

RENDERED: November 7, 1997; 10:00 a.m.
NOT TO BE PUBLISHED

NO. 97-CA-0494-MR

LAVASSA ANDERSON

APPELLANT

v. APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE EDWIN M. WHITE, JUDGE
ACTION NO. 85-CR-218

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

* * * * *

BEFORE: JOHNSON, KNOPF, AND MILLER, JUDGES.

MILLER, JUDGE. This is a pro se appeal from an order denying Lavassa Anderson's Ky. R. Civ. P. (CR) 60.02 motion to vacate a judgment of conviction for complicity to murder, attempted murder, complicity to first-degree sodomy, first-degree sodomy, and first-degree robbery. We affirm.

On December 17, 1985, Anderson was indicted on one count of murder, one count of criminal attempt, one count of attempted murder, one count of complicity, one count of first-degree sodomy, and one count of first-degree robbery. On June 24, 1986, the count of murder was amended to complicity to

murder, and on that same date Anderson, with assistance of counsel, entered a plea of guilty on all counts as amended. On August 11, 1986, Anderson was sentenced to life without parole for 25 years on the complicity to murder charge and twenty years each on the other charges. The twenty-year sentences were to run consecutively with each other and concurrently with the sentence for complicity to commit murder.

On January 27, 1997, Anderson filed a motion to vacate judgment pursuant to CR 60.02(d) (e) and (f). The motion was denied by the circuit court on February 12, 1997, and this appeal followed.

A motion under CR 60.02(d) (e) and (f) must be filed within a "reasonable time" after the judgment has become final. Anderson waited eleven years to bring this action, even though no new evidence or circumstances have arisen in that time to justify the delay. In Gross v. Commonwealth, Ky., 648 S.W.2d 853 (1983), the Court held that a five-year delay could be considered unreasonable and lead to summary dismissal. While it would seem that Anderson's motion is barred by the reasonable time limit in CR 60.02, we will nevertheless address the merits of his claim.

Anderson has moved to vacate his sentence pursuant to CR 60.02 on the grounds that under Ky. R. Crim. P. (RCr) 9.84(2) the circuit court lacked the authority to determine the penalty on any crimes that were punishable by death. The circuit court sentenced Anderson to life without the possibility of parole for 25 years on the count of complicity to murder, which is

punishable by death.¹ At the time Anderson was sentenced, RCr 9.84(2) provided:

When the defendant enters a plea of guilty, the court may fix the penalty, except in cases involving offenses punishable by death.²

Anderson argues that his sentence must be vacated because the circuit court violated this rule.

In Hicks v. Commonwealth, Ky., 388 S.W.2d 568 (1965), the Court held that a defendant could waive his right to jury sentencing, even in death penalty cases. "[I]t may be erroneous for a trial judge to impose a sentence, even less than the death penalty, if death is a permitted penalty--but such error does not render the conviction judgment void." Id. Thus, the fact that the circuit court did not fully comply with RCr 9.84 does not render the judgment and sentence void. See also Debose v. Cowan, Ky., 490 S.W.2d 480 (1973). The judgment is not void, thus, a collateral attack cannot be sustained under CR 60.02. See Hicks, supra, at 569 (holding that a similar judgment was not subject to attack under RCr 11.42).

Lastly, Anderson has requested an evidentiary hearing

¹Anderson claims that he pleaded guilty to two crimes that were punishable by death--complicity to murder and attempted murder. Attempted murder is a class B felony and is not punishable by death, therefore, the only sentence Anderson may challenge under Ky. R. Crim. P. (RCr) 9.84 is the complicity to murder sentence.

²In 1989, RCr 9.84 was amended to include ". . . the defendant may demand that his punishment be fixed by a jury." Anderson was sentenced prior to this amendment.

on his motion and has also requested appointment of counsel to supplement his motion. He is not entitled to a hearing because the record refutes his allegations. Hopewell v. Commonwealth, Ky. App., 687 S.W.2d 153 (1985). He is not entitled to an attorney because appointment of counsel for CR 60.02 proceedings is not required. Gross v. Commonwealth, supra, at 857.

The order of the Christian Circuit Court denying Anderson's CR 60.02 motion is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Lavassa Anderson - Pro Se
Northpoint Training Center
Burgin, Kentucky

BRIEF FOR APPELLEE:

A. B. Chandler III
Attorney General

Joseph R. Johnson
Asst. Attorney General
Frankfort, Kentucky