

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-002420-MR

DONALD WAYNE CROWE, JR.

APPELLANT

v. APPEAL FROM POWELL CIRCUIT COURT
HONORABLE LARRY MILLER, JUDGE
ACTION NO. 83-CR-00005 & 83-CR-00027

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING
** **

BEFORE: EMBERTON, CHIEF JUDGE; GUIDUGLI AND MILLER, JUDGES.

GUIDUGLI, JUDGE. Donald Wayne Crowe, Jr., (hereinafter "Crowe"), proceeding pro se, has appealed from the Powell Circuit Court's September 20, 2000, order denying his CR 60.02 motions to vacate entered in indictments No. 83-CR-00005 and No. 83-CR-00027.¹ Having considered the parties' briefs, the record, and the applicable case law, we affirm.

¹Although the trial court denied both motions in the bench order and the notice of appeal listed both indictment numbers, Crowe has only addressed indictment No. 83-CR-00027 in his brief. Furthermore, on October 3, 2001, the Powell Circuit Court set aside the sentence and judgment in indictment No. 83-CR-00005 on agreement with the Commonwealth. Therefore, we will only address those issues relating to indictment No. 83-CR-00027 in this opinion.

Before addressing the merits of the appeal, we must address the issue as to which trial court orders are properly reviewable at this time. In order to do so, we must look at the procedural histories of both indictments at the trial court and appellate levels. In 2000, Crowe filed CR 60.02 motions to vacate the 1984 judgments entered pursuant to separate guilty pleas. On September 20, 2000, the trial court held a single hearing on both motions with Crowe represented by a public defender and denied both motions in a handwritten docket order that day. On October 9, 2000, Crowe, at that point proceeding pro se, filed a notice of appeal from the September 20, 2000, order listing both indictment numbers. This notice of appeal is the initiating document in the above-styled appeal. On November 4, 2000, more than ten days later, Crowe filed a motion to reconsider that order. New counsel for Crowe entered an appearance, and filed a memorandum in support on May 15, 2001, listing only indictment No. 83-CR-00027. Apparently identifying it as a CR 60.02 motion, the trial court denied the motion to reconsider on June 25, 2001, and Crowe filed a motion to reconsider that order on July 9, 2001. The trial court denied the second motion to reconsider on September 19, 2001, and then set aside the sentence and judgment in indictment No. 83-CR-00005 on October 3, 2001. However, neither Crowe nor his attorney filed a notice of appeal from either the June 25 or the September 19, 2001, orders denying the motions to reconsider.

On Crowe's motion, this Court originally placed the appeal in abeyance on February 20, 2001, pending the trial court's ruling on the motion to reconsider, and returned the

appeal to the active docket on October 23, 2001, upon receipt of a response from Crowe that included the September 19 and October 3, 2001, trial court orders. In the present appeal, Crowe is attempting to raise and argue issues addressed in the June 25 and the September 19, 2001, orders. Because no notices of appeal were filed from those orders, we are precluded from reviewing them. We must therefore limit our review to the September 20, 2000, order, which is the subject of the original appeal.

Crowe was indicted by the grand jury on January 5, 1983, for the offense of theft by unlawful taking over \$100 (indictment No. 83-CR-00005.) The trial court accepted his guilty plea and imposed a two-year sentence on February 24, 1984, which was to be served along with a prior conviction from Clark Circuit Court for which his probation had been revoked. The grand jury next indicted Crowe on May 20, 1983, for the offense of receiving stolen property with a value of more than \$100 (indictment No. 83-CR-00027.) The trial court again accepted his guilty plea on June 28, 1984, and imposed a two-year sentence to be served concurrently with the sentence in indictment No. 83-CR-00005. Crowe was then conditionally released on July 19, 1984.²

Almost sixteen years later, Crowe filed motions to vacate pursuant to CR 60.02, stating that he was proceeding under CR 60.02(d), (e), and (f) as he was time-barred from seeking relief pursuant to RCr 11.42. In the motion to vacate the judgment and sentence in indictment No. 83-CR-00027, Crowe argued

²Crowe is currently serving a three hundred year sentence from a 1988 Jefferson Circuit Court conviction of two counts of rape, one count each of kidnaping and burglary, and of being a persistent felony offender.

that he received ineffective assistance of counsel, that the trial court failed to hold a mandatory hearing due to his youthful age, that double jeopardy applied, that his guilty plea was not knowingly and intelligently entered, and that the indictment was not a true bill. The circuit court appointed counsel for the limited purpose of investigating Crowe's claims, but no records were located that could corroborate his assertions. Following a hearing on September 20, 2000, the trial court denied the CR 60.02 motions as there were no records to bolster Crowe's claims. The order included language stating that it was final and appealable and that there was no just cause for delay. This appeal followed.

As pointed out by the Commonwealth in its brief, Crowe confined his arguments to issues arising from trial court orders entered after September 20, 2000. However, we will still consider whether the circuit court committed any error in denying the CR 60.02 motion to vacate.

CR 60.02(f) allows a trial court to relieve a party from a final judgment for "any other reason of an extraordinary nature justifying relief." The rule mandates that the motion "shall be made within a reasonable time." Crowe did not initially seek relief pursuant to RCr 11.42 prior to seeking relief pursuant to CR 60.02 and did not set forth any reason for his failure to do so other than the fact that he was time barred. Additionally, he waited almost sixteen years before filing his CR 60.02 motion to vacate. All of the claims set forth in his May 31, 2000, motion to vacate should have been known and raised by Crowe well before he sought the relief herein. Crowe's lengthy

delay in seeking any type of post-conviction relief was clearly unreasonable. Gross v. Commonwealth, Ky., 648 S.W.2d 853 (1983); Ray v. Commonwealth, Ky.App., 633 S.W.2d 71 (1982). Furthermore, we do not believe that Crowe has presented any extraordinary circumstances to merit the granting of relief pursuant to CR 60.02. Crowe did not try to attack his convictions until after he received the enhanced three hundred year sentence in Jefferson Circuit Court. As in Ray, supra, Crowe's motivation is obvious. He was clearly seeking to rid himself of the prior felony convictions underpinning the later PFO I charge.

Finally, Crowe was unable to produce any evidence to corroborate his claims in the CR 60.02 motion, and it does not even appear that he raised the issue as to the validity of his prior guilty pleas in the subsequent Jefferson Circuit Court proceedings. In the judgment and sentence on the plea of guilty in indictment No. 83-CR-00027, the trial court indicated that it found that Crowe, represented by counsel, understood the charges against him and knowingly and voluntarily waived his right to be tried before a jury. Nothing in that document revealed any sort of irregularity in the proceedings, and the record refutes his allegations that the plea was anything other than knowingly and voluntarily entered.

For the foregoing reasons, the September 20, 2000, order of the Powell Circuit Court is affirmed.

ALL CONCUR.

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