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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001562-MR

RONALD E. FERRIER

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE GREGORY M. BARTLETT, JUDGE
ACTION NO. 07-CR-00592

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * **

BEFORE: DIXON, LAMBERT AND THOMPSON, JUDGES.

DIXON, JUDGE: Appellant, Ronald Ferrier, appeals from an order of the Kenton Circuit Court denying his motion to vacate his judgment pursuant to CR 60.02 or, alternatively, RCr 11.42. Finding no error, we affirm.

In September 2007, Appellant, a former Kenton County Constable, was indicted on one count of impersonating a police officer stemming from actions that

occurred after his resignation from that position. Appellant subsequently entered an unconditional guilty plea and, on March 14, 2008, was sentenced to three years' imprisonment probated for a period of three years. On Friday March 11, 2011, three days before the expiration of his sentence, Appellant filed a motion seeking to have his conviction and sentence vacated. Appellant sought relief via CR 60.02(f) and, alternatively, via RCr 11.42. In his motion, Appellant claimed that his trial counsel rendered ineffective assistance during the plea negotiation process and, as a result, his plea was involuntary. The Commonwealth opposed the motion, arguing that the request for relief pursuant to RCr 11.42 was moot under *Parrish v. Commonwealth*, 283 S.W.3d 675 (Ky. 2009), and that Appellant was precluded from asserting an ineffective assistance claim via CR 60.02 by *Gross v. Commonwealth*, 648 S.W.2d 853 (Ky. 1983).

By order entered July 27, 2011, the trial court denied Appellant's motion on the grounds that Appellant's request for relief pursuant to RCr 11.42 was moot since his sentence had expired, and that his request for relief pursuant to CR 60.02 was not timely as he failed to explain why he waited until the expiration of his sentence to file the motion. The trial court also determined that underlying claim of ineffective assistance of counsel was without merit. This appeal ensued.

On appeal, Appellant first argues that the trial court erred in ruling that his RCr 11.42 motion was untimely, because it was filed within the three-year limitations period, albeit three days prior to the expiration of his sentence. Further, although Appellant concedes that the right to relief under RCr 11.42 expires when

a defendant's sentence is completed, he argues that his CR 60.02 motion must be deemed to have been filed within a reasonable time because he could not have filed it prior to the RCr 11.42 motion. As such, Appellant asserts that the trial court "did not have the right to apply the 'reasonable time' restriction against [his] combination 11.42/60.02 motion that was timely filed under RCr 11.42(10) and where the 60.02 prong would take effect only when the 11.42 prong of the motion was mooted by the expiration of the probation period." We find Appellant's arguments to be without merit.

In *Gross v. Commonwealth*, 648 S.W.2d 854 (Ky. 1983), our Supreme Court discussed the interrelationship between CR 60.02 and RCr 11.42:

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. CR 60.02 is not intended merely as an additional opportunity to raise *Boykin* defenses. It is for relief that is not available by direct appeal and not available under RCr 11.42. The movant must demonstrate why he is entitled to this special, extraordinary relief. Before the movant is entitled to an evidentiary hearing, he must affirmatively allege facts which, if true, justify vacating the judgment and further allege special circumstances that justify CR 60.02 relief.

...

We hold that the proper procedure for a defendant aggrieved by a judgment in a criminal case is to directly appeal that judgment, stating every ground of error which it is reasonable to expect that he or his counsel is aware of when the appeal is taken.

Next, we hold that a defendant is required to avail himself of RCr 11.42 while in custody under sentence or on probation, parole or conditional discharge, as to any ground of which he is aware, or should be aware, during the period when this remedy is available to him. Final disposition of that motion, or waiver of the opportunity to make it, shall conclude all issues that reasonably could have been presented in that proceeding. The language of RCr 11.42 forecloses the defendant from raising any questions under CR 60.02 which are “issues that could reasonably have been presented” by RCr 11.42 proceedings.

Id. at 856-857. While Appellant’s motion in the trial court requested relief pursuant to CR 60.02 or, *in the alternative*, RCr 11.42, he has now re-characterized his motion as seeking RCr 11.42 relief primarily and CR 60.02 relief alternatively. Clearly such is an attempt to circumvent the language in *Gross* that “[f]inal disposition of [the RCr 11.42] motion, or waiver of the opportunity to make it, shall conclude all issues that reasonably could have been presented in that proceeding.” *Id.* at 857. Appellant urges that because there was no final disposition or waiver of his RCr 11.42 motion, he is not precluded from asserting his ineffective assistance claims via CR 60.02. We disagree.

Appellant’s request for relief pursuant to RCr 11.42 was effectively moot when it was filed on Friday and became actually moot the following Monday when his sentence expired. Appellant’s argument that the Commonwealth had the ability to revoke his probation and incarcerate him during those three days, which would have prevented his motion from becoming moot, is not well taken. Certainly, there can be no argument that the trial court could not have ruled on the motion, nor

could the Commonwealth have even filed a response, prior to the expiration of Appellant's sentence. As the Kentucky Supreme Court held in *Parrish*, “[t]he language of [RCr 11.42] is plain and unambiguous that relief is available only to ‘[a] prisoner in custody ... or on probation[.]’” 283 S.W.3d at 677. Although Appellant's request for RCr 11.42 relief may have been timely at the moment it was filed, it was not at the time the trial court considered and ruled on the request.

We also agree with the trial court that Appellant was not entitled to relief pursuant to CR 60.02. As previously stated, CR 60.02 is not an additional opportunity to raise claims that should have been brought earlier. *Gross*, 648 S.W.2d at 856. The claims Appellant raises are issues that were apparent to him at the time the judgment was entered against him. To be sure, Appellant had three years to utilize RCr 11.42 to pursue his ineffective assistance of counsel claims, and chose not to do so until it was effectively impossible for the motion to be considered and ruled on. Thus, Appellant is now precluded from using CR 60.02 to raise those same claims.

Even if we were to hold that Appellant's CR 60.02 motion was properly invoked, we must agree with the trial court that he failed to exercise due diligence in pursuing his claim. According to CR 60.02, motions made under (d) and (f) “shall be made within a reasonable time.” “What constitutes a reasonable time in which to move to vacate a judgment under CR 60.02 is a matter that addresses itself to the discretion of the trial court.” *Gross*, 648 S.W.2d at 858. In making the decision whether the CR 60.02 motion was timely filed, the trial court does not

have to hold a hearing to decide, but rather can rely on the record. *Id.* As Appellant provided no explanation as to why he waited until three days before the end of his sentence to seek relief, we cannot hold that the trial court abused its discretion in finding that such request was not made within a reasonable time.

For the reasons set forth herein, the order of the Kenton Circuit Court denying Appellant's motion for post-conviction relief is affirmed.

ALL CONCUR.

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