RENDERED: MARCH 14, 2008; 2:00 P.M.
NOT TO BE PUBLISHED

# Commonwealth of Kentucky

# Court of Appeals

NO. 2007-CA-000051-MR

DAVID ALAN VOYLES — APPELLANT

v.

APPEAL FROM CALLOWAY CIRCUIT COURT
HONORABLE DENNIS R. FOUST, JUDGE
ACTION NO. 02-CR-00007

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: MOORE AND WINE, JUDGES; BUCKINGHAM, SENIOR JUDGE.[1]

BUCKINGHAM, SENIOR JUDGE: David Alan Voyles appeals from an order of the Calloway Circuit Court denying his motion for relief pursuant to Kentucky Rules of Civil Procedure (CR) 60.02. We affirm.

On July 8, 2002, Voyles pleaded guilty in the Calloway Circuit Court, pursuant to a plea agreement with the Commonwealth, to six counts of first-degree

[1] Senior Judge David C. Buckingham 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.

sodomy and one count of first-degree rape. The charges were brought as a result of Voyles allegedly committing sex crimes against his stepdaughter in Calloway County between 1994 and 1998. In accordance with the plea agreement, the age enhancements of the offenses were dismissed, resulting in the charges being reduced from Class A felonies to Class B felonies.

On August 28, 2002, Voyles wrote a letter to the Calloway Circuit Clerk stating that he had "made a plea that I do not agree with." He complained in the letter that he had not seen a rape kit test and that his attorney had not interviewed the victim. The clerk responded by letter to Voyles and advised him to contact his attorney. The clerk also offered to send any correspondence to the attorney.

On September 11, 2002, the court sentenced Voyles to 18 years in prison on each count, with the sentences to run concurrently with each other. No motion was made to withdraw the guilty pleas, and no mention was made of the complaints made by Voyles in his letter to the clerk. First-degree sodomy charges had also been brought against Voyles in the Henderson Circuit Court, and Voyles was sentenced to ten years in prison by that court. The Calloway Circuit Court sentences totaling 18 years and the Henderson Circuit Court sentences totaling ten years were to be served concurrently with each other.

On March 14, 2004, Voyles filed a motion to modify or reform the final judgment in the Calloway Circuit Court so that he would be eligible for parole under the 50% rule that had been in effect prior to July 15, 1998, rather than the 85% rule that was in effect subsequent to July 15, 1998. *See* KRS 439.3401(3). Following a hearing, the court granted Voyles's motion and entered an order that reflected the crimes occurred before July 15, 1998. The result was that Voyles became subject to the 50% parole

eligibility rule on the Calloway Circuit Court sentences, and the Department of Corrections altered its records to conform to the court's ruling.

In July 2006 Voyles filed a pro se motion in the Calloway Circuit Court to vacate, alter, or amend the final judgment pursuant to CR 60.02(e) and (f). Therein, Voyles challenged the sufficiency of the evidence and also complained that the judgment in the Henderson Circuit Court had not been amended to reflect the applicability of the 50% rule as had been done in the Calloway Circuit Court. He also stated that his plea was not entered knowingly and intelligently because he would have insisted on going to trial rather than pleading guilty had he known that the Henderson Circuit Court sentences would be calculated under the 85% rule.

On November 30, 2006, the trial court entered an order denying Voyles's motion. In its order, the court noted that "the motion itself seeks relief which this Court believes is a matter at issue between the movant, the Department of Corrections, and possibly the Henderson Circuit Court. With that in mind, the Court believes it has done all that it can do with respect to movant's case and hence DENIES the Motion for Relief." This appeal by Voyles followed.

Concerning the applicability of the 50% rule to the Henderson Circuit Court sentences, we note several things. First, Voyles concedes in his brief that the 85% rule applies to those sentences. He makes no attempt therein to offer any support as to why the 50% rule would be applicable, other than his assertion that the "package deal" applied to parole eligibility as well as to the term of years of imprisonment. Second, as noted by the trial court and by the Commonwealth in its brief, any dispute that Voyles may have with parole eligibility concerning his Henderson Circuit Court sentences was beyond the

authority of the Calloway Circuit Court to consider, despite Voyles's assertion that his guilty pleas in the two courts were a "package deal."

Turning to Voyles's argument as to the sufficiency of the evidence, Voyles is precluded from litigating that issue in a CR 60.02 motion. By pleading guilty to the charges, Voyles waived all defenses other than that the indictment charged no offense. *See Thompson v. Commonwealth*, 147 S.W.3d 22, 39 (Ky. 2004). *See also Taylor v. Commonwealth*, 724 S.W.2d 223, 225 (Ky.App. 1986) ("[e]ntry of a voluntary, intelligent plea of guilty has long been held by Kentucky Courts to preclude a post-judgment challenge to the sufficiency of the evidence").

Any argument that Voyles may have regarding the voluntary and intelligent nature of his guilty pleas are not properly brought under CR 60.02, either. "CR 60.02 is not intended merely as an additional opportunity to raise Boykin defenses. It is for relief that is not available by direct appeal and not available under RCr 11.42." *Gross v. Commonwealth*, 648 S.W.2d 853, 856 (Ky. 1983). As Voyles could have challenged the nature of his guilty pleas by direct appeal or by RCr 11.42 motion, he is precluded from challenging it in a CR 60.02 motion.

Voyles's arguments of ineffective assistance of counsel also were not properly brought under CR 60.02. Rather, those arguments could have been properly brought by motion pursuant to RCr 11.42. Motions under CR 60.02 may not be used to litigate or re-litigate issues which either should have or were raised on appeal or in an RCr 11.42 motion. *See Land v. Commonwealth*, 986 S.W.2d 440, 442 (Ky. 1999). Furthermore, even if Voyles had brought his motion under RCr 11.42 rather than CR

60.02, it would have been precluded by the three-year limitations period in RCr 11.42(10) because it would have been brought more than three years after the judgment.

The order of the Calloway Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

David Alan Voyles, pro se
LaGrange, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky
Frankfort, Kentucky

Matthew R. Krygiel
Assistant Attorney General
Frankfort, Kentucky