

RENDERED: AUGUST 19, 2011; 10:00 A.M.

NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001365-MR

HENRY F. CLAYTON

APPELLANT

v.

APPEAL FROM GRANT CIRCUIT COURT
HONORABLE STEPHEN L. BATES, JUDGE
ACTION NOS. 97-CR-00115 AND
98-CR-00016

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: CAPERTON, KELLER, AND LAMBERT, JUDGES.

CAPERTON, JUDGE: The Appellant, Henry F. Clayton, was convicted of stalking in the first degree, two counts of kidnapping, and assault in the second degree, and was sentenced to forty-two years of imprisonment in 1998. This appeal concerns the denial of Clayton's Kentucky Rules of Civil Procedure (CR)

60.02 motion. Having reviewed the record, the arguments of the parties, and the applicable law, we affirm.

Clayton was convicted of the aforementioned charges on September 23, 1998, and sentenced to forty-two years of imprisonment. His conviction was affirmed by the Kentucky Supreme Court on August 26, 1999.¹ Thereafter, on September 21, 2001, Clayton filed a Kentucky Rules of Criminal Procedure (RCr) 11.42 motion, and the Commonwealth filed an extensive reply. On June 4, 2002, the trial court entered an order denying Clayton's RCr 11.42 motion, a decision which was affirmed by the Court of Appeals on January 9, 2004. On June 9, 2004, the Kentucky Supreme Court denied discretionary review.

Approximately five years later, on August 27, 2009, Clayton filed a CR 60.02 motion, which he amended several times. The Commonwealth replied, and on July 2, 2010, the trial court entered an order denying the motion. It is from that order that Clayton now appeals to this Court.

In reviewing the arguments of the parties, we note that our standard of review concerning a trial court's denial of a CR 60.02 motion is whether the trial court abused its discretion. *Brown v. Commonwealth*, 932 S.W.2d 359, 362 (Ky. 1996). 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). CR 60.02 is an extraordinary remedy that is available only when a substantial miscarriage of

¹ Case No. 1998-SC-000854.

justice will result from the effect of the final judgment. *Wilson v. Commonwealth*, 403 S.W.2d 710, 712 (Ky. 1966). We review the arguments of the parties with these standards in mind.

As his first basis for appeal concerning his CR 60.02 motion, Clayton asserts that the trial court's refusal to grant him a continuance so that he could prepare his case with the attorney of his choice² was an abuse of discretion and reversible error. Clayton asserts that his newly chosen counsel needed a reasonable opportunity to prepare for the case because he had just been hired at the time of the trial. In response, the Commonwealth argues that this issue has already been raised before and decided by our Kentucky Supreme Court, both on direct appeal and again in response to Clayton's RCr 11.42 motion. Thus, the Commonwealth asserts that Clayton cannot raise the same issue again on appeal of the denial of his CR 60.02 motion. We agree.

As noted, Clayton's conviction was affirmed by the Kentucky Supreme Court on August 26, 1999. In this Court's opinion affirming the denial of Clayton's subsequent RCr 11.42 motion, we stated, "The sole issue raised in his direct appeal concerned the refusal of the trial court to allow his court-appointed counsel to withdraw on the morning of trial (a situation which would have necessitated a continuance) in order that he might be represented by counsel employed by him. In its opinion affirming Clayton's conviction, the Supreme

² According to Clayton, he was previously advised that he could not have the attorney he desired and, accordingly, he had to choose another attorney.

Court held that the lower court did not abuse its discretion in requiring Clayton to proceed to trial with his appointed counsel.”

Having reviewed the record, we are in agreement with the Commonwealth that Clayton cannot raise the same issue in this appeal as he has already raised in his direct appeal. The decision of our Kentucky Supreme Court on this exact issue is the law of the case, and we are without authority to find otherwise. Further, CR 60.02 relief is not available for issues that could have been, or were, raised on direct appeal or in RCr 11.42 proceedings. *See Gross v. Commonwealth*, 648 S.W.2d 853, 858 (Ky. 1983); *McQueen v. Commonwealth*, 948 S.W.2d 415, 416 (Ky. 1997).

As his second basis for appeal, Clayton argues that “due to the budget crunch in the Commonwealth” and Clayton’s “peaceful nature,” his sentence should be reduced to time served. Clayton describes himself as a model inmate, and states that he has changed entirely as a person since the time of his conviction. Accordingly, he asserts that the remainder of his sentence should be vacated. Clayton also argues that public policy now favors more humane, just sentencing, and the conservation of state resources and that, as a result, the remainder of his sentence should be commuted. In response, the Commonwealth argues that this is merely Clayton’s attempt to avoid the Parole Board which has twice denied him parole. Again, we agree.

Clayton’s arguments concerning his character and the nature of our justice system are directly contrary to the holding of our Kentucky Supreme Court

in *McQueen v. Commonwealth*, 948 S.W.2d 415, 418 (Ky. 1997). In that case, McQueen argued that his death sentence “should be commuted to life imprisonment because his attitude and character have changed during his sixteen years of confinement.” Addressing that argument, our Supreme Court found that even if McQueen could prove a change in character, it would afford no basis for relieving him from his legally imposed punishment. Indeed, the Court found that McQueen’s arguments would be properly addressed through a plea to the executive branch pursuant to Section 76 of the Kentucky Constitution.

Such is the case with Clayton, *sub judice*. It is not within the purview of this Court to review Clayton’s arguments regarding his allegedly changed character, nor his status as a “model inmate.” Likewise, it is not within the authority of this Court to commute or vacate a sentence otherwise legally imposed upon Clayton as a result of the crimes for which he was convicted. Accordingly, we decline to either reverse or vacate Clayton’s sentence on this basis.

Finally, Clayton argues that his Fifth, Sixth, Eighth, and Fourteenth Amendment rights were violated as a result of the court’s refusal to grant him a continuance. Essentially, Clayton equates the denial of a continuance with the denial of his due process rights during the prosecution and adjudication of his case. For the aforementioned reasons, including the fact that the continuance issue has already been raised and ruled upon both on direct appeal and through Clayton’s RCr 11.42 motion, we decline to address this issue further herein based upon our reasoning *infra* in addressing the first alleged error.

Wherefore, for the foregoing reasons, we hereby affirm the July 2, 2010, order of the Grant Circuit Court denying Clayton's motion pursuant to CR 60.02.

KELLER, JUDGE CONCURS IN RESULT ONLY.

LAMBERT, JUDGE CONCURS.

BRIEF FOR APPELLANT:

Jack S. Gatlin
Covington, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Todd D. Ferguson
Assistant Attorney General
Frankfort, Kentucky