

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2008-CA-000383-MR

RONNIE GRAY

APPELLANT

v. APPEAL FROM KNOX CIRCUIT COURT  
HONORABLE RODERICK MESSER, JUDGE  
ACTION NO. 01-CR-00015

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: COMBS, CHIEF JUDGE; WINE, JUDGE; BUCKINGHAM,<sup>1</sup> SENIOR JUDGE.

BUCKINGHAM, SENIOR JUDGE: Ronnie Gray appeals from an order of the Knox Circuit Court denying his Kentucky Rules of Criminal Procedure (RCr) 11.42 motion to vacate his conviction and sentence. We affirm.

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<sup>1</sup> Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

In February 2001 Gray was indicted by a Knox County grand jury on charges of first-degree rape and being a second-degree persistent felony offender. In February 2003 he pleaded guilty, pursuant to a plea agreement with the Commonwealth, to the amended charge of third-degree rape and to being a second-degree persistent felony offender. The trial court sentenced Gray to ten years' imprisonment in April 2003.<sup>2</sup>

In May 2004, while Gray was imprisoned, the Corrections Program Administrator for the Kentucky Sex Offender Treatment Program advised Gray that he was not eligible for the program because he did "not appear to have the mental skills to complete sex offender treatment." The decision to deny Gray admission to the program was based upon Kentucky Revised Statutes (KRS) 197.410(2)(a), which provides that persons eligible for the program do not include those who suffer from "mental retardation."

In April 2005 Gray filed a motion to correct, modify, or vacate judgment pursuant to Kentucky Rules of Civil Procedure (CR) 60.02(e) and (f). He alleged generally that he received ineffective assistance of counsel because his attorney failed to request the court to order him to undergo a mental examination and allowed him to plead guilty even though he suffered from diminished mental capacity. The trial court denied Gray's motion, and he appealed to this court. This court rendered an opinion on September 8, 2006, affirming the trial court's decision. This court reasoned that Gray's claim for relief from the judgment was

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<sup>2</sup> This sentence ran consecutively to an earlier seven-year sentence that Gray had received.

procedurally barred because the issues presented in his CR 60.02 motion should first have been raised in an RCr 11.42 motion.

Thereafter, Gray filed the RCr 11.42 motion that is the subject of this appeal. That motion raised issues similar to those that Gray had raised in his CR 60.02 motion. On November 13, 2007, the trial court entered an order denying Gray's motion on the merits. This appeal by Gray followed.

The Commonwealth does not address the merits of Gray's appeal. Rather, the Commonwealth argues that this court should dismiss the appeal as "procedurally improper." Citing *Gross v. Commonwealth*, 648 S.W.2d 853 (Ky. 1983), the Commonwealth contends that Gray has improperly sought relief by successive post-conviction motions.<sup>3</sup> It also raises the doctrines of res judicata and collateral estoppel as defenses to Gray's arguments.

We believe that the Commonwealth has misinterpreted the principles of the *Gross* case. In *Gross* the Kentucky Supreme Court set forth the proper procedure to be employed by a defendant seeking post conviction relief. The court explained that CR 60.02 "is for relief that is not available by direct appeal and not available under RCr 11.42." *Id.* at 856. The court further explained that "[t]he language of RCr 11.42 forecloses the defendant from raising any questions under CR 60.02 which are 'issues that could reasonably have been presented' by RCr 11.42 proceedings." *Id.* at 857.

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<sup>3</sup> The Commonwealth states that this is Gray's third post-conviction motion. The record indicates only two, the CR 60.02 motion and the RCr 11.42 motion.

In this case, Gray filed his CR 60.02 motion first, contrary to the proper procedure outlined in *Gross*. Because of Gray's error, this court determined in the first appeal that Gray was procedurally barred from seeking CR 60.02 relief at that juncture and rejected the appeal without considering its merits. Our opinion resulted in Gray's being forced to file an RCr 11.42 motion to pursue the relief he was seeking. He did file such a motion, and the trial court properly addressed it on the merits. This appeal by Gray is neither procedurally improper nor barred by the doctrines of res judicata or collateral estoppel.

Gray argues that he received ineffective assistance of counsel because "counsel failed to investigate and obtain a mental health expert to assist in his understanding of Gray's mental health issues before advising him to plead guilty." He alleges in his brief that he is mentally retarded and that his attorney advised him to plead guilty to third-degree rape even though he was incompetent to commit that offense.

Before Gray pleaded guilty, the court had ordered that Gray be evaluated because it had been advised that he was suicidal. Later, Gray's counsel advised the court that Gray was no longer suicidal, and the court, without objection, withdrew its order to have Gray evaluated. In its order denying Gray's RCr 11.42 motion, the court stated that "[t]here was no other information in the record to suggest that the Movant was incompetent or not criminally responsible." Further, the court stated in its order that it "did not have a reasonable basis to doubt [Gray's] capacity" when Gray pleaded guilty.

Gray's argument that he is mentally retarded is based entirely on the fact that the administrator of the sex offender treatment program denied him the right to participate in the program because she believed Gray did "not appear to have the mental skills to complete sex offender treatment." We see nothing in the record to indicate that Gray was mentally retarded, that he lacked the competency to understand the guilty plea proceedings, or that he lacked the capacity to commit the crime for which he pleaded guilty. Further, there is nothing to indicate that Gray's attorney might have been aware of some mental deficiency on Gray's part at the time Gray pleaded guilty to the charges. As stated in Gray's brief, "it is unclear from the record to what extent exactly that Gray suffers from diminished mental capacity." Therefore, we cannot conclude that the court erred in denying Gray's RCr 11.42 motion based on ineffective assistance of counsel.

Gray also argues that his RCr 11.42 counsel "was not permitted to properly and adequately represent Gray with necessary supplementation." In this regard he states that his counsel twice moved the court for extensions of time to supplement Gray's *pro se* motion but that the court only granted the first extension.

Gray's counsel states in her brief on Gray's behalf that her brother was killed in an automobile accident on June 18, 2007; that she was out of her office from that time until July 2, 2007; that she was unaware of the court's deadline of August 10, 2007, for supplementing the motion until the day before; and that she was unable to timely supplement the motion. While we sympathize with counsel on the tragic loss of her brother, we note that she was in her office for

over a month before the deadline passed. We further note that the court had entered an order on January 19, 2007, giving the Department of Public Advocacy 90 days to evaluate Gray's RCr 11.42 claims and supplement his motion. The 90-day period had long since passed when the court denied the last motion for an extension of time. Under these facts, we cannot say that the court abused its discretion in denying the second motion for an extension of time.

Finally, Gray contends that the court erred by denying an evidentiary hearing. As we have noted, there is nothing in the record to indicate that Gray's attorney had any indication the Gray suffered from any mental deficiency at the time he pleaded guilty. Likewise, there is nothing in the record to indicate that Gray had any mental deficiency that would affect his competency to enter a guilty plea or his capacity to commit the crimes for which he was convicted. His denial of admission into the sex offender treatment program alone does not demonstrate such deficiency. Under these facts, we conclude that the court did not err in denying Gray's motion without an evidentiary hearing.

Thus, the order of the Knox Circuit Court denying Gray's RCr 11.42 motion is affirmed.

WINE, JUDGE, CONCURS.

COMBS, CHIEF JUDGE, DISSENTS AND FILES SEPARATE  
OPINION.

COMBS, CHIEF JUDGE, DISSENTING: This is a disturbing case. I agree with the sound reasoning of the majority opinion as to the procedural posture

of the case in allowing our review to proceed under RCr 11.42. I also agree that there was not necessarily a deficiency on the part of counsel for not having been alerted to a mental competency defense during the course of the proceedings.

Nonetheless, Gray's mental competency appears to be questionable as a result of the decision of corrections officials to deny him admission to the sex offender program because he appeared to them to lack requisite mental skills. Among the statutory criteria listed is "mental retardation." It is not clear whether that denial was based on illiteracy, low IQ, or actual mental retardation. Therefore, since a manifest injustice may be involved in this case as to Gray's mental capacity, I would, *sua sponte*, invoke and apply 10.26, the rule providing an avenue of relief based on manifest injustice. I would remand this case for a mental evaluation of Gray. It is possible that the essential element of *scienter* was lacking because of diminished mental capacity. Under these unique circumstances, it would indeed be a manifest injustice for Gray "to fall between the cracks" procedurally speaking and to bear a full criminal penalty if he lacked requisite capacity to be adjudged criminally liable.

Accordingly, I file this dissent.

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