

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000777-MR
AND
NO. 2003-CA-000846-MR

JOE RAY TURNER

APPELLANT

v. APPEAL FROM ALLEN CIRCUIT COURT
HONORABLE WILLIAM R. HARRIS, JUDGE
ACTION NO. 97-CR-00087

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: EMBERTON, CHIEF JUDGE; BARBER AND GUIDUGLI, JUDGES.
GUIDUGLI, JUDGE. Joe Ray Turner (hereinafter "Turner") has
filed two pro se appeals alleging the Allen Circuit Court erred
in denying his RCr 11.42 and CR 60.02 motions. The two appeals
have been consolidated for appellate review in that the issues
and arguments presented are similar. Having thoroughly reviewed
the motions, the facts of the case, the arguments of the
parties, and the applicable law, we affirm both appeals.

Turner has filed two appeals. In appeal No. 2002-CA-000777-MR, he appeals from the March 29, 2002, "memorandum opinion and order ruling on [Turner's] various pro se motions filed between January 2, 2002 and March 1, 2002." In the March 29th order, the trial court sets for the procedural history as follows:

Between the inclusive dates of January 2, 2002 and March 1, 2002 the above-named defendant, acting pro se, has filed some twelve separate motions with the Clerk of this Court. The Commonwealth has filed responses, and in some instances replies and responses to replies have been filed both by the defendant pro se and by the Commonwealth.

Among the motions filed by the defendant are three motions for leave to proceed in forma pauperis, all of which the Court will sustain based upon defendant's demonstrated indigency.

Of the defendant's other motions, the Court characterizes five of them as substantive in nature, whereas the other motions are considered collateral to these substantive motions. The substantive motions are the following:

(1) Filed January 2, 2002 - "Motion Pursuant to RCr¹ 60.02 (E & F) Independent Action".

(2) Filed January 16, 2002 - "Motion to Consider Erroneous Order Overruling Movant's 11.42 Motion to Vacate or Set Aside Conviction".

¹ [Footnote 1 in original Circuit Court Order] Throughout, the defendant refers to RCr 60.02, but it is obvious that he is attempting to cite CR 60.02. The Court will treat his motion as made under CR 60.02.

(3) Filed January 31, 2002 - "Motion for Jail Time Credit Pursuant to KRS 532.120".

(4) Filed February 2, 2002 - "Motion to Show Cause Why the Commonwealth Should Not be Held in Contempt for Failure to Abide by Court Order".

(5) Filed February 21, 2002 - "Motion to Dismiss Indictment. . .".

In ruling upon these motions, the Court in (sic) mindful that following his trial by jury and conviction of murder in the beating death of his father the defendant exercised his right of direct appeal to the Kentucky Supreme Court, which affirmed his conviction and 99-year sentence in a reported decision rendered in 1999, Turner v. Commonwealth, Ky., 5 S.W.3d 119 (1999). Thereafter, represented by retained counsel, he filed a motion pursuant to RCr 11.42 alleging ineffective assistance of appointed trial counsel and seeking to have his conviction and sentence vacated. Following a lengthy evidentiary hearing, the Court overruled defendant's RCr 11.42 motion. The defendant appealed to the Kentucky Court of Appeals. By an opinion (not to be published) rendered on March 22, 2002 a panel of the Court of Appeals affirmed denial of post-conviction relief under RCr 11.42. The opinion of the Court of Appeals is not yet final and is not to be cited as authority, and it is referred to herein only to show the chronology and current status of the defendant's RCr 11.42 motion.²

The circuit court's order of March 29, 2002, proceeded to deny Turner's motions in that they were successive motions which raised issues that could and should have been raised in

² The opinion of the Court of Appeals (No. 2002-CA-002737-MR) affirming the trial court's denial of Turner's RCr 11.42 motion became final on 3/19/03. The Kentucky Supreme Court refused to grant discretionary review.

his direct appeal, or, in his initial RCr 11.42 motion. See McQueen v. Commonwealth, Ky., 948 S.W.2d 415 (1997); Land v. Commonwealth, Ky., 986 S.W.2d 440 (1999); Gross v. Commonwealth, Ky., 648 S.W.2d 853 (1983).

On appeal, Turner continues to argue issues that were or should have been presented in his direct appeal to the Supreme Court of Kentucky or in his initial RCr 11.42 motion. The Allen Circuit Court properly ruled successive collateral attacks are not permissible. This principle was set forth in Gross v. Commonwealth, Ky., 648 S.W.2d 853 (1983), and has been faithfully followed ever since. In Gross, Justice Leibson stated:

The structure provided in Kentucky for attacking the final judgment of a trial court in a criminal case is not haphazard and overlapping, but is organized and complete. That structure is set out in the rules related to direct appeals, in RCr 11.42, and thereafter in CR 60.02. (Emphasis in original).

. . .

We hold that the proper procedure for a defendant aggrieved by a judgment in a criminal case 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.

Next, we hold that 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.

Gross, 648 S.W.2d at 856-57. Despite Turner's continued impassioned arguments that the trial court and appellate courts have erred in its rulings and opinions, the fact remains that he has been afforded his constitutionality protected due process rights. The issues he raised in his direct appeal and his RCr 11.42 have been thoroughly and properly reviewed to his detriment. Unfortunately for Turner, the sad fact remains that he brutally beat to death his elderly father and he must now serve the sentence he received.

Turner's second appeal, Court of Appeals No. 2003-CA-000846-MR, follows the trial court's denial of several motions he filed after the court had denied his second RCr 11.42 motion (which formed the basis of his appeal previously addressed in this opinion). In that we believe the trial court's memorandum opinion and order entered April 1, 2003 succinctly and correctly addresses the issues raised by Turner, we adopt it, in relevant part, as follows:

The case is now before the Court on the following motions which the defendant has filed pro se:

(1) Motion for an order granting a mistrial (filed December 9, 2002).

(2) Motion for the Commonwealth to provide certain police reports (filed January 27, 2003).

(3) Motion for relief pursuant to CR 60.02(e) and (f) (filed February 7, 2003).

(4) Motion for summary judgment (filed March 19, 2003).

The Commonwealth has filed a response to the motion for an order granting a mistrial but has not responded to the other motions.

After reviewing the record and considering the law, the Court concludes that all of the defendant's motions lack merit.

The defendant's motion for an order declaring a mistrial and his motion for an order compelling the Commonwealth to produce police reports have no basis in law. They are not post-conviction motions under any criminal or civil rule or statute, nor has any case law been cited as authority for such motions. Accordingly, they will be summarily denied.

The motion for CR 60.02(e) and (f) relief fails for two reasons. First, the grounds for relief have not been asserted within a reasonable time. The jury trial was held in May, 1998; the motion was filed in February, 2003. On its face, a delay of more than four years in asserting grounds for relief which were obviously known to the defendant ever since the voir dire examination of prospective jurors at trial,

fails to satisfy the requirement that relief under CR 60.02 be brought within a reasonable time. Second, the defendant is not allowed to avail himself of yet another CR 60.02 motion to seek or raise grounds for relief (relationship between a juror and a Commonwealth witness) which could and should have been raised in his direct appeal, his RCr 11.42 motion, or his earlier CR 60.02 motion. Gross v. Commonwealth, Ky., 648 S.W.2d 853 (1983); McQueen v. Commonwealth, Ky., 948 S.W.2d 415 (1997).

The motion for summary judgment fails because summary judgment procedures are not authorized in criminal actions. Commonwealth v. Hayden, Ky., 489 S.W.2d 513 (1972); Commonwealth v. Hay, Ky. App., 987 S.W.2d 792 (1998).

ORDER DENYING MOTIONS

WHEREFORE, the defendant's above-
enumerated motions are hereby **DENIED**.

ENTERED this April 1st, 2003.

Having thoroughly reviewed the record, the numerous post-judgment filings of Turner, the arguments presented by the parties hereto and the applicable law, we find no basis to tamper with the well-reasoned orders entered by the Allen Circuit Court. Turner received a fair trial, received competent legal representation and has previously presented his allegations of legal error to the Supreme Court of Kentucky and to this Court, both of which affirmed his conviction.

For the foregoing reasons, the orders of the Allen Circuit Court entered on March 29, 2002 and on April 1, 2003, denying Turner's various post-trial motions are affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Joe Ray Turner
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BRIEF FOR APPELLEE:

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