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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-001935-MR

JOHN ROGERS — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ERNEST JASMIN, JUDGE
ACTION NO. 93-CR-001288

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: BUCKINGHAM, GUIDUGLI, AND HUDDLESTON, JUDGES.

BUCKINGHAM, JUDGE: John Rogers appeals from an order of the Jefferson Circuit Court denying his motions for relief pursuant to CR[1] 60.02 and RCr[2] 11.42. Because the motions were properly denied, we affirm.

On October 4, 1993, Rogers was convicted of four counts of second-degree burglary and was sentenced to ten years in prison on each count to run concurrently with each other for a total sentence of ten years. His sentence was probated, however,

[1] Kentucky Rules of Civil Procedure.

[2] Kentucky Rules of Criminal Procedure.

for a five-year period on various conditions, including a condition that he "refrain from violating the law in any respect." On November 6, 1997, the Commonwealth filed a motion to revoke Rogers' probation on the ground that he had violated it due to being convicted of criminal offenses in Indiana.

On February 17, 1999, Rogers, by and through an attorney, moved the court to enter an agreed order revoking his probation and reinstating his ten-year sentence. The agreed order provided that the sentence would be served consecutively to his sentence on Indiana charges that Rogers was currently serving. Attached to Rogers' motion was a plea agreement signed by both Rogers and his attorney which stated that "[i]n exchange for the defendant's agreement to admit the violations of probation, the CW recommends that the sentence of 10 years be served consecutively with the sentence which the defendant is serving in Indiana." A letter from Rogers to his attorney was also attached to the motion. The letter, in Rogers' handwriting, stated that he gave permission for the agreed order to be entered "without my appearance." Following the entry of the agreed order revoking Rogers' probation in Kentucky, he was released by the Indiana authorities to the Kentucky authorities to begin serving his sentence.

On April 28, 1999, a little over two months after the entry of the agreed order, Rogers filed a "CR 60.02 Motion to Vacate Sentence and Conviction." Although the motion's title indicated that it was made for the purpose of vacating the sentence and conviction, the body of the motion indicated that it

was made for the purpose of vacating the agreed order revoking probation. On June 10, 1999, Rogers filed an RCr 11.42 motion. That motion likewise sought to have the court vacate the probation revocation order. On June 15, 1999, Rogers filed another CR 60.02 motion, in which he moved the court to award him additional jailtime credit.

On July 14, 1999, the trial court entered an order denying Rogers' CR 60.02 and RCr 11.42 motions. This appeal followed.

Rogers states in his brief that "the trial court mistakenly believed that [he] was appealing his original conviction when, in fact, he was appealing the court's revocation of his probation." Having examined the court's order denying Rogers' motions, we agree that the trial court was apparently mistaken concerning the nature of the motions. However, any confusion on the part of the trial court was certainly understandable in that at least one of the motions specifically stated that its purpose was to vacate the conviction and sentence. Nevertheless, we agree with the trial court that none of the motions had any merit.

In Rogers' first CR 60.02 motion, he argued that he was entitled to relief from the probation revocation order because he was coerced into signing the order by Indiana authorities and because his attorney was not licensed to practice law in Kentucky. He also alleged in this motion and in his second CR 60.02 motion that he was entitled to additional jailtime credit

for time he spent in the Bullitt County jail on charges in that county.

Rogers' argument that he was entitled to CR 60.02 relief from the probation revocation order because he had been coerced into agreeing to it by the Indiana authorities is without merit. This is an argument that could have been raised on a direct appeal from the revocation order, and CR 60.02 "is for relief that is not available by direct appeal[.]" Gross v. Commonwealth, Ky., 648 S.W.2d 853, 856 (1983). Likewise, Rogers' argument that his lawyer was not licensed to practice law in Kentucky is without merit. Assuming the truth of this allegation, we fail to see how such fact would have prevented his probation from being revoked due to his conviction of criminal offenses in another state. Concerning his CR 60.02 motion as it related to jailtime credit, Rogers did not argue this issue on appeal.[3]

Rogers' RCr 11.42 motion was also without merit. Therein, he asserted that he was entitled to relief from the probation revocation order because he had been coerced to agree to it by Indiana authorities and because he received the ineffective assistance of counsel due to counsel's knowledge of the coercion. RCr 11.42 provides a prisoner an opportunity to seek relief from a sentence through collateral attack by filing a

[3] The argument is without merit at any rate. See Duncan v. Commonwealth, Ky. App., 614 S.W.2d 701 (1980), wherein the court held that motions concerning the correction of the original judgment as it relates to jailtime credit are made pursuant to CR 60.02 and must be made within one year of the date of said judgment. Id. at 702.

motion to vacate, set aside, or correct it. RCr 11.42(1). Rogers has neither cited any authority indicating that a probation revocation order is subject to RCr 11.42 proceedings nor are we aware of any such authority. We conclude that relief from an order revoking probation is not available under RCr 11.42.

Rogers also argues that the trial court erred in revoking his probation without a hearing, without his being present, and without a valid waiver. This argument is without merit for two reasons. First, Rogers did not appeal the agreed order revoking his probation, and these arguments could have been raised on direct appeal. He was thus precluded from raising them via CR 60.02. See Gross, 648 S.W.2d at 856. Second, Rogers waived his appearance in writing and consented to an agreed order revoking his probation without a hearing.

The bottom line in this case is that Rogers agreed to the revocation of his probation and then did not appeal from the agreed order. Rather, after the time for filing an appeal from the order had passed, he commenced to seek relief pursuant to CR 60.02 and RCr 11.42. Having reviewed those motions and considered his arguments, we perceive no grounds which would have allowed him relief under either rule.

The order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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