RENDERED: APRIL 12, 2002; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-002733-MR

CILLUS CALDWELL — APPELLANT

v.

APPEAL FROM BELL CIRCUIT COURT
HONORABLE JAMES L. BOWLING, JR., JUDGE
ACTION NO. 98-CR-00130

COMMONWEALTH OF KENTUCKY — APPELLEE

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

BEFORE: GUDGEL, CHIEF JUDGE; COMBS AND JOHNSON, JUDGES.

JOHNSON, JUDGE: Cillus Caldwell, pro se, has appealed from an order of the Bell Circuit Court entered on October 9, 2000, which denied his motion to vacate, correct, set aside or modify his sentence pursuant to RCr[1] 11.42 and KRS[2] 532.070. Having concluded that the trial court did not err in denying Caldwell's motion, we affirm.

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[1]Kentucky Rules of Criminal Procedure.

[2]Kentucky Revised Statutes.

Caldwell was indicted by a Bell County grand jury on August 8, 1998, on one count of murder,[3] for the fatal shooting of Larry Slusher. On May 10, 1999, a jury found Caldwell guilty of manslaughter in the second degree,[4] and recommended a 10-year prison sentence. On June 24, 1999, the trial court sentenced Caldwell in accordance with the jury's recommendation. Caldwell did not file a direct appeal of his conviction.

However, on September 21, 2000, nearly 15 months after his final sentencing, Caldwell filed a motion to vacate, correct, set aside, or modify his sentence pursuant to RCr 11.42 and KRS 532.070. In that motion, Caldwell requested that the trial court (1) "enter an order reducing his sentence of imprisonment from a ten (10) year term to a maximum term of five (5) years"; (2) "schedule an evidentiary hearing"; and (3) provide him with appointed counsel to represent him on the motion. The Commonwealth did not respond to Caldwell's RCr 11.42 motion, which the trial court denied on October 9, 2000. In its order denying the motion, the trial court stated that it "can only modify the Defendant's sentence pursuant to KRS 532.070 at the time of sentencing. Once the Court either accepts or modifies the jury's sentence at the time of sentencing, the Court loses jurisdiction over any potential release of the Defendant other

[3]KRS 507.020.

[4]KRS 507.040.

than those authorized by Statute or Rule and none of which are applicable to the present case." This appeal followed.

In his brief, Caldwell reiterates the arguments he made before the trial court. Caldwell states that he was "not able to [find] any time limitation, in which a trial court has to modify a defendant's sentence, imposed, or even implied." Caldwell further states that he "has been unable to locate any published case law in which it was found that a trial court can only modify a defendant's sentence at the very time of initial sentencing or imposition of final judgment."

In Silverburg v. Commonwealth,[5] the Supreme Court of Kentucky held:

> KRS 532.070 does not define the time within which the judgment complained of may be set aside or modified. Where the Criminal Rules do not provide a time, the Civil Rules shall apply. RCr 1.10. CR[6] 59.05 provides that a judgment may be altered, amended or vacated within ten days after the entry of the final judgment.[7]

In Silverburg, our Supreme Court held that 38 days after the entry of the final judgment and sentence the trial court had "lost jurisdiction of the case."[8] Likewise, in the case sub judice, 15 months after the final judgment and sentence was

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[5]Ky., 587 S.W.2d 241 (1979).

[6]Kentucky Rules of Civil Procedure.

[7]Id. at 244.

[8]Id.

entered, the trial court had lost jurisdiction of the case and could not modify Caldwell's sentence under KRS 532.070.

In his brief, Caldwell states that "in reviewing Appellant's original RCr 11.42 motion, it is clear to see that Appellant complied with the guidelines of RCr 11.42 'to the letter.'" We disagree. While Caldwell's motion may be facially correct, we opine that procedurally Caldwell should have filed a motion pursuant to CR 60.02. While ordinarily a final judgment may only be altered, amended or vacated within ten days after its entry,[9] CR 60.02 provides that in extraordinary circumstances a circuit court may relieve a party from its judgment at any time.

In Gross v. Commonwealth,[10] our Supreme Court provided a comprehensive summary of the post-judgment remedies that are available to a movant:

> 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 appeal, in RCr 11.42, and thereafter in CR 60.02. CR 60.02 is not intended merely as an additional opportunity to raise Boykin[11] defenses. It 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. Before the movant is entitled to an evidentiary hearing, he must affirmatively allege facts which, if

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[9]CR 59.05; Silverburg, supra.

[10]Ky., 648 S.W.2d 853 (1983).

[11]Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969).

true, justify vacating the judgment and further allege special circumstances that justify CR 60.02 relief.

CR 60.02 was enacted as a substitute for the common law writ of coram nobis. The purpose of such a writ was to bring before the court that pronounced judgment errors in matter of fact which (1) had not been put into issue or passed on, (2) were unknown and could not have been known to the party by the exercise of reasonable diligence and in time to have been otherwise presented to the court, or (3) which the party was prevented from so presenting by duress, fear, or other sufficient cause. Black's Law Dictionary, Fifth Edition, 487, 1444.

In Harris v. Commonwealth, Ky., 296 S.W. 2d 700 (1956), this court held that 60.02 does not extend the scope of the remedy of coram nobis nor add additional grounds of relief. We held that coram nobis "is an extraordinary and residual remedy to correct or vacate a judgment upon facts or grounds, not appearing on the face of the record and not available by appeal or otherwise, which were not discovered until after rendition of judgment without fault of the party seeking relief."

In Jones v. Commonwealth, 269 Ky. 779, 108 S.W.2d 816, 817 (1937), this court held that the purpose for the writ is to obtain a new trial in situations in "which the real facts, as later presented on application for the writ, rendered the original trial tantamount to none at all, and when to enforce the judgment as rendered would be an absolute denial of justice and analogous to the taking of life or property without due process of law."

Thus, while the remedies formerly available in criminal cases by writ of coram nobis have been preserved by CR 60.02 (Balsley v. Commonwealth, Ky., 428 S.W.2d 614, 616 (1967)), the remedies have not been extended, but have been limited by the language of that rule.

. . .

> 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.
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> Next, we 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.[12]

From our review of the record, we learn that Caldwell did not request a reduction of his sentence at the sentencing hearing. Caldwell also did not challenge his sentence through a direct appeal. He has failed to properly invoke either RCr 11.42 or CR 60.02, nor has he stated any grounds entitling him to relief under either of these rules. The trial court was correct to deny Caldwell's motion due to a lack of jurisdiction.

Accordingly, the order of the Bell Circuit Court is affirmed.

ALL CONCUR.

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[12] Id. at 856-57.

BRIEF FOR APPELLANT:

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