

RENDERED: NOVEMBER 26, 2003; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2003-CA-000668-MR

ROY E. WHITE

APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JOHN R. ADAMS, JUDGE
ACTION NO. 94-CR-00834

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: BAKER, KNOFF, AND TACKETT, JUDGES.

KNOFF, JUDGE: Roy White appeals pro se from an order of the Fayette Circuit Court, entered March 12, 2003, denying his CR 60.02 motion for relief from a 1995 judgment. In that judgment, the Circuit Court found White guilty of trafficking in cocaine and sentenced him as a first-degree persistent felony offender to twenty years in prison. White claims to have recently come upon evidence of police misconduct in his case that, he

contends, entitles him to relief from his conviction. The trial court did not abuse its discretion when it rejected White's claim.

On August 22, 1994, a confidential informant for the Lexington police solicited cocaine from John E. Doneghy, Jr. Officers observed Doneghy drive to White's residence, enter it briefly, then return to the informant and give him a small package of cocaine in exchange for forty dollars. Largely on the basis of this exchange, on August 23, 1994, the officers obtained a warrant to search White's residence. They executed the warrant on August 24. In the residence they found small quantities of cocaine and marijuana as well as trafficking paraphernalia, a loaded handgun, and more than \$30,000.00 in cash. This evidence was the basis of White's trafficking conviction.

On August 25, 1994, the officers obtained a warrant to search Doneghy's residence where they found a large quantity of simulated cocaine. Eventually Doneghy was indicted for that possession and apparently he pled guilty. White claims that the substance Doneghy sold to the informant on August 22 was simulated rather than real cocaine, and he asserts that this fact was known to the investigating officers and should have been included in the application for the search warrant. That

it was not, White contends, renders the search of his residence unconstitutional and entitles him to relief from his conviction.

We review a trial court's ruling on a CR 60.02 motion for abuse of discretion.¹ For several reasons we are convinced that the trial court did not abuse its discretion in this case.

First, as the trial court noted, CR 60.02 is not available to raise claims of error that were or that could have been raised either on direct appeal or in an RCr 11.42 proceeding.² White has already used both of those avenues to challenge the legality of the search of his residence, and both the Supreme Court and this Court were satisfied that the search was legal. If the substance Doneghy sold to the informant on August 22, 1994, was simulated cocaine, White could easily have discovered that fact prior to one of his earlier requests for relief. He is not entitled, therefore, to raise the issue now.

Even if White could not have discovered the nature of that substance any sooner, CR 60.02 requires that motions based on newly discovered evidence be brought within one year of the judgment under attack. White's motion several years after his judgment is thus untimely.

¹ Barnett v. Commonwealth, Ky., 979 S.W.2d 98 (1998).

² Gross v. Commonwealth, Ky., 648 S.W.2d 853 (1983).

Finally, CR 60.02 provides for an extraordinary form of relief. It is to be reserved for situations in which justice has clearly gone egregiously awry.³ White's allegations do not meet this standard. He apparently bases his assertion that the substance Doneghy sold to the informant was simulated cocaine on the fact that three days later the police found simulated cocaine at Doneghy's residence. This latter fact provides little support for White's assertion. But even supposing that Doneghy sold simulated cocaine to the informant, if the officer believed in good faith that Doneghy sold cocaine, then it was not improper for the officer to base his warrant application on that belief.⁴ White asserts that the officer did not have such a good-faith belief, but he fails to explain why, at the time he applied for the warrant, the officer would have believed anything else.

In short, White has failed to raise any doubt, much less the substantial doubt CR 60.02 requires, that his conviction was unjust. Accordingly, we affirm the March 12, 2003, order of the Fayette Circuit Court.

ALL CONCUR.

³ Brown v. Commonwealth, Ky., 932 S.W.2d 359 (1996).

⁴ Crayton v. Commonwealth, Ky., 846 S.W.2d 684 (1992).

BRIEFS FOR APPELLANT

Roy E. White, pro se
Blackburn Correctional
Complex
Lexington, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler III
Attorney General of Kentucky

Michael L. Harned
Assistant Attorney General
Frankfort, Kentucky