

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1999-CA-002133-MR

MICHAEL LEE VOGELSBERG

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE STEVEN P. RYAN, JUDGE  
ACTION NO. 82-CR-001465

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: BARBER, JOHNSON, AND SCHRODER, JUDGES.

BARBER, JUDGE. Michael Lee Vogelsberg appeals from an opinion and order of the Jefferson Circuit Court denying his Kentucky Rule of Civil Procedure (CR) 60.02 motion seeking an order setting aside the court's prior order denying his motion to supplement his previous motion filed pursuant to Kentucky Rule of Criminal Procedure (RCr) 11.42. We affirm.

The root of Vogelberg's complaints giving rise to this appeal involve a tortured administrative history. In July 1982, the Jefferson County Grand Jury indicted Vogelsberg in Indictment No. 82-CR-982 on one felony count of first-degree robbery, two

felony counts of first-degree wanton endangerment, and one count of being a persistent felony offender in the first degree (PFO I), involving a theft at a convenience store in July 1982. In September 1982, the Jefferson County Grand Jury indicted Vogelsberg in Indictment No. 82-CR-1465 on one count of capital murder, one count of first-degree robbery, and one count of being a persistent felony offender in the first degree, in connection with the death of a clerk from multiple gunshot wounds during a robbery at a convenience store in April 1982.

In March 1983, Vogelsberg entered a guilty plea in both indictments during the same proceeding pursuant to an agreement with the Commonwealth. Under Indictment No. 82-CR-982, he pled guilty to first-degree robbery, two counts of first-degree wanton endangerment and PFO I with the Commonwealth recommending sentences of ten years on the robbery convictions enhanced to twenty years under the PFO I count and one year on each of the two counts of wanton endangerment with no enhancement, all to run concurrently with each other. Under Indictment No. 82-CR-1465, Vogelsberg pled guilty to murder and PFO I with the Commonwealth recommending a sentence of life in prison and moving to dismiss the first-degree robbery count. The Commonwealth further recommended that the sentence in Indictment No. 82-CR-982 run concurrently with the life sentence in Indictment No. 82-CR-1465.

On August 17, 1984, Vogelsberg filed an RCr 11.42 motion and a motion for appointment of counsel in the case under Indictment No. 82-CR-1465. In his RCr 11.42 motion, he challenged his convictions based on ineffective assistance of

counsel on five grounds alleging counsel failed to: (1) investigate his prior felony convictions to determine their validity; (2) attack the separate use of his prior felonies for purposes of the PFO charge; (3) spend sufficient time interviewing and discussing the case with him; (4) file a suppression motion; and (5) conduct a thorough investigation and interview of potential witnesses. The trial court appointed an attorney to represent appellant on the RCr 11.42 motion. Although the record is unclear, it appears that Vogelsberg moved to hold adjudication of his RCr 11.42 motion in abeyance while he challenged one of his convictions in federal court through federal post-judgment habeas proceedings under 42 U.S.C. § 2254.

Nothing happened on Vogelsberg's state post-judgment motion until April 15, 1996, when he filed a "Motion to Reinstate RCr 11.42 Proceedings." Again he sought appointment of counsel and raised the same issues concerning ineffective assistance of counsel that he had raised in the original 1984 motion.<sup>1</sup> On April 24, 1996, the circuit court summarily denied the motion to reinstate the RCr 11.42 motion. On May 9, 1996, Vogelsberg filed a notice of appeal of the court's order denying his motion to reinstate. On June 6, 1996, the clerk of the Court of Appeals issued a letter requesting certification of the record by the circuit court clerk. On June 10, 1996, the circuit court clerk certified the record on appeal. On September 18, 1996, this

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<sup>1</sup>Vogelsberg indicates in the motion that one reason for the long delay in seeking reinstatement was his desire to have the same inmate legal aide, who had been transferred to another penal institution, handle the case.

Court entered an order dismissing the appeal. Vogelsberg v. Commonwealth, 96-CA-001342-MR.

On September 10, 1997, Vogelsberg filed a Motion to Allow Amendment/Supplement by Appointed Counsel, a Motion for Appointment of Counsel, and a Motion to Vacate, Set Aside, or Correct Judgment pursuant to RCr 11.42 in both cases under Indictment No. 82-CR-962 and Indictment No. 82-CR-1465. In this RCr 11.42 motion, Vogelsberg again challenged his trial counsel's effectiveness but also raised several new issues including the sufficiency of the evidence for the convictions, the improper enhancement of his murder sentence because of the PFO conviction (KRS 532.080), whether the guilty plea was entered knowingly, voluntarily and intelligently, and whether the trial court erred by failing to conduct a competency hearing. On February 3, 1998, the circuit court denied the RCr 11.42 motion in an extensive opinion and order that addressed the merits of all the issues. Vogelsberg states that he sent a timely notice of appeal to the circuit court clerk's office, but due to an administrative error, the notice was not properly filed and entered on the record. On August 7, 1998, Vogelsberg's appellate brief was returned to him by the clerk of the Court of Appeals because this Court had no record of an appeal having been filed.

On September 14, 1998, Vogelsberg filed in the circuit court a Motion to Reinstate Notice of Appeal, resubmitted his notice of appeal, and filed motions seeking appointment of counsel and in forma pauperis status on appeal. On November 13, 1998, the circuit court summarily denied his motion for

appointment of counsel but granted his motion to proceed in forma pauperis on appeal. In December 1998, this Court issued a show cause order requiring Vogelsberg to explain why his appeal from the February 1998 opinion and order should not be dismissed as untimely. Vogelsberg v. Commonwealth, 1998-CA-002839. After he responded, this Court dismissed the appeal and later denied his motion to reconsider. On January 12, 2000, the Kentucky Supreme Court vacated the dismissal and remanded the case for reconsideration in light of the evidence showing that the circuit court clerk erroneously filed the notice of appeal in the wrong case file. On February 28, 2000, this Court reinstated the appeal and it is currently pending.

Meanwhile, on January 19, 1999, Vogelsberg filed a document entitled "Renewed Motion to Allow Amendment - Supplement of Submitted RCr 11.42 Motion" in which he sought a ruling from the circuit court on his September 1997 motion to supplement his 1996 RCr 11.42 Motion which he asserted the circuit court had failed to adjudicate. However, he did not explain how or why the RCr 11.42 motion should be amended or supplemented. There is no indication in the record that this renewed motion to allow amendment was ruled on by the circuit court.

On July 22, 1999, Vogelsberg filed a document entitled "Motion to Set Aside or Amend Prior Ruling Denying Movant's RCr 11.42 Motion, Pursuant to CR 60.02." In this motion, he sought reconsideration of the court's failure to act on his request to supplement his September 1997 RCr 11.42 motion. Although he admits that the circuit court denied his motion for appointment

of counsel and failed to specifically rule on his request to supplement the RCr 11.42 motion, the bulk of his CR 60.02 motion dealt with the need for appointment of counsel in order to adequately present his post-judgment complaints. He also cited CR 15.01 as authority for allowing him to amend the RCr 11.42 motion. He asked the court to "Vacate the Order denying Movant's RCr 11.42 Motion, inasmuch as it applies to the separate enjoined Motion for Amendment/Supplement, and if the Court continues to deny counsel, allow Movant to proceed pro se."

In an opinion and order entered on August 11, 1999, the circuit court denied the CR 60.02 motion. It stated that appointment of counsel is not generally available on a CR 60.02 motion, and that CR 60.02 was not the proper procedural device for appealing the denial of counsel or motion to supplement in a RCr 11.42 proceeding. This appeal followed.

Vogelsberg argues on appeal that he should have been appointed counsel to represent him in his September 1997 RCr 11.42 proceeding. He alleges that the Commonwealth failed to disclose exculpatory evidence during the initial prosecution, which an attorney would have discovered if one had been appointed. Vogelsberg also contends that he was entitled to an attorney under KRS 31.100, which deals with appointment of counsel for indigent persons. He states that under CR 15.01, he had the right to amend his RCr 11.42 motion. He also cites the case of Bowling v. Commonwealth, Ky., 926 S.W.2d 667 (1996), for authority on his ability to supplement his collateral motion. Vogelsberg contends that CR 60.02 is the proper motion because he

has been denied a full hearing on his appeal of the circuit court's denial of the RCr 11.42 motion filed in September 1997.

Generally, the standard of review on appeal of a trial court's denial of a CR 60.02(f) motion is abuse of discretion. Bethlehem Minerals Co. v. Church and Mullins Corp., Ky., 887 S.W.2d 327 (1994); Dull v. George, Ky. App., 982 S.W.2d 227 (1998). In addition, "CR 60.02 is not a separate avenue of appeal to be pursued in addition to other remedies, but is available only to raise issues which cannot be raised in other proceedings." McQueen v. Commonwealth, Ky., 948 S.W.2d 415, 416 (1997), cert. denied, 521 U.S. 1130, 117 S. Ct. 2535, 138 L. Ed. 2d 1035 (1997).

As the above described procedural history reveals, Vogelsberg's collateral attack of his convictions and guilty plea has been plagued by extensive delays and administrative errors. He has filed numerous motions for reconsideration and appointment of counsel. A part of the confusion can be traced to the fact that while he entered his guilty plea in both Indictment No. 82-CR-982 and Indictment No. 82-CR-1465 in a single proceeding, those indictments originated in two separate divisions of circuit court in Jefferson County. Furthermore, over the years, several different circuit court judges have entered rulings on his various motions.

After reviewing the record, we believe the trial court did not err in denying the motion. As the trial court indicated, CR 60.02 is not the proper procedural device for raising the issues in the current case. Vogelsberg's primary complaint

concerns the circuit court's denial of his motion to appoint counsel in the RCr 11.42 proceeding. This complaint is more appropriately addressed on direct appeal within his appeal of the RCr 11.42 motion. Moreover, appointment of counsel is not required in an RCr 11.42 proceeding where the substantive claim is refuted on the record or appointment of counsel would be futile. Commonwealth v. Stamps, Ky., 672 S.W.2d 336 (1984); Maggard v. Commonwealth, Ky., 394 S.W.2d 893 (1965).

Vogelsberg made a reference to the need to amend his RCr 11.42 motion to include an argument based on the prosecution's failure to provide exculpatory evidence as a ground for the CR 60.02 motion. Indeed, if Vogelsberg did uncover newly discovered evidence rendering the conviction potentially invalid, then CR 60.02 or RCr 10.06 would be possible legitimate avenues to raise that issue even though an appeal of the denial of Vogelberg's RCr 11.42 was pending before this Court. See Wilson v. Commonwealth, Ky. App., 761 S.W.2d 182 (1988). However, Vogelsberg did not ask for a stay of the appeal proceedings based on his CR 60.02 motion in the circuit court. See CR 60.04 and CR 10.06(2). Moreover, Vogelsberg failed to provide any specifics related to the claim and merely made vague references to possible exculpatory evidence that might have been discovered if an attorney had been appointed to handle his RCr 11.42.

In conclusion, we believe the trial court did not abuse its discretion in denying the CR 60.02 motion. Vogelsberg failed to establish a cognizable claim under that rule or show that other avenues of relief were unavailable.



As Vogelsberg points out, the Court in Bowling v. Commonwealth, Ky., 926 S.W.2d 667 (1996), cert. denied by Sanborn v. Kentucky, 517 U.S. 1223, 116 S. Ct. 1855, 134 L. Ed. 2d 955 (1996), stated that a movant may seek permission to amend his RCr 11.42 motion.

In recognition of the need for both speed and specificity, we hold that an RCr 11.42 motion must be filed in an expeditious manner and is subject to amendment, if appropriate with leave of court. Due to the unquestioned right of defendants to have their contentions decided by a court, "leave [to amend] shall be freely given when justice so requires." CR 15.01.

Id. at 670. Vogelsberg's reliance on CR 15.01 and the trial court's authority to allow amendments lacks merit for several reasons. First, the trial court lost jurisdiction to allow an amendment of the RCr 11.42 motion ten days after entering its final order dismissing the RCr 11.42 motion. See generally Silverburg v. Commonwealth, Ky., 587 S.W.2d 241 (1979); McMurray v. Commonwealth, Ky., 682 S.W.2d 794 (1985); RCr 12.04(3); CR 59.04. A trial court may allow a post-judgment amendment to the pleadings only if it has continuing jurisdiction after issuing a non-final judgment. See, e.g., Givens v. Boutwell, Ky. App., 701 S.W.2d 146 (1985). Second, the trial court has broad discretion in deciding whether to allow an amendment and may consider such factors as whether the amendment would fail to cure any deficiencies or the futility of the amendment. First Nat'l Bank v. Hartmann, Ky. App., 747 S.W.2d 614 (1988). In the current case, the trial court lacked authority to permit an amendment to the RCr 11.42 motion under CR 15.01 because it had entered a

final judgment approximately two years earlier, and Vogelsberg failed to establish an abuse of discretion even if the court could have granted permission to amend.

Finally, we note that subsequent to the trial court's order and the filing of briefs in this appeal, Vogelsberg's direct appeal of the circuit court's denial of his September 1997 RCr 11.42 motion was reinstated pursuant to an order of the Kentucky Supreme Court. That appeal is currently pending and the decision in that case should resolve the complaints raised in the current appeal.

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

ALL CONCUR.

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