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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001060-MR

MICHAEL NEIL BROWN — APPELLANT

v.

APPEAL FROM CLINTON CIRCUIT COURT
HONORABLE EDDIE C. LOVELACE, JUDGE
ACTION NO. 03-CR-00075

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; COMBS AND TAYLOR, JUDGES.

ACREE, CHIEF JUDGE: Michael Brown appeals the Clinton Circuit Court's April 20, 2012 order denying his motion seeking relief pursuant to Kentucky Rules of Civil Procedure (CR) 60.02. Brown has presented no meritorious arguments. Accordingly, we affirm.

In 2004, a jury found Brown guilty of driving under the influence of alcohol/drugs, and four counts of first-degree assault. The factual basis giving rise to Brown's convictions stemmed from a motor vehicle accident during which Brown's vehicle crossed the yellow-center line, and collided head-on with a car driven by the victim. The victim and her three children suffered severe injuries.

Following the accident, witnesses observed beer cans in Brown's car and noted a strong odor of alcohol emanating from both Brown and his vehicle. Brown was transported to a nearby hospital. At law enforcement's request, approximately one and one-half hours after the collision, medical personnel collected blood and urine samples from Brown.[1] The Kentucky State Police Crime Lab analyzed the samples. The testing revealed Brown's blood alcohol level was .09, and that Brown had "constituents" of marijuana in his urine, indicating he had used marijuana within 24 to 36 hours prior to the accident. The crime lab issued a toxicology report cataloging its findings.

The circuit court sentenced Brown to fifty years' imprisonment. Brown filed a matter-of-right appeal with the Kentucky Supreme Court challenging the admissibility of the toxicology report on hearsay grounds. The

[1] Initially, law enforcement attempted to secure Brown's consent to collect the blood and urine samples. However, Brown was unresponsive to law enforcement's requests and, shortly thereafter, lost consciousness.

Supreme Court affirmed Brown's convictions. *Brown v. Commonwealth*, 2004-SC-000344-MR, 2006 WL 141614, at *1 (Ky. Jan. 19, 2006) (*Brown I*).

In 2007, Brown filed a motion to vacate his convictions pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42. Therein, Brown claimed he received ineffective assistance of counsel when, *inter alia*, his trial counsel failed to object to the blood alcohol testing procedures on grounds that they violated Kentucky Revised Statutes (KRS) 189A.103(1)-(3). The circuit court denied Brown's motion. Brown appealed to this Court. Finding no ineffective assistance, we affirmed. *Brown v. Commonwealth*, 2007-CA-001643-MR, 2008 WL 7438773, at *1 (Ky. App. Oct. 3, 2008) (*Brown II*).

Four years later, Brown filed a motion for relief pursuant to CR 60.02(e) and (f). He claimed therein that: (1) the toxicology report analyzing his blood and urine samples should have been excluded at trial because the samples were: (a) taken in a manner contrary to statute, and (b) held for forty-one days without a proper chain of custody; and (2) both his trial and appellate counsel rendered ineffective assistance. Brown also requested an evidentiary hearing. By order entered April 20, 2012, the circuit court declined to hold an evidentiary hearing and denied Brown's motion. This appeal followed.

We review a circuit court's ruling on a CR 60.02 motion for an abuse of discretion. *White v. Commonwealth*, 32 S.W.3d 83, 86 (Ky. App. 2000). "The

test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Miller v. Eldridge*, 146 S.W.3d 909, 914 (Ky. 2004) (citation omitted).

On appeal, Brown argues that the circuit court abused its discretion when it declined to hold an evidentiary hearing and denied him relief pursuant to CR 60.02(e) and (f). These sections authorize the circuit court to set aside a final judgment if "(e) the judgment is void, or has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (f) any other reason of an extraordinary nature justifying relief." CR 60.02(e), (f).

CR 60.02 affords relief only in extraordinary circumstances and only for extraordinary reasons. *U.S. Bank, NA v. Hasty*, 232 S.W.3d 536, 541 (Ky. App. 2007). "It is for relief that is not available by direct appeal and not available under RCr 11.42." *Gross v. Commonwealth*, 648 S.W.2d 853, 856 (Ky. 1983). It cannot be said often enough that CR 60.02 is not to be used as a vehicle to relitigate the same issues which could reasonably have been raised on direct appeal or in an RCr 11.42 proceeding. *See McQueen v. Commonwealth*, 948 S.W.2d 415, 416 (Ky. 1997); *Goldsmith v. Fifth Third Bank*, 297 S.W.3d 898, 903 (Ky. App. 2009). "The obvious purpose of this principle is to prevent the relitigation of issues which

either were, should or could have been litigated in a similar proceeding." *Stoker v. Commonwealth,* 289 S.W.3d 592, 597 (Ky. App. 2009).

As he did before the circuit court, Brown continues to argue that the toxicology report was erroneously admitted at trial, and that he was the victim of ineffective assistance of counsel at both the trial and appellate levels. Brown also asserts the circuit court abused its discretion when it refused to hold an evidentiary hearing on his CR 60.02 motion.

We first address Brown's arguments pertaining to the admissibility of the toxicology report. Brown asserts his blood and urine samples were obtained more than two hours after he ceased operation and control of his vehicle, in violation of KRS 189A.010, and that those samples were not tested within a reasonable length of time, in violation of KRS 189A.103(7). Brown asserts these violations rendered the toxicology report unreliable and, therefore, inadmissible. These arguments undoubtedly and reasonably could, and should, have been presented and addressed as part of his direct appeal. Brown offers no reasonable explanation why these arguments were not raised at the appropriate time. Under the guise of CR 60.02, Brown seeks to call into question and relitigate the evidence upon which his convictions were based. That is not the purpose of a CR 60.02 motion, and we refuse to sanction its use in that manner. *McQueen*, 948 S.W.2d at 416.

Likewise, Brown's ineffective-assistance-of-counsel arguments relating to the performance of his *trial counsel* are similarly barred. Brown argues his trial counsel failed to meaningfully challenge the admissibility of the toxicology report by filing of a motion to suppress it. As noted, in 2007 Brown challenged the adequacy of his trial counsel's representation by the timely filing of an RCr 11.42 motion. Brown could, and should, have raised any and all alleged deficiencies by trial counsel at that time. *Hollon v. Commonwealth*, 334 S.W.3d 431, 437 (Ky. 2010) ("At each stage in this structure the defendant is required to raise all issues then amenable to review, and generally issues that either were or could have been raised at one stage will not be entertained at any later stage."). In the course of the RCr 11.42 proceedings, Brown did challenge his trial counsel's performance with respect to the blood alcohol testing procedures. In rejecting Brown's ineffective-assistance argument, this Court found that Brown's trial counsel "*did* object to the blood alcohol testing procedures" set forth in KRS 189A.103(1)-(3), and "the [circuit] court did not err in overruling his objection to the procedure." *Brown II*, 2008 WL 7438773, *3. However, at no point did Brown argue that his trial counsel rendered deficient performance when he failed to file a motion to suppress the toxicology report on grounds that it violated KRS 189A.010(2) and KRS 189A.103(7). Brown is precluded from now raising that argument by means of CR 60.02. *Gross*, 648 S.W.2d at 857 ("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." (Quoting RCr 11.42)).

Brown's third argument is that he received ineffective assistance of *appellate* counsel because counsel, on direct appeal, failed to take issue with the manner in which Brown's urine and blood samples were obtained, and failed to call into question the admissibility of the toxicology report. In *Hollon*, *supra*, our Supreme Court recognized that criminal defendants are entitled to effective assistance of appellate counsel and, should appellate counsel wholly fail in this endeavor, criminal defendants may pursue a claim of ineffective assistance of appellate counsel. In so ruling, the Court placed several limitations on ineffective assistance of appellate counsel claims, two of which are particularly relevant to this case. First, the Court explained that a timely filed RCr 11.42 motion is the proper vehicle for asserting an ineffective assistance of appellate counsel claim. Second, the Court held its "ruling is to have prospective effect only[,]" explaining:

> It applies to this case, to cases pending on appeal in which the issue has been raised and preserved, and to cases currently in or hereafter brought in the trial court in which the issue is raised. Prospective application is appropriate because, although our courts have not until now provided a forum for [ineffective assistance of appellate counsel] claims based on an allegedly inadequate appellate brief, the federal courts have provided a forum through habeas review. See *Boykin v. Webb*, [541 F.3d 638 (6th Cir. 2008)]. Kentucky

> defendants have not, therefore, been denied an opportunity to vindicate their right to effective appellate counsel, and there is thus no need for our decision today to reach back and operate retroactively.

Hollon, 334 S.W.3d at 439. Relying on *Hollon*, the Court recently held in *Sanders v. Commonwealth*, 339 S.W.3d 427 (Ky. 2011), that, "[b]ecause Appellant's RCr 11.42 proceeding, the sanctioned method for bringing an ineffective assistance of direct appeal counsel claim, has long since been decided and become final, he is barred by the retroactivity provisions of *Hollon* from prosecuting the claim in the present CR 60.02 proceeding." *Id.* at 435.

Sanders is dispositive of Brown's ineffective assistance of appellate counsel arguments. Like the appellant in *Sanders*, Brown's RCr 11.42 challenge culminated in this Court's 2008 opinion affirming the denial of Brown's RCr 11.42 motion. Brown may not use CR 60.02 to breathe new life into an already decided and final RCr 11.42 proceeding, and *Hollon* may not be wielded retroactively. Brown's ineffective assistance of appellate counsel claim is barred. *Sanders*, 339 S.W.3d at 435.

Finally, Brown claims the circuit court abused its discretion when it denied his CR 60.02 motion without first conducting an evidentiary hearing. An evidentiary hearing, while often requested by a CR 60.02 movant, is not always warranted. Indeed, "[b]efore [a] 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." *Gross*, 648 S.W.2d at 856. As explained, Brown has identified no special circumstances justifying relief pursuant to CR 60.02. Accordingly, the circuit court committed no error when it denied Brown's request for an evidentiary hearing.

The circuit court did not abuse its discretion when it denied Brown's motion for CR 60.02 relief. Accordingly, we affirm the April 20, 2012 order of the Clinton Circuit Court.

ALL CONCUR.

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