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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000724-MR

DARYL SHULTZ APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE AUDRA J. ECKERLE, JUDGE
ACTION NO. 04-CR-003221

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, MOORE AND THOMPSON, JUDGES.

DIXON, JUDGE: Daryl Shultz appeals, *pro se,* from a Jefferson Circuit Court opinion and order denying his motion made pursuant to Kentucky Rules of Civil Procedure (CR) 60.02 and Kentucky Rules of Criminal Procedure (RCr) 10.26.

In 2005, a jury convicted Shultz of sodomy and indecent exposure. Before the sentencing phase of the trial began, the Commonwealth moved to dismiss the

charge of indecent exposure because the statute of limitations for that offense had expired. The trial court granted the motion. Shultz then entered a plea of guilty to sodomy in the first degree in exchange for the Commonwealth's recommendation of a sentence of twenty years. As part of the plea agreement, he waived his right to "all appeals," a condition which was expressly stated in the final judgment. His trial counsel subsequently filed a motion notwithstanding the verdict, or in the alternative, for a new trial, claiming that the improper inclusion of evidence relating to indecent exposure led the jury to convict Shultz of the sodomy charge. The trial court denied the motion and imposed the sentence of twenty years as specified by the plea agreement.

Shultz filed a post-conviction motion pursuant to RCr 11.42, alleging ineffective assistance of counsel. The trial court denied the motion, and its order was affirmed on appeal. *See Shultz v. Commonwealth*, 20120 WL 3927788 (Ky. App. 2010) (2009-CA-00962-MR). The Kentucky Supreme Court denied discretionary review. 2010-SC-000731 (May 11, 2011).

On November 28, 2011, Shultz filed a *pro se* pleading styled "motion for relief of judgment or in the alternative to alter and amend final judgment and sentence pursuant to CR 60.02 and RCr 10.26." He claimed that he had never been informed of the lifetime sex offender registry requirement, and that the failure to apprise him of this requirement constituted a miscarriage of justice. He also claimed that the prosecution used incorrect and false testimony, and inadmissible hearsay, to convict him, in violation of his due process rights.

The trial court denied the motion without a hearing in an order and opinion entered on March 28, 2012. This appeal by Shultz followed.

"The standard of review of an appeal involving a CR 60.02 motion is whether the trial court abused its discretion." *White v. Commonwealth*, 32 S.W.3d 83, 86 (Ky. App. 2000).

On appeal, Shultz concedes that his argument regarding lifetime registration as a sex offender is without merit. Consequently, it will not be addressed here.

Shultz raises for the first time on appeal the argument that this Court and the Kentucky Supreme Court made serious errors in denying his prior RCr 11.42 motion, and that these errors must be corrected before this appeal can be considered. Specifically, he argues that both courts erroneously stated that he had admitted to committing oral sodomy against his daughter. The direct appeal of the order denying Shultz's RCr 11.42 motion was heard by this Court; the Supreme Court denied discretionary review of that opinion in a summary order and thus made no substantive remarks about the case. Any alleged errors in the opinion of this Court susceptible to correction could have been brought to the Court's attention via a petition for rehearing under CR 76.32; Shultz did not file such a motion. The opinion of this Court is now final and has become the law of the case. "The law of the case doctrine is 'an iron rule, universally recognized, that an opinion or decision of an appellate court in the same cause is the law of the case for a subsequent trial or appeal however erroneous the opinion or decision may have been.'" *Brooks v. Lexington–Fayette Urban County Housing Authority*, 244

S.W.3d 747 (Ky. App. 2007) (quoting *Union Light, Heat & Power Co. v. Blackwell's Ad'r,* 291 S.W.2d 539, 542 (Ky. 1956)).

Next, Shultz argues that he was convicted using incorrect or false testimony and inadmissible hearsay testimony. This is an attack on the sufficiency of the evidence supporting his conviction that is appropriate for resolution on direct appeal.

> 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 for relief that is not available by direct appeal and not available under RCr 11.42.
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> . . . .
>
> 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.

Gross v. Commonwealth, 648 S.W.2d 853, 856-57 (Ky. 1983).

By entering his guilty plea, Shultz expressly waived his right to a direct appeal. "[A]n unconditional guilty plea waives the right . . . to appeal a finding of guilt on the sufficiency of the evidence[.]" *Windsor v. Commonwealth*, 250 S.W.3d 306, 307 (Ky. 2008). He may not use CR 60.02 as a means to challenge the sufficiency of the evidence and thereby bypass the terms of his plea agreement, and the express language of the final judgment.

Shultz also challenges the voluntariness of his guilty plea, and the effectiveness of his trial counsel. These are issues that could and should have been raised in his earlier RCr 11.42 motion.

> [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.

Gross, 648 S.W.2d at 857.

Several claims of ineffective assistance of counsel were raised in Shultz's RCr 11.42 motion, and subsequently fully reviewed by this Court on appeal. They may not therefore be raised again. Nor has Shultz explained why any different, additional claims of ineffective assistance of counsel could not be raised in that earlier motion. Thus, Shultz has failed to demonstrate why he is entitled to the "special, extraordinary relief" provided by CR 60.02. *Id.* at 856.

The opinion and order denying Shultz's CR 60.02 motion is therefore affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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