

Commonwealth of Kentucky
Court of Appeals

NO. 2007-CA-001634-MR

ROOSEVELT ELSWICK

APPELLANT

v. APPEAL FROM PIKE CIRCUIT COURT
HONORABLE STEVEN D. COMBS, JUDGE
ACTION NO. 80-CR-00176

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, CHIEF JUDGE; NICKELL, JUDGE; GRAVES,¹ SENIOR JUDGE.

NICKELL, JUDGE: Roosevelt Elswick (Elswick) appeals from an order entered July 10, 2007, by the Pike Circuit Court denying his motion to dismiss the fully adjudicated Pike County Indictment No. 80-CR-00176. We affirm.

¹ Senior Judge John W. Graves 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.

On May 27, 1981, following a jury trial, Elswick and his wife were convicted of rape in the first degree.² Both were sentenced to life imprisonment³ and our Supreme Court affirmed the judgment on direct appeal in an opinion which became final on July 27, 1982.⁴

Thereafter, Elswick filed five motions seeking relief under RCr⁵ 11.42. The trial court denied each of those motions on August 26, 1983; December 7, 1983; April 3, 1985; and May 23, 1985, respectively. We affirmed the denial of relief on October 30, 1986.

On June 27, 1996, a CR⁶ 60.02 motion was denied by the trial court. We dismissed an appeal of that denial on February 5, 1997. The trial court then denied a successive CR 60.02 motion and we affirmed that denial on October 9, 1998.

Elswick subsequently moved the trial court to allow him to obtain court records pursuant to the Open Records Act. KRS 61.870 *et seq.* On March 16, 2006, the trial court sustained the motion. The records were not produced and in August 2006, Elswick moved the trial court to: (1) appoint counsel; (2) dismiss

² KRS 510.040.

³ The record on appeal contains only pleadings filed with the trial court since 2006. A more complete history of the proceedings may be found in *Elswick v. Commonwealth*, 1997-CA-1699-MR (not-to-be-published, 10/9/98).

⁴ *Elswick v. Commonwealth*, 81-SC-729-MR (not-to-be-published, 7/27/1982).

⁵ Kentucky Rules of Criminal Procedure.

⁶ Kentucky Rules of Civil Procedure.

Indictment No. 80-CR-00176 pursuant to CR 61.02; and (3) hold an evidentiary hearing. The trial court appointed counsel and entered an order compelling the circuit clerk to permit the public advocate to review any pending motions.

However, the trial court denied Elswick's motion to dismiss the indictment on July 10, 2007, finding it had been fully adjudicated in 1982 and that the trial court was without authority to dismiss an indictment pursuant to CR 61.02. Elswick contends this was error. We disagree.

Elswick makes numerous claims about his failure to acquire a transcript of the grand jury proceedings. He further attacks his conviction by asking this Court to dismiss the original indictment pursuant to CR 61.02. However, Elswick has failed to direct us to any authority supportive of his position. For the following reasons, we hold he is not entitled to the grand jury transcripts or to relief pursuant to CR 61.02.

Rulings on motions to dismiss indictments are generally subject to an abuse of discretion standard of review. *Commonwealth v. Deloney*, 20 S.W.3d 471, 474 (Ky. 2000). To amount to an abuse of discretion, a trial court's denial must be "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Clark v. Commonwealth*, 223 S.W.3d 90, 95 (Ky. 2007). We will affirm the trial court's denial of the motion absent a "flagrant miscarriage of justice." *Gross v. Commonwealth*, 648 S.W.2d 853, 858 (Ky. 1983).

Our Supreme Court has held "post-conviction discovery is not required by either the state or federal constitution." *Sanders v. Commonwealth*, 89

S.W.3d 380, 394 (Ky. 2002). RCr 5.16 entitles a defendant to a copy of the grand jury transcript from the attorney for the Commonwealth, “but not solely for use in preparation of post-conviction proceedings. . . . [Elswick] is not entitled to post-conviction discovery.” *Wagner v. Commonwealth*, 247 S.W.3d 540, 542 (Ky.App. 2008) (citing *Sanders v. Commonwealth*, 89 S.W.3d 380, 394 (Ky. 2002)); *Haight v. Commonwealth*, 41 S.W.3d 436, 445 (Ky. 2001). Like the appellant in *Wagner*, *supra*, Elswick has not stated how he intends to use the requested records nor has he alleged that he did not receive a copy of the transcript before he was tried and convicted in 1981. Since he has already availed himself of a direct appeal and filed multiple state court motions⁷ pursuant to CR 61.02, CR 61.03 and RCr 11.42, he has exhausted every opportunity for post-conviction relief, and he has not articulated a legitimate purpose. *See Gross v. Commonwealth*, 648 S.W.2d 853, 856 (Ky. 1983). Post-conviction proceedings are not an opportunity to conduct a fishing expedition for possible grievances. *Haight v. Commonwealth*, 41 S.W.2d 436, 445 (Ky. 2001).

Moreover, while CR 61.02 permits the granting of relief pursuant to a motion for a new trial, the window for seeking such relief is limited to five days after the verdict has been returned. Elswick was convicted twenty-six years ago and he allowed seven and one-half years to pass before filing his latest motion.

⁷ In addition to filing numerous pleadings in state court, Elswick has also filed numerous pleadings in federal court resulting in at least four opinions. *Elswick v. Parke*, 861 F.2d 720 (C.A.6 (Ky.) 1988) (unpublished); *Elswick v. Parke*, 489 U.S. 1056, 109 S.Ct. 1321, 103 L.Ed.2d 590 (1989); *Elswick v. Sparkman*, 95 F.3d 1152 (C.A.6 (Ky.) 1996) (unpublished); *Elswick v. Morgan*, 2005 WL 1719971 (E.D.Ky. 2005).

Filing a motion for a new trial at this juncture would clearly be untimely, and the grant of relief pursuant to CR 61.02 is legally unavailable. The trial court did not abuse its discretion in denying Elswick's motion to dismiss the indictment.

For the foregoing reasons, the order of the Pike Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Roosevelt Elswick, *pro se*
Burgin, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Gregory C. Fuchs
Assistant Attorney General
Frankfort, Kentucky