

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-002296-MR

TIMOTHY C. SHANE

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE SUSAN SCHULTZ GIBSON, JUDGE
ACTION NOS. 04-CR-000977 & 08-CR-001427

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: DIXON, MOORE, AND THOMPSON, JUDGES.

MOORE, JUDGE: Timothy C. Shane appeals the Jefferson Circuit Court's order denying his RCr¹ 11.42 and CR² 60.02 motions to vacate the judgment of conviction against him. After a careful review of the record, we affirm because

¹ Kentucky Rule of Criminal Procedure.

² Kentucky Rule of Civil Procedure.

Shane's CR 60.02 claim could have been presented in RCr 11.42 proceedings, and his claim of prosecutorial vindictiveness was not presented to the circuit court.

I. FACTUAL AND PROCEDURAL BACKGROUND

Following a DNA analysis, Shane was indicted in 2004 on charges of first-degree rape, first-degree sodomy, first-degree burglary, and of being a second-degree persistent felony offender (PFO-2nd). The events upon which the rape, sodomy, and burglary charges were based occurred in 1993. Shane was incarcerated in Colorado at the time of his 2004 indictment, and he was returned to Kentucky via interstate detainer to face his Kentucky charges.

A jury trial was held, and the jury found Shane guilty of first-degree burglary, but the jury returned a not guilty verdict on the charge of first-degree sodomy. The jury was unable to reach a verdict on the first-degree rape charge. Therefore, a mistrial was declared concerning the rape charge.

During the penalty phase of the trial, the jury found Shane guilty on the PFO-2nd charge. Shane was then sentenced to a term of twenty years of imprisonment for the burglary conviction, which was enhanced to thirty-five years due to his PFO-2nd conviction. The sentence was ordered to run consecutively to Shane's sentence in Colorado.

Shane appealed. While the appeal was pending, pursuant to an agreement between Shane and the Commonwealth, the Commonwealth moved to dismiss the rape charge without prejudice. The motion stated that in exchange for the dismissal without prejudice, Shane "expressly waived any speedy trial issues

regarding the dismissed count.” The Commonwealth also stated in the motion that it was the Commonwealth’s understanding that because the charge was being dismissed without prejudice, Shane could then be returned to Colorado to continue serving his Colorado sentence. The circuit court granted the Commonwealth’s motion.

In June 2005, while his direct appeal was still pending, Shane filed a CR 60.02 motion to vacate the judgment. He alleged that his case should be dismissed with prejudice because the Commonwealth had violated various sections of the Interstate Agreement on Detainers (IAD). Shane asserted that the Notice of Detainer and Request for Final Disposition of Detainer were received by the Colorado Department of Corrections from the Commonwealth’s Attorney’s Office on June 22, 2004, and that the detainer was served on Shane on July 1, 2004. Shane claimed that upon signing the waiver, he was instructed “to submit a letter in response to the Commonwealth’s Attorney [O]ffice and [the circuit] court to request . . . [f]inal [d]isposition of [the] detainer.” He also asserted that he was returned to Kentucky on September 17, 2004, and during a January 7, 2005 suppression hearing, his letter was entered into the record as a *pro se* motion. Shane’s CR 60.02 motion was denied because the circuit court noted that an “appeal on the merits [was] pending.” Shane appealed that decision to this Court, but the appeal was ultimately dismissed for want of prosecution because Shane failed to abide by the Court’s order to file his *pro se* appellate brief by a particular date.

Meanwhile, the Kentucky Supreme Court reversed Shane's conviction on direct appeal and remanded the case for a new trial. The Court reasoned that the trial court should have removed a biased juror for cause, rather than forcing Shane to use a peremptory strike to remove that juror from the venire. *See Shane v. Commonwealth*, 243 S.W.3d 336, 343 (Ky. 2007).

While Shane was awaiting a new trial in the circuit court on his first-degree burglary charge following the Supreme Court's remand, another detainer was lodged against Shane, and he was re-indicted in April 2008. This time he was charged with first-degree rape, first-degree robbery, and first-degree unlawful imprisonment. Colorado returned the detainer, which was dated May 29, 2008, but it was not signed by the Colorado Department of Corrections's Detainer Administrator until June 17, 2008. On June 5, 2008, Shane requested final disposition of the detainer pursuant to the IAD.

On August 18, 2008, Shane filed a motion to dismiss the charges of first-degree rape and first-degree burglary due to violations of KRS³ 500.110 and the IAD, which he stated was enacted at KRS 440.450. In December 2008, he filed another motion to dismiss the indictments against him pursuant to CR 60.02, again claiming that the Commonwealth had violated KRS 440.450. Approximately one week later, Shane filed a supplement to his second motion to dismiss, which included citations to case law.

³ Kentucky Revised Statute.

In April 2009, Shane was convicted, following a jury trial, of first-degree rape, first-degree burglary, second-degree robbery, and first-degree unlawful imprisonment. Shane waived his right to a separate penalty hearing, and he accepted the following penalties: twenty years of imprisonment for the rape conviction; ten years of imprisonment for the burglary conviction; ten years of imprisonment for the robbery conviction; and five years of imprisonment for the unlawful imprisonment conviction. He agreed that the penalties for the burglary, robbery, and unlawful imprisonment convictions should be served concurrently with each other, and consecutively to his sentence for the rape conviction. Therefore, he agreed that his total sentence would be thirty years of imprisonment. Shane also accepted that this sentence would be run consecutively to any sentence he was currently serving, and he waived his right to appeal the jury's verdict from the guilt phase of his trial. The circuit court sentenced him accordingly.

In June 2009, Shane filed another CR 60.02 motion, claiming that his convictions should be vacated because they were obtained in violation of the IAD. Then, in March 2010, Shane's counsel filed a motion to vacate his convictions and dismiss all counts with prejudice pursuant to RCr 11.42. In that motion, Shane alleged that he had received the ineffective assistance of trial counsel when defense counsel failed to argue that the prosecutor was being vindictive in seeking and obtaining indictments on other charges that were not charged initially. Shane claimed that the prosecutor was being vindictive. He bases this argument on the fact that he won on appeal, and when his case was remanded, the prosecutor

decided to charge him with other crimes, even though the prosecutor allegedly had the information upon which those other charges were based at the time of the original indictment.

The circuit court entered an order denying Shane's CR 60.02 and RCr 11.42 motions. The court stated that previously, following a September 30, 2008 court hearing on Shane's motion to dismiss, the court had denied the motion to dismiss,⁴ "citing the language of the IAD, and ruling that the 180-day clock began to run on June 25, 2008, when Shane complied with the letter of the law and properly notified the Court and the Commonwealth of his desire to be returned to face the charges." The circuit court also noted that after it denied Shane's motion to dismiss, defense counsel moved for a continuance of the trial, which the court granted.⁵ The trial was rescheduled for February 10, 2009. However, the Commonwealth was not able to go to trial on that date because the prosecutor was ill. The court stated that Shane had objected to another continuance, but defense counsel "acknowledged that the prosecutor's illness was such that he would be

⁴ We were unable to find any written order in the record denying Shane's initial motion to dismiss.

⁵ There is nothing in the record before us supporting these findings by the circuit court. Specifically, the September 30, 2008 hearing at which the court heard arguments concerning the alleged violations of the IAD, the court allegedly denied Shane's motion to dismiss, Shane's defense counsel moved for a continuance, and the court granted that motion, is not in the record on appeal. In fact, the tape receipt that was filed in this Court on appeal specifying which hearings could be found at which part of the video record states as follows: "The arraignment on 4-5-09 [and] several motion hours were specified on the designation of record, however, it was the practice of Judge Conliffe to not record his motion hours." (Capitalization changed). Additionally, the court's denial of Shane's motion to dismiss, Shane's motion for a continuance, and the court's granting of that motion were not reduced to writing. We remind the circuit court and the parties that the court speaks only through its written record. *See Holland v. Holland*, 290 S.W.3d 671, 675 (Ky. App. 2009). Regardless, because Shane's claims in the present appeal fail due to procedural errors on his part, we need not review the merits of his claims.

unable to be present in court and suggested a relatively short continuance.” The trial was rescheduled for April 20, 2009, and trial began on that date. The circuit court noted that the motion to dismiss was not renewed; Shane was convicted; the parties reached an agreement concerning his sentence; and the court sentenced him accordingly.

In its order denying Shane’s CR 60.02 and RCr 11.42 motions, the circuit court noted that in his RCr 11.42 motion, Shane alleged that he had received the ineffective assistance of counsel because counsel had “failed to challenge the added charges of first-degree robbery and unlawful imprisonment, on the basis that the charges constitute[d] vindictive prosecution, added only as a punishment of Shane for appealing, and prevailing on, his original conviction.” The court also noted that Shane’s CR 60.02 motion claimed that his conviction should be vacated “because his case was not tried within the time prescribed by the IAD.”

The circuit court first held that it was able to make a determination on all of the issues based upon the record and, therefore, an evidentiary hearing was unnecessary. Regarding the vindictive prosecution claim, the circuit court found that the victim

testified to events which supported the indicted offenses, but which also supported additional charges of robbery and unlawful imprisonment. . . . Once the conviction was reversed, on grounds that had nothing to do with any actions of the Commonwealth, the Commonwealth took the opportunity to add two counts which were supported by an objective review of the trial record.

Therefore, the court held that “[w]ithout more, this Court cannot conclude that this action alone signifies vindictiveness.” The court also held that Shane was

unable to demonstrate that the inclusion of the additional charges prejudiced him in any way. Both juries heard the same facts, and the first jury set a penalty based on those facts. The second jury ultimately found him guilty of first[-]degree burglary, first-degree rape, second-degree robbery and first-degree unlawful imprisonment; however, the added charges resulted in convictions for only C and D felonies, the penalties for which were capped at 20 years, and which could not have run consecutively with the penalties for the burglary and rape charges. Shane negotiated a penalty of 30 years, five (5) years less than the jury imposed in the first trial. Additionally, as part of that negotiation, the persistent felony offender charge was dismissed. Therefore, even if counsel was ineffective in failing to assert a challenge to the additional charges, Shane can demonstrate no prejudice caused by the failure.

As for Shane’s assertion under CR 60.02 that his case should be dismissed due to violations of the IAD, the circuit court held that this claim also failed. The court noted that Shane had raised the issue after his first trial, but the circuit court declined to address it while the case was pending on appeal. The court stated that Shane then raised the issue again after he was reindicted, “and the Court held an extensive hearing on the issue the day before his October 2008 trial date. At that time, the Court found no violation of the IAD.”⁶ The circuit court noted that Shane had then requested a continuance,⁷ and the court reasoned that the

⁶ As we stated previously, this hearing is not in the record before us, and the circuit court did not include its findings in the written record.

⁷ This is the motion that we previously explained is not in the record before us.

request waived any objection he may have had. Further, after he was found guilty in his second trial, “Shane negotiated a 30 year sentence, and agreed to give up any appeal of the guilty phase. Shane did not reserve the right to appeal any procedural issues. The Court finds no reason to grant the extraordinary remedy of vacating the conviction pursuant to CR 60.02.” Therefore, Shane’s RCr 11.42 and CR 60.02 motions were denied.

Shane, proceeding *pro se*, now appeals, contending as follows: (a) his rights under KRS 440.450 Article I and Article III(4) were violated; and (b) the prosecutor acted vindictively in charging him with additional offenses after Shane successfully appealed his initial conviction.

II. ANALYSIS

A. VIOLATIONS OF KRS 440.450 ARTICLE I AND ARTICLE III(4)

Shane first alleges that the Commonwealth violated his rights under the IAD, specifically, under KRS 440.450 Article I and Article III(4). He raised this claim in the circuit court in his CR 60.02 motion. On appeal, we review the denial of a CR 60.02 motion for an abuse of discretion. “A movant is not entitled to a hearing on a CR 60.02 motion unless he affirmatively alleges facts which, if true, justify vacating the judgment and further allege[s] special circumstances that justify CR 60.02 relief.” *White v. Commonwealth*, 32 S.W.3d 83, 86 (Ky. App. 2000) (internal quotation marks and citation omitted).

“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.” *McQueen v. Commonwealth*, 948 S.W.2d 415, 416 (Ky. 1997) (internal quotation marks omitted). Civil Rule 60.02 “is not a separate avenue of appeal to be pursued in addition to other remedies, but is available only to raise issues which cannot be raised in other proceedings.” *Id.*

Although Shane waived his right to directly appeal issues from the guilt phase of his trial when he entered into the penalty-phase agreement with the Commonwealth, this allegation could have been presented in RCr 11.42 proceedings. Therefore, it was not properly brought in Shane’s CR 60.02 motion because it could have been presented in a motion filed pursuant to RCr 11.42.

B. PROSECUTORIAL VINDICTIVENESS

Shane next contends that the prosecutor acted vindictively in charging him with additional offenses after Shane successfully appealed his initial conviction. However, in the circuit court, Shane made this assertion as an ineffective assistance of counsel claim. Thus, Shane did not raise the claim he asserts on appeal in the circuit court. Because Shane did not present this claim to the circuit court, we will not consider it for the first time on appeal. *See Kennedy v. Commonwealth*, 544 S.W.2d 219, 222 (Ky. 1976) (“The appellants will not be permitted to feed one can of worms to the trial judge and another to the appellate court.”).

Accordingly, the order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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