

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-001170-MR

WILLIAM TODD BURNS

APPELLANT

v. APPEAL FROM MUHLENBERG CIRCUIT COURT
HONORABLE DAN CORNETTE, SPECIAL JUDGE
ACTION NO. 90-CR-00001

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: DYCHE, GUIDUGLI, AND SCHRODER, JUDGES.

DYCHE, JUDGE: William Todd Burns appeals from the Muhlenberg Circuit Court's denial of his Kentucky Rule of Civil Procedure (CR) 60.02 motion. We affirm.

The record certified on appeal in this case is scant; therefore, the summary of facts is necessarily based on the briefs submitted by the parties. Burns was indicted for murder and robbery in January, 1990. To avoid the possibility of the death penalty, Burns entered a plea of guilty to both counts in October, 1990, and, according to Burns, was sentenced by the trial court to a term of life imprisonment for murder, and twenty

years' imprisonment for robbery, the sentences to be served consecutively.

Burns states that he first filed a CR 60.02 motion in July, 1994, seeking to have his sentences run concurrently. This motion was granted. Both parties acknowledge that Burns filed a Kentucky Rule of Criminal Procedure (RCr) 11.42 motion later in 1994 challenging the convictions. This motion was denied by the trial court and appealed. Burns voluntarily dismissed this appeal, and his later efforts to have it reinstated were unsuccessful. Burns v. Commonwealth, Ky. App., No. 99-CA-0225 (June 25, 1996) (denying motion to reinstate).

Burns then filed another CR 60.02 motion to vacate the judgment, which motion was denied by the trial court as successive. On appeal, this Court affirmed the denial, Burns v. Commonwealth, Ky. App., No. 98-CA-2068 (Aug. 13, 1999) (unpublished opinion), and discretionary review was denied by the Kentucky Supreme Court, Burns v. Commonwealth, Ky., No. 99-SC-0769 (March 15, 2000) (order denying discretionary review).

On April 24, 2000, Burns filed yet another CR 60.02 motion which is now before us. This motion sought to vacate or set aside the judgment of conviction on the grounds that the trial court, rather than a jury, fixed Burns's punishment, contrary to RCr 9.84. The trial court denied the motion, and this appeal followed.

CR 60.02 is not a separate avenue of appeal by which a defendant may relitigate issues that could have or should have been raised pursuant to a RCr 11.42 motion. McQueen v. Commonwealth, Ky., 948 S.W.2d 415 (1997). See also Land v.

Commonwealth, Ky., 986 S.W.2d 440 (1999); Barnett v. Commonwealth, Ky., 979 S.W.2d 98 (1998). Clearly, the issue Burns cites as error – sentencing by the court rather than a jury where he entered a plea of guilty to an offense punishable by death – could or should have been raised in his RCr 11.42 motion. CR 60.02 further requires that “[t]he motion shall be made within a reasonable time.” We do not believe that an almost ten year interval between sentencing and the filing of this motion is reasonable.

Even if this motion did not suffer from fatal procedural flaws, we find no merit in Burns's claim. RCr 9.84(2) states that “[w]hen the defendant enters a plea of guilty the court may fix the penalty, *except that in cases involving offenses punishable by death the defendant may demand that his or her punishment be fixed by the jury.*” (Emphases added.) While Burns asserts that there is no evidence in the record to show that he waived his right to have a jury fix his punishment, there is likewise nothing in the record to suggest that Burns made such a request. In fact, the record as certified on appeal in this case contains nothing pertaining to either Burns's plea of guilty or his sentencing hearing. All we have been provided in this record are the documents that have been filed since April, 2000.

“[W]hen the complete record is not before the appellate court, that court must assume that the omitted record supports the decision of the trial court.” Commonwealth v. Thompson, Ky., 697 S.W.2d 143, 145 (1985). We must follow this presumption in favor of the trial court as opposed to Burns's unsubstantiated

allegations. See Gillum v. Commonwealth, Ky. App., 925 S.W.2d 189 (1995).

The judgment of the Muhlenberg Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

William Todd Burns, *Pro Se*
West Liberty, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler III
Attorney General of Kentucky

Matthew Nelson
Assistant Attorney General
Frankfort, Kentucky