

Commonwealth Of Kentucky
Court of Appeals

NO. 2002-CA-000206-MR

TIMOTHY FANCHER

APPELLANT

v. APPEAL FROM METCALFE CIRCUIT COURT
HONORABLE BENJAMIN L. DICKINSON, JUDGE
ACTION NO. 93-CR-00001

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: BUCKINGHAM, DYCHE AND JOHNSON, JUDGES.

JOHNSON, JUDGE: Timothy Fancher, pro se, has appealed from an order entered by the Metcalfe Circuit Court on December 4, 2001, which denied his motion to obtain free copies of his court records. Having concluded that the trial court did not err, we affirm.

On September 21, 1992, Fancher was indicted by a Metcalfe County grand jury for the offense of murder¹ for the

¹ Kentucky Revised Statutes (KRS) 507.020.

shooting death of David L. Burdick. A jury trial was held in December 1993. The jury found Fancher guilty of murder and he was sentenced to life in prison on January 7, 1994. The Supreme Court of Kentucky affirmed Fancher's conviction and sentence in a memorandum opinion rendered on April 25, 1996.²

The Commonwealth has treated this appeal as an appeal from an order denying Fancher relief under CR³ 60.02. However, because we determine that the appeal from the denial of the CR 60.02 motion is not properly before this Court, we find it necessary to outline the procedural history of the case after Fancher's conviction was affirmed. After the entry of the Supreme Court's Opinion affirming Fancher's conviction, the next entry in the record is an order of the Metcalfe Circuit Court, entered on December 4, 2001, denying a motion by Fancher to obtain court records.⁴ Fancher then filed an "appeal from Metcalfe Circuit Court, Honorable Benjamin L. Dickinson, Judge", on January 22, 2002. Fancher also filed a motion to proceed in forma pauperis on appeal, which was granted by the circuit court.

On May 9, 2002, while this appeal was pending, the record establishes that Fancher filed a "Motion for Modification

² Case no. 1994-SC-000565-MR.

³ Kentucky Rules of Civil Procedure.

⁴ The motion filed by Fancher is not in the record.

of Sentence Pursuant to Civil Rule CR 60.02 (F).” In an order entered on June 4, 2002, the circuit court denied Fancher CR 60.02 relief. Fancher then tendered a notice of appeal from this order on June 24, 2002. He also filed a motion to proceed in forma pauperis on appeal. The trial court denied the motion to proceed in forma pauperis. Fancher did not appeal from the order denying his motion to proceed in forma pauperis or pay the requisite filing fee.

CR 73.02(1)(b) states in pertinent part:

If the motion to proceed in forma pauperis is denied, the party shall have ten days within which to pay the filing fee or to appeal the denial to the appropriate appellate court. Time for further steps in the appeal or cross-appeal shall run from the date that the notice of appeal is filed upon payment of the filing fee or the granting of the motion to proceed in forma pauperis.

Because Fancher did not appeal the denial of his motion to proceed in forma pauperis on the appeal of the denial of his CR 60.02 motion or pay the filing fee, he failed to properly appeal from the order denying him CR 60.02 relief. As such, those issues are not properly before the Court. Therefore, the only issue on appeal is whether the circuit court erred by denying Fancher’s motion requesting free copies of his trial record.

Unfortunately, we can only speculate as to what Fancher argued in support of his motion requesting free copies

of his court records, as the motion is not in the record. "It has long been held that, when the complete record is not before the appellate court, that court must assume that the omitted record supports the decision of the trial court."⁵ As such, we must affirm.

However, even if we were to assume that Fancher made the same arguments to the circuit court as he makes to this Court on appeal, we would still affirm. First, at the time Fancher filed his motion for free copies of his trial records, he had no motion or case pending before the circuit court. It is well established that a person is not entitled to copies of court records at the Commonwealth's expense in order to search for grievances.⁶

Second, and more importantly, Fancher failed to file a motion to vacate his judgment under RCr⁷ 11.42 within three years of the date his conviction was final. All of Fancher's generalized allegations involve his claim that his trial counsel was ineffective. In Gross v. Commonwealth,⁸ our Supreme Court stated:

[T]he proper procedure for a defendant aggrieved by a judgment in a criminal case

⁵ Commonwealth v. Thompson, Ky., 697 S.W.2d 143, 145 (1985) (citing Commonwealth, Dept. of Highways v. Richardson, Ky., 424 S.W.2d 601 (1968)).

⁶ Gilliam v. Commonwealth, Ky., 652 S.W.2d 856, 858 (1983).

⁷ Kentucky Rules of Criminal Procedure.

⁸ Ky., 648 S.W.2d 853, 857 (1983).

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.

. . . . [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.

Fancher makes no claim that during the three years that RCr 11.42 relief was available to him that he was unaware of the grounds he now claims entitle him to relief or that these grounds could not have reasonably been presented in an RCr 11.42 proceeding. Indeed, all issues raised by Fancher were either decided by the Supreme Court on direct appeal, reasonably could or should have been raised on direct appeal or could or should have been raised in a motion for RCr 11.42 relief. As such, these issues have been waived. Therefore, Fancher's only need for trial records would be to search for new grievances. As stated previously, he was not entitled to copies of court records at the Commonwealth's expense for that purpose.

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

ALL CONCUR.

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