

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001800-MR

JOSEPH EDWARD MORRIS

APPELLANT

v. APPEAL FROM HARLAN CIRCUIT COURT
HONORABLE JAMES L. BOWLING, JR., SPECIAL JUDGE
ACTION NO. 84-CR-00136

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ABRAMSON AND TAYLOR, JUDGES; KNOPF,¹ SENIOR JUDGE.

ABRAMSON, JUDGE: On June 9, 2006, the Harlan Circuit Court entered an order denying Joseph Morris's motion pursuant to Kentucky Rule of Criminal Procedure (RCr) 11.42 to vacate his conviction for two counts of robbery and one count of murder.

Finding no error in the circuit court's decision, we affirm.

On October 18, 1984, Morris and another man, Tony Mallory, entered the home of George, Howard and John Pope, three brothers. Forcing their way inside,

¹ Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5) of the Kentucky Constitution and KRS 21.580.

Morris and Mallory, both armed with handguns, threatened to kill George and John Pope if they did not surrender their money. A third conspirator, Jack Gilbert, then entered the home and started binding the two brothers with duct tape.

As this was occurring, Howard Pope descended the steps from the second floor carrying a rifle. Hearing the commotion downstairs, he took the weapon with him in order to protect his brothers. Shortly thereafter, a barrage of shots rang out and Howard fell dead from four gunshot wounds. Morris later testified that he fired all four of the shots that struck Howard.

On November 1, 1984, the Harlan County grand jury indicted Morris for one count of capital murder and two counts of robbery. While Morris's first trial ended in a mistrial, a second trial was conducted during December 1985. The jury subsequently convicted Morris of both robbery counts in addition to one count of intentional murder. Finding that the robbery convictions constituted aggravating circumstances, the jury recommended the death penalty and the trial court sentenced him in accordance with that recommendation. On direct appeal, the Kentucky Supreme Court found that prosecutorial misconduct had occurred and reversed the conviction.

On remand, Morris entered into a plea agreement with the Commonwealth pursuant to which he pled guilty to all three charges. In accordance with the agreement, the Commonwealth recommended a sentence of life without the possibility of parole for twenty-five years. The trial court sentenced Morris accordingly on February 16, 1990.

On September 9, 1996, approximately six and one-half years following entry of the trial court's judgment of conviction, Morris filed a motion pursuant to RCr 11.42 seeking to vacate his sentence. The trial court denied the motion by order entered July 8, 1998. Morris appealed to this Court, which, by Opinion rendered May 14, 1999, affirmed the trial court's ruling.

Urging the same grounds as before, Morris filed a second RCr 11.42 motion on May 31, 2006 seeking to set aside his conviction. On June 9, 2006, the Harlan Circuit Court again denied the request.² This appeal followed.

Subsection 10 of RCr 11.42 states:

Any motion under this rule shall be filed within three years after the judgment becomes final, unless the motion alleges and the movant proves either:

(a) that the facts upon which the claim is predicated were unknown to the movant and could not have been ascertained by the exercise of due diligence; or

(b) that the fundamental constitutional right asserted was not established within the period provided for herein and has been held to apply retroactively.

If the judgment becomes final before the effective date of this rule, the time for filing the motion shall commence upon the effective date of this rule.

As noted above, the trial court entered judgment against Morris on February 16, 1990.

Because the effective date of the present version of RCr 11.42(10) was October 1, 1994,

Morris was required to have filed his second motion pursuant to this Rule no later than

² The circuit court entered a second order denying Morris's motion on July 31, 2006 in order to correct a mistake in the case number.

September 30, 1997. Because he did not, but rather waited for an additional nine years past the deadline before filing the current motion, we agree with the trial court that it was untimely and affirm the June 9, 2006 order dismissing it.

Moreover, there is no merit to Morris's argument that the filing deadline for his motion was extended because “the facts upon which [his] claim were predicated were unknown to [him] and could not have been ascertained by the exercise of due diligence” Morris contends that his plea was not intelligently made because he did not fully understand the law relative to extreme emotional disturbance during his trial, and that he was unaware of how it impacted the Commonwealth's burden of proof when prosecuting a murder case. Morris's argument is somewhat puzzling given that he admits that *by the time he entered his plea*, the law had changed so that the Commonwealth no longer had the burden of disproving extreme emotional disturbance. Rather, that burden had shifted to a defendant to prove its existence. Because of this, we believe that Morris's present claim concerning his lack of understanding of the law that existed during his trial is irrelevant. Likewise, because the law had already changed prior to the entry of his plea, even if Morris did not understand the law relative to extreme emotional disturbance by that date, that information was readily available to him and discoverable by him within the three-year period following the trial court's entry of the judgment of conviction.

Relative to his plea, in his present motion, Morris's second seeking relief pursuant to RCr 11.42, he once again challenges the effectiveness of his defense counsel on the ground that he did not fully understand the law relative to extreme emotional

disturbance at the time he entered the plea. However, Kentucky law is well established that a defendant is permitted only one such motion. *Lycans v. Commonwealth*, 511 S.W.2d 232 (Ky. 1974); *Case v. Commonwealth*, 467 S.W.2d 367 (Ky. 1971); *Satterly v. Commonwealth*, 441 S.W.2d 144 (Ky. 1969). Further, even if a defendant fails to include all of the grounds for relief in the first motion, he is barred from asserting them in a subsequent motion. *Case, supra*; *Hampton v. Commonwealth*, 454 S.W.2d 672 (Ky. 1970); *Odewahn v. Commonwealth*, 407 S.W.2d 137 (Ky. 1966). Thus, because Morris now asserts as grounds for relief that which he previously asserted or, at a minimum, could have asserted in his prior RCr 11.42 motion, he is now barred from once again seeking relief pursuant to that rule.

Moreover, because Morris fully litigated in his prior motion the same grounds that he again asserts in his present motion—his misunderstanding of the law pertaining to extreme emotional disturbance—he is estopped from again seeking relief. “Collateral estoppel, or issue preclusion, is part of the concept of *res judicata* and serves to prevent parties from relitigating issues necessarily determined in a prior proceeding.” *Gregory v. Commonwealth*, 610 S.W.2d 598, 600 (Ky. 1980). In other words, a party is barred from rearguing “any issue actually litigated and finally decided in an earlier action.” *Buis v. Elliott*, 142 S.W.3d 137, 140 (Ky. 2004), quoting *Yeoman v. Commonwealth Health Policy Bd.*, 983 S.W.2d 459, 464 (Ky. 1998). Applying this principle of law to the present matter, because Morris asserts in his current RCr 11.42 motion the same complaints regarding his lack of understanding of the law of extreme

emotional disturbance that he raised and litigated in his first motion, he is now bound by the decision rendered on that previous motion. Accordingly, we affirm both the Harlan Circuit Court's June 9, 2006 judgment and the July 31, 2006 order amending that judgment.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Joseph Edward Morris, *pro se*
Sandy Hook, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Perry T. Ryan
Assistant Attorney General
Frankfort, Kentucky