

RENDERED: July 2, 1998; 10:00 a.m.
NOT TO BE PUBLISHED

NO. 97-CA-0963-MR

PAUL M. HOPKINS

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE GREGORY M. BARTLETT, JUDGE
ACTION NO. 92-CR-000036

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

* * *

BEFORE: GUIDUGLI, JOHNSON, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: This is an appeal from an order denying appellant's motion to set aside two previous orders and his motion alleging ineffective assistance of counsel. Upon consideration of appellant's arguments in light of the record herein and the applicable law, we affirm.

On March 23, 1992, appellant, Paul Hopkins, plead guilty to one count of trafficking in cocaine and one count of being a persistent felony offender in the first degree (PFO I). He was sentenced to five years' imprisonment, enhanced to ten years pursuant to the PFO I on May 4, 1992.

Thereafter, on October 23, 1992, Hopkins filed a pro se motion styled, "Motion To Withdrawal Pleadings 'Uneffective Counsel'" wherein he alleged that his counsel overlooked the fact that a defendant must have committed one or more felonies within a five year period. In an order entered October 30, 1992, the circuit court denied Hopkins' motion, and no appeal was taken from that ruling.

On March 29, 1994, Hopkins then filed a pro se motion styled, "Petition To Modify Sentence Pursuant To KRS 61.01 Civil Rule 10.26," requesting that the court reconsider his sentence and reduce or probate any remaining time left. That motion was denied and no appeal was taken therefrom.

On June 17, 1996, Hopkins, by counsel, filed a motion to set aside judgment, alleging that the PFO I conviction was erroneous because the prior felony conviction was not within five years of the felony to which he plead guilty on March 23, 1992. On July 9, 1996, the court denied the motion, specifically finding that the 1991 offense was committed within five years of Hopkins' discharge from probation on the prior felony. No appeal was taken from this order.

On February 3, 1997, Hopkins, by counsel, filed a motion pursuant to CR 60.02(f) to set aside the orders of October 30, 1992 and July 9, 1996, and to grant an evidentiary hearing on his ineffective assistance of counsel claims. In that motion, Hopkins again argued that counsel was ineffective for advising him to plead guilty to PFO I because the subsequent

felony was not committed within five years of the prior felony. On April 10, 1997, the court denied said motions, again finding that Hopkins was on probation on the felony in 84-CR-060(2) at the time he committed the subsequent felony on November 20, 1991. From that order, Hopkins now appeals.

As to the motion to set aside the orders of October 30, 1992 and July 9, 1996, we deem said motion to be untimely. In essence, Hopkins is attempting to circumvent CRr 12.04(3) by belatedly challenging orders from which he did not and cannot now appeal.

As to the ineffective assistance of counsel claim, it has been held that a final disposition of a RCr 11.42 motion concludes all issues that reasonably could have been presented in that proceeding and precludes the defendant from raising any issue that could have been raised in the RCr 11.42 motion in a CR 60.02 motion. Gross v. Commonwealth, Ky., 648 S.W.2d 853 (1983). Hopkins now raises the same ineffective assistance of counsel issue that he raised in both the March 23, 1992 and June 27, 1996 motions, from which he did not appeal. Thus, he is now foreclosed from raising the same issue via a CR 60.02 motion.

We would also note that even if we did review the merits of Hopkins' argument, the record in the Kenton Circuit Court Case No. 84-CR-060(2) was not included as a part of the record in this appeal. Thus, we would have to presume that the trial court's order in this case was supported by the record. See Commonwealth v. Thompson, Ky., 697 S.W.2d 143 (1985).

For the reasons stated above, the order of the Kenton Circuit court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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