntary, 2) Elza was not prejudiced by his counsel's advice because the intoxication defense had little chance of success, 3) that counsel's advice to accept the guilty plea was reasonable and therefore not ineffective, and 4) that Elza was not entitled to a hearing. The Kentucky Supreme Court rendered an Opinion on May 21, 2009, reversing the Opinion on appeal and reinstating the Judgment of the Laurel Circuit Court. Elza's subsequent Petition for Writ of Habeas Corpus in the United States District Court, Eastern District, was denied.

On April 6, 2015, Elza filed a CR 60.02 motion in Laurel Circuit Court seeking to vacate the Judgment based on newly discovered evidence. Elza argued

that he did not learn until December 2014, when he reviewed his Department of Public Advocacy file, that his trial counsel failed to inform him of the existence of three expert opinions demonstrating that Elza was mentally ill. Elza also argued that counsel improperly abandoned certain defenses, coerced him to plead guilty, and lied to Elza and his family about his release date.

On April 24, 2015, the Laurel Circuit Court rendered an Order denying Elza's CR 60.02 motion. In support of the Order, the court determined that the arguments asserted were very similar to those made and rejected in his RCr 11.42 motion. The court also noted that the Kentucky Supreme Court had already ruled that Elza's counsel was not ineffective. It concluded that Elza was not entitled to have the trial court rule on these matters again via CR 60.02. This appeal followed.

Elza now argues that the decision of the Laurel Circuit Court was arbitrary, unfair and unsupported by sound legal principles. Specifically, he maintains that the lower court's decision was factually and legally erroneous because an evidentiary hearing would have demonstrated that two expert witness opinions were not addressed in prior litigation, were suppressed by defense counsel, were newly discovered by Elza, and had Elza known of these reports he would not have pled guilty. Elza also argues that his mental health history "arguably" provided a viable defense at trial worthy of consideration. He seeks an Opinion vacating the Order on appeal and remanding the matter for the appointment of counsel and an

evidentiary hearing, or in the alternative an Opinion finding that his counsel was ineffective and remanding the matter for a new trial.

CR 60.02 states that,

> On motion a court may, upon such terms as are just, relieve a party or his legal representative from its final judgment, order, or proceeding upon the following grounds: (a) mistake, inadvertence, surprise or excusable neglect; (b) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59.02; (c) perjury or falsified evidence; (d) fraud affecting the proceedings, other than perjury or falsified evidence; (e) 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; or (f) any other reason of an extraordinary nature justifying relief. The motion shall be made within a reasonable time, and on grounds (a), (b), and (c) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this rule does not affect the finality of a judgment or suspend its operation.

Elza asserted his claim seeking CR 60.02 relief after having unsuccessfully prosecuted and appealed a claim for relief under RCr 11.42. The Kentucky Supreme Court has addressed the relationship between a direct appeal, RCr 11.42, and CR 60.02 in *McQueen v. Commonwealth*, 948 S.W.2d 415, 416 (Ky. 1997), where it stated that,

> The interrelationship between CR 60.02 and RCr 11.42 was carefully delineated in *Gross v. Commonwealth*, Ky., 648 S.W.2d 853 (1983). In a criminal case, these rules are not overlapping, but separate and distinct. A defendant who is in custody under sentence or on probation, parole or conditional

discharge, is required to avail himself of RCr 11.42 as to any ground of which he is aware, or should be aware, during the period when the remedy is available to him. Civil Rule 60.02 is not intended merely as an additional opportunity to relitigate the same issues which could "reasonably have been presented" by direct appeal or RCr 11.42 proceedings. RCr 11.42(3); *Gross v. Commonwealth, supra,* at 855, 856. The obvious purpose of this principle is to prevent the relitigation of issues which either were or could have been litigated in a similar proceeding. As stated in *Gross,* CR 60.02 was enacted as a substitute for the common law writ of coram nobis.

> The purpose of such a writ was to bring before the court that pronounced judgment errors in matter of fact 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. Black's Law Dictionary, *Fifth Edition,* 487, 144.

Id. at 856. In summary, 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. Nothing we said in *Fryrear v. Parker*, Ky., 920 S.W.2d 519 (1996) alters or abrogates these principles.

Finally, as we pointed out in *Gross,* a CR 60.02 movant must demonstrate why he is entitled to this special, extraordinary relief. "Before the movant is entitled to an evidentiary hearing, he must affirmatively allege facts which, if true, justify vacating the judgment and further allege special circumstances that justify CR 60.02 relief." *Gross v. Commonwealth*, supra, at 856.

The focus of Elza's claim of entitlement to CR 60.02 relief is his assertion that his trial counsel suppressed or otherwise failed to timely apprise him of the existence of three expert opinions and counsel otherwise misadvised him as to the defense of Extreme Emotional Disturbance and as to parole eligibility. As properly noted by the Laurel Circuit Court, Elza's appellate brief to the Kentucky Supreme Court reveals that at the time he filed the RCr 11.42 motion, he was fully aware of the expert opinions which he now characterizes as newly discovered evidence. The arguments now asserted – both as to the purported newly discovered evidence as well as trial counsel's effectiveness – either were raised or could have been raised via RCr 11.42. To the extent that Elza's arguments now differ slightly from those raised via RCr 11.42, we agree with the Laurel Circuit Court that those claims should have been raised, if at all, via RCr 11.42.

While Elza's motion is styled as a claim for relief under CR 60.02(e) and (f), i.e., alleging that the judgment is void and seeking relief for any other reason of an extraordinary nature justifying relief, it might more properly be characterized as a CR 60.02(b) motion alleging newly discovered evidence. Claims asserted under subsections (e) and (f) must be brought within a reasonable time and those brought under section (b) must be brought within one year of judgment. Ten years elapsed between the 2005 entry of judgment and the 2015 filing of Elza's CR 60.02 motion. Though not relied on by the Laurel Circuit Court as a basis for its Order overruling Elza's motion, the motion was not timely whether brought under sections (b), (e), or (f).

When considering the entirety of the record and the law, including the prosecution of Elza's RCr 11.42 motion, his CR 60.02 motion and now three appellate reviews, we cannot conclude that the Laurel Circuit Court erred in denying Elza's instant claim for relief alleging newly discovered evidence and ineffective assistance of counsel. The claim for CR 60.02 relief was largely brought and disposed of via RCr 11.42 and his assertion of newly discovered evidence is rebutted by the record. We find no error.

For the foregoing reasons, we AFFIRM the Order Overruling Movant's CR 60.02 Motion To Vacate Judgment and Sentence rendered by the Laurel Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

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