

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-002125-MR

ROBBIE WATERMAN

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE LEWIS G. PAISLEY, JUDGE
ACTION NO. 95-CR-00106

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BUCKINGHAM, DYCHE AND JOHNSON, JUDGES.

JOHNSON, JUDGE: Robbie Waterman, pro se, has appealed from an order entered by the Fayette Circuit Court on October 1, 2002, which denied his CR¹ 60.02 motion to vacate one of his two sodomy convictions or in the alternative to amend his sentence. Having concluded that the trial court properly denied Waterman's CR 60.02 motion, we affirm.

¹ Kentucky Rules of Civil Procedure.

On February 13, 1995, Waterman was indicted by a Fayette County grand jury and charged with two counts of sodomy in the first degree² and one count of burglary in the first degree.³ Waterman was subsequently tried and convicted of all three offenses. On July 8, 1996, the trial court entered its final judgment and sentence of imprisonment. The court sentenced Waterman to prison for a term of 15 years on each of the two convictions for sodomy in the first degree and 20 years on the remaining conviction for burglary in the first degree. As recommend by the jury, the trial court ordered the sentences to be served consecutively for a total of 50 years.

On May 21, 1998, the Supreme Court of Kentucky rendered a Memorandum Opinion affirming Waterman's convictions.⁴ On May 25, 1999, Waterman filed an RCr⁵ 11.42 motion to vacate judgment based on the alleged ineffective assistance of his trial counsel. On August 10, 1999, the trial court entered an order denying the motion without an evidentiary hearing. On November 16, 2001, this Court rendered an Opinion affirming the trial court's order.⁶

² Kentucky Revised Statutes (KRS) 510.070.

³ KRS 511.020.

⁴ Waterman v. Commonwealth, 1996-SC-000622-MR (not-to-be published opinion).

⁵ Kentucky Rules of Criminal Procedure.

⁶ Waterman v. Commonwealth, 1999-CA-001941-MR, as modified November 30, 2001 (not-to-be published opinion).

On September 23, 2002, Waterman filed a CR 60.02 motion to vacate one of his two sodomy convictions or in the alternative to amend his sentence.⁷ In sum, Waterman contended that his multiple convictions for sodomy in the first degree violated the double jeopardy clause of the Fifth Amendment to the United States Constitution, the due process clause of the Fourteenth Amendment to the United States Constitution, and Section 13 of the Kentucky Constitution due to the fact that both offenses took place simultaneously with the same victim. On October 1, 2002, the trial court entered an order summarily denying Waterman's CR 60.02 motion. This appeal followed.

We first note that Waterman did not raise the argument he now seeks to advance in this appeal in his direct appeal or in his RCr 11.42 motion. It is well established that "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."⁸ Simply stated, "CR 60.02 is not an appellate vehicle."⁹ "It is for relief that is not available by direct appeal and not available under RCr

⁷ Waterman brought his motion pursuant to CR 60.02(f) which permits a court to relieve a party from its final judgment or order based upon "any reason of an extraordinary nature justifying relief."

⁸ McQueen v. Commonwealth, Ky., 948 S.W.2d 415, 416 (1997). See also Gross v. Commonwealth, Ky., 648 S.W.2d 853, 856 (1983).

⁹ Faris v. Stone, Ky.App., 103 S.W.3d 1, 4 (2003) (citing McQueen, supra at 416).

11.42.”¹⁰ Consequently, Waterman’s double jeopardy argument is procedurally barred as it could have and should have been raised in his direct appeal or his RCr 11.42 motion.¹¹

Regardless, Waterman’s double jeopardy argument is entirely devoid of merit. The testimony introduced at trial indicated that Waterman broke into the victim’s home and forced her to engage in two separate acts of sodomy. More specifically, the victim testified that Waterman first performed oral sex on her, after which he forced her to perform oral sex on him. The victim testified that Waterman threatened her with a pair of meat scissors, but promised not to harm her if she did as she was told. Waterman seems unwilling to recognize that each charge of sodomy in the case sub judice was based on a separate act of sexual gratification. The fact that the acts occurred in a brief period of time with the same victim and in a continuum of force does not protect him from prosecution and conviction of each separate offense.¹² Simply stated, “[t]he fact that the two sexual acts occurred either simultaneously or nearly so is irrelevant.”¹³

¹⁰ Gross, supra at 856.

¹¹ See RCr 11.42(3).

¹² See, e.g., Van Dyke v. Commonwealth, Ky., 581 S.W.2d 563, 564 (1979).

¹³ Hampton v. Commonwealth, Ky., 666 S.W.2d 737, 739 (1984). See also State v. Williams, 898 P.2d 497, 511 (Ariz.Ct.App. 1995) (“[w]hen several acts of intercourse and several lewd and lascivious acts are committed on the same victim we see no reason why as many counts for each offense cannot be

Based on the foregoing reasons, the order of the Fayette Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Robbie Waterman, Pro Se
Central City, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler III
Attorney General

George G. Seelig
Assistant Attorney General
Frankfort, Kentucky

brought, despite the fact the defendant never left his victim's bed during the course of the commission of the acts'") (quoting State v. Hill, 450 P.2d 696, 698 (Ariz. 1969)); and State v. Wilson, 456 N.E.2d 1287, 1294 (Ohio.App. 1982) ("entry into two separate bodily orifices constitutes two separate acts of rape, permitting separate convictions, even though the sexual conduct occurs at one place and with no significant lapse of time between the acts of rape" [citations omitted]).