

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2010-CA-000261-MR

JOHNNY COWHERD

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE JAMES D. ISHMAEL, JR., JUDGE  
ACTION NO. 93-CR-00395

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: TAYLOR, CHIEF JUDGE; STUMBO, JUDGE; SHAKE,<sup>1</sup> SENIOR JUDGE.

STUMBO, JUDGE: Johnny Cowherd appeals from an Order of the Fayette Circuit Court denying his motion for CR 60.02 relief from a Final Judgment of the Fayette Circuit Court. He argues that he was entitled to CR 60.02 relief because his

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<sup>1</sup> Senior Judge Ann O'Malley Shake, 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.

criminal sentence was not allowable by law, and because the jury instructions were improper. We conclude that these issues should have been raised, if at all, in one of the five CR 60.02 and RCr 11.42 post-judgment motions previously filed by Cowherd. In the alternative, even if these issues were properly before the Fayette Circuit Court, it correctly disposed of them on the merits. Accordingly, we affirm the Order on appeal.

On November 23, 1993, a Final Judgment of the Fayette Circuit Court was rendered which reflected a jury verdict finding Cowherd guilty on two counts of First-Degree Rape, four counts of First-Degree Sodomy and one count of Second-Degree Burglary. Cowherd was sentenced to 104 years in prison, and the Judgment was affirmed on appeal to the Kentucky Supreme Court.

Over the years which followed, Cowherd filed at least five motions for post-judgment relief. These include an RCr 11.42 motion filed in 1994, three motions for CR 60.02 relief which were filed in 1997, 1999, and 2008, and a motion to vacate and motion for declaratory judgment filed in 2000. Each of these motions was denied, and each Order denying was affirmed on appeal to this Court. Cowherd also unsuccessfully sought relief from judgment in United States District Court.

On January 5, 2010, Cowherd filed his fourth CR 60.02 motion, which now forms the basis for the instant appeal. In this latest motion, Cowherd argued that the sentence and the jury instructions were improper, thus entitling him to have the judgment vacated. The matter went before the circuit court, which

opined that Cowherd's motions were repetitive and meritless, and which found that the sentencing issue was previously raised by Cowherd, denied by the circuit and affirmed on appeal. It also found that the jury instruction argument should have been raised, if at all, in one of Cowherd's previous motions for relief. The court rendered an Order denying this latest motion for CR 60.02 relief, and Cowherd's subsequent Motion for Reconsideration also was denied. This appeal followed.

Cowherd now argues that the circuit court erred in denying his motion for CR 60.02 relief. He again maintains that his sentence of 104 years is not allowable by law. Though not clearly articulated, it appears that Cowherd is arguing that he was improperly sentenced under KRS 532.110(1)(c). This argument was previously raised by Cowherd, disposed of by the circuit court, and affirmed on appeal to this Court. As such, it is not properly before us. *Gross v. Commonwealth*, 648 S.W.2d 853 (Ky. 1983).

**As stated in *Gross*, “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.” *Id.* at 856. CR 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 by RCr 11.42 proceedings. *McQueen* at 416. The obvious purpose of this principle is to prevent the relitigation of issues which either were, should or could have been litigated in a similar proceeding. *Id.* citing *Gross* at 855-856 and RCr 11.42(3).**

***Stoker v. Commonwealth*, 289 S.W.3d 592 (Ky. App. 2009).**

*Arguendo*, even if Cowherd’s argument were properly raised, the Commonwealth correctly notes that because Cowherd was convicted in 1993, he was properly sentenced pursuant to KRS 446.110 and the pre-amendment provisions of KRS Chapter 532. The sentencing statute upon which Cowherd apparently relies, KRS 532.110(1)(c), was enacted in 1998, or some five years after Cowherd was sentenced. We find no error on this issue.

Cowherd also argues that the jury instructions were not specific enough with regard to each count and each charge. This issue should have been raised, if at all, on direct appeal to the Kentucky Supreme Court, then via Cowherd’s RCR 11.42 motion in 1994, and then in the first of his three previous CR 60.02 motions. *Gross, supra*.

Cowherd also contends that the circuit court erred in failing to conduct a hearing on the motion. No hearing is required where the motion may be

disposed of by reference to the record. *Gross, supra*. We find no error in the circuit court's adjudication of Cowherd's motion by reference to the record, and without a hearing.

Lastly, Cowherd maintains that he is entitled to relief based on palpable error. "A palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error." RCr 10.26. We find no basis for concluding that manifest injustice has resulted from any alleged error arising at trial or in sentencing, and are not persuaded by Cowherd's argument on this issue.

*Commonwealth v. Jones*, 283 S.W.3d 665 (Ky. 2009).

"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 judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999) (citing 5 Am. Jur. 2d *Appellate Review* § 695 (1995)). We cannot conclude that the circuit court's disposition of Cowherd's motion was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. As such, we find no error.

For the foregoing reasons, we affirm the Order of the Fayette Circuit Court denying Cowherd's motion for CR 60.02 relief.

ALL CONCUR.

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