RENDERED: JULY 3, 2003; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2001-CA-001679-MR
AND
NO. 2001-CA-002236-MR

CHARLES HELTON — APPELLANT

v.

APPEAL FROM PULASKI CIRCUIT COURT
HONORABLE DANIEL J. VENTERS, JUDGE
ACTION NOS. 82-CR-00061 AND 82-CR-00121

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: EMBERTON, CHIEF JUDGE; JOHNSON AND SCHRODER, JUDGES.

JOHNSON, JUDGE: Charles Helton has appealed from two orders entered by the Pulaski Circuit Court on July 16, 2001, and on September 25, 2001, which denied his motions for modification of sentence filed pursuant to CR[1] 60.02. Having concluded that the issues presented by Helton either were not properly raised under CR 60.02 or were insufficient to justify relief, we affirm.

[1] Kentucky Rules of Civil Procedure.

On March 25, 1982, Helton was indicted by a Pulaski County grand jury in Case No. 82-CR-061 for rape in the first degree[2] involving sexual intercourse with his step-daughter, J. K. K. On April 22, 1982, Helton appeared with his appointed attorney, James Cox, and was arraigned on that indictment. A trial date was scheduled for September 22, 1982. On September 22, the trial was continued with a new trial date of January 26, 1983. On November 10, 1982, a Pulaski County grand jury returned a second indictment in Case No. 82-CR-121, charging Helton with rape in the first degree involving sexual intercourse with another step-daughter, R. K. On December 17, 1982, Helton was arraigned on the second indictment and Mary Obermeyer indicated she had been appointed to represent him. At that time, the two cases were consolidated and joined for trial because of the similarity in the facts and circumstances giving rise to the charges.

On January 26, 1983, a trial was held on both indictments with Cox alone representing Helton. During the trial, five witnesses testified for the Commonwealth, including J. K. K. and R. K., and five witnesses testified for the defense, including Helton. The jury found Helton guilty of both charged offenses and recommended sentences of life imprisonment on each conviction to run consecutively. A subsequent motion

[2] Kentucky Revised Statutes (KRS) 510.040.

for a new trial was denied. On February 24, 1983, the trial court sentenced Helton to two consecutive terms of life imprisonment on the two convictions of rape in the first degree consistent with the jury's recommendation.

On December 22, 1983, the Supreme Court of Kentucky rendered an opinion affirming the convictions on direct appeal.[3] In its opinion, the Supreme Court rejected Helton's claims that: (1) the trial court erred in excluding evidence about the sexual activity of J. K. K. and R. K. with persons other than Helton; (2) he could be convicted of only incest and not rape in the first degree; (3) the instructions were erroneous for failing to require the jury to make specific findings that the victims were under the age of 12; and (4) running the life sentences consecutively was illegal. With respect to issues (2) and (3), the Supreme Court held they were not properly preserved because Helton had failed to object to the rape in the first degree instruction as required by CR 9.54(2).

On July 27, 1984, Helton filed a motion in circuit court seeking to have the two sentences to run concurrently, rather than consecutively. On January 7, 1995, the trial court,

[3] Helton v. Commonwealth, 1983-SC-000675-MR (not to be published).

after considerable delay, finally granted the motion and amended the judgment to require the sentences to run concurrently.[4]

While the above-mentioned motion was pending, on September 27, 1984, Helton filed a motion to vacate, set aside or correct sentence pursuant to RCr[5] 11.42. In the motion, Helton asserted several complaints of alleged ineffective assistance of counsel with respect to the issues raised on direct appeal including counsel's failure to object to the instructions not being limited to incest and not requiring a finding on the victims' ages. Helton also asserted that counsel was ineffective for not seeking a competency hearing because he alleged that he was under the influence of prescription drugs and incompetent on the day of the trial. On February 28, 1985, the trial court denied the motion rejecting Helton's arguments. On September 27, 1985, this Court affirmed the trial court's opinion denying the RCr 11.42 motion.[6]

On September 7, 1999, Helton filed a pro se motion for modification of sentence pursuant to CR 60.02 and/or KRS 532.070. In the two-page memorandum in support of the motion, Helton sought modification of his concurrent life sentences to

[4] The Supreme Court's rejection of Helton's challenge to the consecutive life sentences was based on counsel's failure to object and Shannon v. Commonwealth, Ky., 562 S.W.2d 301 (1978). Subsequent to the Supreme Court's decision affirming Helton's convictions, the Supreme Court overruled its decision in Shannon in Wellman v. Commonwealth, Ky., 694 S.W.2d 696 (1985).

[5] Kentucky Rules of Criminal Procedure.

[6] Helton v. Commonwealth, 1985-CA-002440-MR (not to be published).

concurrent terms of 20 years because (1) neither of his appointed attorneys, Cox and Obermeyer, were members of the Kentucky Bar Association (KBA) and duly licensed to practice law in the Commonwealth of Kentucky at the time of his arraignments; (2) both of the female victims were allegedly over the age of 12 on the date of the alleged offenses; and (3) he was allegedly incompetent on the day of trial because of depression and paranoia. On September 14, 1999, the trial court denied the motion stating it lacked jurisdiction to modify the sentence beyond the time period for a shock probation motion.

On May 4, 2001, this Court rendered an Opinion vacating the trial court's order and remanding the case for further proceedings.[7] This Court extensively discussed the jurisdictional and procedural aspects for post-judgment review in criminal cases in holding the trial court had subject-matter jurisdiction under CR 60.02. This Court noted that the limited appellate record, which failed to contain any relevant documents between the 1982 indictment and the 1999 CR 60.02 motion, precluded adequate review of the motion. The case was remanded to the trial court for further proceedings.

On May 30, 2001, the Commonwealth filed its memorandum in opposition to the CR 60.02 motion to modify sentence. It argued that the motion was precluded as untimely based on the

[7] 1999-CA-002372-MR (not to be published).

prior RCr 11.42 motion. Attached to the memorandum were the Supreme Court's decision on direct appeal and the trial court's order denying the RCr 11.42 motion. On July 16, 2001, the trial court entered a nine-page order denying the CR 60.02 motion on both procedural and substantive grounds. On September 25, 2001, Helton filed another CR 60.02 motion in Case No. 82-CR-121 alleging ineffective assistance of counsel because attorney Obermeyer was not licensed to practice law in Kentucky on the date he was arraigned in that case. On the same day, the trial court denied the motion. This Court has consolidated the appeals of the trial court's July 16 and September 25, 2001, orders denying the related CR 60.02 motions.

Unfortunately, the record on appeal still does not contain the entire circuit court record. The Commonwealth indicates that the circuit court record was released to a former Assistant Attorney General for filing in the federal district court in connection with a petition for a writ of habeas corpus filed by Helton. It is unclear whether the federal court proceeding has been completed or why the record has not been returned to the circuit court. While we would prefer a more complete record, the current appellate record does contain a transcript of the trial and sufficient documentation to render a decision in this appeal.

The trial court correctly denied the motions on both procedural and substantive grounds. As this Court discussed in the previous opinion, in Gross v. Commonwealth,[8] the Supreme Court set out the procedure for post-judgment review in criminal cases. The Supreme Court stated that the structure for appellate review is not haphazard or overlapping.[9] It held that 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, and only utilize CR 60.02 for extraordinary situations not otherwise subject to relief by direct appeal or by way of RCr 11.42.[10] More recently, in McQueen v. Commonwealth,[11] the Supreme Court reaffirmed the procedural requirements set out in Gross, when it stated:

> 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 Areasonably have been presented@ by direct appeal or RCr 11.42 proceedings.[12] The obvious purpose of this

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

[9] Id. at 856.

[10] Id. See also Bowling v. Commonwealth, Ky., 981 S.W.2d 545, 549 (1998); and Sanborn v. Commonwealth, Ky., 975 S.W.2d 905, 908-09 (1998);.

[11] Ky., 948 S.W.2d 415 (1997).

[12] RCr 11.42 (3); Gross, supra at 855.

> principle is to prevent the relitigation of issues which either were or could have been litigated in a similar proceeding.[13]

In the case sub judice, Helton could have raised, or did previously raise, the issues presented in his CR 60.02 motions. In his direct appeal and RCr 11.42 motion, Helton challenged the jury instructions with respect to the need for a specific finding on the ages of the victims. Helton was aware of the children's ages and should have raised the issue of the sufficiency of the evidence as to the victims' ages in the direct appeal. Similarly, Helton could, and should, have questioned his competency to stand trial in the direct appeal. He did, in fact, challenge his conviction based on incompetency indirectly in the RCr 11.42 proceeding through a claim of ineffective assistance of counsel. The only issue that Helton arguably was not aware of at the time of the trial involves his attorneys' KBA membership and their licensing status. These facts certainly could have been discovered earlier. Helton has failed to explain why it took him over 17 years to discover these facts.

In addition to the procedural bar, each of Helton's complaints lacks substantive merit. First, Helton asserts that the victims were not less than 12 years of age at the time of

[13] McQueen, 948 S.W.2d at 416. See also Land v. Commonwealth, Ky., 986 S.W.2d 440, 442 (1999); Barnett v. Commonwealth, Ky., 979 S.W.2d 98, 101 (1998); and Commonwealth v. Gross, Ky., 936 S.W.2d 85 (1996).

the offenses based on an alleged date for the two rape offenses of February 1, 1982, which is taken from his prison Resident Record Card. His reliance on the Resident Record Card is misplaced. J. K. K. was born on May 4, 1968; R. K. was born on December 11, 1966. During the trial, J. K. K. testified that Helton began forcing her to have sexual intercourse when she was nine-years old and that it continued sporadically every few weeks for several years up to approximately February 1982. R. K. testified that Helton had sexual intercourse with her repeatedly every few weeks for four or five years starting when she was 11-years old. Additionally, Jimmy Helton, appellant's biological son, testified that his father had had sex with J. K. K. when she was 11-years old. Helton attacks the credibility of the victims, but that was a matter for the jury. It is unclear why the prison resident card erroneously identifies February 1, 1982, as the date of the crime. Nevertheless, there was sufficient evidence presented at trial that the two victims were under the age of 12 at the time of the offenses.

Helton's attempt to invalidate his sentences based on his attorneys' bar membership and licensing status is equally unavailing. The documents submitted by Helton indicate that Cox was granted a license for limited practice in May 1981, and was admitted to the KBA by examination in October 1982. Thus, he was duly licensed to practice law in Kentucky throughout the

prosecution proceedings. The Rules of the Supreme Court provide for a limited license to practice law for persons employed by a public defender program, such as the one Cox was participating in at the time, without KBA membership.[14] The fact that Cox did not become a member of the KBA until after the trial is insignificant.

The documents also state that Obermeyer was granted a limited license to practice law in January 1983, and was admitted to the KBA by exam in June 1984. While this information indicates that Obermeyer may not have been licensed at the time of Helton's arraignment in Case No. 82-CR-121, that fact does not invalidate the convictions or sentences. A defendant is constitutionally entitled to effective assistance of counsel under the Sixth Amendment to the United States Constitution at every "critical stage" of a criminal proceeding.[15] Constitutional error exists without any showing of prejudice when counsel was either totally absent or prevented from assisting the defendant during a critical stage of the prosecution.[16] Although somewhat imprecise, the United States Supreme Court has articulated a test for determining whether a

[14] See Supreme Court Rule (SCR) 2.112. Cox apparently had been admitted to and practiced law in Tennessee prior to moving to Kentucky.

[15] See, e.g., Michigan v. Jackson, 475 U.S. 625, 629-30, 106 S.Ct. 1404, 1407-08, 89 L.Ed.2d 631 (1986); and United States v. Cronic, 466 U.S. 648, 659, 104 S.Ct. 2039, 2047, 80 L.Ed.2d 657 (1984).

[16] Cronic, supra at 689, n.25.

particular time period is a critical stage based on an assessment of whether, at the time in question, "the accused required aid in coping with legal problems or assisting in meeting his adversary."[17] Arraignment may be a "critical stage" where "what happens there may affect the whole trial" or implicates the "substantial rights" of the defendant, such as the loss of defenses or the entry of a guilty plea.[18] Kentucky cases have held that under Kentucky criminal procedure, arraignment does not represent a "critical stage," so that absence of counsel would not constitute grounds to invalidate a conviction.[19]

In the current case, Obermeyer was present and assisted Helton at his arraignment in Case No. 82-CR-121. Helton has not alleged any prejudice or ineffective assistance of counsel because of the arraignment proceeding, he merely complains that Obermeyer was not officially licensed or a member of the KBA at the time. Because Helton's arraignment is not a "critical stage" requiring representation of counsel and he was

[17]United States v. Ash, 413 U.S. 300, 313, 93 S.Ct. 2568, 2575, 37 L.Ed.2d 619 (1973).

[18]See Mempa v. Rhay, 389 U.S. 128, 88 S.Ct. 254, 19 L.Ed.2d 336 (1967); White v. Maryland, 373 U.S. 59, 83 S.Ct. 1050, 10 L.Ed.2d 193 (1963); and Hamilton v. Alabama, 368 U.S. 52, 82 S.Ct. 157, 7 L.Ed.2d 114 (1961).

[19] See Parrish v. Commonwealth, Ky., 472 S.W.2d 69 (1971); Collins v. Commonwealth, Ky., 433 S.W.2d 663 (1968); and Maise v. Commonwealth, Ky., 380 S.W.2d 230 (1964).

in fact assisted by counsel, he has not shown a constitutional violation with respect to his arraignment in Case No. 82-CR-121.

Helton's third argument is that he was incompetent and unable to participate adequately in his own defense at the trial because of medication he had taken. He identifies a few of his answers to questions during cross-examination as examples that he was confused and had a faulty memory. First, several of the excerpts merely represent attempts to avoid responding to the questions. A review of Helton's entire testimony reveals that his memory of events was quite good. As this Court stated in its August 1996, Opinion on the RCr 11.42 motion:

> A careful review of appellant's testimony clearly establishes that he was fully aware of and had the capacity to appreciate the nature and consequences of the proceedings against him, and to rationally and effectively participate in his own defense. We conclude, therefore, that the record refutes appellant's claim that on the date he was tried, he was under the influence of drugs and narcotics and incompetent to stand trial.

Nothing presented in the current appeal dissuades us that this Court's earlier observations were not correct.

Our standard of review on a CR 60.02 motion is whether the trial court abused is discretion.[20] A movant is not entitled to a hearing on the motion unless he "affirmatively alleges

[20] Brown v. Commonwealth, Ky., 932 S.W.2d 359, 361 (1996); White v. Commonwealth, Ky.App., 32 S.W.3d 83, 86 (2000).

facts which, if true, justify vacating the judgment and further allege[s] special circumstances that justify CR 60.02 relief."[21] Helton's motion was properly denied on both procedural and substantive grounds based on the record. Accordingly, the trial court did not abuse its discretion by denying the motion without a hearing.

For the foregoing reasons, the orders of the Pulaski Circuit Court are affirmed.

ALL CONCUR.

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[21] McQueen, 948 S.W.2d at 416; Gross, 648 S.W.2d at 856.