

Commonwealth of Kentucky
Court of Appeals

NO. 2012-CA-000451-MR

MATTHEW R. CONRAD

APPELLANT

v. APPEAL FROM HENDERSON CIRCUIT COURT
HONORABLE KAREN LYNN WILSON, JUDGE
ACTION NO. 08-CR-00081

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: ACREE; CHIEF JUDGE; LAMBERT AND STUMBO, JUDGES.

STUMBO, JUDGE: Matthew R. Conrad, *pro se*, appeals from an Order of the Henderson Circuit Court denying his motion for CR 60.02 relief from judgment.

Conrad argues that the trial court did not properly consider his motion on the merits of the case but instead denied the motion on issues which he did not raise.

Having closely reviewed the record and the law, we find no error in the Henderson Circuit Court's denial of Conrad's motion for relief, and accordingly affirm.

On August 26, 2008, and pursuant to an agreement with the Commonwealth, Conrad entered an *Alford* plea in Henderson Circuit Court to the charges of Second-Degree Rape and being a Persistent Felony Offender, Second Degree. On November 3, 2008, the court sentenced Conrad to ten years in prison in accordance with the plea agreement. Conrad did not prosecute an appeal nor file a motion for RCr 11.42 relief.

On January 18, 2012, Conrad filed a *pro se* Motion for Amendment of Sentence Pursuant to CR 60.02(e) and (f), as well as a motion to proceed as an indigent. As a basis for the motion, Conrad maintained that he was denied the effective assistance of counsel because counsel "failed to inform him of the effects of his plea agreement" and because he was "unaware of the percentage of the plea agreement that he signed in 2008." That is to say, Conrad appears to have argued that he was entitled to parole after serving 20% of his sentence upon completion of a Sex Offender Treatment Program ("SOTP"). Conrad also argued that the trial court failed to make sure that he was entering the plea knowingly and voluntarily.

On January 24, 2012, the Henderson Circuit Court rendered an Order sustaining Conrad's motion to proceed as an indigent and denying his motion to amend the sentence. The court concluded in relevant part that though second-degree rape is a violent offense under KRS 439.3401 which requires offenders to serve 85% of their sentences prior to parole eligibility, the Department of

Corrections told Conrad he would be eligible for parole after he served 20% of his sentence upon completion of the SOTP. The court noted that there is no right to parole, and determined that the eligibility to be considered for parole is not the same as a right to receive parole. It went on to find that Conrad was not ineligible for parole, but rather that he had been considered for parole in 2011 and that the Department of Corrections had denied him parole. As to whether Conrad's plea was entered knowingly and intelligently, the court found that Conrad participated in the plea colloquy and stated that he was aware of his rights, that he understood those rights, and that he was satisfied with his counsel's representation. The court found that Conrad also stated that he understood that neither the court nor his attorney could advise him as to when he might be released on parole, if at all. This appeal followed.

Conrad now argues that the Henderson Circuit Court erred in denying his motion to modify his sentence pursuant to CR 60.02. After first noting that, "Appellant is not argueing [sic] any part of his knowledge of the percentage in which he would see the parole board," the focus of Conrad's argument appears to be his assertion that the trial court and defense counsel "failed to assure that he knew all of the direct consequences of his Alford plea." Conrad contends that he believed he would be eligible for parole after serving 20% of his sentence and completing the SOTP, and that defense counsel and the trial court "failed to assure that Appellant was aware that a serve out from the parole board would be at the eighty-five percent (85%) mark, instead of at the same percentage that he was

eligible to see the Parole Board.” As best we can discern, Conrad appears to assert that he entered into the *Alford* plea only on the basis of his belief of entitlement to parole after completion of 20% of his sentence, and that the failure of defense counsel and the court to disabuse him of this belief now justifies relief under CR 60.02.

The Kentucky Supreme Court has held that because of the desirability of according finality to judgments, CR 60.02 must be invoked only with extreme caution and only under most unusual circumstances. *Cawood v. Cawood*, 329 S.W.2d 569, 571 (Ky. 1959). Additionally, “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.” *McQueen v. Commonwealth*, 948 S.W.2d 415, 416 (Ky. 1997) (internal quotation marks and citations omitted). 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.” *Id.*

In the matter at bar, Conrad was availed of the opportunity to prosecute this issue by way of a direct appeal, but he did not do so. Thereafter, he could have raised the issue on a motion for RCr 11.42 relief, but again did not do so. Even if his claim of error arising from his plea and/or sentencing was properly raised by way of CR 60.02 some 38 months after sentencing, we find no error in the Henderson Circuit Court’s determination that Conrad is not entitled to CR 60.02 relief. We first note that there is no right to parole, and no right to parole release at

any given time. *Seymour v. Colebank*, 179 S.W.3d 886 (Ky. App. 2005).

Additionally, Conrad *was* availed of parole eligibility after serving 20% of his sentence and completing the SOTP, which he acknowledged did occur when he went before the parole board. Conrad appears to claim entitlement to parole - as opposed to mere eligibility - after serving 20% of his sentence and completing the SOTP, but this assertion is not supported by the case law or statutory law.

Additionally, we find no error in the trial court's determination that Conrad was properly and fully informed of the consequences of his plea. The trial court advised Conrad of his rights, and he stated under oath that he understood those rights and was satisfied with his representation. He acknowledged understanding that neither his trial counsel nor the court could advise him as to when he might be released on parole, if at all, and that he might have to serve out his entire sentence. Finally, he acknowledged that he reviewed the Commonwealth's offer and the motion to enter a guilty plea. We find no basis for concluding that Conrad's plea was not entered knowingly and voluntarily, and find no error in the trial court's determination that the record did not support the extraordinary remedy set out in CR 60.02.

For the foregoing reasons, we affirm the Order of the Henderson Circuit Court overruling Conrad's Motion for Amendment of Sentence Pursuant to CR 60.02(e) & (f).

ALL CONCUR.

BRIEF FOR APPELLANT:

Matthew R. Conrad, *pro se*
Burgin, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Tami Allen Stetler
Assistant Attorney General
Frankfort, Kentucky