

RENDERED: JULY 17, 2009; 10:00 A.M.
 NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001336-MR

GARY DILLARD

APPELLANT

APPEAL FROM CHRISTIAN CIRCUIT COURT
v. HONORABLE ANDREW SELF, JUDGE
ACTION NOS. 94-CR-00221 & 94-CR-00443

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

*** * * * *

BEFORE: COMBS, CHIEF JUDGE; THOMPSON, JUDGE; BUCKINGHAM,¹ SENIOR JUDGE.

THOMPSON, JUDGE: Gary Dillard, *pro se*, appeals an order of the Christian Circuit Court denying his CR 60.02 motion for post-conviction relief. Because Dillard's claims could have been presented during his earlier court actions, we affirm.

¹ 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 Kentucky Revised Statutes (KRS) 21.580.

On July 8, 1994, Dillard shot and killed Howard Weaver outside of Gray's Tavern in Hopkinsville. The shooting stemmed from an altercation over Dillard's conduct toward Weaver's daughter. Dillard was charged with murder and eight counts of wanton endangerment in the first degree. Subsequently, a jury found him guilty of murder and three counts of wanton endangerment in the first degree. In accordance with the jury's recommendation, the trial court sentenced Dillard to life imprisonment.

While his direct appeal was pending, Dillard filed an RCr 11.42 motion for post-conviction relief seeking to vacate his conviction. Pending resolution of Dillard's direct appeal to the Supreme Court, the trial court held the motion in abeyance and did not redocket the case after our Supreme Court affirmed Dillard's conviction.

On October 5, 1999, Dillard filed a motion for post-conviction relief pursuant to CR 60.02, which was denied by the trial court. Affirming the trial court's denial, in an unpublished opinion in Case No. 1999-CA-002492-MR, this Court wrote that “[i]t is clear from a review of the record that appellant's litany of alleged errors is an attempt to relitigate issues which were determined in his direct appeal . . . [and] to raise issues which he could have brought in the direct appeal or RCr 11.42 motion, but did not.” For those reasons, the Court concluded that Dillard was precluded from obtaining CR 60.02 relief.

Subsequently, Dillard filed two additional CR 60.02 motions but was denied relief each time. After being unsuccessful in his prior motions, Dillard

sought to revive his original RCr 11.42 motion, which had not been redocketed by the trial court. On review of the trial court's denial, this Court affirmed, concluding that Dillard's claims were either refuted by the record or waived due to his failure to specifically address the issue on appeal.

On December 19, 2005, Dillard filed another CR 60.02 motion, alleging numerous claims for relief. Following the trial court's denial of his motion, this Court affirmed the denial concluding that Dillard's CR 60.02 claims were improper because they could have been raised either on direct appeal or in a prior RCr 11.42 motion. Over two years later, Dillard filed the present CR 60.02 motion, which the trial court denied. This appeal followed.

On appeal, Dillard makes five arguments in support of his request for post-conviction relief. However, Dillard's arguments can be succinctly restated into three claims: (1) the trial court abused its discretion by denying him CR 60.02 relief; (2) he was prejudiced by ineffective assistance of counsel; and (3) the Commonwealth violated his constitutional rights by failing to disclose that the handgun found beside the body of Howard Weaver belonged to Weaver. Because these three claims could and should have been raised in Dillard's direct appeal or in his prior RCr 11.42 action, 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). The test for abuse of discretion is whether the trial court's

decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

CR 60.02 is designed to provide defendants with the opportunity to obtain special and extraordinary relief when the particular circumstances of a case justify post-judgment relief. *McQueen v. Commonwealth*, 948 S.W.2d 415, 416 (Ky. 1997). However, as stated in *Gross v. Commonwealth*, 648 S.W.2d 853, 856 (Ky. 1983), CR 60.02 provides relief that is not available by direct appeal or through an RCr 11.42 action. Thus, CR 60.02 cannot be employed to relitigate matters which could reasonably have been brought by direct appeal or in an RCr 11.42 motion. *McQueen*, 948 S.W.2d at 416.

Having reviewed the record, we conclude that the trial court did not abuse its discretion by denying Dillard's CR 60.02 motion. Dillard's CR 60.02 motion presents claims, including ineffective assistance of counsel and prosecutorial misconduct, which could have been raised in his direct appeal or in his prior RCr 11.42 motion. As stated in *McQueen*, CR 60.02 actions cannot be brought to relitigate matters which could have been presented in earlier court actions. *Id.* at 416. Therefore, the trial court's denial was not erroneous.

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

ALL CONCUR.

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