

RENDERED: AUGUST 25, 2006; 2:00 P.M.  
NOT TO BE PUBLISHED

**Commonwealth Of Kentucky**  
**Court of Appeals**

NO. 2004-CA-002662-MR

LARRY DUKES

APPELLANT

v. APPEAL FROM HOPKINS CIRCUIT COURT  
HONORABLE CHARLES W. BOTELEER, JR., JUDGE  
ACTION NO. 96-CR-00229

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: GUIDUGLI AND JOHNSON, JUDGES; HUDDLESTON,<sup>1</sup> SENIOR JUDGE.

JOHNSON, JUDGE: Larry Dukes, pro se, has appealed from the November 12, 2004, order of the Hopkins Circuit Court which denied his pro se motion to vacate judgment pursuant to CR<sup>2</sup> 60.02, without holding an evidentiary hearing. Having concluded

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<sup>1</sup> Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

<sup>2</sup> Kentucky Rules of Civil Procedure.

that the trial court did not abuse its discretion by denying Dukes relief, we affirm.

Because Dukes directly appealed his life sentence to the Supreme Court of Kentucky,<sup>3</sup> which upheld the conviction and sentence, we quote the pertinent facts of this case from its Opinion as follows:

[Dukes] was convicted in the Hopkins Circuit Court of eleven counts of indecent or immoral practices with a child under 15 years of age, two counts of first-degree sodomy, and two counts of rape of a child under 12 years of age. He received a life sentence on each count of rape, a 20-year sentence on each count of first degree sodomy, and a 10-year sentence on each count of indecent or immoral practices with a child under 15, with all sentences to run consecutively for a total of life imprisonment. [Dukes] now appeals to this Court as a matter of right. . . .

[Dukes] was indicted on 110 counts for criminal sex acts he allegedly committed on his stepchildren, T.S. and B.G., from August of 1971 to January of 1976. [Dukes] was tried on June 3, 1997. At the close of the Commonwealth's case, defense counsel moved for a directed verdict on the grounds that the Commonwealth had failed to establish with sufficient specificity the times, dates, and location of the alleged sexual acts. The trial court sustained defense counsel's motion to the extent that it dismissed 95 counts of the indictment and allowed only 15 counts to be submitted to the jury.

The Supreme Court Opinion became final on November 5, 1998.

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<sup>3</sup> Case No. 1997-SC-0594-MR, rendered October 15, 1998, not-to-be published.

On July 9, 1999, Dukes filed a pro se motion to vacate, set aside, or correct his sentence pursuant to RCr<sup>4</sup> 11.42. The Commonwealth filed its objections to Dukes's RCr 11.42 motion on July 19, 1999. On October 5, 1999, Dukes filed a motion for appointment of counsel and a request for an evidentiary hearing. The trial court, without appointing counsel or holding an evidentiary hearing, denied Dukes's RCr 11.42 motion on September 7, 2000.<sup>5</sup> Dukes appealed the denial to this Court,<sup>6</sup> which affirmed the trial court's order in a non-published opinion rendered on March 15, 2002. Dukes filed for discretionary review with the Supreme Court, which was denied on August 14, 2002. The Court of Appeals Opinion became final on August 28, 2002.<sup>7</sup>

Thereafter, on August 13, 2004, Dukes filed a motion to vacate judgment pursuant to CR 60.02(e) and (f),<sup>8</sup> as well as a

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<sup>4</sup> Kentucky Rules of Criminal Procedure.

<sup>5</sup> On September 16, 1999, this case was held in abeyance upon request by Dukes so he could hire counsel. It was returned to the active docket on February 11, 2000, without Dukes having hired counsel.

<sup>6</sup> Case No. 2000-CA-002202-MR.

<sup>7</sup> In its brief, the Commonwealth alludes to Dukes's filing of a petition for writ of habeas corpus in the United States District Court, Western District of Kentucky, and attaches several pleadings in that case in its appendix.

<sup>8</sup> CR 60.02(e) and (f) provide:

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: . . .  
(e) the judgment is void, or has been satisfied, released, or discharged, or a prior

motion for a full evidentiary hearing and a motion for appointment of counsel. Dukes argued two claims of error in the motion: (1) that trial counsel did not raise the issue of his mental incompetency; and (2) that his RCr 11.42 motion was improperly dismissed. The Commonwealth filed its response on August 16, 2004. On August 23, 2004, Dukes filed a reply to the Commonwealth's objections, wherein he raised three additional claims of error that had been raised and addressed in his RCr 11.42 motion.<sup>9</sup> On September 23, 2004, Dukes filed a motion requesting that he be allowed to formally supplement his CR 60.02 motion with the three additional grounds as raised in his reply. The trial court, without ruling on the motion to supplement and without holding an evidentiary hearing, denied Dukes's CR 60.02 motion on November 12, 2004. This appeal followed.

On appeal, Dukes claims that the trial court erred in denying his CR 60.02 motion to his prejudice and denied him due process of law for the following reasons: (1) trial counsel failed to request a competency hearing; (2) the trial court

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judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (f) any other reason of an extraordinary nature justifying relief. . . .

<sup>9</sup> These claims related to trial counsel's failure to call an expert witness, trial counsel's failure to impeach medical records, and trial counsel's failure to object to the use of notes by certain witnesses during their testimony.

erred in trying him for pre-penal code and post-penal code crimes at the same time; (3) the trial court erred by allowing the Commonwealth to question witnesses without him being present; (4) trial counsel was ineffective for failing to call an expert witness; (5) trial counsel was ineffective for failing to impeach certain medical records; (6) trial counsel was ineffective for failing to object to the witnesses use of notes during testimony; and (7) appellate counsel was ineffective for failing to raise various issues in post-conviction proceedings.

In Gross v. Commonwealth,<sup>10</sup> our Supreme Court set forth a detailed, sequential procedure governing post-conviction proceedings. The Court stated that "[t]he 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."<sup>11</sup> The Supreme Court subsequently held in McQueen v. Commonwealth,<sup>12</sup> that a criminal defendant must first bring a direct appeal when available, and only then should he utilize the provisions of RCr 11.42 by addressing every error of which he was (or should have been) aware.<sup>13</sup> The Court emphasized that

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<sup>10</sup> 648 S.W.2d 853 (Ky. 1983).

<sup>11</sup> Id. at 856.

<sup>12</sup> 948 S.W.2d 415 (Ky. 1997).

<sup>13</sup> Id. at 416.

CR 60.02<sup>14</sup> relief is "special, extraordinary relief" and "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."<sup>15</sup> Our review of the trial court's decision is based on an abuse of discretion standard and we will affirm its decision unless there is a showing of some "flagrant miscarriage of justice."<sup>16</sup>

Thus, Dukes is precluded from raising any issues in a CR 60.02 motion that reasonably could have been presented in an RCr 11.42 motion. All of the issues Dukes now raises are issues that were apparent at the time the judgment was entered against him, or when Dukes's other motions collaterally attacking the judgment were made.

As for Dukes's general claim of ineffective assistance of appellate counsel, the law as stated by our Supreme Court in Lewis v. Commonwealth,<sup>17</sup> is that "[i]neffective assistance of

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<sup>14</sup> The Court in Gross, 648 S.W.2d at 856, stated:

Rule 60.02 is part of the Rules of Civil Procedure. It applies in criminal cases only because Rule 13.04 of the Rules of Criminal Procedure provides that "the Rules of Civil Procedure shall be applicable in criminal proceedings to the extent not superseded by or inconsistent with these Rules of Criminal Procedure."

<sup>15</sup> McQueen, 948 S.W.2d at 416.

<sup>16</sup> Gross, 648 S.W.2d at 858.

<sup>17</sup> 42 S.W.3d 605, 612 (Ky. 2001).

counsel is not a cognizable issue in this jurisdiction."

Further, our Supreme Court has stated:

We think there is a substantial difference in the situation of a convicted defendant for whom no appeal was ever taken or one whose appeal was completely processed and the judgment affirmed. In the first case, there was never any consideration of the merits of any substantive issue by the appellate court. In the latter case, the appellate court has considered and decided the merits of the appeal.<sup>18</sup>

Accordingly, we will not further examine any claims on appeal that have previously been reviewed, considered, and decided, or which should have been.

In addition to challenging the trial court's rejection of his various claims, Dukes contends the trial court erred in failing to conduct an evidentiary hearing on his CR 60.02 motion. As with an RCr 11.42 motion, a movant is not automatically entitled to an evidentiary hearing on a CR 60.02 motion unless there is an issue of fact which cannot be determined on the face of the record.<sup>19</sup> "Where the movant's allegations are refuted on the face of the record as a whole, no evidentiary hearing is required."<sup>20</sup> As the following discussion of each of Dukes's claims demonstrates, each allegation is

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<sup>18</sup> Hicks v. Commonwealth, 825 S.W.2d 280, 281 (Ky. 1992).

<sup>19</sup> Stanford v. Commonwealth, 854 S.W.2d 742, 743-44 (Ky. 1993).

<sup>20</sup> Sparks v. Commonwealth, 721 S.W.2d 726 (Ky.App. 1986) (citing Hopewell v. Commonwealth, 687 S.W.2d 153, 154 (Ky.App. 1985)).

refuted on the face of the record. Thus, Dukes was not entitled to an evidentiary hearing.

For the foregoing reasons, the order of the Hopkins Circuit Court is affirmed.

ALL CONCUR.

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