

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-000590-MR

TERRANCE LEE WHITE, SR.

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE GEOFFREY P. MORRIS, JUDGE
ACTION NO. 95-CR-002979

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * **

BEFORE: COMBS, EMBERTON, and GUIDUGLI, Judges.

COMBS, JUDGE: This is an appeal by Terrance L. White (White) from an order of the Jefferson Circuit Court denying his petition for post-conviction relief.

In 1995, during the pendency of a dissolution proceeding, White's former wife petitioned the court for temporary child support for their two children. The case was referred to a Domestic Relations Commissioner (DRC), before whom White appeared, *pro se*, to answer the child support request. At the Commissioner's hearing, White refused to cooperate in the computation of his monthly earnings, and the DRC relied primarily

on the testimony of the former wife in determining the figures. The DRC ultimately imputed gross monthly income to White of \$9,400.00 and recommended that he pay child support of \$351.63 per week. On October 12, 1995, the circuit judge entered an order adopting the DRC's recommendation and ordered that White pay the recommended amount retroactive to June 29, 1995.

In the meantime, the former wife had sought and obtained a domestic violence order against White in Jefferson District Court. In granting that order, the District Court ordered temporary child support payments in the amount of \$47.65 per week. This order remained in effect from May 1995 to May 1996.

White concedes that he did not pay the child support as required under these orders, contending that the amount of his child support obligation as recommended by the DRC was based on erroneous information as to his income. It is uncontested that as a result of his failure to comply with the support orders, White incurred an arrearage in excess of \$1,000.00.

On November 17, 1995, White was indicted for flagrant nonsupport (KRS 530.050). Following a jury trial, he was found guilty as charged and was sentenced to two-years' incarceration, probated for five years. White appealed, alleging: (1) that his conviction violated double jeopardy and (2) that the trial court erred in denying his motion for a directed verdict. On October 10, 1997, in Case No. 96-CA-1350, we rendered an Opinion rejecting these claims and affirming White's conviction.

On April 30, 1998, White filed a hand-written, *pro se*, motion to "set aside and expunge" his conviction. On October 8, 1998, White filed a similar motion. On November 16, 1998, the trial court entered an order denying White's motions. This appeal followed.

In both of his motions, White did not identify the Criminal Rule (RCr) or Civil Rule (CR) upon which he relied for post-conviction relief. At the hearing on White's motions, the trial court stated that it was treating the motion as a CR 60.02 motion. We will do the same, but we will also analyze his contentions pursuant to RCr 11.42. The same result flows from application of either rule.

First, White contends that "the trial court erred in overruling his motion for a directed verdict when the evidence was insufficient to support any finding that appellant was financially able to pay the amount of support ordered which constituted the charge of flagrant non-support." A claim that the trial court erred in failing to grant a directed verdict is an issue which should be raised on direct appeal; in this case, that issue was in fact raised on direct appeal. Thus, both CR 60.02 and RCr 11.42 are unavailable to White as vehicles to seek relief at this juncture. "CR 60.02 is meant to provide relief which is not available by direct appeal or under RCr 11.42." Barnett v. Commonwealth, Ky., 979 S.W.2d 98, 101 (1998) (citing Gross v. Commonwealth, Ky., 648 S.W.2d 853, 856 (1983) and McQueen v. Commonwealth, Ky., 948 S.W.2d 415, 416 (1997)). (Emphasis added). Similarly, "In an RCr 11.42 proceeding, the

movant cannot raise issues which were raised and decided on direct appeal." Wilson v. Commonwealth, Ky., 975 S.W.2d 901, 903 (1998). (Emphasis added). Hence, the trial court's failure to grant a directed verdict was not a proper issue for White's motion for post-conviction relief under either CR 60.02 or RCr 11.42.

Next, White contends that "the order of support entered in this case is pendente lite and interlocutory, and it is not a final judgment subject to execution and where support is awarded [sic] pendente lite, it can only be enforced by contempt proceeding[s] not by execution or prosecution [sic]." As we understand White's argument, he alleges that his child support arrearage accumulated as a result of a temporary (as opposed to a final) child support order; thus, he contends that such an arrearage is subject to punishment only by contempt proceedings rather than by a criminal prosecution for flagrant nonsupport. However, as with his previous argument, this issue should have been raised on direct appeal and is, therefore, not proper subject matter for a CR 60.02 motion. Barnett v. Commonwealth, supra. Similarly, an RCr 11.42 motion "is limited to issues that were not and could not be raised on direct appeal." Sanborn v. Commonwealth, Ky., 975 S.W.2d 905, 908-909 (1998). Because this issue could have been raised on direct appeal, we are not at liberty to review it pursuant to motions involving CR 60.02 or RCr 11.42.

Finally, White contends that:

the trial court erred in prosecuting appellant on a pendente lite and

interlocutory order from the Commissioner's Report dat[ed] 8/1/95, with no final order, which was signed ex-parte by Judge Richard Fitzgerald on August 11, 1995. (Reversible Error). [And] [f]urthermore, [it] was only after the trial date that this report was found to be based on perjured testimony and mistakes, newly discovered evidence, substantial error, [and] misrepresentation.

We have already addressed White's contention that the prosecution was based upon a temporary child support order. As to his remaining issues, CR 60.02 requires that motions addressing these allegations must be brought within one year. Further, allegedly perjured testimony is not a proper basis for impeaching a jury verdict in a proceeding pursuant to RCr 11.42. Commonwealth v. Basnight, Ky App., 770 S.W.2d 231 (1989). Moreover, White has not identified with any specificity the substance of the newly discovered evidence, substantial error, and misrepresentation; hence, these issues are not reviewable under RCr 11.42. (RCr 11.42(2).)

For the foregoing reasons, the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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