

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001772-MR

CHESTER DUNCAN

APPELLANT

v. APPEAL FROM BELL CIRCUIT COURT
HONORABLE RODERICK MESSER, JUDGE
ACTION NO. 90-CR-00087

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: DIXON, MAZE AND NICKELL, JUDGES.

MAZE, JUDGE: On July 2, 1990, a Bell County grand jury indicted Chester Duncan on one count of first-degree sodomy and two counts of first-degree sexual abuse. Following a jury trial in October 1991, Duncan was found guilty of all three counts and was sentenced to a term of imprisonment totaling fifty (50) years. The Kentucky Supreme Court affirmed the conviction on direct appeal. *Duncan v.*

Commonwealth, No. 91-SC-00933-MR (not-to-be-published opinion rendered October 22, 1992).

Thereafter, in 1993, Duncan filed a motion to set aside his conviction pursuant to RCr 11.42, alleging ineffective assistance of counsel. Eventually, the trial court denied that motion following an evidentiary hearing, and this Court affirmed that decision. *Duncan v. Commonwealth*, No. 96-CA-000524-MR (not-to-be-published opinion rendered June 27, 1997). Since that time, Duncan has filed motions for relief under CR 60.02 (twice), CR 60.01, and RCr 10.26. All of these motions have been unsuccessful before the trial court and before this Court. *See* No. 2001-CA-000956-MR, 2003 WL 22024884 (Ky. App. 2003); No. 2007-CA-001505-MR, 2008 WL 162896 (Ky. App. 2008); and 2009-CA-000920-MR, 2009 WL 4882825 (Ky. App. 2009). He has also sought a writ of mandamus in an original action before this Court, which was also denied. 2011-CA-000637-OA (Ky. App. 2011).

Duncan filed this current motion in the trial court on July 29, 2011, seeking relief pursuant to RCr 10.06 and RCr 10.26 based on claims of substantial error. The trial court summarily denied the motion on August 18, 2011. This appeal followed.

RCr 10.06 allows a criminal defendant to make a motion for a new trial based on newly discovered evidence within one year after entry of the judgment “or at a later time if good cause so permits.” Duncan alleges that the indictment was defective because it alleged facts which were at variance with those

presented in the post-arrest complaint. However, he presents no reason for the twenty-one year delay in raising this issue or for his failure to raise this alleged error in his prior appeal or post-conviction motions.

Finally, we agree with the trial court that RCr 10.26 is not a proper vehicle to raise this claim. That rule addresses the failure to preserve a trial error that affects the substantial rights of a party and permits review of an unpreserved error on appeal. The rule does not afford a separate basis for relief under RCr 11.42 or CR 60.02. *Stoker v. Commonwealth*, 289 S.W.3d 592 (Ky. App. 2009).

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

ALL CONCUR.

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