

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2008-CA-001581-MR

PAUL RAY MILLER

APPELLANT

v.

APPEAL FROM PERRY CIRCUIT COURT  
HONORABLE WILLIAM ENGLE, III, JUDGE  
ACTION NO. 95-CR-00050

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: KELLER, MOORE AND TAYLOR, JUDGES.

MOORE, JUDGE: This is an appeal by Paul Ray Miller from an order of the Perry Circuit Court denying his CR<sup>1</sup> 60.02 motion. Upon review of the record, we affirm.

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<sup>1</sup> Kentucky Rule of Civil Procedure.

## I. FACTUAL AND PROCEDURAL BACKGROUND

Prior to delving into the facts of this case, it is necessary for the Court to address issues pertaining to the record. Substantial portions of the Trial Record (TR) are missing. The existence of some missing motions were proven by court orders, judgments, and supplements in the record.<sup>2</sup>

Omitted from the record is the CR 60.02 motion before us. Miller filed two *pro se* CR 60.02 motions. Contrary to the trial judge's belief, the first CR 60.02 motion can be found in the record.<sup>3</sup> The second CR 60.02 motion, on which this appeal is founded, is absent from the record.

However, multiple supplements to the missing CR 60.02 motion were filed. In addition to multiple *pro se* supplements filed by Miller, counsel filed a supplement to the missing CR 60.02 motion. Counsel's supplement to the unrecorded *pro se* CR 60.02 motion reiterates Miller's *pro se* motion and Miller's previously filed *pro se* supplements to that motion.<sup>4</sup> From counsel's reiteration, we glean the contents of the CR 60.02 motion and its supplements which cannot be

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<sup>2</sup> On July 26, 2001, Miller filed a notice of appeal regarding his first CR 60.02 motion. Months later on October 25, Miller filed a memorandum in support of an RCr 11.42 motion. The record contains an RCr 11.42 motion at TR 451; however, the motion is not file stamped. The Perry Circuit Court wrote that "Miller has never filed an RCr 11.42 motion." Miller does not challenge the status of the motion. Nothing in the record leads us to believe this matter was returned to the trial court in the time period between July 26 and October 25. We are uncertain as to why the motion is in the record or why the court accepted it. We are certain that the RCr 11.42 motion is not before us.

<sup>3</sup> TR 402.

<sup>4</sup> TR 519.

found in the record. Counsel thoroughly reviewed the facts and issues, apprising this Court of the information necessary to render an opinion.

No allegations have been made or motions have been filed for additional rulings pursuant to the CR 60.02 motion on appeal. Miller does not claim the trial court did not address all of his issues. Therefore, we presume from counsel's and Miller's supplements that the trial court ruled on all issues argued by Miller and his counsel. Although the record is incomplete, we conclude the record contains all information needed to determine the issues on appeal.

In the trial court, Miller was indicted on one count of murder and six counts of first-degree wanton endangerment. After two trials, final judgment was entered, and Miller was convicted. On direct appeal, the Kentucky Supreme Court affirmed Miller's conviction.

Miller has filed two CR 60.02 motions in total. The first CR 60.02 motion, based on subsections (e) and (f), was filed in June 2001. The trial court denied this motion, and Miller appealed to the Court of Appeals. Shortly thereafter, Miller moved to dismiss that appeal. In March 2002, the Court of Appeals granted Miller's motion to dismiss his appeal. Miller later moved to resubmit his CR 60.02 appeal. Miller's motion to resubmit was denied in September of 2004. In April 2007, the Court of Appeals denied a motion from Miller to reinstate his CR 60.02 appeal.

Although it is not in the record, Miller filed a second *pro se* CR 60.02 motion in August 2007. Counsel was then appointed for Miller; nonetheless,

Miller filed *pro se* supplements to his August 2007 motion in October 2007 and November 2007. Counsel filed a supplement to Miller's *pro se* CR 60.02 motion in January 2008. Miller filed an additional *pro se* supplement in March 2008. The Commonwealth filed a response, and Miller filed a reply. Ultimately the circuit court denied Miller's second CR 60.02 motion in August 2008.

In denying Miller's second CR 60.02 motion, the circuit court determined that Miller's claim of ineffective assistance of counsel, which apparently was the actual basis of the motion, should have been raised in a motion pursuant to RCr 11.42. An RCr 11.42 motion would have been time barred under the rule. Miller appealed.

On appeal, Miller argues that his due process rights under the United States and Kentucky Constitutions were violated when the trial court failed to hold an evidentiary hearing to determine Miller's competency to stand trial. Additionally, Miller argues that he was denied other constitutional rights vested by the United States and Kentucky Constitutions when counsel failed to prepare and present a proper defense at trial.

The Commonwealth points out that Miller does not argue anything on appeal that was not or could not have been asserted in a prior CR 60.02 motion or on direct appeal.

## **II. STANDARD OF REVIEW**

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). We will not disturb the exercise of that discretion on appeal absent abuse. *Id.* “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)).

### III. ANALYSIS

As explained in *Gross v. Commonwealth*, 648 S.W.2d 853, 856 (Ky. 1983), the rules regarding post-conviction remedies are designed for specific purposes.

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 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.*

In this case, the trial judge held:

“Civil Rule 60.02 is not intended merely as an additional opportunity to relitigate the same issues which could ‘reasonably have been presented’ by direct appeal or RCr 11.42.” *McQueen v. Commonwealth*, 948 S.W.2d 415, 416 (Ky. 1997). RCr 11.42 and CR 60.02 are mutually exclusive in criminal cases. *Gross v. Commonwealth*,

648 S.W.2d 853, 856 (Ky. 1983). . . . Miller's arguments on this issue, clearly RCr 11.42 claims, are now time-barred by RCr 11.42's three-year statute of limitations.

We agree that Miller is making an RCr 11.42 claim under the guise of CR 60.02.

On appeal, Miller argues that an evidentiary hearing was required to determine his competency to stand trial. Based on the trial court's judgment denying Miller's motion, it appears that he argued the lack of an evidentiary hearing below. The trial court held that "Miller's arguments, which generally involve allegations that certain mitigating evidence about Miller's mental state were not presented, are actually issues that could have been raised in an RCr 11.42 motion." Therefore, the trial court held this claim to be under RCr 11.42 rather than CR 60.02 and dismissed the claim as time barred.

Miller also argues on appeal that counsel failed to prepare or present a proper defense. Clearly this claim would be properly designated as an RCr 11.42 motion and also time barred under the trial court's judgment.

Looking at Miller's appellate brief in conjunction with the circuit court's judgment, we are of the opinion that the circuit court did not abuse its discretion in denying Miller's motion. A defendant is required to avail himself of RCr 11.42 while in custody under sentence as to any ground of which he is aware, or should be aware, during the period when this remedy is available to him. *Gross*, 648 S.W.2d at 857. "The 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.* The circuit court's judgment was

not arbitrary, unreasonable, unfair, or unsupported by sound legal principles.

However, we note that there are additional legal theories that would have resolved this case other than holding the CR 60.02 motion to be time barred as an RCr 11.42 motion.

On direct appeal to the Kentucky Supreme Court (and in his first CR 60.02 motion), Miller argued his alleged lack of competency to stand trial. Miller claimed that he was not granted a hearing to determine his competency to stand trial. Our High Court ruled a hearing was, in fact, held. As this issue was already addressed by the Supreme Court on appeal, Miller is precluded from having this issue re-litigated. The Kentucky Supreme Court's decision is the law of the case.

Miller also argued on appeal that counsel failed to prepare and present a proper defense. Miller presented this issue in his first CR 60.02 motion.<sup>5</sup> That motion was denied by the trial court and withdrawn by Miller on appeal due to a lack of merit. The appeal of the trial court's decision was dismissed and the Court of Appeals denied Miller's requests to resubmit and reinstate his appeal. The matter has been finalized in the eyes of the law. Miller makes the same or similar arguments before us. All of his present arguments were or could have been asserted in the first CR 60.02 motion. Final disposition of that motion, or waiver of the opportunity to make it, shall conclude all issues that reasonably could have

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<sup>5</sup> The court below stated in its judgment that "Miller's previous CR 60.02 motion is not in the record." That was incorrect. Among the many documents absent from the record, the first CR 60.02 is not one of them. However, the trial court expressed no opinion whether Miller raised the same or similar arguments in that motion and drew no conclusion from the fact that Miller withdrew his appeal from a denial of the motion.

been presented in that proceeding. *Id.* He does not allege any facts that would give rise to relief under CR 60.02(e) or (f).

The trial court did not abuse its discretion as CR 60.02 is not intended to allow persons to re-litigate issues that have previously been presented and ruled upon, or to present new issues that could have been raised in those proceedings. *McQueen v. Commonwealth*, 948 S.W.2d 415, 416 (Ky. 1997); RCr 11.42(3). CR 60.02 “is available only to raise new issues which cannot be raised in other proceedings.” *Id.* Miller has had abundant opportunities to address all of those issues in his direct appeal or in his prior post-conviction motions. Therefore, we conclude that CR 60.02 relief is not warranted. The prior rulings procedurally bar Miller’s claims.

Additionally, all of Miller’s claims are barred by the doctrine of res judicata. “Res judicata is a doctrine that bars subsequent suits between the same parties and their privies on a cause of action that was previously decided upon its merits.” *Buis v. Elliott*, 142 S.W.3d 137, 139 (Ky. 2004).

Res judicata is generally thought of as consisting of two subparts. Claim preclusion bars a party from re-litigating a previously adjudicated cause of action and entirely bars a new lawsuit on the same cause of action. . . . Issue preclusion, also known as collateral estoppel, bars a party from re-litigating any issue actually litigated and finally decided in an earlier action.

*Id.* at 140 (internal quotation marks omitted).



All of Miller's claims were raised or could have been raised on direct appeal or in his prior CR 60.02 motion. Therefore, his present claims are also barred by the doctrine of res judicata.

#### IV. CONCLUSION

Application of any of the above legal theories would result in affirmation of the trial court. The trial court did not abuse its discretion in denying Miller's second CR 60.02 motion. Accordingly, the judgment of the Perry Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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