

RENDERED: FEBRUARY 8, 2013; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2011-CA-002021-MR

ESAU MAUDEE MILLINER

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE AUDRA J. ECKERLE, JUDGE  
ACTION NO. 06-CR-000367

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: CAPERTON, DIXON, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Esau Maudee Milliner brings this *pro se* appeal from an October 7, 2011, Opinion and Order of the Jefferson Circuit Court, denying a successive Kentucky Rules of Civil Procedure (CR) 60.02 motion. We affirm.

In January 2007, appellant was convicted by a jury of murder and first-degree burglary. Thereafter, appellant and the Commonwealth entered into a

plea agreement as to sentencing. In accordance with the plea agreement, the circuit court rendered final judgment sentencing appellant to life imprisonment without the possibility of parole for twenty-five years.

Thereafter, in October 2007, appellant filed a Kentucky Rules of Criminal Procedure (RCr) 11.42 motion to vacate judgment and a CR 60.02 motion to vacate judgment. The circuit court denied both motions without an evidentiary hearing. An appeal was taken to the Court of Appeals. Ultimately, the Court of Appeals rendered an Opinion affirming in Appeal No. 2008-CA-002138-MR.

Appellant then filed a second CR 60.02(f) motion to vacate judgment on July 20, 2011. By Opinion and Order entered October 7, 2011, the circuit court summarily denied appellant's CR 60.02(f) motion. This appeal follows.

Appellant contends that the circuit court erred by denying his CR 60.02(f) motion to vacate judgment. In his pro se brief, appellant alleged entitlement to CR 60.02(f) relief because his trial counsel rendered ineffective assistance and he involuntarily entered into the plea agreement as to sentencing with the Commonwealth.

We agree with the circuit court's decision denying appellant's CR 60.02(f) and adopt the court's reasoning herein:

Here, [appellant] has previously submitted a motion predicated on CR 60.02 jointly with his RCr 11.42 motion. However, he now alleges additional grounds exist for extraordinary relief under CR 60.02. A CR 60.02 motion must be brought within a reasonable

time. *Gross*, 648 S.W.2d at 858. Presupposing [appellant's] motion was filed within a reasonable period of time despite the passage of over four years since his conviction and nearly four years after his previous CR 60.02 motion, [appellant] has failed to proffer any arguments that would entitle him to relief.

Because [appellant] knowingly and voluntarily chose to plead guilty and waive his right to separate sentencing by the jury, holding a hearing during which he might present mitigating evidence is not mandatory. [Kentucky Revised Statutes] KRS § 532.025(1). Moreover, while [appellant] contends that the Court erred in permitting him to sign a guilty plea, there exists no bar that precludes a criminal defendant from waiving certain rights, including the right to appeal and the right to a separate sentencing hearing. In pleading, [appellant] knowingly and voluntarily waived the separate sentencing phase. Thus, he cannot now complain of its absence. Therefore, [appellant's] arguments are meritless.

A CR 60.02 motion is not intended to provide a party another opportunity to litigate matters that previously were or could have been adjudicated. *Stoker*, 289 S.W.3d at 597. The Kentucky Supreme Court has held that the purpose of the rule is to “prevent relitigation of issues which either were or could have been litigated in a similar proceeding.” *McQueen v. Commonwealth*, 948 S.W.2d 415, 416 (Ky. 1997). “[C]ourts have much more to do than occupy themselves with successive ‘reruns’ of RCr 11.42 motions stating grounds that have or should have been presented earlier.” *Hampton v. Com.*, 454 S.W.2d 672, 673 (Ky. 1970). CR 60.02 is therefore available only to raise issues that could not have been raised in other proceedings. *McQueen*, 948 S.W.2d at 416.

[Appellant] previously submitted an extensive RCr 11.42 motion. He was provided counsel, who also filed a 46-page supplementary brief on his behalf. In the two briefs, [appellant] raised numerous and detailed allegations of ineffective assistance of counsel.

[Appellant] appealed the denial of his motion to the Kentucky Supreme Court, which upheld this Court's preceding ruling. [Appellant's] latest claims of ineffective assistance of counsel could have and should have been brought in the earlier motion. [Appellant] may not utilize a second CR 60.02 motion to again raise additional ineffective assistance of counsel contentions. *See Dillard v. Commonwealth*, 2008 WL 162902 \* 1 (Ky. App., Jan. 18, 2008). Accordingly, [appellant's] motion will be denied.

Upon review of the record and applicable law, we are of the opinion that the circuit court properly denied appellant's CR 60.02(f) motion.

For the foregoing reasons, the Opinion and Order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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