

RENDERED: SEPTEMBER 5, 2003; 10:00 A.M.  
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2001-CA-002284-MR

CLIFFORD SMITH

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE JAMES M. SHAKE, JUDGE  
ACTION NO. 79-CR-001103

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: GUIDUGLI AND JOHNSON, JUDGES; AND HUDDLESTON, SENIOR JUDGE.<sup>1</sup>

JOHNSON, JUDGE: Clifford Smith, pro se, has appealed from an opinion and order entered by the Jefferson Circuit Court on October 1, 2001, which denied his motion for relief pursuant to CR<sup>2</sup> 60.02. Having concluded that the trial court properly denied

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<sup>1</sup> Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

<sup>2</sup> Kentucky Rules of Civil Procedure.

Smith's CR 60.02 motion because he failed to demonstrate that he was entitled to this extraordinary relief, we affirm.

On September 21, 1979, a Jefferson County grand jury indicted Smith on 15 counts of robbery in the first degree<sup>3</sup> and one count of being a persistent felony offender in the first degree (PFO I).<sup>4</sup> In return for a guilty plea, the Commonwealth agreed to recommend that the trial court dismiss five counts of robbery, reduce the PFO I charge to PFO II,<sup>5</sup> and impose a sentence of 15 years on each of the ten remaining counts of robbery. The sentences were to be enhanced to 20 years by the PFO II conviction and to run concurrently. On June 6, 1980, Smith pled guilty and the trial court sentenced him in accordance with the plea agreement.

However, on June 16, 1980, the trial court entered the following handwritten order:

On motion of the Commonwealth the sentencing on this Judgment is set aside. The PFO II charge is dismissed. The defendant is sentenced to 20 years on each of 10 counts of Robbery I to run concurrently and he is remanded to La Grange.

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<sup>3</sup> KRS 515.020.

<sup>4</sup> KRS 532.080(3).

<sup>5</sup> KRS 532.080(2).

While the record concerning this amended judgment is scant, it appears that Smith's first sentence was set aside because he did not have a criminal conviction making him subject to a PFO II conviction.

On June 24, 1981, more than one year after the amended sentence was entered, Smith filed an RCr<sup>6</sup> 11.42 motion seeking to set aside the June 16, 1980, sentence. The trial court denied Smith's RCr 11.42 motion, as well as his motion for an evidentiary hearing. Smith then filed a motion to reconsider, which the trial court denied on August 11, 1981.

Smith appealed the denial of his RCr 11.42 motion, alleging that (1) his guilty plea was induced by a promise by the Commonwealth which was not fulfilled; (2) he was denied effective assistance of counsel; and (3) the trial court failed to conduct an evidentiary hearing. This Court, after considering all three of Smith's arguments, affirmed the denial of his RCr 11.42 motion.<sup>7</sup>

On April 17, 2001, Smith filed a motion to void judgment pursuant to CR 60.02. The trial court entered its opinion and order denying Smith's CR 60.02 motion in October

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<sup>6</sup> Kentucky Rules of Criminal Procedure.

<sup>7</sup> Smith v. Commonwealth, 1981-CA-002048-MR.

2001.<sup>8</sup> The trial court ruled that Smith's motion was untimely and that his arguments had been previously addressed and disposed of by this Court's 1982 decision on Smith's RCr 11.42 motion. The trial court further ruled that Smith was not entitled to the extraordinary relief of CR 60.02 because it is available only "where there is no recourse to direct appeal or relief pursuant to RCr 11.42[.]" The trial court concluded that Smith's claims had already been rejected by the courts. This appeal followed.

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<sup>8</sup> There is a discrepancy in the record regarding the date of the trial court's order denying Smith's CR 60.02 motion. The record reveals that the trial court entered its order and opinion in July 2001. This order is slightly more than two pages long and contains the matter's factual history, sequence of events, and findings of law. However, the record also reveals that the trial court entered another opinion and order denying Smith's CR 60.02 motion in October 2001. This order is two pages in length and has a heading entitled "BRIEF SUMMARY." Under this heading, there is a one paragraph description of the case's facts. There is another heading entitled "OPINION," which includes a concise application of the law to the facts. The record does not indicate why there are two separate orders and opinions denying Smith's CR 60.02 motion. Further complicating the issue is the fact that Smith appealed from the October 2001 order, while the Commonwealth references the July 2001 order.

After an examination of the two orders, it appears that there are three differences between the July 2001 order and the October 2001 order. The first difference is that the July 2001 order indicates that Smith was indicted in September 1978 for 15 counts of first-degree robbery. However, the record clearly shows that Smith was charged in September 1979. The October 2001 order states that Smith was indicted in September 1979 for 15 counts of first-degree robbery. Therefore, it appears that the trial court under CR 60.01 properly corrected a typographical error in the July 2001 order. The second difference is that the October 2001 order specifically declares that Smith's CR 60.02 motion was untimely because the issues had been resolved more than 20 years earlier. The October 2001 order appears to supplement the July 2001 order by providing another reason for denying Smith's motion. The third difference is that the July 2001 order regards Smith's motion to void judgment. The October 2001 order regards Smith's motion for relief pursuant to CR 60.02. Both orders have the same consequence, which is the denial of Smith's claim for relief. However, as Smith has appealed from the October 2001 order, and it is the more recent order, we shall address that order in this Opinion.

Smith raises five issues on appeal: (1) that he was denied his substantial right to due process under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, and Sections 2, 3, and 11 of the Kentucky Constitution because the trial court denied his CR 60.02 motion and his request for an evidentiary hearing to determine the facts alleged in his CR 60.02 motion; (2) that his guilty plea was induced by a promise which was not fulfilled; (3) that the trial court acted without jurisdiction when it entered an amended sentence; (4) that he was denied effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution and Section 11 of the Kentucky Constitution; and (5) that his guilty plea was not knowingly, intelligently and voluntarily entered.

"CR 60.02<sup>9</sup> is an extraordinary remedy and is available only when a substantial miscarriage of justice will result from

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<sup>9</sup> CR 60.02 provides as follows:

On motion a court may, upon such terms as are just, relieve a party or his legal representative from its final judgment, order, or proceeding upon the following grounds: (a) mistake, inadvertence, surprise or excusable neglect; (b) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59.02; (c) perjury or falsified evidence; (d) fraud affecting the proceedings, other than perjury or falsified evidence; (e) the judgment is void, or has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (f) any other reason of an extraordinary nature

the effect of the final judgment."<sup>10</sup> The Supreme Court of Kentucky has declared that CR 60.02 "is for relief that is not available by direct appeal and not available under RCr 11.42."<sup>11</sup>

In the case sub judice, this Court affirmed the trial court's denial of Smith's motion for RCr 11.42 relief in 1982. The first four issues raised in this appeal were also raised by Smith in his RCr 11.42 motion. "[CR] 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."<sup>12</sup> "CR 60.02 is not a separate avenue of appeal to be pursued in addition to other remedies, but is available only to raise issues which cannot be raised in other proceedings."<sup>13</sup> Furthermore, Smith "has failed to affirmatively allege any facts which, if true, would justify vacating his sentence under CR 60.02[.]"<sup>14</sup> As such, Smith has

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justifying relief. The motion shall be made within a reasonable time, and on grounds (a), (b), and (c) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this rule does not affect the finality of a judgment or suspend its operation.

<sup>10</sup> Wilson v. Commonwealth, Ky., 403 S.W.2d 710, 712 (1966).

<sup>11</sup> Gross v. Commonwealth, Ky., 648 S.W.2d 853, 856 (1983).

<sup>12</sup> McQueen v. Commonwealth, Ky., 948 S.W.2d 415, 416 (1997) (citing RCr 11.42(3); and Gross, supra at 855-56).

<sup>13</sup> McQueen, 948 S.W.2d at 416.

<sup>14</sup> Id. at 418 (citing Gross, 648 S.W.2d at 856).

not "demonstrate[d] why he is entitled to this special, extraordinary relief."<sup>15</sup>

The fifth issue raised by Smith is that his guilty plea was not knowingly, intelligently and voluntarily entered. In his reply brief, Smith states that "[o]nce the trial court accepted [his] plea, the plea agreement became binding on the Commonwealth and [he] was entitled to enforce it."<sup>16</sup> While this claim was not specifically considered by this Court in its 1982 decision, this Court did determine that the sentences Smith received in the judgments entered on June 6, 1980, and June 16, 1980, were the same. Each time Smith received a 20-year sentence, which is precisely what he had bargained for with the Commonwealth. This Court concluded that the trial court "merely resentenced [Smith] after having lawfully set aside an illegal sentence[,]" adding that Smith's "second sentence was not more severe than the first or detrimental to [him] because he received the same sentence" [emphasis original]. Thus, Smith has failed to show that he did not get the benefit of the plea bargain. Furthermore, this issue is the type of issue that should have been pursued upon direct appeal and/or in a motion

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<sup>15</sup> McQueen, 948 S.W.2d at 416.

<sup>16</sup> Smith v. Commonwealth, Ky., 845 S.W.2d 534 (1993).

for RCr 11.42 relief and relief is not available under CR 60.02.<sup>17</sup>

Lastly, we note that pursuant to CR 60.02 Smith's motion must have been made within a reasonable time. Smith's motion for CR 60.02 relief was filed on April 19, 2001, slightly more than 19 years after this Court upheld the denial of his RCr 11.42 motion. "What constitutes a reasonable time in which to move to vacate a judgment under CR 60.02 is a matter that addresses itself to the discretion of the trial court."<sup>18</sup> The trial court ruled that Smith's CR 60.02 motion was untimely. We agree.

Based on the foregoing reasons, the order of the trial court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Clifford Smith, Pro Se  
Burgin, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler III  
Attorney General

Elizabeth A. Heilman  
Frankfort, Kentucky

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<sup>17</sup> Gross, 648 S.W.2d at 856.

<sup>18</sup> Id. at 858.