

RENDERED: JULY 18, 2008; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2007-CA-000237-MR

THOMAS LEE HOLLARS

APPELLANT

v. APPEAL FROM PULASKI CIRCUIT COURT
HONORABLE JEFFREY T. BURDETTE, JUDGE
ACTION NO. 02-CR-00270

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, CHIEF JUDGE; ACREE AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Thomas Lee Hollars appeals from an order of the Pulaski Circuit Court denying his motion, pursuant to Kentucky Rules of Civil Procedure (CR) 60.02, to vacate the revocation of his probation. For the reasons stated herein, we affirm.

On November 20, 2003, Hollars, assisted by his defense counsel, entered into a plea agreement with the Commonwealth. Under the terms of the

agreement, he pled guilty to three counts of trafficking in a controlled substance in the first degree, first offense, while in possession of a firearm; four counts of trafficking in a controlled substance in the first degree, first offense; and one count of trafficking in a controlled substance in the second degree, first offense. In accordance with the plea, Hollars was sentenced to ten-years' imprisonment, which was probated for a period of five years.

On February 16, 2006, Lucas, with his counsel, appeared before the trial court for a probation revocation hearing as a consequence of Probation Officer Rebecca Light's visit to his residence. During the hearing, the Commonwealth presented Light's affidavit as evidence. The affidavit provided that Hollars violated his probation by doing the following:

The affiant further states that Thomas Lee Hollars, #02-CR-00270, a probationer under active supervision of the affiant, has violated the conditions of his release by:

1. Associating with a convicted felon (On 2/1/06, Tony Nevels, a convicted felon, was at Hollars' residence).
2. On 2/1/06 Jerry Stallings was at Hollars' residence and had two (2) 40mg OxyContin tablets in his possession.
3. On 2/1/06, this officer discovered \$8,030.00 cash hidden in Hollars' truck, behind the insulation.
4. On 2/1/06, Hollars had in his possession a bow, considered to be a deadly weapon. Hollars also had two (2) pistols under the drivers' seat.
5. On 2/1/06, Hollars had in his possession a magnetic lock-box containing a white powdery substance.

The affiant further states that in view of the above violations she has reasonable grounds to believe, and does believe, that Thomas Lee Hollars is in violation of the terms of his release, and because of his conduct and defiance of all reasonable attempts to assist and counsel him hereby recommends that a warrant or summons be issued for his arrest and that probable cause hearing be held.

At the conclusion of the hearing, following Hollars' explanation for the alleged probation infractions, the trial court revoked his probation, and Hollars' ten-year sentence was reinstated.

Subsequently, Hollars, through counsel, filed three motions for shock probation on the following dates: March 10, 2006; July 7, 2006; and August 16, 2006. These three motions were denied. However, following the revocation hearing, the trial court granted Hollars' motion, filed by counsel, to return the seized property from his residence, namely, his vehicle and the \$8,030. On January 2, 2007, Hollars, acting *pro se*, filed a motion pursuant to CR 60.02(e) and (f) for the granting of extraordinary relief.

In support of his CR 60.02 motion, Hollars alleged the following: (1) the probation condition restricting his association with felons was not intended to apply to incidental contact with felons; (2) that two oxycontin tablets, two toy guns, and eight thousand dollars should not be sufficient grounds for revocation; (3) the trial court denied him due process when it failed to notify him of his right to appeal his probation revocation; (4) the trial court denied him due process by failing to make written factual findings; and (5) the trial court denied him due

process when it failed to consider lesser alternative forms of punishment outside of revocation. This motion was denied, and this appeal followed.

Hollars contends that he is entitled to relief pursuant to CR 60.02(e) and (f). CR 60.02(e) provides that a court may relieve a party from its final judgment if “the judgment is void, or has been satisfied, released, or discharged, or a prior 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.” CR 60.02(f) provides that post-judgment relief can be granted for “any other reason of an extraordinary nature justifying relief.” After reviewing the record, Hollars is not entitled to relief pursuant to CR 60.02(e) and (f).

Our appellate courts have repeatedly explained to litigants the proper manner in which to pursue an appeal in a criminal case. In *Gross v. Commonwealth*, 648 S.W.2d 853, 856 (Ky.1983), our Supreme Court wrote the following:

The 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. That structure is set out in the rules related to direct appeals, in [Kentucky Rules of Criminal Procedure] RCr 11.42, and *thereafter* in CR 60.02. 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. The movant must demonstrate why he is entitled to this special, extraordinary relief. Before the movant is entitled to an evidentiary hearing, he must affirmatively allege facts which, if true, justify vacating the judgment and further allege special circumstances that justify CR 60.02 relief.

Additionally, the court stated:

CR 60.02 was enacted as a substitute for the common law writ of coram nobis. The purpose of such a writ was to bring before the court that pronounced judgment errors in matter of fact which (1) had not been put into issue or passed on, (2) were unknown and could not have been known to the party by the exercise of reasonable diligence and in time to have been otherwise presented to the court, or (3) which the party was prevented from so presenting by duress, fear, or other sufficient cause. *Black's Law Dictionary, Fifth Edition, 487, 1444.*

Id.

Under our clear precedent, a defendant must proceed under RCr 11.42 while he is under state supervision, of any form, “as to any ground of which he is aware, or should be aware, during the period when this remedy is available to him.” *Id.* at 857. Based on the language of RCr 11.42, a defendant is precluded from raising any issues under CR 60.02 which could have reasonably been presented in his RCr 11.42 proceeding. *Id.*

For unexplained reasons, Hollars filed a CR 60.02 motion before he filed an RCr 11.42 motion for relief. *Gross* clearly requires that CR 60.02 actions proceed only after a direct appeal or an RCr 11.42 proceeding have resolved all possible issues. *Id.* Hollars was required to bring his numerous claims on direct appeal or by an RCr 11.42 proceeding. Because Hollars did not pursue his remedies under RCr 11.42 prior to filing his CR 60.02 motion, the trial court did not err by denying his motion for extraordinary relief.

For the foregoing reasons, the order of the Pulaski Circuit Court denying Hollars' motion for post-conviction relief pursuant to CR 60.02 is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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