

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000801-MR

JEFFERY PALMER

APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE JUDITH E. McDONALD-BURKMAN, JUDGE
ACTION NO. 85-CR-001593

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CAPERTON AND VANMETER, JUDGES; GUIDUGLI,¹ SENIOR JUDGE.

VANMETER, JUDGE: Jeffery Palmer appeals *pro se* from the Jefferson Circuit Court's dismissal of his motion to amend or vacate his sentence pursuant to CR² 60.02 (f) and RCr³ 10.26. For the following reasons we affirm.

¹ Senior Judge Daniel T. Guidugli 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.

²
[□] Kentucky Rules of Civil Procedure.

³ Kentucky Rules of Criminal Procedure.

On September 24, 1986, Palmer pled guilty to burglary in the first-degree, theft by unlawful taking over \$100.00, and burglary in the third-degree. The court sentenced Palmer to concurrent terms for a total of ten years' imprisonment, to run consecutive to other terms of imprisonment.

Twenty years later, on November 8, 2006, Palmer filed a *pro se* motion to amend or vacate his sentence pursuant to CR 60.02(f). He alleged in pertinent part that his appointed counsel was not present at the time of his guilty plea, and that the court brought in as substitute counsel another attorney who forged the signatures of both appellant and his appointed counsel on a guilty plea form. The circuit court denied Palmer's motion without an evidentiary hearing. This appeal followed.

CR 60.02 states in part that “[o]n motion a court may, upon such terms as are just, relieve a party or his legal representative from its final judgment, order, or proceeding upon . . . (f) any other reason of an extraordinary nature justifying relief. The motion shall be made within a reasonable time[.]”

The Kentucky Supreme Court has previously held that actions brought under CR 60.02 are left to the discretion of the trial court and will be affirmed unless there is a showing of some “flagrant miscarriage of justice[.]” *Gross v. Commonwealth*, 648 S.W.2d 853, 858 (Ky. 1983). In *Gross*, the court established that a defendant who raised or could have raised a ground for relief on direct appeal, or in a motion seeking RCr 11.42 relief, is foreclosed from raising the issue in a subsequent CR 60.02 motion. *Id.* at 857. *Gross* further held that in the

circumstances before it, the trial court did not abuse its discretion by finding that the passage of five years between a final judgment and a CR 60.02 motion exceeded a reasonable time. *Id.* at 858.

Here, as a consequence of his plea agreement, Palmer waived any right to raise the alleged fraud as an issue on direct appeal. *See Johnson v. Commonwealth*, 120 S.W.3d 704, 706 (Ky. 2003) (holding that the right to appeal may constitutionally be waived in a plea agreement). Although Palmer could have raised this issue during the period when RCr 11.42 relief was available, he failed to avail himself of that remedy. In any event, in these circumstances the trial court did not abuse its discretion by holding that Palmer's motion to vacate the judgment, made twenty years after his entry of a guilty plea, was not made within a reasonable time. CR 60.02(f).

The order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Jeffery Palmer, *Pro se*
LaGrange, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
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