

Commonwealth Of Kentucky

Court Of Appeals

NO. 2002-CA-000212-MR

DAVID S. GEX

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE F. KENNETH CONLIFFE, JUDGE
ACTION NO. 91-CR-001171

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING
** **

BEFORE: BARBER, DYCHE AND TACKETT, JUDGES.

BARBER, JUDGE: David S. Gex ("Gex") appeals from an order of the Jefferson Circuit Court denying his motion for relief pursuant to Kentucky Rules of Civil Procedure (CR) 60.02 from a criminal conviction and sentence. After reviewing the issues raised by Gex, the record and the applicable law, we affirm.

On March 10, 1992, a jury convicted Gex of wanton murder in connection with the shooting death of Ronald Sadler. Gex was sentenced to twenty-three (23) years imprisonment. The Kentucky Supreme Court unanimously affirmed this conviction on April 21, 1994 in an unpublished opinion. The Supreme Court denied his petition for rehearing on September 1, 1994.

Gex filed a motion to vacate or set aside judgment pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42 on December 19, 1995. In his RCr 11.42 motion, Gex alleged that he was denied effective assistance of counsel during the sentencing phase of his trial and that the trial court erred by giving the jury a wanton murder instruction while ignoring a claim of self-defense. The trial court denied Gex's RCr 11.42 motion. Gex appealed the trial court's decision to this Court. However, on October 30, 1996, this Court dismissed Gex's appeal due to his failure to file a brief. Gex filed a motion with this Court for a belated appeal, which was ultimately denied.

On December 5, 2001, Gex filed his CR 60.02 motion with the trial court. In this motion, Gex revived the arguments originally made in his RCr 11.42 motion. The trial court denied Gex's CR 60.02 motion. This appeal followed.

In Gross v. Commonwealth, Ky., 648 S.W.2d 853 (1983), the Kentucky Supreme Court established the procedure for appellate review in criminal cases. The Supreme Court stated that the structure for appellate review is not haphazard or overlapping. Id. at 856. A criminal defendant must first bring a direct appeal when available, then utilize RCr 11.42 by raising every error of which he should be aware. Id. CR 60.02 should be utilized only for extraordinary situations not subject to relief by direct appeal or by way of RCr 11.42. Id. The Supreme Court reaffirmed the procedural requirements set out in Gross in its opinion in McQueen v. Commonwealth, Ky., 948 S.W.2d 415 (1997):

A defendant who is in custody under sentence
or on probation, parole or conditional

discharge, is required to avail himself of RCr 11.42 as to any ground of which he is aware, or should be aware, during the period when the remedy is available to him. Civil Rule 60.02 is not intended merely as an additional opportunity to relitigate the same issues which could "reasonably have been presented" by direct appeal or RCr 11.42 proceedings. RCr 11.42(2); Gross v. Commonwealth, supra, at 855, 856. The obvious purpose of this principle is to prevent the relitigation of issues which either were or could have been litigated in a similar proceeding.

Id. at 416.

Gross and McQueen clearly establish that "[a]n issue raised and rejected on direct appeal may not be litigated [in an RCr 11.42 proceeding] by claiming that it amounts to ineffective assistance of counsel," Sanborn v. Commonwealth, Ky., 975 S.W.2d 905, 909 (1998), cert. denied, 526 U.S. 1025 (1999). This same logic applies to CR 60.02 motions since, by the very terms of the rule, it provides "extraordinary relief" just as RCr 11.42 does. CR 60.02. In order to be eligible for CR 60.02 relief, Gex must demonstrate why he is entitled to such special, extraordinary relief. Barnett v. Commonwealth, Ky., 979 S.W.2d 98, 101 (1998).

In his brief, Gex once again raises concerns about the propriety of the instructions given to the jury by the trial court. These concerns were raised, and ultimately rejected, by the Kentucky Supreme Court on direct appeal. Consequently, Gex is barred from raising these issues again by a CR 60.02 motion.

Additionally, Gex failed to exercise due diligence in pursuing his claim. Under CR 60.02, a motion must be filed within a reasonable time if the motion is based upon an extraordinary reason justifying the relief sought. Here, Gex

waited until December 5, 2001 to file his CR 60.02 motion with the trial court. A delay of over nine years is not reasonable and does not comply with CR 60.02 requirements. Therefore, the trial court did not err in denying Gex's CR 60.02 motion.

For the foregoing reasons, the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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