

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-002169-MR

JAMES MALLORY

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE STEPHEN P. RYAN, JUDGE
ACTION NO. 97-CR-001269

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, CHIEF JUDGE; GUIDUGLI AND HENRY, JUDGES.

COMBS, CHIEF JUDGE: James Mallory appeals from the denial of his motion filed pursuant to CR¹ 60.02 seeking relief from his conviction of sodomy in the first degree. A juvenile at the time of the offense, Mallory argues that his attorneys at both the juvenile court level and at the circuit court level were ineffective in their representation. The Jefferson Circuit Court denied relief without an evidentiary hearing. After our review of the record, we affirm.

¹ Kentucky Rules of Civil Procedure.

Mallory was fourteen years of age at the time he committed the offense of forcible anal intercourse on an eleven-year-old boy. Based on his record and the seriousness of the offense, the juvenile court transferred his case to circuit court in April 1997 for prosecution as a youthful offender. In July 1998, Mallory entered a plea of guilty and received a sentence of twelve (12) years. In September 2000, Mallory became eighteen years of age. After a hearing in the circuit court, he was re-sentenced and was ordered to serve the remainder of his sentence in prison.

In July 2004, Mallory filed this motion to vacate the judgment, alleging ineffective assistance of counsel in both courts. He contended that the district court failed to comply with the law in its order transferring him to circuit court and that it relied on false information in its decision to transfer. His motion was denied in August 2004, and this appeal followed.

The Commonwealth correctly observes that these arguments are not the proper subject matter for a CR 60.02 motion because they should have been raised either in a motion for relief under RCr 11.42 or on direct appeal. Gross v. Commonwealth, 648 S.W.2d 853, 857 (Ky. 1983), emphasizes that a CR 60.02 motion cannot substitute for an RCr 11.42 motion or for an appeal. Gross sets forth the required sequence of procedural events: the first recourse is to an appeal; second, a

proceeding may be filed under RCr 11.42 and must be filed within three years of the judgment in order to be timely; and only last may relief be sought pursuant to CR 60.02. It is a distinct hierarchy, and no one level may substitute for the other.

In the appendix to his brief, Mallory included the order of the circuit court denying relief to a motion filed pursuant to RCr 11.42. He filed that motion in August 2005 -- more than three years beyond the relevant date. Even if we were to treat this motion as having been filed under RCr 11.42, it would also fail for timeliness. The CR 60.02 motion was filed in July 2004 -- still more than three years from September 2000 (the date of his re-sentencing) and far more than three years when measured from his 1998 plea of guilty and conviction. The circuit court did not err in summarily denying relief without an evidentiary hearing.

We affirm the judgment of the Jefferson Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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