

RENDERED: AUGUST 10, 2001; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-003116-MR

DEMETRIUS FLETCHER

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JOHN W. POTTER, JUDGE
ACTION NO. 94-CR-002813

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING
** **

BEFORE: EMBERTON, GUIDUGLI AND JOHNSON, JUDGES.

JOHNSON, JUDGE: Demetrius Fletcher has appealed pro se from an order of the Jefferson Circuit Court entered on November 22, 1999, which denied his motion for relief pursuant to CR¹ 60.02 without an evidentiary hearing. Having concluded that all of Fletcher's claims are procedurally improper and otherwise without merit, we affirm.

¹Kentucky Rules of Civil Procedure.

On October 4, 1995, after a jury found Fletcher guilty of the murder of Dedrick D. Johnson, he was sentenced to forty years in prison by the Jefferson Circuit Court. Fletcher's conviction was later affirmed on his direct appeal to the Supreme Court of Kentucky on December 12, 1996.² Thereafter, on July 18, 1997, Fletcher filed a motion for relief pursuant to RCr³ 11.42, alleging several grounds for ineffective assistance of counsel. This motion was denied by the circuit court, which was then affirmed by this Court on July 28, 1999.⁴ On September 8, 1999, Fletcher filed his motion seeking relief pursuant to CR 60.02. On November 22, 1999, the circuit court denied Fletcher's motion for relief, and this appeal followed.

In his CR 60.02 motion, Fletcher argued (1) that he was improperly placed in double jeopardy; (2) that certain evidence should have been suppressed at trial; (3) that he was denied due process of law by having been placed in double jeopardy; (4) that the Commonwealth failed to prove an essential element of the murder charge; and (5) that he received ineffective assistance of counsel. All of these claims by Fletcher are procedurally improper under CR 60.02, and either should have, or already have been, raised in a prior appeal.

²1995-SC-000916-MR, not-to-be-published opinion.

³Kentucky Rules of Criminal Procedure.

⁴1998-CA-000427-MR, not-to-be-published opinion.

In Gross v. Commonwealth,⁵ our Supreme Court explained the purpose of CR 60.02:

The structure provided in Kentucky for attacking the final judgment of a trial court in a criminal case is not haphazard and overlapping, but is organized and complete. That structure is set out in the rules related to direct appeals, in RCr 11.42, and thereafter in CR 60.02. CR 60.02 is . . .for relief that is not available by direct appeal and not available under RCr 11.42. The movant must demonstrate why he is entitled to this special, extraordinary relief [emphasis original].

. . .

We hold that the proper procedure for a defendant aggrieved by a judgment in a criminal case is to directly appeal that judgment, stating every ground of error which it is reasonable to expect that he or his counsel is aware of when the appeal is taken [emphasis added].

In Howard v. Commonwealth,⁶ the former Court of Appeals further stated:

It has long been the policy of this court that errors occurring during the trial should be corrected on direct appeal, and the grounds set forth under the various subsections of CR 60.02 deal with extraordinary situations which do not as a rule appear during the progress of a trial [emphasis added].

If Fletcher had viable issues to raise concerning his claims of double jeopardy, insufficient evidence, failure to suppress evidence, and due process, he should have raised these issues in his direct appeal to the Supreme Court. As Gross and

⁵Ky., 648 S.W.2d 853, 856-57 (1983).

⁶Ky., 364 S.W.2d 809, 810 (1963).

Howard hold, it is not procedurally proper to use CR 60.02 as a means of raising issues that could have been raised in a prior appeal. Accordingly, since Fletcher has exhausted his direct appeal, the trial court was correct in denying his motion for relief on these claims. Furthermore, none of these claims has any merit.

Fletcher's final claim of error, that he received ineffective assistance of counsel, is also procedurally improper. This Court has already ruled in Fletcher's prior RCr 11.42 appeal that his ineffective assistance of counsel claim was without merit. We turn to Gross once again, where the Supreme Court stated:

[W]e hold that a defendant is required to avail himself of RCr 11.42 while in custody under sentence or on probation, parole or conditional discharge, as to any ground of which he is aware, or should be aware, during the period when this remedy is available to him. Final disposition of that motion, or waiver of the opportunity to make it, shall conclude all issues that reasonably could have been presented in that proceeding. The language of RCr 11.42 forecloses the defendant from raising any questions under CR 60.02 which are "issues that could reasonably have been presented" by RCr 11.42 proceedings [emphases added].⁷

Therefore, since Fletcher has already raised the issue of ineffective assistance of counsel in a previous RCr 11.42 motion, he is precluded from raising the same claim under this current CR 60.02 motion. Accordingly, the trial court was correct in denying Fletcher's ineffective assistance of counsel claim.

⁷Gross, supra at 857.

In summary, all of Fletcher's claims are procedurally improper and without merit. CR 60.02 is intended to provide relief for those extraordinary situations where relief is not available through a direct appeal or RCr 11.42 motion. Since all of Fletcher's claims either could have, or already have been, raised in a prior proceeding, it was not proper for him to raise them in a CR 60.02 motion.

For these reasons, the order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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