

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001756-MR

WILLIAM TOLBERT, *PRO SE*

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE GEOFFREY P. MORRIS, JUDGE
ACTION NO. 92-CR-002125

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: DYCHE, McANULTY, AND SCHRODER, JUDGES.

McANULTY, JUDGE: William Tolbert (Tolbert), *pro se*, has appealed from an opinion and order entered by the Jefferson Circuit Court on July 18, 2003, that denied his motion for relief pursuant to Ky. R. Civ. P. (CR) 60.02 to vacate his sentence. Tolbert argues that the plea agreement with the Commonwealth was not honored, and that the plea agreement itself was illegal and void on its face due to language requiring sentences to run concurrent with a non-received sentence. Since

Tolbert failed to demonstrate that he is entitled to extraordinary relief pursuant to CR 60.02, we affirm.

The charges arose from events occurring over a six-week period in late 1991. Tolbert was placed under police surveillance after an anonymous tip was received by Crimestoppers that Tolbert had committed various robberies throughout southern Indiana and Louisville. The police had been observing Tolbert watching various fast food restaurants and other locations. Tolbert was apprehended when the police observed Tolbert watching the bank deposit courier from Key Market. Tolbert fled the police, and when he was apprehended he was in possession of a ski mask and a chrome .38 caliber revolver. These items matched the descriptions of those used in numerous robberies. There were also several similarities among the robberies including: locking employees in the freezer, using a handgun, and wearing a mask and gloves. Tolbert was positively identified by ten people in a line-up in four of the robberies.

On September 22, 1992, Tolbert was charged in an indictment with five counts of robbery in the first degree, one count of criminal attempt, one count of possession of a handgun by a convicted felon, and one count of persistent felony offender in the second degree. On December 1, 1992, Tolbert pled guilty to all counts, except criminal attempt. He was

sentenced to twenty years on the robbery counts, enhanced to thirty years by the persistent felony offender count, and five years for possession of a handgun by a convicted felon. These sentences were to run concurrently for a total sentence of thirty years. In exchange for his plea, the Commonwealth agreed *not to object* to time running concurrent with Indiana sentences, to recommend no federal prosecution, and to not write the parole board.

On September 29, 1995, Tolbert filed a *pro se* Ky. R. Crim. P. (RCr) 11.42 motion seeking to vacate and set aside the December 1, 1992 judgment against him. In this motion, Tolbert claimed that (1) he was denied due process through an unlawful search and seizure, (2) his constitutional rights were violated by an illegally constituted and impaneled grand jury, (3) his constitutional rights were violated by the suppression of exculpatory evidence, (4) an involuntary and unintelligent guilty plea was given and (5) he had ineffective assistance of counsel. The trial court denied Tolbert's motion to vacate. The judge also stated when Tolbert changed his plea of not guilty to guilty, he was not coerced into the guilty plea and that he "voluntarily waived his rights to irregularities in the grand jury, jury trial, and his right of appeal from proposed motion to suppress." (Citations omitted). Tolbert appealed and

this court affirmed the trial court in an opinion rendered December 12, 1997.

In pertinent part, the opinion states as follows:

Tolbert has failed to show any deficiency by counsel and any prejudice to his case. . . . We conclude that Tolbert's general allegations of counsel's deficiencies simply fail to meet the Strickland¹ test for ineffective assistance of counsel.

. . . .

[W]e conclude that Tolbert's allegations are so vague that he has failed to "allege facts which, if true, render the judgment void." . . . Thus, the trial court properly denied Tolbert's motion for an evidentiary hearing.

(citations omitted).

On July 16, 2003, Tolbert filed a *pro se* motion to vacate his sentence pursuant to CR 60.02(d) and (f). Tolbert alleged in this motion that he was a victim of fraud during his plea negotiations. He specifically alleged that the negotiated plea agreed upon by the Commonwealth was not carried out by the Commonwealth, resulting in fraud. The portion of the plea agreement Tolbert claims was not fulfilled was a stipulation that his sentence received in Kentucky would run concurrently with his sentence yet to be received in Indiana. He argued that the Commonwealth failed to make sure that once he received his sentence in Indiana that his Kentucky sentence would then run

¹ Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

concurrently. Thus, he argued that the plea agreement was void, and since the conviction was based on his guilty plea, the judgment of conviction should be vacated. The trial court denied this motion on July 18, 2003, stating that the "judgment is silent, thus under Kentucky law time normally runs concurrent." Tolbert then filed a motion for reconsideration and for an evidentiary hearing pursuant to CR 52.01, 52.02 and 52.03. The trial court denied this motion on August 1, 2003. This appeal of the initial order denying the CR 60.02 motion entered July 18, 2003, followed. On appeal, Tolbert argues that (1) the trial court committed reversible error by not conducting an evidentiary hearing and (2) his plea agreement was induced by fraud and was illegal/void on its face.

One may seek relief under CR 60.02 only when such "relief . . . is not available by direct appeal and not available under RCr 11.42." Gross v. Commonwealth, Ky., 648 S.W.2d 853, 856 (1983). The sections of CR 60.02 on which Tolbert relies state 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: . . . (d) fraud affecting the proceedings, other than perjury or falsified evidence; . . . or (f) any other reason of an *extraordinary nature* justifying relief. The motion shall be made within a reasonable time . . . (emphasis added).

In order to prevail under CR 60.02, "[t]he movant must demonstrate why he is entitled to this special, extraordinary relief." Gross, 648 S.W.2d at 856. For a movant to receive an evidentiary hearing, "he must affirmatively allege facts which, if true, justify vacating the judgment and further allege special circumstances that justify CR 60.02 relief." Id. The trial court has the discretion on whether to grant relief under CR 60.02. Id. at 857. Thus, our review of the trial court's decision is an abuse of discretion standard and we will affirm that decision unless there is a showing of some "flagrant miscarriage of justice." Id. at 858.

According to our Supreme Court, in order to properly attack a final judgment, one must first directly appeal the judgment, then use RCr 11.42 relief, and finally one may use CR 60.02. Id. at 856. The reason why CR 60.02 should be sought last is because this rule "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." McQueen v. Commonwealth, Ky., 948 S.W.2d 415, 416 (1997) (quoting RCr 11.42(3); Gross, 648 S.W.2d at 856).

As the Supreme Court of Kentucky has held:

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 857 (emphasis added) (quoting RCr 11.42(2)). Thus, issues that could have reasonably been presented in an RCr 11.42 motion preclude the defendant from raising those issues in a CR 60.02 motion. All of the issues Tolbert raises are issues that were apparent to him at the time the judgment was entered against him. The record supports the finding that these issues were apparent to Tolbert at the time the trial ended and could have been brought in a timely RCr 11.42 motion.

One of the issues Tolbert raised in his prior RCr 11.42 motion was that his guilty plea was involuntary and unintelligent. In that motion, which was denied, he claimed the plea was void because it was involuntary due to his counsel's actions. Here, he is now claiming the plea is void because there was no other sentence entered at that time in which the plea could run concurrently with. Tolbert was aware of this at the time he filed his prior RCr 11.42 and this issue he is now raising should have been raised then. To be sure, the issues he now raises are all issues that could "reasonably have been

presented' by direct appeal or RCr 11.42 proceedings." McQueen, 948 S.W.2d at 416 (quoting RCr 11.42(3); Gross, 648 S.W.2d at 855, 856). Thus, Tolbert is now precluded from using CR 60.02.

Even had Tolbert's CR 60.02 motion been properly invoked, Tolbert failed to exercise due diligence in pursuing his claim. According to CR 60.02, motions made under (d) and (f) "shall be made within a reasonable time." "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." Gross, 648 S.W.2d at 858. In making the decision whether the CR 60.02 motion was timely filed, the trial court does not have to hold a hearing to decide, but rather can rely on the record. Id. Tolbert filed his CR 60.02 motion July 16, 2003, eleven years after he pled guilty. In Gross, it was held that filing a CR 60.02 motion five years after the conviction was not a "reasonable time" and thus was not an abuse of discretion on the part of the trial court. Gross, 648 S.W.2d at 858. Here, Tolbert waited eleven years to file, twice the amount in Gross. Thus, we feel that a delay of eleven years is not reasonable and the trial court did not abuse its discretion in denying Tolbert's CR 60.02 motion.

Furthermore, Tolbert has "failed to affirmatively allege any facts which, if true, would justify vacating his sentence under CR 60.02." Id. at 418 (citing Gross, 648 S.W.2d

at 856). Tolbert alleges that the Commonwealth stipulated that under their plea agreement, the Kentucky and Indiana sentences would be served concurrently. Contrary to Tolbert's assertions, the plea agreement was honored and is not void on its face, nor illegal. A review of the plea agreement itself, and even of the affidavit of Tolbert's attorney during the plea agreement, states *only* that the Commonwealth would not object "to time running concurrent with Indiana sentences." The Commonwealth never objected to this, thereby fulfilling their part of the agreement. There is no mention of the Commonwealth promising to ensure that the sentences would run concurrently; only that the Commonwealth would not object. In fact, there is a letter from the Commonwealth to the Defendant's counsel dated March 24, 1992 wherein the Commonwealth stated that it "would have no objection to the time running concurrent with Indiana time; however, as I have expressed, I do not feel as if this is a question within the Commonwealth's control." (Citations omitted). The Indiana sentence had not been imposed at the time the plea agreement was entered into, so the Commonwealth could not have stipulated to ensuring that another tribunal would follow its sentencing recommendations.

Nevertheless, Tolbert maintains that the trial judge, when denying his CR 60.02 motion, supported Tolbert's assertions by stating that since the record was silent, the default under

Kentucky law is that sentences will run concurrently. The judge must have been referring to Ky. Rev. Stat. (KRS) 532.110(2) that states "If the court does not specify the manner in which a sentence imposed by it is to run, the sentence shall run concurrently with any other sentence which the defendant must serve . . ." Tolbert's reliance on the judge's statement, however, is misplaced. This only applies to the Kentucky sentences, not those sentences imposed by another tribunal. KRS 532.115 states what the default is with sentences of another state. "If the court does not specify that its sentence is to run concurrent with a specific federal sentence or *sentence of another state*, the sentence shall *not run concurrent* with any federal sentence or sentence of another state." (Emphasis added).

Furthermore, the plea agreement, in writing, does not state that the Commonwealth would have the Kentucky sentence modified once the Indiana sentence was entered. The only thing written in the plea agreement is that the Commonwealth would not object "to time running concurrent with Indiana sentences." The Commonwealth did not object, thereby upholding its part of the bargain.

For the foregoing reasons the order of the Jefferson Circuit Court dismissing Appellant Tolbert's CR 60.02 motion is affirmed.

ALL CONCUR.

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