

Commonwealth of Kentucky
Court of Appeals

NO. 2011-CA-000742-MR

TIMOTHY WELLS

APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE FREDERIC J. COWAN, JUDGE
ACTION NO. 97-CR-000392

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: DIXON AND VANMETER, JUDGES; LAMBERT,¹ SENIOR JUDGE.

VANMETER, JUDGE: Timothy Wells appeals from the March 21, 2011 opinion and order of the Jefferson Circuit court denying his CR² 60.02 motion to vacate judgment and conviction. For the following reasons, we affirm.

¹ Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

² Kentucky Rules of Civil Procedure.

On March 20, 1997, when he was seventeen years of age, Wells entered a plea of guilty to first-degree robbery and was sentenced to serve twelve years in prison. In August 1997, he moved to be resentenced when he reached his eighteenth birthday, pursuant to KRS³ 640.030. The circuit court entered an order denying the motion. On appeal, this Court reversed the order in accordance with the holding in *Britt v. Commonwealth*, 965 S.W.2d 147 (Ky. 1998). See *Wells v. Commonwealth*, (1997-CA-003308-MR) (Ky.App. 1999). The opinion held that although a juvenile over the age of fourteen who commits a crime using a firearm is to be tried and sentenced as an adult, that juvenile remains a “youthful offender” for purposes of the ameliorative provisions of KRS Chapter 640 and, at eighteen, is entitled to a resentencing hearing pursuant to KRS 640.030. The pertinent portions of that statute state as follows:

If an individual sentenced as a youthful offender attains the age of eighteen (18) prior to the expiration of his sentence, and has not been probated or released on parole, that individual shall be returned to the sentencing court. At that time, the sentencing court shall make one (1) of the following determinations:

- (a) Whether the youthful offender shall be placed on probation or conditional discharge;
- (b) Whether the youthful offender shall be returned to the Department of Juvenile Justice to complete a treatment program, which treatment program shall not exceed the youthful offender's attainment of the age of eighteen (18) years and five (5) months. At the conclusion of the treatment program, the individual shall be returned to the sentencing court for a determination under paragraph (a) or (c) of this subsection; or

³ Kentucky Revised Statutes.

(c) Whether the youthful offender shall be incarcerated in an institution operated by the Department of Corrections[.]

KRS 640.030(2).

The case was remanded for a resentencing hearing, but it was never held.

Over seven years later, in March 2007, Wells filed a pro se motion requesting a hearing for final sentencing pursuant to KRS 640.030(2), and a motion to dismiss the indictment. The circuit court appointed counsel for Wells, and scheduled a final sentencing hearing. Wells failed to appear at the hearing because he was in federal custody, serving a sentence for an unrelated felony conviction. The circuit court ultimately entered an order denying both motions, stating that the motion to dismiss was without factual basis or legal merit, and that since Wells had “served out” his state sentence, returning him to court for resentencing under KRS 640.030 would serve no legitimate purpose. The order was entered on February 23, 2008, and reentered on October 27, 2009. No appeal was taken from either order.

On December 9, 2010, Wells filed a motion pursuant to CR 60.02(e), seeking to vacate the judgment and dismiss the robbery charge with prejudice, because he had never been resentenced. The motion stated that he was currently serving a federal sentence and was “negatively prejudiced by governmental delay because he was never afforded a final sentencing hearing and by the fact that the

above-styled indictment was never finally disposed of by the trial court; i.e. he was denied a final sentencing hearing as is required by statute.” The circuit court denied the motion and this appeal followed.

CR 60.02(e) permits a court to relieve a party from its final judgment, on the grounds that: “the judgment is void, or has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application[.]”

We review the denial of a CR 60.02 motion for an abuse of discretion. *White v. Commonwealth*, 32 S.W.3d 83, 86 (Ky.App. 2000). To warrant relief, the trial court’s decision must have been “arbitrary, unreasonable, unfair, or unsupported by sound legal principals.” *Clark v. Commonwealth*, 223 S.W.3d 90, 95 (Ky.2007). A trial court may grant relief under CR 60.02 only if a movant demonstrates “he is entitled to this special, extraordinary relief.” *Gross v. Commonwealth*, 648 S.W.2d 853, 856 (Ky.1983). We will affirm the trial court's decision absent a “flagrant miscarriage of justice.” *Id.* at 858.

Wells’s claims under CR 60.02(e) could have been raised in a direct appeal from the order of February 23, 2008.

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. . . . 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. . . . CR 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.

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

Wells nonetheless attempts to circumvent the obvious procedural bar to this action by arguing that (1) the trial court based its denial of his motion on clearly erroneous findings, (2) under *Begley v. Vogler*, 612 S.W.2d 339 (1981), his sentence is still pending because the circuit court did not implement the mandate of the Court of Appeals and (3) the failure to hold a resentencing hearing in accordance with the directive of the appellate court violated his constitutional right to speedy sentencing.

As to the first argument, any allegedly erroneous findings made by the circuit court in its order of March 21, 2011, were made in reliance on the earlier order of February 29, 2008, which was never challenged on appeal. Wells is, in effect, attempting a direct appeal of that prior order. “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.” *Gross v. Commonwealth*, 648 S.W.2d 853, 856 (Ky. 1983). Wells has simply failed to demonstrate why his claims could not have been brought in a direct appeal.

In regard to the second argument, *Begley* holds that “in those cases where an appellate court has ordered some corrective action to be taken, the litigation is not complete until the action is formally taken in the appropriate lower court.” *Begley*, 612 S.W.2d at 341. The circuit court did address the Court of Appeals mandate in its February 2008 order, and held that resentencing under KRS 640.030 would serve no legitimate purpose since Wells had served out his sentence. Right or wrong, this was a final judgment of the circuit court and could have been challenged on appeal.

Thirdly and finally, the constitutional argument regarding speedy sentencing could also have been raised on appeal. “[A]n appellate court ‘has no power on a second appeal to correct an error in the original judgment which either was, or *might have been* relied upon in the first appeal.’” *Brown v. Commonwealth*, 313 S.W.3d 577, 610-11 (Ky. 2010) quoting *Commonwealth v. Schaefer*, 639 S.W.2d 776, 777 (Ky. 1982) (emphasis added).

The opinion and order denying Wells’s CR 60.02 motion is hereby affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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