

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-001565-MR

MARTY SMITH

APPELLANT

v. APPEAL FROM KNOX CIRCUIT COURT
HONORABLE LEWIS B. HOPPER, JUDGE
ACTION NO. 85-CR-00092

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION AND ORDER

DISMISSING

** ** * * * * *

BEFORE: DYCHE, EMBERTON and HUDDLESTON, Judges.

HUDDLESTON, Judge. Marty Smith appeals from an order denying his Ky. R. Civ. Proc. (CR) 60.02 motion¹ to relieve him from a final judgment that convicted him of murder and sentenced him to imprisonment for life. Smith claims on appeal that the trial court failed to adequately address his CR 60.02 motion, that he should have been granted an evidentiary hearing, and that counsel should

¹ Smith also claims to have filed his motion for relief from the judgment convicting him of murder pursuant to Ky. R. Civ. Proc. (CR) 60.03. That rule authorizes a court to entertain an independent action for relief from a judgment unless the same relief has been denied in a proceeding brought under CR 60.02. Since the same relief can be obtained under both rules and inasmuch as Smith did not file an independent action, we review this case as an appeal from a denial of a CR 60.02 motion.

have been appointed to represent him in proceedings relating to the motion.

The Commonwealth responds that Smith's appeal was not timely filed and must, therefore, be dismissed. In any event, the Commonwealth argues, Smith was not entitled to the appointment of counsel or to an evidentiary hearing because the allegations he makes in support of his motion are refuted by the record.

The Rules of Civil Procedure apply to criminal cases except in those instances where they are superseded by or are inconsistent with the Rules of Criminal Procedure. Ky. R. Crim. Proc. (RCr) 13.04 and 12.02. While a CR 60.02 motion is authorized by the Civil Rules and the time to appeal the denial of such a motion is ordinarily fixed at 30 days by CR 73.02(1)(a), appeals in criminal cases are governed by RCr 12.04. CR 12.04(3) provides that an appeal must be taken within 10 days following entry of the judgment or order from which the appeal is prosecuted.

In this case, the order denying Smith's CR 60.02 motion was entered on June 3, 1997. He then filed a motion for findings of fact and conclusions of law² which was denied by an order entered on June 13, 1997. Smith filed his notice of appeal on June 24, 1997, eleven days after entry of the June 13, 1997, order.³ As a consequence, his appeal was untimely and must be dismissed.

² See CR 52.04 and CR 59.05.

³ June 23, 1997, the last day on which Smith could have filed a notice of appeal, fell on Monday, a business day.

Although Smith's appeal is being dismissed as untimely, we have reviewed his claims of error and find them lacking in merit.

In 1985, Smith was charged in an indictment with murder, first-degree burglary, first-degree robbery and theft by unlawful taking over \$100.00. By agreement with the Commonwealth, Smith pled guilty in early 1987 to the charge of murder and the remaining charges were dismissed. Smith was sentenced to imprisonment for life.

In 1988, Smith filed a RCr 11.42 motion to vacate his sentence. Counsel was appointed to represent him and an evidentiary hearing was scheduled. However, the hearing was not held as the court determined that Smith's factual allegations were refuted by the record. Insofar as we can determine from the record available to us, Smith did not appeal the denial of his motion to vacate.

In 1992, Smith moved the court to reduce his sentence claiming that it was unduly harsh. The record does not reflect a ruling on the motion.

In 1997, Smith filed the CR 60.02 motion that is before us for consideration in this appeal. The issues which he raises -- ineffective assistance of counsel and a challenge to his guilty plea as involuntary -- are the same issues he raised in his 1988 RCr 11.42 motion. Issues raised in a RCr 11.42 motion may not be advanced a second time in a CR 60.02 motion. In Gross v. Commonwealth, Ky., 648 S.W.2d 853 (1983), the procedure for reviewing

criminal convictions was delineated. RCr 11.42 provides a vehicle to attack an erroneous judgment for reasons which are not accessible by direct appeal. Final disposition of the motion concludes all issues that could reasonably have been presented in the proceeding and forecloses the defendant from raising any questions under CR 60.02 that could have been raised in the RCr 11.42 proceeding. As this state's highest court has said: "The courts have much more to do than occupy themselves with successive 're-runs' of RCr 11.42 motions stating grounds that have or should have been presented earlier." Hampton v. Commonwealth, Ky., 454 S.W.2d 672, 673 (1970) (citing Kennedy v. Commonwealth, Ky., 451 S.W.2d 158, 159 (1970)). Since Smith raised in his earlier RCr 11.42 motion the same issues raised in his subsequent CR 60.02 motion, the circuit court appropriately denied his CR 60.02 motion.

There was no reason for the circuit court to grant Smith's motion for an evidentiary hearing or his motion for appointment of counsel. This is so because the allegations he makes in support of his CR 60.02 motion are refuted by the record. Hopewell v. Commonwealth, Ky. App., 687 S.W.2d 153, 154 (1985). That record clearly reflects that Smith's plea was intelligently and voluntarily made. See Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed.2d 274 (1990). During the guilty plea colloquy, Smith stated, inter alia, that he understood the nature of the charges against him and of the proceedings; that he did not suffer from any mental impairment and was not under the influence of any intoxicating

beverages or drugs; that he was waiving his right to a trial; and, that he was pleading guilty of his own free will.

Smith's claim that he received ineffective assistance of counsel is likewise refuted by the record. To establish ineffective assistance, Smith must demonstrate that his counsel's performance was deficient and the deficiency was prejudicial. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984). The burden is Smith's to overcome the strong presumption that counsel's assistance was constitutionally sufficient. Jordan v. Commonwealth, Ky., 445 S.W.2d 878, 879 (1969). The record indicates that the prosecution had sufficient evidence to establish that Smith was guilty of the charge of murder. The record does not suggest an absence of effort or preparation on the part of Smiths' counsel. Merely advising a defendant to plead guilty does not constitute ineffective assistance of counsel. Beecham v. Commonwealth, Ky., 657 S.W.2d 234, 236 (1983) (citing Glass v. Commonwealth, Ky., 474 S.W.2d 400 (1971)).

Smith's appeal is dismissed as untimely.

ALL CONCUR.

ENTERED: October 30, 1998

Joseph R. Huddleston
JUDGE, COURT OF APPEALS

Burgin, Kentucky

BRIEF FOR APPELLANT:

Marty Smith, Pro se

BRIEF FOR APPELLEE:

A. B. Chandler III
Attorney General of Kentucky

Vickie L. Wise
Assistant Attorney General