

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 2001-CA-001588-MR

ANTHONY SCOTT WEBB

APPELLANT

v. APPEAL FROM WARREN CIRCUIT COURT  
HONORABLE WILLIAM R. HARRIS, SPECIAL JUDGE  
ACTION NO. 94-CR-00036

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING  
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BEFORE: GUDGEL, JOHNSON AND McANULTY, JUDGES.

JOHNSON, JUDGE: Anthony Scott Webb has appealed from an order entered by the Warren Circuit Court on January 9, 2001, which denied his CR<sup>1</sup> 60.02 motion to vacate judgment. Having concluded that the trial court properly denied Webb's CR 60.02 motion, we affirm.

On January 26, 1994, a Warren County grand jury

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<sup>1</sup>Kentucky Rules of Civil Procedure.

indicted Webb for burglary in the first degree,<sup>2</sup> theft by unlawful taking over \$300.00,<sup>3</sup> unlawful transaction with a minor in the second degree,<sup>4</sup> and being a persistent felony offender in the first degree (PFO I).<sup>5</sup> At Webb's jury trial on September 23, 1994, he was found guilty of burglary in the first degree, theft by unlawful taking over \$300.00, and being a persistent felony offender in the second degree (PFO II).<sup>6</sup> On October 21, 1994, Webb was sentenced to prison on the burglary conviction, enhanced by PFO II, to a life sentence and on the theft conviction, enhanced by PFO II, to a ten-year sentence, with the sentences to run concurrently. However, it was also ordered that the life sentence would run consecutively with other sentences Webb was serving from indictments in 1991 and 1993.

Webb appealed these 1994 convictions directly to the Supreme Court of Kentucky and raised the issues of the trial court's refusal to sever his case from a co-defendant's, its denial of his motion for a change of venue, the admission of evidence of other crimes, the refusal to provide funds for expert

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<sup>2</sup>Kentucky Revised Statutes (KRS) 511.020.

<sup>3</sup>KRS 514.030.

<sup>4</sup>KRS 530.065.

<sup>5</sup>KRS 532.080.

<sup>6</sup>The underlying conviction for Webb's PFO II conviction was a 1991 conviction for burglary in the second degree (9 counts) and theft by unlawful taking of property valued over \$100.00 (11 counts).

witnesses, improper closing argument, and ineffective assistance of counsel. On November 22, 1995, the Supreme Court affirmed the convictions.<sup>7</sup> Specifically, the Supreme Court determined that Webb's ineffective assistance of counsel claim was "more properly the subject of an RCr<sup>8</sup> 11.42 motion."

On April 22, 1997, Webb filed a RCr 11.42 motion to vacate his sentence.<sup>9</sup> On March 17, 1999, the trial court entered an order that the RCr 11.42 motion as supplemented be granted in part and denied in part. The trial court ordered that Webb's life sentence must run concurrently with all of his other sentences, not consecutively.<sup>10</sup> The trial court also granted Webb an evidentiary hearing on the issue of ineffective assistance of counsel.<sup>11</sup> As to all other issues raised in Webb's

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<sup>7</sup>1994-SC-000884-MR.

<sup>8</sup>Kentucky Rules of Criminal Procedure.

<sup>9</sup>This motion was supplemented twice, November 24, 1997, and December 21, 1998.

<sup>10</sup>The trial court ruled that pursuant to Bedell v. Commonwealth, Ky., 870 S.W.2d 779, 783 (1994), the life sentence imposed in Webb's case could not be ordered to be served consecutively with any other sentence.

<sup>11</sup>Specifically, the trial court "granted an evidentiary hearing limited to the following asserted grounds for relief under RCr 11.42:

- (a) Alleged ineffective assistance of counsel by trial counsel's failure to properly assert a motion for change of venue;
- (b) Alleged ineffective assistance of

(continued...)

RCr 11.42 motion, the trial court denied relief on the basis that the issues could have been raised and should have been raised on direct appeal.

An evidentiary hearing was held on June 17, 1999;<sup>12</sup> and on September 9, 1999, the trial court entered an order granting Webb's RCr 11.42 motion in part and otherwise denying the motion.<sup>13</sup> The trial court found that trial counsel's failure to challenge the validity of Webb's 1991 conviction, which was used to prove the PFO II charge, constituted ineffective assistance of counsel.<sup>14</sup> The trial court concluded that Webb had been

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<sup>11</sup>(...continued)

counsel by trial counsel's failure to challenge the validity of the prior felony conviction used by the Commonwealth to prove the persistent felony offender charge (See Graham v. Commonwealth, Ky., 952 S.W.2d 206 (1997)); and

- (c) Alleged ineffective assistance of counsel by trial counsel's calling of co-defendant [Brett] Ridgley as a witness, over the objection of the defendant."

<sup>12</sup>The hearing was originally scheduled for April 7, 1999, but it was reset for June 17, 1999, to allow Webb time to confer with his new counsel and to adequately prepare for the hearing.

<sup>13</sup>The claims concerning change of venue and calling Ridgley as a witness were denied.

<sup>14</sup>At a trial held in 1994, the 1991 conviction was held to be invalid under Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969), because Webb had not been made aware of his right to confront his accusers. See Webb v. Commonwealth, Ky., 904 S.W.2d 226 (1995). In the case sub judice, Webb's trial counsel failed to challenge the validity of the 1991 conviction  
(continued...)

prejudiced by his trial counsel's deficient performance and vacated Webb's PFO II conviction. The trial court then resentenced Webb to 20 years on the burglary conviction and five years on the theft conviction, ordering that the sentences be served consecutively.<sup>15</sup> Webb appealed the trial court's denial of his other RCr 11.42 claims of ineffective assistance of counsel. The denial of Webb's other claims in his RCr 11.42 motion was affirmed by this Court on February 2, 2001,<sup>16</sup> and discretionary review was denied by the Supreme Court on August 15, 2001.<sup>17</sup>

On February 24, 2000, while Webb's appeal of his RCr 11.42 motion was still pending, he filed a CR 60.02 motion to vacate judgment. The CR 60.02 motion was denied by an order entered on January 9, 2001, as procedurally improper since the issues raised by Webb in his CR 60.02 motion could have been raised and should have been raised in his RCr 11.42 appeal, which was pending before this Court. On January 18, 2001, Webb filed a CR 59.05 motion to vacate or set aside the January 9, 2001, order. The CR 59.05 motion was denied by an order entered on

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<sup>14</sup>(...continued)  
and the Commonwealth used the 1991 conviction to prove the PFO II charge.

<sup>15</sup>These were the same sentences recommended by the jury prior to the enhancement by the PFO II conviction.

<sup>16</sup>1999-CA-002267.

<sup>17</sup>2001-SC-000142.

June 29, 2001. The trial court stated that "the issue which the defendant seeks to raise in his present motion, and in his prior motion which the Court overruled in its order entered January 9, 2001, is not an issue which is outside the scope of the case which is in the jurisdiction of the appellate courts in defendant's pending appeal."<sup>18</sup> This appeal followed.<sup>19</sup>

Webb argues in this appeal that his right to have his sentence set by a jury pursuant to KRS 532.055 was violated when the trial court entered the order vacating his PFO II conviction and sentencing him in accordance with the original sentence recommended by the jury. Webb relies on the United States Supreme Court case of Apprendi v. New Jersey,<sup>20</sup> for his claim that the trial court violated his right to be sentenced by a jury when it adopted a recommended jury sentence that was based upon unconstitutional information, i.e., the invalid 1991 conviction.

The trial court ruled that the claim raised by Webb in his motions filed on February 24, 2000, and January 18, 2001, and denied in the orders entered on January 9, 2001, and June 29, 2001, was not "outside the scope of the case which is in the jurisdiction of the appellate courts in defendant's pending

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<sup>18</sup>The trial court cited Commonwealth v. Blincoe, Ky.App., 33 S.W.3d 533 (2000).

<sup>19</sup>Webb also has a habeas corpus petition currently pending in United States District Court for the Western District of Kentucky at Bowling Green.

<sup>20</sup>530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

appeal.” Stated differently, since Webb had appealed the trial court’s ruling on his RCr 11.42 motion, that appeal was the proper procedural avenue where Webb should have raised his claim that the trial court erred in his sentencing. We agree.

Kentucky courts have consistently held that once a criminal defendant files a motion to vacate sentence under RCr 11.42, he is precluded from raising identical issues under CR 60.02.<sup>21</sup> RCr 11.42 provides a procedure for a motion to vacate, set aside or correct a sentence for a “prisoner in custody under sentence . . . who claims a right to be released on the ground that the sentence is subject to collateral attack. . . .” RCr 11.42 provides a prisoner an opportunity to collaterally attack an improper sentence on grounds which were not available on direct appeal. RCr 11.42(3) provides that the final disposition of such a motion concludes all issues that could reasonably have been presented in that proceeding. In other words, the language of RCr 11.42 forecloses a defendant from raising any claim under CR 60.02, if the claim could reasonably have been presented in a RCr 11.42 motion.

The constitutionality of Webb’s sentencing was an issue that could have been raised in his RCr 11.42 motion. Webb claims that he should be allowed for the first time to argue in his CR 60.02 motion his claim that the trial court erred when it adopted

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<sup>21</sup>Gross v. Commonwealth, Ky., 648 S.W.2d 853 (1983).

the original recommended jury sentence which was based in part on evidence of his invalid 1991 conviction. This argument fails, however, because Webb still could have raised this issue in his RCr 11.42 motion.<sup>22</sup> As to Webb's Apprendi argument, we have found no language in that case that would justify the extraordinary relief requested.<sup>23</sup>

For the foregoing reasons, the order of the Warren Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Anthony Scott Webb, Pro Se  
Pineville, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler III  
Attorney General

Perry T. Ryan  
Assistant Attorney  
Frankfort, Kentucky

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<sup>22</sup>Webb could have argued any issues pertaining to his sentencing in his RCr 11.42 motion. Webb tries to get around this fact by claiming that it was the adoption of his original recommended sentence that violated his rights to a jury sentencing. This argument, however, is premised on alleged errors which were made at Webb's original sentencing and thus could have been raised in his RCr 11.42 motion.

<sup>23</sup>Webb appears to argue that since Apprendi was decided on June 26, 2000, he could not have been aware of the case when he brought his RCr 11.42 motion in April 1997. Regardless, we fail to see how Apprendi entitles Webb to any relief.