

# Commonwealth Of Kentucky

## Court Of Appeals

NOS. 1997-CA-000322-MR AND 1997-CA-001147-MR

ROGER ANTHONY BROWN

APPELLANT

V. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE GEOFFREY P. MORRIS, JUDGE  
ACTION NO. 90-CR-967

COMMONWEALTH OF KENTUCKY

APPELLEE

### OPINION AFFIRMING

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BEFORE: GUDGEL, Chief Judge; COMBS and GARDNER, Judges.

GUDGEL, CHIEF JUDGE: These appeals stem from orders entered by the Jefferson Circuit Court denying appellant's CR 60.03 motion and amended motion. The issue is whether the circuit court abused its discretion by denying the motions. There being no abuse of discretion, we affirm.

In May 1990, appellant was indicted for assault in the first degree, possession of a handgun by a convicted felon, and as a persistent felony offender in the first degree (PFO 1). In June 1992 appellant entered a guilty plea pursuant to North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970), to an amended charge of assault under extreme emotional disturbance and to the charges of possession of a handgun by a

convicted felon and PFO 1. On July 22, 1992, appellant was sentenced to ten years' imprisonment.

On October 8, 1993, appellant filed a pro se CR 60.02(f) motion in which he alleged that the PFO 1 indictment was void due to its failure to recite the essential elements of the offense and that he received ineffective assistance of counsel. Counsel was appointed and filed a supplemental memorandum in which it was alleged that trial counsel was ineffective due to her failure to investigate the case, to raise any issue as to his mental competency, and to object to the composition of the grand jury. On January 30, 1995, the court denied the motion.

On appeal, a panel of this court affirmed the trial court's order. Citing Gross v. Commonwealth, Ky., 648 S.W.2d 853 (1983), the panel noted that the "issues raised in appellant's CR 60.02 motion in this case could have and should have been raised in an RCr 11.42 motion. Nevertheless, we shall address them and our opinion shall be considered dispositive of any further RCr 11.42 claims." The panel then held that appellant did not receive ineffective assistance because counsel raised the issue of appellant's competency and obtained an order for a psychiatric evaluation. Further, the panel also concluded that counsel was not ineffective by failing to advise him as to the alleged improper composition of the grand jury which indicted him. On August 27, 1997, the supreme court denied appellant's motion for discretionary review.

On January 15, 1997, while his motion for discretionary review was pending, appellant filed a CR 60.03 motion and asked for counsel to be appointed and for an evidentiary hearing. In the motion appellant claimed that his prior felony convictions, which formed the basis of his PFO 1 conviction, were invalid and that his trial counsel was ineffective by failing to inform him of this fact and to contest their validity. The court denied all of appellant's requests for relief on January 15, 1997, and Appeal No. 1997-CA-000322-MR followed.

Thereafter, on March 20, 1997, appellant sought to amend his CR 60.03 motion and claim that his guilty plea was not entered voluntarily and knowingly and that his prior convictions relied upon in the PFO prosecution were not adequately established. On March 27, 1997, the circuit court also denied appellant's amended motion and Appeal No. 1997-CA-001147-MR followed.

Appellant argues in both appeals that his prior felony convictions which support his PFO 1 conviction are invalid and that his counsel was ineffective because she failed to attack them. However, it is clear that appellant has waived his right to raise this issue.

In Gross v. Commonwealth, 648 S.W.2d at 856, the supreme 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 [v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969)] defenses. It is for relief that is not available by direct appeal and not available under RCr 11.42.

Moreover, CR 60.03 cannot be invoked as a separate avenue of attack. CR 60.03 states that "[r]ule 60.02 shall not limit the power of any court to entertain an independent action to relieve a person from a judgment, order or proceeding on appropriate equitable grounds. Relief shall not be granted in an independent action if the relief sought has been denied in a proceeding by motion under Rule 60.02 . . . ." Indeed, as noted in 7 Kurt A. Phillips, Jr., Kentucky Practice, CR 60.03 cmt.2 (5th ed. 1995):

The most common ground for an independent action is fraud. It is not the function of an independent action to relitigate issues determined in an earlier action. It is also not a remedy for inadvertence or oversight by the losing party in the original action.

. . . In fact relief under this Rule should be granted only in unusual and exceptional circumstances. (Footnotes omitted.)

Further, a criminal defendant such as appellant who is charged with being a persistent felony offender is provided specific opportunities to challenge the validity of any prior convictions used as a basis for the PFO charge. If the defendant fails to properly question the validity of the prior convictions at the appropriate time, the right to do so is waived.

Commonwealth v. Hodges, Ky., \_\_\_ S.W.2d \_\_\_, 45 K.L.S. 14, p. 24 (rendered December 17, 1998). In reaching this conclusion the Hodges court cited Graham v. Commonwealth, Ky., 952 S.W.2d 206 (1997), in which it stated that "Howard [v. Commonwealth, Ky., 777 S.W.2d 888 (1989)] is still the applicable case law. When a defendant is charged with PFO, it is incumbent upon the defendant to challenge the validity of the prior conviction within the PFO proceeding. If a defendant fails to do so, the validity of the conviction is final and cannot be challenged in a subsequent RCr 11.42 proceeding." Graham, 952 S.W.2d at 208.

Here, appellant has filed repetitive motions attacking his PFO I conviction in clear violation of the procedures established in both Gross and Howard. Thus, the court did not err by denying his CR 60.03 motions. This is especially true since appellant did not timely object to the validity of his prior felony convictions, but pled guilty to the PFO 1 charge. Consequently, appellant admitted the validity of the prior felony charges and PFO I charge and waived all defenses thereto except that the indictment did not charge a public offense. See Bush v. Commonwealth, Ky., 702 S.W.2d 46 (1986); Centers v. Commonwealth, Ky. App., 799 S.W.2d 51 (1990).

Likewise, appellant cannot raise a claim as to ineffective assistance in any other respect in this proceeding because he was required to raise any such issue in his first post-conviction motion. See Gross v. Commonwealth, supra. More important, in its opinion affirming the circuit court's denial of

appellant's first post-conviction motion, this court stated that its opinion "shall be considered dispositive of any further RCr 11.42 claims." Further, all the grounds asserted in support of the alleged ineffective assistance claim herein could and should have been raised in appellant's first post-conviction motion. It is therefore clear that appellant is not entitled to CR 60.03 relief.

The court's judgment is affirmed.

ALL CONCUR.

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