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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001428-MR

WINSTON BRISCOE — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES D. ISHMAEL, JR., JUDGE
ACTION NO. 00-CR-00318

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: LAMBERT, MOORE, AND WINE, JUDGES.

WINE, JUDGE: Winston Briscoe appeals from an order of the Fayette Circuit Court denying his motion for a new trial pursuant to CR 60.02. We agree with the trial court that the claims which Briscoe raises have all been or should have been raised in his prior appeal or in his prior motions for post-conviction relief under either Kentucky Rules of Criminal Procedure ("RCr") 11.42 or Kentucky Civil Rules of Procedure ("CR") 60.02. Hence, we affirm.

On May 18, 2000, a Fayette County jury found Briscoe guilty of first-degree sodomy and being a second-degree persistent felony offender. On July 5, 2000, the trial court entered its final judgment sentencing Briscoe to 20 years in accordance

with the jury's verdict. Thereafter, on April 4, 2003, Briscoe filed a *pro se* RCr 11.42 motion, alleging ineffective assistance of counsel and for an evidentiary hearing. The trial court appointed counsel from the Department of Public Advocacy and provided additional time for counsel to offer supplemental grounds within 60 days. Counsel filed notice on September 9, 2003, that there were no further grounds to file and the court should rule. The trial court denied the RCr 11.42 motion on October 9, 2003, and this Court affirmed in an unpublished opinion rendered April 8, 2005. On August 17, 2005, the Supreme Court of Kentucky denied discretionary review.

In December of 2005, Briscoe filed a CR 60.02 motion, asserting that the trial court erred in failing to instruct the jury on third-degree sexual abuse and sexual misconduct as he may have been convicted of an offense which did not involve forcible compulsion. In an order entered on December 8, 2005, the trial court denied Briscoe's CR 60.02 motion, noting that the Kentucky Supreme Court rejected Briscoe's error on instructions argument in the direct appeal. On June 7, 2006, Briscoe filed his second CR 60.02 motion claiming a discovery violation. On June 14, 2006, the trial court denied the motion concluding that Briscoe's claim was one that could have been raised in his direct appeal.

Finally, on May 31, 2007, Briscoe filed a third CR 60.02 motion raising a *Batson v. Kentucky* challenge error, claiming that two witnesses should have been called to testify at trial, error regarding his conditions of release on bond, and a claim there was error based on a newspaper article. The trial court denied the motion, concluding that Briscoe's motion raised no meritorious issues and they were further procedurally barred as successive. 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 re-litigate 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); 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.

Briscoe has met none of the requirements for raising these issues on a subsequent motion for relief under CR 60.02. Briscoe's first argument that the trial court erroneously denied his CR 60.02 motion with regard to his claim of error under *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), is without merit. Specifically, Briscoe contends that the prosecution was allowed to use peremptory strikes to remove all of the African-American jurors from the jury. Briscoe presents no facts to support this contention and the record discloses no such violation. Moreover, it is inappropriate for Briscoe to raise this issue now when he could have raised this issue in his direct appeal, his RCr 11.42 motion, or in his two prior actions under CR 60.02.

Briscoe's second argument that he did not receive a fair trial because two detention center inmates, who Briscoe claims would have testified that he and the victim's contact was consensual, were not called to testify. Again, this issue should have been raised on direct appeal or in his RCr 11.42 motion. The record reflects that this is the first time Briscoe has presented this argument. Seven years is not a reasonable time within which to present such a claim and Briscoe fails to show that relief on this ground was not available by any other avenue. *Barnett v. Commonwealth*, 979 S.W.2d 98 (Ky. 1998).

Briscoe's third and fourth arguments are that the trial court erred in denying his CR 60.02 motion because there was error regarding his conditions of release on bond. Apparently, defense counsel and the prosecution agreed that a condition of his release on bond pending trial required that he stay in contact with Detective Brad Ingram of the Lexington Police Department who was involved in the investigation of this case. The agreement was disclosed to the trial judge at a pre-trial hearing at which defense counsel and the prosecution approached the bench and privately advised the judge of the agreement. Briscoe was later summoned to the bench and acknowledged his agreement with and understanding of the bond agreement.

Briscoe contends this requirement violated his right to remain silent. However, Briscoe puts forth no evidence to suggest that he was required to talk to Detective Ingram about the case. But even if Briscoe was required to disclose information about the case, any right to remain silent was waived voluntarily and knowingly on the record at the pre-trial. Regardless, the only information that Detective Ingram testified to at trial was regarding Briscoe's voluntary admission to the detective during the search warrant for pubic hair, head hair and saliva, "that that (sic) wouldn't be necessary to do, that he wasn't going to deny that that (sic), that we'd probably find the DNA or have a match with whatever we were going to collect."

Further, there is no equal protection violation as non-financial conditions of release are permissible. RCr 4.04; RCr 4.12. While these conditions normally must be in writing pursuant to RCr 4.14, the record shows that the court required the prosecutor to explain the conditions to Briscoe and his attorney. Finally, these issues, too, should have been raised on direct appeal and not seven years later after Briscoe has received the benefit of that agreement.

Briscoe's final argument points to a newspaper editorial entitled "Find better way to assess he said/she said rape cases." We find no merit to this argument. The editorial has no particular relevancy to the facts of this case and does not "affirmatively allege facts which, if true, justify vacating the judgment and further allege special circumstances that justify CR 60.02 relief." *McQueen v. Commonwealth*, 948 at 416. The editorial simply discusses the common problem of assessing the credibility of witnesses in these types of cases. The jury made that determination at trial and Briscoe does not present any factual basis for revisiting that determination. Therefore, Briscoe was not entitled to the extraordinary relief provided under CR 60.02.

In conclusion, Briscoe was aware or should have been aware of all of these issues on direct appeal and when he filed his previous post-conviction motions. We agree with the trial court that seven years is not a "reasonable time" in which to bring these claims. Furthermore, Briscoe has not shown that the judgment is void, has been satisfied, released or discharged, CR 60.02(e), or any other extraordinary circumstances warranting relief under CR 60.02(f). *Commonwealth v. Bustamonte*, 140 S.W.3d 581, 583 (Ky. App. 2004). Therefore, the trial court did not abuse its discretion in denying his CR 60.02 motion.

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

ALL CONCUR.

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