

RENDERED: October 24, 1997; 10:00 a.m.
NOT TO BE PUBLISHED

NO. 96-CA-001818-MR

ANTHONY HEFLIN

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES E. KELLER, JUDGE
ACTION NO. 84-CR-00378

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

* * * * *

BEFORE: WILHOIT, CHIEF JUDGE, COMBS, and JOHNSON, Judges.

JOHNSON, JUDGE: Anthony Heflin (Heflin) appeals from the order of the Fayette Circuit Court entered on May 29, 1996, which denied his request for both an evidentiary hearing and his motion for relief from his judgment of conviction pursuant to Kentucky Rules of Civil Procedure (CR) 60.02. We affirm.

In 1984, Heflin was indicted for numerous offenses including multiple counts of burglary in the second and third degree, criminal possession of a forged instrument, receiving stolen property, rape in the first degree, and sodomy in the first degree. He was convicted on all charges after a jury trial, and sentenced to serve a total of seventy (70) years in

prison. His conviction was affirmed by the Supreme Court.¹

Heflin moved for post-conviction relief pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42 in July 1986. His pro se motion was supplemented by appointed counsel in September. The trial court found no merit to the motion and denied it on November 26, 1986. Heflin did not perfect his appeal from the order and it was dismissed by this Court on May 12, 1988.² His subsequent attempt to have his appeal reinstated was denied³ and the Supreme Court denied his motion for discretionary review of this Court's dismissal of his appeal.⁴

In January 1987, Heflin filed a motion requesting that the trial court modify his sentence from seventy (70) years to twenty (20) years. This motion was denied on January 22, 1987. On May 29, 1992, the Sixth Circuit Court of Appeals affirmed the ruling of the U.S. District Court denying Heflin's petition for a writ of habeas corpus.

On April 9, 1996, Heflin filed his most recent post-judgment motion, the denial of which is the subject of this appeal. In that motion, Heflin made eight separate arguments which he alleged entitled him to relief. All the grounds advanced in support of the motion concerned either prosecutorial

¹His conviction was affirmed in an unpublished opinion rendered in case number 85-SC-330-MR on October 31, 1985.

²No. 86-CA-2897-MR.

³Order entered August 1, 1990.

⁴No. 90-SC-632-D, order entered November 20, 1990.

misconduct before and during the trial or alleged errors in the admission of evidence. In its order denying the motion, the trial court stated:

The movant's arguments all relate to alleged trial or discovery errors supposedly committed by the prosecution, the defendant's counsel or the Court. Even if true, these assertions do not satisfy the required extraordinariness for relief under this rule. CR 60.02 is intended "for relief that is not available by direct appeal and not available under RCr 11.42." Gross v. Commonwealth of Kentucky, [Ky.], 648 S.W.2d 853 (1983). The movant should have addressed these issues in his direct appeal of his convictions or his RCr 11.42 motion or the appeal therefrom. Id. at 857.

In this appeal, Heflin reiterates many of the same arguments made to the trial court. For example, he contends the prosecutor invaded the province of the jury by suggesting he, Heflin, had a motive to lie. He complains that he was not given the opportunity to conduct independent tests of physical evidence introduced at trial. For the first time ever, Heflin alleges his sentences for burglary in the second degree, rape in the first degree, and sodomy in the first degree violate both federal and state constitutional prohibitions against the imposition of multiple punishments for a single course of conduct.⁵

It is settled in this jurisdiction that CR 60.02(f) "'may be invoked only under the most unusual circumstances.

⁵Although this issue was not raised in the trial court and thus is not properly before us on review, we do not hesitate to note for Heflin's benefit that it has no merit. See Commonwealth v. Burge, Ky., 947 S.W.2d 805 (1996).

. . .'" Brown v. Commonwealth, Ky., 932 S.W.2d 359, 362 (1996), quoting Howard v. Commonwealth, Ky., 364 S.W.2d 809, 810 (1963). "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, supra at 856. It is just as settled, as the trial court noted, that CR 60.02 is not another avenue for appeal for those issues that could have been raised in a defendant's direct appeal or RCr 11.42 proceeding. Id.

Clearly there was not an abuse of the trial court's discretion in denying Heflin's motion without a hearing. A review of his CR 60.02 motion reveals that all the alleged errors of which he complains are matters that should have been raised in his direct appeal and/or his RCr 11.42 motion. The fact that the allegations may raise questions of constitutional import do not alter the structure "for attacking the final judgment of a trial court in a criminal case[.]" Id. See also McQueen v. Commonwealth, Ky., 948 S.W.2d 415 (1997). Heflin has not presented any grounds for relief which could not have been raised before, nor has he alleged any facts which would make CR 60.02 relief appropriate some thirteen years after his conviction.

Accordingly, the order of the Fayette Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Anthony Heflin, Pro Se
LaGrange, KY

BRIEF FOR APPELLEE:

Hon. A. B. Chandler, III
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