

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001399-MR

CHARLES HARRISON

APPELLANT

v.

APPEAL FROM ESTILL CIRCUIT COURT
HONORABLE THOMAS P. JONES, JUDGE
ACTION NO. 99-CR-00040

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: LAMBERT, MOORE, AND WINE, JUDGES.

WINE, JUDGE: Charles Harrison appeals from an order of the Estill Circuit Court denying his motion pursuant to Kentucky Rules of Civil Procedure ("CR") 60.02 to modify or vacate his conviction and sentence. He argues that the trial court lacked jurisdiction to revoke his pre-trial diversion agreement due to lack of notice and because the revocation occurred after the expiration of the diversionary period. We agree with the trial court that Harrison failed to raise these issues within a reasonable time and that he has failed to state any grounds for extraordinary relief under CR 60.02. Hence, we affirm.

On December 10, 1999, Harrison entered a plea of guilty to two counts of first-degree wanton endangerment, and one count each of first-degree fleeing and evading police and carrying a concealed deadly weapon. The Commonwealth recommended a total sentence of ten years on the other counts, but also agreed to pre-trial diversion of these charges for a period of one year. On January 5, 2000, the trial court issued a judgment sentencing Harrison to twelve months on the concealed weapon charge, probated for two years. On January 14, 2000, the trial court entered an order directing the Irvine Police Department to return Harrison's weapons to him one year from the date of the order. The order also stated that the court had granted pre-trial diversion to Harrison for one year.

On December 8, 2000, the Commonwealth orally moved to revoke Harrison's diversion agreement after he had been charged with murder in another matter. A revocation hearing was initially scheduled for December 22, 2000, but was rescheduled to February 9, 2001, at Harrison's request. At that hearing, Harrison stipulated that there was probable cause to believe that he possessed a firearm in violation of the terms of his diversion agreement. Thereafter, the trial court revoked his diversion in an order entered on February 12, 2001. The court entered a judgment of conviction on April 24, 2001, sentencing Harrison to seven years' imprisonment based on his earlier guilty plea. Harrison did not appeal from this judgment.

On November 29, 2005, Harrison filed a motion to modify this sentence pursuant to CR 60.02. He argued that the sentence should run concurrent with his later sentence for reckless homicide. The trial court denied this motion on March 14, 2006.

Harrison then filed a second CR 60.02 motion, arguing that the trial court lacked authority to revoke his pre-trial diversion agreement because the one-year period had expired prior to the Commonwealth's motion to revoke. The trial court denied the

motion, finding that the diversionary period did not begin until the court entered the diversion order on January 14, 2000, and therefore the Commonwealth's motion to revoke was timely. The trial court also rejected Harrison's argument that the Commonwealth's oral motion to revoke was improper.

On appeal, this Court passed Harrison's motion for appointment of counsel on this appeal for review by the Department of Public Advocacy. The Department of Public Advocacy declined the appointment, stating that the appeal was not a proceeding that a reasonable person with adequate means would be willing to bring at his own expense. *Anders v. California*, 386 U.S. 738, 744, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). Kentucky Revised Statutes ("KRS") 31.110(2)(c). This *pro se* appeal followed.

It is well-established that CR 60.02 is for relief that is not available by direct appeal and not available collaterally under RCr 11.42. *Gross v. Commonwealth*, 648 S.W.2d 853, 856 (Ky. 1983). CR 60.02 is not intended to afford individuals an additional opportunity to relitigate issues that have already been presented in an earlier direct appeal or collateral attack or present new issues that could have been raised in those proceedings. *McQueen v. Commonwealth*, 948 S.W.2d 415, 416 (Ky. 1997); Kentucky Rules of Criminal Procedure ("RCr") 11.42(3). And CR 60.02 should only be used to provide relief when the movant demonstrates why he or she is entitled to the special, extraordinary relief provided by the rule. *Gross*, 648 S.W.2d at 856. Finally, claims under CR 60.02(e) & (f) must be raised within a reasonable time.

In this case, Harrison should have been aware of any issues concerning lack of notice or the timeliness of the motion to revoke his diversion when he appeared for the hearing on February 9, 2001. Harrison not only failed to raise these issues at that time, he stipulated to probable cause for the violation. Harrison does not offer any

explanation for his five-year delay in raising these issues. Therefore, we agree with the trial court that his current CR 60.02 motion is untimely.

Moreover, we find that Harrison has failed to present any grounds for relief on the merits. As the trial court noted, the period of diversion did not begin on the day of Harrison's guilty plea, but on the day the order was signed by the trial court. *Allen v. Walter*, 534 S.W.2d 453, 455 (Ky. 1976). And even if the diversionary period expired on December 9, 2001, Harrison conceded that he had violated the conditions of his diversion agreement by possessing a firearm on November 14, 2001. Since the violation occurred within the diversionary period, the trial court had the authority to revoke the diversion agreement.

Likewise, Harrison was not prejudiced by the Commonwealth's oral motion to revoke on December 8, 2001. While a defendant should be personally served with the motion to revoke, the purpose for the rule disappears or has been satisfied when the party appears with knowledge of the proceedings and participates or is given an opportunity to participate. *Messer v. Commonwealth*, 754 S.W.2d 872, 874 (Ky. App. 1988). In this case, the Commonwealth sought to revoke the diversion agreement based upon a violation within the diversionary period. Harrison appeared at the revocation hearing, stipulated to the violation, and did not object to the sufficiency of notice. Having failed to raise a timely objection to the notice, we agree with the trial court that Harrison will not be heard to complain now.

Accordingly, the order of the Estill Circuit Court denying Harrison's CR 60.02 motion is affirmed.

ALL CONCUR.

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