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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2005-CA-001500-MR

MORRIS DUNCAN, SR. APPELLANT

v. APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE T. STEVEN BLAND, JUDGE
ACTION NOS. 98-CR-00001 AND 98-CR-00188

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: NICKELL, MOORE AND STUMBO, JUDGES.

NICKELL, JUDGE: Morris Duncan ("Duncan") appeals from the Hardin Circuit Court's denial of his CR[1] 61.02 motion seeking post-conviction relief. We affirm.

On November 24, 1997, Duncan, Thomas Eugene Stewart ("Stewart") and Aaron L. Camp ("Camp") broke into the home of James Willian ("Willian") and Virginia Williams ("Williams"). Armed with a knife and a handgun, the trio

[1] Kentucky Rules of Civil Procedure.

stabbed and robbed Willian and Williams. Willian died from the stab wounds and Williams was critically injured. The assailants also shot and killed the victim's dog.

On January 27, 1998, Duncan was indicted and charged with complicity[2] to commit: capital murder,[3] burglary in the first degree,[4] robbery in the first degree[5] and assault in the first degree.[6] Soon after, he was indicted for criminal mischief in the first degree[7] for causing $1,000.00 in damage to the Hardin County jail. On February 17, 1998, counsel was appointed and Duncan pleaded not guilty to all charges. On May 3, 1999, Duncan accepted a plea bargain. In exchange for the Commonwealth's recommendation that the court sentence him to forty years imprisonment, Duncan signed a motion to enter guilty plea and pleaded guilty to all charges. Following the customary colloquy in which Duncan acknowledged he was aware of the charges and evidence against him, had discussed everything he knew about the crime with his attorney, was freely and voluntarily pleading guilty, and was fully informed of the constitutional rights he would be waiving by pleading guilty, the trial court accepted Duncan's guilty plea.

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[2] KRS 502.020.

[3] KRS 507.020.

[4] KRS 511.020.

[5] KRS 515.020.

[6] KRS 508.010.

[7] KRS 512.020.

On May 11, 1999, judgment was entered against Duncan in accordance with the Commonwealth's recommendation.

On May 15, 2000, Duncan filed a motion to vacate his conviction and sentence pursuant to RCr[8] 11.42. Duncan claimed counsel's assistance was ineffective because he did not prepare for trial, investigate potential witnesses or offer mitigating evidence. Duncan also claimed counsel's advice to accept the plea agreement and plead guilty to the charge of complicity to commit murder was deficient because the Commonwealth failed to prove the principal crime of murder had occurred. On June 1, 2000, the trial court denied Duncan's 11.42 motion. It found the statement in his motion to enter guilty plea and affirmation of those provisions during the colloquy were sufficient to dispel any claim of ineffective assistance of counsel. Further, the trial court found pleading guilty to complicity to commit murder was a judicial admission of the underlying crime of murder. *Lovett v. Commonwealth*, 858 S.W.2d 205, 207 (Ky.App. 1993); *Toppass v. Commonwealth*, 799 S.W.2d 587, 589 (Ky.App. 1990). This Court affirmed the trial court's decision in an unpublished opinion rendered June 7, 2002.[9]

On December 4, 2003, Duncan filed the instant motion for relief from judgment pursuant to CR 60.02(f) claiming his convictions for assault and robbery constituted a double jeopardy violation, his conviction for assault in the first degree was statutorily impermissible because the victim was not seriously injured, and

[8] Kentucky Rules of Criminal Procedure (RCr).

[9] *Duncan v. Commonwealth*, 2000-CA-001417-MR, not-to-be-published (June 7, 2002).

counsel's assistance was ineffective. On January 22, 2004, the trial court denied the motion finding Duncan previously presented, or should have previously presented, each of his claims to the court.

We hear this appeal pursuant to Duncan's motion for a belated appeal, granted September 19, 2007. Duncan now alleges: (1) his convictions for both complicity to commit robbery in the first degree and complicity to commit assault in the first degree constitute a double jeopardy violation; (2) counsel's assistance was ineffective because counsel did not prepare for trial, investigate potential witnesses or prepare mitigating evidence; (3) Duncan's guilty plea was not knowing and voluntary because he did not understand the terms of the agreement; and (4) he was entitled to an evidentiary hearing because the record does not conclusively refute his contentions. We disagree.

"The standard of review of an appeal involving a CR 60.02 motion is whether the trial court abused its discretion." *White v. Commonwealth*, 32 S.W.3d 83, 86 (Ky.App. 2000) (citing *Brown v. Commonwealth,* 932 S.W.2d 359, 361 (Ky. 1996)). To amount to an abuse of discretion, a trial court's denial must be "arbitrary, unreasonable, unfair, or unsupported by sound legal principals." *Clark v. Commonwealth*, 223 S.W.3d 90, 95 (Ky. 2007). We will affirm the decision absent a "flagrant miscarriage of justice." *Gross v. Commonwealth*, 648 S.W.2d 853, 858 (Ky. 1983).

The trial court's disposition of Duncan's double jeopardy claim was fair and grounded in sound legal principals. RCr 11.42 forecloses Duncan from

raising an issue under CR 60.02 "that could reasonably have been presented" in an RCr 11.42 proceeding. *Id.* at 857. RCr 11.42 states in relevant part: "The motion shall state all grounds for holding the sentence invalid of which the movant has knowledge. Final disposition of the motion shall conclude all issues that could reasonably have been presented in the same proceeding." Further, "CR 60.02 is not a separate avenue of appeal to be pursued in addition to other remedies, but is available only to raise issues which cannot be raised in other proceedings." *McQueen v. Commonwealth*, 948 S.W.2d 415, 416 (Ky. 1997). The facts surrounding Duncan's convictions remain the same today as when he pleaded guilty. Because Duncan could have reasonably argued double jeopardy on his direct appeal or in his RCr 11.42 motion, he is now precluded from presenting it to this Court pursuant to CR 60.02. *Gross, supra,* 648 S.W.2d at 857.

Likewise, the trial court's disposition of Duncan's ineffective assistance of counsel claim did not constitute an abuse of discretion. The thrust of this argument parallels the claim Duncan made in his RCr 11.42 motion. Again, Duncan's claim is rooted in counsel's advice to accept the plea bargain and plead guilty to complicity to commit murder before either of his co-defendants went to trial. Because neither co-defendant was convicted of murder, and both received lesser sentences than Duncan, he now claims his counsel's advice was ineffective. However, Duncan may not relitigate issues he presented in an earlier direct appeal or collateral attack pursuant to CR 60.02. *McQueen, supra,* 948 S.W.2d at 416. As the trial court necessarily determined when ruling on Duncan's RCr 11.42

motion, the doctrine of *res judicata* precludes Duncan from taking a "second bite at the apple." *Alvey v. Commmonwealth*, 648 S.W.2d 858, 860 (Ky. 1983); *Gregory v. Commonwealth,* 610 S.W.2d 598, 600 (Ky. 1980).

Duncan's third contention, that his plea was not knowing and voluntary, is not properly preserved. "An appellate court will not consider a theory unless it has been raised before the trial court and that court has been given an opportunity to consider the merits of the theory." *Shelton v. Commonwealth*, 992 S.W.2d 849, 851 (Ky.App. 1998). Duncan presents this issue for the first time on this appeal. He did not raise the issue to the trial court on direct appeal, nor in his RCr 11.42 or CR 60.02 motions. Consequently, Duncan's claim is not properly before us and requires no further discussion.

Finally, Duncan contends the trial court wrongfully deprived him of an evidentiary hearing. However, he is not automatically entitled to such. *Stanford v. Commonwealth*, 854 S.W.2d 742, 744 (Ky. 1993). Only if there is an issue of fact which cannot be determined on the face of the record must the trial court allow an evidentiary hearing. *Id.* at 743-744. If the record refutes his claims of error, there is no basis for holding an evidentiary hearing. *Id.* at 743 (citing *Glass v. Commonwealth*, 474 S.W.2d 400, 401, (Ky. 1971)). The trial court correctly determined, based solely on the record, Duncan's CR 60.02 claims were not properly before it. It was clearly within the trial court's discretion to deny Duncan's request for an evidentiary hearing. Thus, there was no error.

For the foregoing reason, the order of the Hardin Circuit Court is affirmed.

ALL CONCUR.

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