

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-002351-MR

MICHAEL VINCENT

APPELLANT

v. APPEAL FROM EDMONSON CIRCUIT COURT
HONORABLE RONNIE C. DORTCH, JUDGE
ACTION NO. 00-CR-00003

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CAPERTON AND DIXON, JUDGES; HENRY,¹ SENIOR JUDGE.

HENRY, SENIOR JUDGE: Michael L. Vincent, proceeding *pro se*, appeals from an order of the Edmonson Circuit Court entered on October 28, 2008, which denied his motion made pursuant to Kentucky Rules of Civil Procedure (CR) 60.02. Finding no error, we affirm.

¹ Senior Judge Michael L. Henry 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.

Vincent, and his mother and co-defendant, Martha Poteet, were indicted for arson in the second degree in connection with the burning of a trailer. Following a jury trial, Vincent was convicted of the charge on March 23, 2004, and received a sentence of ten years' imprisonment. No appeal was taken from his conviction. He filed a *pro se* motion pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42 on September 15, 2006, which was denied on November 31, 2006. No appeal was taken from the denial of the motion. On August 29, 2008, Vincent, again proceeding *pro se*, filed the CR 60.02 motion which is the subject of this appeal, requesting his sentence to be set aside and for a new trial. The motion was denied by the trial court on October 28, 2008. This appeal followed.

Vincent argues that he was denied effective assistance of counsel at his trial, due to his attorney's failure to investigate and present a meaningful defense. He claims that the indictment in the case was incorrect because it stated that the trailer which was destroyed by arson belonged to an individual named Bonnie Lindsey, when in fact the trailer belonged to his mother, Martha Poteet. He further argues that Poteet and her friend, Schirlene Young, actually conspired to burn the trailer and that Vincent had nothing to do with it. Finally, he claims that a friend, Timothy Herald, was an alibi witness who could place him in another city at the time the crime was committed.

In *Gross v. Commonwealth*, 648 S.W.2d 853 (Ky. 1983), the Kentucky Supreme Court explained that the structure of post-conviction review is

not haphazard or overlapping. *Id.* at 856. *Gross* made it clear that a criminal defendant must first bring a direct appeal when available, then utilize RCr 11.42 by raising every error of which “he is aware, or should be aware, during the period when this remedy is available to him.” *Id.* at 857. CR 60.02 may be used only in extraordinary circumstances not otherwise subject to relief by direct appeal or by way of RCr 11.42. *Id.* at 856.

Vincent’s argument regarding the indictment is barred from our consideration because he raised it in his earlier RCr 11.42 motion.

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 proceedings. RCr 11.42(3); *Gross v. Commonwealth, supra*, at 855, 856. The obvious purpose of this principle is to prevent the relitigation of issues which either were or could have been litigated in a similar proceeding.

McQueen v. Commonwealth, 948 S.W.2d 415, 416 (Ky. 1997).

Even if we consider the merits of the argument, we fail to see why the ownership of the trailer would be material in this case. KRS 513.030 states that

(1) A person is guilty of arson in the second degree when he starts a fire or causes an explosion with intent to destroy or damage a building:

(a) Of another; or

(b) Of his own or of another, to collect or facilitate the collection of insurance proceeds for such loss.

(2) In any prosecution under this section, it is a defense that:

(a) No person other than the defendant had a possessory or proprietary interest in the building, or, if other persons had such an interest, all of them consented to the defendant's conduct; and

(b) The defendant's sole intent was to destroy or damage the building for a lawful purpose.

The jury at Vincent's trial was instructed in pertinent part as follows:

You will find the Defendant Michael Vincent guilty of Second-Degree Arson under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:

A. That in this county on or about February 5, 2000 and before the finding of the Indictment herein, the above-named Defendant, Michael Vincent committed the offense of Second-Degree Arson when he, alone or in complicity with Martha Poteet, damaged a building at 1156 Oak Grove Church Road by setting fire to it;

B. That the fire was started intentionally;

AND

C. That in so doing, it was his intention to damage or destroy the building for the purpose of collecting or facilitating the collection of insurance proceeds.

It was immaterial to Vincent's prosecution whether the trailer belonged to Poteet or to Lindsey. Because the jury found that he did not destroy the building for a lawful purpose, the statutory defense (that he acted with the owner's consent and with a lawful purpose) was unavailable to him.

As to his claims that Schirlene Young, not he, was his mother's co-conspirator, and that Timothy Herald (who testified at trial) could provide him with an alibi for the time the arson was committed, CR 60.02 provides that a motion

brought on the grounds of subsection (c) “perjury or falsified evidence” must be brought “not more than one year after the judgment[.]” Even if Vincent’s claim falls within one of the subsections of the rule that permit a motion to be made “within a reasonable time,” Vincent has not explained why he has raised these issues for the first time almost four years after his conviction. The trial court did not, therefore, abuse its discretion in denying his motion. *White v. Commonwealth*, 32 S.W.3d 83, 86 (Ky. App. 2000).

The order of the Edmonson Circuit Court denying Vincent’s CR 60.02 motion is therefore affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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