RENDERED: May 22, 1998; 10:00 a.m.
NOT TO BE PUBLISHED

NO. 97-CA-002109-MR

PAUL BROUGHTON — APPELLANT

v.

APPEAL FROM SHELBY CIRCUIT COURT
HONORABLE WILLIAM F. STEWART, JUDGE
ACTION NO. 88-CR-00033

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

* * * * * * * * * * * *

BEFORE: GUIDUGLI, KNOX, and MILLER, JUDGES.

GUIDUGLI, JUDGE. Paul Broughton (Broughton), acting pro se, appeals from an order of the Shelby Circuit Court entered on July 17, 1997, denying his motion brought pursuant to Kentucky Rule of Civil Procedure (CR) 60.02, in which he sought dismissal of a criminal indictment. Finding no error, we affirm.

In July 1988, Broughton was arrested on a charge of first-degree rape following issuance of a warrant of arrest by the Shelby District Court. On July 13, 1988, the case was waived to the grand jury by the district court. On September 8, 1988, the Shelby County Grand Jury indicted Broughton on the felony

offense of first-degree rape (Kentucky Revised Statute (KRS) 510.040), involving his young daughter. In April 1989, Broughton was convicted by a jury of first-degree rape, and the circuit court sentenced him to life imprisonment. Broughton brought a direct appeal, but the Kentucky Supreme Court affirmed the conviction in an unpublished opinion rendered in December 1989. (Broughton v. Commonwealth, 89-SC-320 (rendered December 21, 1989)).

In May 1991, Broughton filed an RCr 11.42 motion containing an extensive list of alleged errors by his attorney amounting to ineffective assistance of counsel, which included an allegation that counsel failed to challenge the sufficiency of the indictment. In November 1991, the circuit court denied the RCr 11.42 motion, and Broughton appealed the order of denial. This Court affirmed the trial court's order by written opinion in December 1992, and the Kentucky Supreme Court denied discretionary review of that opinion. In August 1993, Broughton filed a motion for resentencing pursuant to RCr 13.04 and CR 60.02(f). The circuit court denied the motion for resentencing in September 1993, and Broughton apparently did not appeal. In November 1993, Broughton filed another motion entitled Motion to Correct Invalid Sentence based on KRS 532.055(2) and brought pursuant to RCr 10.26. In that motion, he again requested reversal of his conviction or resentencing. In February 1994, the circuit court denied the motion, and Broughton appealed. In an opinion rendered in February 1995, this Court affirmed the

circuit court's denial of the motion and the Kentucky Supreme Court denied discretionary review.

On April 4, 1997, Broughton filed a motion to dismiss the indictment pursuant to CR 60.02(f). He sought dismissal of the indictment and an order vacating the conviction based on allegations that he never received a preliminary hearing prior to being indicted, and that the indictment was issued beyond the sixty (60) day time period referred to in RCr 5.22. On July 17, 1997, the circuit court summarily denied the CR 60.02(f) motion. This appeal followed.

The court in Gross v. Commonwealth, Ky., 648 S.W.2d 853 (1983), discussed the use of CR 60.02 in criminal cases. It clearly stated that a defendant must first utilize established criminal procedure available through direct appeal or RCr 11.42, if possible, prior to seeking relief under CR 60.02. The court stated as follows:

> The structure provided in Kentucky for attacking the final judgment of a trial court in a criminal case is not haphazard and overlapping, but is organized and complete. That structure is set out in the rules related to direct appeals, in RCr 11.42 and thereafter in CR 60.02. CR 60.02 is not intended merely as an additional opportunity to raise Boykin defenses. It is for relief that is not available by direct appeal and not available under RCr 11.42. The movant must demonstrate why he is entitled to this special, extraordinary relief . . . .
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> In Harris v. Commonwealth, Ky., 296 S.W.2d 700 (1956), this Court held that 60.02 does not extend the scope of the remedy of coram nobis nor add additional grounds of

> relief. We held that coram nobis "is an extraordinary and residual remedy to correct or vacate judgment upon facts or grounds not appearing on the face of the record and not available by appeal or otherwise, which were not discovered until after rendition of judgment without fault of the party seeking relief."
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> We hold that the proper procedure for a defendant aggrieved by a judgment in a criminal case is to directly appeal that judgment, stating every ground of error which it is reasonable to expect that he or his counsel is aware of when the appeal is taken.
>
> Next, we hold that 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.

648 S.W.2d at 856-57 (emphasis in original). See also Commonwealth v. Gross, Ky., 936 S.W.2d 85, 88 (1997).

In the case at bar, Broughton has waived the right to challenge the judgment based on the lack of a preliminary hearing. The record reveals that Broughton has brought several post-judgment motions under both RCr 11.42 and CR 60.02. He raised the issue of the sufficiency of the indictment in both his direct appeal and the RCr 11.42 motion. The question of whether he was denied due process because of an alleged lack of a

preliminary hearing is clearly an issue that could and should have been raised in the prior proceedings. Broughton was well aware of the facts on which this claim is based even prior to trial. While Broughton presented numerous alleged errors by his attorney in the prior RCr 11.42 motion, he did not claim that his attorney failed to assert a challenge to the prosecution because of the lack of a preliminary hearing in district court. Broughton reasonably could have raised the issue of the lack of a preliminary hearing in the prior RCr 11.42 proceeding, and therefore he is precluded from raising that issue by way of CR 60.02 at this time. See, e.g., Messer v. Commonwealth, Ky., 454 S.W.2d 694 (1970)(appellant raised due process claim in RCr 11.42 based on failure to provide preliminary hearing).

In addition to the procedural bar, Broughton's claim is without merit on substantive grounds. His reliance on RCr 3.10[1] and RCr 5.22(2) is misplaced. RCr 3.10(2) states in part:

> If a defendant does not waive the preliminary hearing, the hearing shall be held within 10 days following the initial appearance if the defendant is in custody. . . . In the event the preliminary hearing is not held within the above time period, the defendant shall be discharged from custody, and he shall thereafter be proceeded against on that charge by indictment only.

Broughton was arrested on July 6, 1988, and the record indicates the district court appointed an attorney to represent him prior to the case being waived to the grand jury on July 13,

[1]Broughton's appellate brief and his motion in the circuit court incorrectly cites to a non-existent criminal rule RCr 9.03 as the rule dealing with criminal preliminary hearings.

1988. Although the record is ambiguous, even if a preliminary hearing was not held and Broughton did not waive it, failure to hold a preliminary hearing does not necessarily invalidate a subsequent criminal conviction. The courts have repeatedly held that there is no constitutional right to a preliminary hearing. See, e.g., Little v. Commonwealth, Ky., 438 S.W.2d 527, 530 (1969); Messer v. Commonwealth, Ky., 454 S.W.2d 694, 695 (1970); Caine v. Commonwealth, Ky., 491 S.W.2d 824, 829, cert. denied, 414 U.S. 876, 94 S. Ct. 80, 38 L. Ed. 2d 121 (1973); United States v. Neff, 525 F.2d 361, 364 (8th Cir. 1975); Ramirez v. State of Arizona, 437 F.2d 119, 119 (9th Cir. 1971); Lunsford v. Howard, 316 F. Supp. 1125 (E.D. Ky. 1970).

In Commonwealth v. Watkins, Ky., 398 S.W.2d 698, cert. denied, 384 U.S. 965, 86 S. Ct. 1596, 16 L. Ed. 2d 677 (1966), the court held that the failure to conduct a preliminary hearing does not render a conviction invalid because it is not a critical stage in a prosecution. "The crux of the matter is that the preliminary hearing is simply a procedural device to secure the temporary freedom of the accused (if warranted) following arrest and pending indictment. It is not an integral or essential part of the prosecutory process and is thus to be distinguished from such phases of the proceedings as arraignment, trial and judgment." Id. at 701. The only purpose of a preliminary hearing is to determine whether there is sufficient evidence to justify holding an accused in jail or under bond pending consideration of the charges by a grand jury. Commonwealth v.

Arnette, Ky., 701 S.W.2d 407, 408 (1985); King v. Venters, Ky., 595 S.W.2d 714, 715 (1980); Commonwealth v. Wortman, Ky. App., 929 S.W.2d 199, 200 (1996). In addition, once an indictment has been returned by a grand jury, the whole purpose for a preliminary hearing is satisfied and the need for such a hearing is eliminated. United States v. Mulligan, 520 F.2d 1327, 1329 (6th Cir. 1975), cert. denied, 424 U.S. 919, 96 S. Ct. 1123, 47 L. Ed. 2d 325 (1976); United States v. Neff, 525 F.2d at 364. Consequently, even if Broughton did not receive a preliminary hearing, he is not entitled to have his conviction vacated.

Broughton relies on RCr 5.22(2) in arguing that he should be released because he was not indicted within sixty (60) days after being arrested. In Peercy v. Paxton, Ky., 637 S.W.2d 639 (1982), the court denied the defendant a petition for writ of mandamus seeking to have the court discharge him from custody because he was indicted approximately eighty-five (85) days after his arrest and approximately seventy-nine (79) days after his case was waived to the grand jury. The court stated, "The second sentence of RCr 5.22(2) applies only while a defendant remains unindicted. It applied to Peercy after he had been held for 60 days, but ceased to apply when he was indicted." Broughton had no right to release under RCr 5.22(2) once he was indicted in September 1988. Therefore, Broughton is not entitled to post-judgment relief under RCr 5.22(2).

For the foregoing reasons, we affirm the order of the Shelby Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

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