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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-000205-MR

DAVID B. GRUBBS APPELLANT

v. APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE RODERICK MESSER, JUDGE
ACTION NO. 05-CR-00186

COMMONWEALTH OF KENTUCKY
APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, KELLER, AND NICKELL, JUDGES.

CAPERTON, JUDGE: David Bubba Grubbs, aka Robert Lee Barr (Grubbs), appeals an order of the Laurel Circuit Court denying his CR 60.02 motion to vacate judgment. After careful review of the record, we affirm the circuit court.

Grubbs pled guilty before the Laurel Circuit Court to charges of Fraudulent Use of Credit Card of the Value of $300.00 or more within a Six Month

Period, a Class D felony, as well as Persistent Felony Offender First Degree. Thus, there was no trial, nor any evidence submitted.

On August 19, 2005, the grand jury of the Laurel Circuit Court indicted Grubbs, charging him with both fraudulent use of a credit card, and with being a persistent felony offender in the first degree. Thereafter, pursuant to a plea agreement, Grubbs appeared before the Laurel Circuit Court on February 13, 2006, and pled guilty to both charges. In accordance with the plea agreement, the prosecutor recommended a sentence of imprisonment for a total of fifteen years. On March 21, 2006, Grubbs was sentenced accordingly.

Thereafter, on both August 17, 2006, and March 27, 2007, Grubbs filed motions requesting that the Laurel Circuit Court amend the judgment of conviction to order his sentence of imprisonment to run concurrently with his federal sentence. Those motions were denied by the circuit court on August 23, 2006, and April 9, 2007, respectively.

In denying Grubbs' motion, the circuit court stated that the judgment already reflected that Grubbs' sentence was to run concurrently with his federal sentence. More motions followed, including two motions for credit of time served in federal custody, filed on April 20, 2007, and May 8, 2007, both of which were denied. Grubbs also filed two motions, in August and September of 2007, for orders reflecting indictment numbers of the federal charges to which he pled guilty, as well as a motion to modify judgment on August 30, 2007. All were denied.

Subsequently, on October 1, 2007, Grubbs filed a motion to vacate judgment pursuant to RCr 11.42, asserting that his trial counsel was ineffective both for failing to object to the sentence of fifteen year imprisonment under the PFO count of the indictment, and for failing to conduct a reasonable investigation into the facts. That motion was denied by the trial court on October 4, 2007. In so ruling, the trial court found that any error in the arraignment order was corrected in the Commonwealth's plea offer. The court further found that Grubbs' second allegation lacked sufficient specificity to warrant relief.

On October 8, 2007, Grubbs filed a notice of appeal of the denial of his RCr 11.42 motion, as well as a motion to reconsider and a motion to correct judgment, which were denied by the circuit court on October 24, 2007. Grubbs then filed an October 26, 2007, motion to correct illegal sentence, as well as another notice of appeal of the denial of his RCr 11.42 motion on November 1, 2007. He later sought to withdraw his notice of appeal on the RCr 11.42 issue, stating he wanted to file yet another RCr 11.42 motion instead. Grubbs' motion to withdraw appeal was denied by the trial court on November 26, 2007.

Grubbs then filed a November 30, 2007, motion to correct sentence pursuant to CR 60.02(a) and (f), and a second identical motion on January 14, 2008, both of which were denied by the circuit court on January 22, 2008. It is the January 22, 2008, Order denying his CR 60.02 motion that Grubbs now appeals to this Court. In that motion, Grubbs' allegations were two-fold. First, he alleged that his trial counsel was ineffective for failing to object to the admissibility of

copies of a judgment of conviction from federal court utilized to enhance a PFO sentence which were "not exemplified by a judge as required for an out-of-state document to be self-authenticating, nor were they authenticated by a witness". Secondly, Grubbs asserted that the records used to demonstrate his status as PFO were not properly attested as required by KRS 422.040.

As noted, the circuit court denied the CR 60.02 motion on January 22, 2008. In denying Grubbs' CR 60.02 motion, the circuit court found that Grubbs' claim for relief on grounds of mistake under CR 60.02(a), namely that the federal judgment was not properly authenticated, was barred under the one year time limitation of CR 60.02(a). With respect to Grubbs' claim for relief based on "extraordinary nature" pursuant to CR 60.02(f), the circuit court found it to be without merit as any question as to the authenticity of the federal judgment became moot when Grubbs pled guilty to the PFO charge. Grubbs now appeals the January 22, 2008, denial of his motion under CR 60.02(a) and (f).

We review this matter under an abuse of discretion standard, and will only overturn the trial court's exercise of discretion in the event of a miscarriage of justice. *Fortney v. Mahan*, 302 S.W.2d 842 (Ky. 1957), and *Richardson v. Bruner*, 327 S.W.2d 572 (Ky. 1959). Absent a showing of abuse of discretion, the trial court's decision in this matter should stand. *Bethlehem Minerals Co. v. Church and Mullins Corp.*, 887 S.W.2d 327, 329 (Ky. 1994), *Wittington v. Cunnagin*, 925 S.W.2d 455 (Ky. 1996), *Brown v. Commonwealth*, 932 S.W.2d 359, 362 (Ky. 1996).

Grubbs frames the sole issue on appeal as "[w]hether the indictment on persistent felony offender first degree was illegally sought and obtained by the Laurel Circuit Court against the appellant." After a thorough review of the record and applicable law, we find no error.

At the outset, we note that Grubbs was beyond his statute of limitations to file a motion under CR 60.02(a). The record clearly reflects that judgment was entered against Grubbs on March 21, 2006, and his motion was not filed within one year of that date. Having so found, we therefore decline to address any basis for appeal which would fall under the purview of that provision.

We now turn to the remaining issue on appeal, namely, whether Grubbs has demonstrated grounds of an extraordinary nature justifying relief as required by CR 60.02(f). To that end, Grubbs now makes an assertion slightly different than that made in the CR 60.02 motion from which he now appeals. In that motion, Grubbs argued that the copies of his federal convictions were not properly authenticated or attested. In addressing this argument, we note first that this is primarily an evidentiary issue, insofar as Grubbs is essentially asserting that the court mistakenly admitted unauthenticated evidence. We do not believe that such an argument would properly be categorized as "mistake" under CR 60.02(a), even if we were to consider it under that provision, as we do not find that provision to properly extend to evidentiary issues such as the one raised *sub judice*. Nevertheless, as previously stated, we believe any such argument to be barred by the applicable statute of limitations.

In his brief to this court, however, Grubbs changes his argument and does not assert that the evidence was not properly authenticated, but instead argues that there was no evidence at all. Grubbs now alleges that the circuit court erred in failing to request or obtain a properly certified copy of his federal records from the appropriate federal court. Grubbs asserts that this alleged failure to obtain records from the appropriate federal court justifies such extraordinary relief pursuant to CR 60.02(f). Again, we disagree.

First, we believe this to be an issue for direct appeal, not an issue to be raised in a CR 60.02 motion. Our review of the record, including the motions made by Grubbs himself, indicate that at the time of his guilty plea, Grubbs never raised the issue he currently brings before this court, nor did he bring it before the court in any of his prior post-conviction motions. Accordingly, we do not believe this issue to be properly before this Court at this time.

The law in this Commonwealth is clear. An appellate court will not consider an argument unless it has been raised before the trial court, and that court has been given an opportunity to consider the merits of the argument. *Shelton v. Commonwealth*, 992 S.W.2d 849, 852 (Ky.App. 1998). Further, as our Supreme Court stated in *Kennedy v. Commonwealth*, 544 S.W.2d 219, 222 (Ky. 1976), an appellant "will not be permitted to feed one can of worms to the trial judge and another to the appellate court."

In any event, even if the issues now raised by Grubbs were properly before this Court, we believe it critical to note that Grubbs pled guilty to the

charges for which he was convicted, including that of persistent felony offender first degree. Had Grubbs not pled guilty, then the matter would have gone to trial. However, here we are considering evidence that was presented to the Grand Jury. Hearsay evidence is admissible before a grand jury.[1] The unauthenticated copy of Grubbs' convictions would have been sufficient for purposes of the indictment based on RCr 5.10 which states the grand jurors shall find an indictment where they have received what they believe to be sufficient evidence to support it, but no indictment shall be quashed or judgment of conviction reversed on the ground that there was not sufficient evidence before the grand jury to support the indictment. On this basis, our courts have held that the issue of sufficiency of the evidence is to be determined at trial. *Russell v. Commonwealth*, 992 S.W.2d 871 (Ky. App. 1999).

This is also the view of our United States Supreme Court, as set forth in *Bracy v. U.S.*, 435 U.S. 1301, 98 S.Ct. 1171 (1978):

> The grand jury does not sit to determine the truth of the charges brought against a defendant, but only to determine whether there is probable cause to believe them true, so as to require him to stand his trial. Because of this limited function, we have held that an indictment is not invalidated by the grand jury's consideration of hearsay, *Costello v. United States*, 350 U.S. 359, 76 S. Ct. 406, 100 L. Ed. 397 (1956).... While the presentation of inadmissible evidence at trial may pose a substantial threat to the integrity of that factfinding process, its introduction before the grand jury poses no such threat ... An indictment returned by a legally constituted and

[1] At trial, the Commonwealth would have been required to prove the statutory elements of persistent felony offender first degree, which would have included a properly certified copy of Grubbs' prior convictions as opposed to an unauthenticated copy.

> unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits. The Fifth Amendment requires nothing more. *Costello at 409.*

Ultimately, it is not the function of the circuit court to produce evidence to substantiate the indictment nor is it the function of the court to obtain certified records. The prosecution of the case is reserved to the Commonwealth. Moreover, as previously noted, certified copies are not needed until trial, and in this matter a trial never occurred because Grubbs pled guilty to the charges. In so doing, Grubbs waived his right to be *proven* guilty of the charge of PFO first degree at trial.

The law in the Commonwealth is that a plea of guilty waives all defenses except that the indictment fails to charge a public offense. *Hughes v. Commonwealth*, 875 S.W.2d 99 (Ky. 1994). Grubbs cites both *Wellman v. Commonwealth*, 694 S.W.2d 696, 698 (Ky. 1985) and *Myers v. Commonwealth*, 42 S.W.3d 594 (Ky. 2001) for the respective arguments that sentencing is jurisdictional and cannot be waived, and that an unauthorized sentence is an error correctable on appeal.

Upon review, we do not find either of these cases to be on point in the matter *sub judice*. Those cases addressed situations in which the sentence itself was not in accordance with the crime for which the defendant was convicted. In this matter, however, by pleading guilty, Grubbs admitted to the elements

necessary for a conviction of PFO first degree. The sentence he received is commensurate with the plea, and with applicable law.

Grubbs pled guilty to counts of Fraudulent Use of Credit Card of the Value of $300.00 or More within a Six Month Period, a Class D felony, as well as Persistent Felony Offender First Degree. Thereafter, he was sentenced to fifteen years in prison. Accordingly, our statutes clearly provide that if one stands convicted of a Class D felony, as a persistent felony offender in the first degree, they may be sentenced to an indeterminate term of imprisonment, the maximum of which shall not be less than ten years, nor more than twenty years. KRS 532.080(6)(b). The sentence that Grubbs received was within the provisions of the law, and we decline to find otherwise on appeal.

Even if we chose to disregard the waivers made by Grubbs when entering his guilty plea, we note that his appeal is duplicitous, in light of his four previous post-conviction relief motions. As previously noted, Grubbs filed his 11.42 motion, one of several post-conviction motions, on October 1, 2007. The language of RCr 11.42 clearly mandates that the motion shall state *all* grounds for holding the sentence invalid, of which the movant has knowledge, and that final disposition of the motion shall conclude all issues that could reasonably have been presented in the same proceeding. Thus, our courts have repeatedly held that the language of RCr 11.42 forecloses a defendant from raising any questions under CR 60.02 which are "issues that could reasonably have been presented" in the RCr 11.42 proceedings. *Gross v. Commonwealth,* 648 S.W.2d 853, 857 (Ky. 1983).

CR 60.02 is available to raise issues which cannot be raised in other proceedings, not to relitigate issues which could reasonably have been presented by either direct appeal or CR 11.42 proceedings. *McQueen v. Commonwealth*, 948 S.W.2d 415, 426 (Ky. 1997).

In the matter *sub judice*, Grubbs not only filed an RCr 11.42 motion, but also filed a motion to amend judgment, a motion to correct illegal sentence, as well as the CR 60.02 motion presently considered on appeal. As we noted in *Gross*, supra:

> 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 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 is 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.

In reviewing the record, we find that each of the issues which Grubbs raised in his CR 60.02 motion, namely that his trial counsel rendered ineffective assistance at sentencing, and that the evidence pertaining to his federal convictions was not properly authenticated, were issues that could have been raised and in many respects were raised, in his first post-conviction RCr 11.42 motion. Therefore, we do not believe these issues are properly before this court on appeal.

After a thorough review, we do not believe that Grubbs has met his burden of proof in establishing that his claims on appeal justify "relief of an extraordinary nature" as required by CR 60.02 (f), nor that the trial court abused its discretion in denying his motion. Accordingly, we affirm the decision of the trial court, the Honorable Roderick Messer, Judge, presiding.

ALL CONCUR.

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