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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2008-CA-000674-MR

LUTHER BARRETT, III

APPELLANT

v. APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE FRED A. STINE, JUDGE
ACTION NO. 03-CR-00536

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: KELLER, STUMBO, AND VANMETER, JUDGES.

KELLER, JUDGE: Luther Barrett (Barrett) appeals from the Campbell Circuit Court's Memorandum Order denying his third motion for post-conviction relief. Barrett raises two issues for our review: first, that his trial counsel was ineffective as Barrett was not informed of a plea offer and, second, that the offenses described in the Kentucky Revised Statutes of assault in the first degree and assault in the

second degree are unconstitutionally vague. We disagree with both of Barrett's contentions and affirm the trial court's order for the reasons set forth below.

FACTS

In November 2003, Barrett was indicted for assault in the first degree and for being a persistent felony offender in the second degree. The charges stemmed from an incident wherein Barrett attacked and seriously injured an elderly man causing brain damage. The case proceeded to trial in April 2004; however, following the presentation of the Commonwealth's evidence, Barrett entered a plea of guilty, as charged. The trial court sentenced Barrett to a total of 20 years' imprisonment, thus requiring Barrett to serve 85% of the sentence prior to becoming eligible for parole.

In May 2004, Barrett filed a motion to withdraw his guilty plea, based primarily upon allegations that his counsel was ineffective pursuant to Rule of Criminal Procedure (RCr) 11.42. The court appointed Barrett counsel to supplement the post-conviction motion and a hearing on the motion was held in July 2005. In December 2005, the trial court overruled Barrett's RCr 11.42 motion, finding that Barrett's plea was knowingly, voluntarily, and intelligently made and that Barrett had failed to prove his counsel ineffective. Barrett appealed the ruling, but before this Court could render an opinion on Barrett's appeal, he filed a second post-conviction motion pursuant to Rule of Civil Procedure (CR) 60.02 in September 2006. The Commonwealth responded, arguing that Barrett was attempting to re-litigate his prior RCr 11.42 claims. The trial court denied this

second motion on jurisdictional grounds in October 2006. This Court affirmed the trial court's denial of the first RCr 11.42 in April 2007 and the Supreme Court of Kentucky denied discretionary review in October 2007.

In December 2007, Barrett filed the present post-conviction motion, made pursuant to both RCr 11.42 and CR 60.02. Barrett alleged therein, that the facts on which his motion was predicated were unknown to him and could not have been ascertained by the exercise of due diligence. Barrett claimed that his trial counsel had failed to inform him of a December 8, 2003, plea offer of ten years, with a parole eligibility of 20%.

Unfortunately for Barrett, the trial court took note of his preceding motion for discretionary review with the Supreme Court. In that pleading Barrett asserted that he had refused all efforts at settling his case via plea agreement, including the Commonwealth's final offer prior to trial of seven years "the day before" the trial. The trial court denied the motion, citing the successive nature of the challenge, the fact that the allegations could have been raised previously, as well as Barrett's lack of credibility regarding his lack of knowledge as to the plea agreement of ten years.

STANDARD OF REVIEW

To succeed on a motion pursuant to RCr 11.42 claiming ineffective assistance of counsel, the movant must show that his counsel's performance was inadequate and that this deficiency of counsel prejudiced the case. *Strickland v.*

Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984).

Additionally, with respect to a guilty plea, the movant must prove that counsel's performance so seriously affected the case, that but for the deficiency, the movant would not have pled guilty and would have insisted on going to trial. *Hill v.*

Lockhart, 474 U.S. 52, 59, 106 S.Ct. 366, 370, 88 L.Ed.2d 203 (1985). In reviewing an ineffective assistance of counsel claim, a court must examine counsel's conduct as to whether it was reasonable based upon professional norms.

Fraser v. Commonwealth, 59 S.W.3d 448, 452 (Ky. 2001).

Due to the difficulty in assessing counsel's performance, in retrospect, deference must be given counsel by the court.

A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance

Strickland, 466 U.S. at 689; 104 S.Ct. 2065.

Furthermore, we may not set aside a trial court's findings in such a proceeding unless they are clearly erroneous. *Lynch v. Commonwealth*, 610 S.W.2d 902 (Ky. App. 1980). *Commonwealth v. Payton*, 945 S.W.2d 424, 425 (Ky. 1997). The standard of review concerning a trial court's denial of a CR 60.02 motion is whether or not the trial court abused its discretion. *Richardson v. Brunner*, 327 S.W.2d 572, 574 (Ky. 1959). "The test for abuse of discretion is

whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Johnson v. Commonwealth*, 184 S.W.3d 544, 551 (Ky. 2005), citing *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). Rule 60.02(f) “may be invoked only under the most unusual circumstances” *Howard v. Commonwealth*, 364 S.W.2d 809, 810 (Ky. 1963); *see also*, *Cawood v. Cawood*, 329 S.W.2d 569 (Ky. 1959), and relief should not be granted, pursuant to Rule 60.02(f), unless the new evidence, if presented originally, would have, with reasonable certainty, changed the result. *See*, *Wallace v. Commonwealth*, 327 S.W.2d 17 (Ky. 1959); *Brown v. Commonwealth*, 932 S.W.2d 359, 362 (Ky. 1996).

ANALYSIS

In *Gross v. Commonwealth*, 648 S.W.2d 853, 856 (Ky. 1983), the Supreme Court of Kentucky held that the rules regarding the remedies available post-conviction are methodically designed:

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. . . . It is for relief that is not available by direct appeal and 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.

Id. at 856.

RCr 11.42(3) provides that, “the motion shall state all grounds for holding the sentence invalid of which the movant has knowledge.” Barrett makes no claim, nor explanation as to why it was that the issues of the “unknown” plea agreement, or the unconstitutionality of the assault statutes could not have been presented in his first post-conviction action. Although we hasten to mention that had Barrett presented a compelling reason as to why this successive claim should proceed, he would nevertheless fail due to the incredulous and spurious nature of his allegations. As the trial court found, whether or not Barrett knew of the ten year offer on a plea of guilty is not just doubtful, but immaterial; Barrett turned down a later offer of seven years and proceeded to trial. In light of this, Barrett’s assertion that he would have accepted a ten year offer if only he had known of its existence is wholly without merit. Therefore, we discern no abuse of abuse of discretion in the trial court’s denial of his request for relief under RCr 11.42.

We note that Civil Rule 60.02(a) through (e) provides that “a court may, upon such terms as are just, relieve a party . . . from its final judgment, order or proceeding” if one or more of several circumstances are present, including: mistake, inadvertence, surprise or excusable neglect; newly discovered evidence that could not, with due diligence, have been discovered in time to move for a new trial; perjury; fraud affecting the proceedings; the judgment being void, satisfied, released, discharged or overturned. Subsection (f) of CR 60.02 also provides for relief for “any other reason of an extraordinary nature justifying relief.” The trial

court's ruling on this matter was sound as there is simply no reason justifying relief. The issues presented to this Court could have been litigated previously and the appeal of that decision rendered.

We now turn to Barrett's other claim of relief, that being that the assault statute is unconstitutionally vague, thereby allowing the prosecution to exercise arbitrary power. In truth, Barrett's actual argument is not that the statute is vague, but that his fists were the only evidence of a weapon or dangerous instrument presented at the trial of this matter. Thus, he opines, the evidence was insufficient to constitute assault in the first degree, because the Commonwealth did not prove that the brain injury was caused by a dangerous instrument.

The very definition of dangerous instrument includes hands and belies Barrett's contention:

“Dangerous instrument” means any instrument, including parts of the human body when a serious physical injury is a direct result of the use of that part of the human body, article, or substance which, under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or serious physical injury.

KRS 500.080.

Additionally, it is well-established that a valid guilty plea constitutes a waiver of all defenses other than that the indictment charged no offense. *Centers v. Commonwealth*, 799 S.W.2d 51, 55 (Ky. App. 1990); *Greer v. Commonwealth*, 713 S.W.2d 256 (Ky. App. 1986). In either instance, if it is the constitutionality of the statute, or the insufficiency of the evidence, Barrett's arguments were waived

when he entered a guilty plea to assault in the first degree. *See Windsor v. Commonwealth*, 250 S.W.3d 306, 307 (Ky. 2008); *Taylor v. Commonwealth*, 724 S.W.2d 223, 225 (Ky. App. 1986). Furthermore, this Court held Barrett's guilty plea was voluntarily, knowingly, and intelligently made in our previous decision denying his first RCr 11.42 appeal; therefore, any issues regarding Barrett's plea of guilty are meritless.

Finally, CR 60.02 is not intended to allow persons to litigate issues that have previously been presented and ruled upon either in an earlier direct appeal or collateral attack or to re-present issues that could have been raised in those proceedings. *McQueen v. Commonwealth*, 948 S.W.2d 415, 416 (Ky. 1997); RCr 11.42(3). Accordingly, Barrett is foreclosed from raising any questions under CR 60.02 which could reasonably have been presented in his prior RCr 11.42 proceeding. Because Barrett did not raise any issues regarding the constitutionality of KRS 506.080 or of the sufficiency of the evidence, he is foreclosed from doing so under CR 60.02.

Thus, we hold that the judgment of the Campbell Circuit Court denying the motion is affirmed in all matters.

ALL CONCUR.

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