

RENDERED: April 30, 1999; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-000964-MR

RUSSELL ROBINSON

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE GEOFFREY MORRIS, JUDGE
ACTION NO. 81-CR-001198

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING
** **

BEFORE: HUDDLESTON, JOHNSON, AND KNOPF, JUDGES.

JOHNSON, JUDGE: Russell Robinson (Robinson) appeals from the order of the Jefferson Circuit Court entered on February 3, 1998, denying his motion for modification of sentence. After reviewing the record, we affirm.

On the early morning of October 9, 1981, Robinson entered a Five Star convenience store, pointed a handgun at the clerk, and told him it was a holdup. Robinson took some money from the store's cash register, and then took money out of the clerk's wallet. While Robinson was taking the money out of the cash register, he activated the store's alarm system, which

alerted the police. As Robinson was leaving the store, police officer Gayle Clemons (Officer Clemons) arrived to investigate. Robinson pointed his pistol at Officer Clemons and pulled the trigger twice, but the gun failed to fire. After a struggle, Officer Clemons arrested Robinson at the scene.

On October 28, 1981, the Jefferson County Grand Jury indicted Robinson on two felony counts of robbery in the first degree (Robbery I) (Kentucky Revised Statutes (KRS) 515.020) (one count concerned the theft of money from the Five Star Store and the other count concerned the theft of money from the clerk); one felony count of criminal attempt to commit murder (KRS 506.010 and 507.020), one misdemeanor count of resisting arrest (KRS 520.090), and one count of being a persistent felony offender in the second degree (PFO II) (KRS 532.080). The misdemeanor charge was dismissed and Robinson was tried on the remaining felony charges. The jury found Robinson guilty on all counts and initially recommended prison sentences of ten years on each of the two robbery counts and eighteen years for criminal attempt to commit murder. The jury also found Robinson guilty of being a PFO II and recommended that his sentences be enhanced with the Robbery I sentences being enhanced to twenty-one years and thirty years, and the criminal attempt to commit murder sentence being enhanced to life imprisonment.

On July 14, 1982, Robinson's attorney filed a motion for a new trial and a motion for judgment notwithstanding the verdict. As grounds for the motions, Robinson argued, inter

alia, that the trial court erred by giving instructions on two counts of robbery because the thefts occurred in a single continuous transaction, and that the trial court erred by failing to give an instruction of wanton endangerment in the first degree as a lesser-included offense of criminal attempt to commit murder. The trial court denied both motions.

On July 19, 1982, the trial court sentenced Robinson to prison for twenty-one years on one count of Robbery I, for thirty years on the second count of Robbery I, and for life on the count of criminal attempt to commit murder, with all the sentences to run concurrently.

On August 2, 1982, Robinson filed a direct appeal of his conviction. While this appeal was pending, Robinson filed a motion to vacate or set aside the judgment pursuant to Kentucky Rules of Civil Procedure (CR) 60.02(f). In the motion, Robinson argued that the evidence was insufficient to sustain a conviction for criminal attempt to commit murder, and that the constitution's Double Jeopardy Clause was violated by the two separate robbery convictions because they involved a single course of conduct. The trial court denied the motion on procedural grounds because a direct appeal was still pending. Robinson appealed the denial of the CR 60.02 motion. This Court affirmed the trial court's denial of the CR 60.02 motion on January 6, 1984, and stated that RCr 11.42 was the appropriate post-judgment procedure for Robinson to follow.

On July 6, 1983, the Kentucky Supreme Court affirmed Robinson's convictions in an unpublished opinion. Robinson v. Commonwealth, 82-SC-964-MR. In its opinion, the Court rejected Robinson's argument that he was entitled to a jury instruction on wanton endangerment as a lesser-included offense of criminal attempt to commit murder because there was a lack of evidence to support such an instruction.

On November 26, 1984, Robinson filed an RCr 11.42 motion. Robinson also filed an accompanying motion for leave to supplement the record following appointment of counsel in part because under RCr 11.42(3), "should Movant not raise all available grounds that could and should be raised in the motion to vacate he is barred to raise [sic] additional issues in a subsequent RCr 11.42 motion." In this motion, Robinson raised the following five issues: (1) whether there was insufficient evidence to support the conviction for criminal attempt to commit murder; (2) whether the prohibition against double jeopardy prevented separate convictions for robbery of both the store and the clerk; (3) whether the PFO II conviction was invalid because the underlying prior felony conviction was statutorily invalid; (4) whether defense counsel provided ineffective assistance; and, (5) whether appellate counsel rendered ineffective assistance in his direct appeal.

On December 9, 1984, the trial court denied the RCr 11.42 motion on the merits. On January 2, 1985, Robinson filed an appeal of the trial court's denial of his RCr 11.42 motion.

On October 16, 1985, this Court granted the Commonwealth's motion to dismiss based on the procedural grounds that the appeal was not timely filed. Robinson did not seek discretionary review of this Court's order from the Kentucky Supreme Court.¹

On January 22, 1998, Robinson filed the motion for modification of sentence that is at issue in the current appeal. In the motion, Robinson relied upon KRS 532.070 and 500.030 and made the following claims: (1) that double jeopardy prohibited the convictions for two separate counts of robbery; (2) that Robinson's prior felony conviction was improperly used to enhance the substantive robbery and criminal attempt to commit murder sentences, as well as to support the PFO II offense; and, (3) that there was insufficient evidence to support the criminal attempt to commit murder conviction, rather than the lesser offense of wanton endangerment. On February 3, 1998, the trial court summarily denied the motion, and this appeal followed.

A review of the record reveals that Robinson's current motion is procedurally barred under the successive motions principle. Robinson argues that the successive motions principle does not apply because his motion was filed pursuant to KRS 532.070. However, KRS 532.070 does not afford Robinson the relief he seeks.

¹In August 1996, Robinson's petition for a writ of habeas corpus in which he raised the same issues in the current appeal was denied by the United States District Court.

A trial court generally loses jurisdiction to modify a judgment ten days after it becomes final. See Commonwealth v. Marcum, Ky., 873 S.W.2d 207, 211 (1994). In Silverburg v. Commonwealth, Ky., 587 S.W.2d 241 (1979), while the Court noted that KRS 532.070 allowing modification of a felony sentence does not contain or define a time period within which the judgment may be modified, the Court determined that under RCr 1.10, CR 59.05 would apply to create the ten-day time period for modifying a final judgment. Id. at 244. Once a trial court loses jurisdiction to modify a criminal judgment, “[i]t [can] be reinvested with jurisdiction only upon the filing of a proper motion under RCr 11.42 or CR 60.02, or a petition for a writ of habeas corpus under KRS 439.020, et seq.” Bowling v. Commonwealth, Ky., 964 S.W.2d 803, 804 (1998). Because Robinson’s motion contained only a request to reduce the sentence rather than an immediate release from prison, it cannot be considered to constitute a petition for habeas corpus. See Hudson v. Commonwealth, Ky., 932 S.W.2d 371, 373 (1996); Brumley v. Seabold, Ky.App., 885 S.W.2d 954, 956 (1994). Thus, Robinson’s motion must be treated as having been filed under either RCr 11.42 or CR 60.02, and these motions are subject to the successive motions principle.

In Gross v. Commonwealth, Ky., 648 S.W.2d 853 (1983), the Kentucky Supreme Court set out the procedure for challenging a criminal conviction. A defendant must first bring a direct appeal when available and state every ground of error of which he

or his counsel is reasonably aware. Id. at 857. Next, a defendant in custody or on probation or parole must utilize RCr 11.42 to raise errors of which he is aware or should have been aware during the period that remedy is available. Id. "Final disposition of that [RCr 11.42] motion, or waiver of the opportunity to make it, shall conclude all issues that reasonably could have been presented in that proceeding." Id. See also RCr 11.42(3); McQueen v. Commonwealth, Ky., 949 S.W.2d 70, 71 (1997), cert. denied, ___ U.S. ___, 117 S.Ct. 2536, 138 L.Ed.2d 1035 (1997) (defendant "precluded from raising issues in a successive RCr 11.42 motion which were or could have been raised in the first motion"); Hampton v. Commonwealth, Ky., 454 S.W.2d 672, 673 (1970) ("[t]he courts have much more to do than occupy themselves with successive 'reruns' of RCr 11.42 motions stating grounds that have or should have been presented earlier"). The successive motions principle applies even though an appeal was dismissed on procedural grounds and the merits of the first motion were not addressed on appeal. Lycans v. Commonwealth, Ky., 511 S.W.2d 232 (1974). In addition, a claim that is raised and rejected on direct appeal may not be reconsidered under an RCr 11.42 motion. Sanborn v. Commonwealth, Ky., 975 S.W.2d 905, 913 (1998); Wilson v. Commonwealth, Ky., 975 S.W.2d 901, 903 (1998).

In the case at bar, Robinson's attorney raised the claims of double jeopardy and insufficiency of evidence for the criminal attempt to commit murder conviction during the trial and

in the motion for a new trial. The Kentucky Supreme Court expressly rejected the insufficiency of evidence claim on direct appeal. Two of the three issues raised in Robinson's current motion to modify the judgment were raised and rejected by the trial court in his initial RCr 11.42 motion. Even though this Court dismissed his appeal of the trial court's denial of the RCr 11.42 motion on procedural grounds, Robinson is precluded from raising the same issues in a subsequent RCr 11.42 motion. See Lycans, supra. Robinson could have and should have raised the third issue involving double enhancement with the PFO II charge in his direct appeal or the initial RCr 11.42 motion. As the record demonstrates, all of the issues raised in the current motion either were or could have been raised in earlier proceedings, and therefore Robinson cannot raise them in a subsequent collateral attack. As a result, the trial court properly denied Robinson's motion for modification of sentence.²

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

ALL CONCUR.

BRIEF FOR APPELLANT:

Russell Robinson, Pro Se
West Liberty, Ky

BRIEF FOR APPELLEE:

Hon. A. B. Chandler III
Attorney General

²We note that if Robinson's motion were treated as having been filed pursuant to RCr 11.42, it would also be barred by the three-year time limitation in Subsection 10.

Hon. Vickie L. Wise
Assistant Attorney General
Frankfort, Ky