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NOT TO BE PUBLISHED

OPINION OF AUGUST 15, 2014, WITHDRAWN

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000938-MR

JAMES KILGORE

APPELLANT

v. APPEAL FROM CLINTON CIRCUIT COURT
HONORABLE EDDIE C. LOVELACE, JUDGE
ACTION NO. 10-CR-00066

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CAPERTON, COMBS, AND VANMETER, JUDGES.

VANMETER, JUDGE: James Kilgore appeals from the April 3, 2012, order of the Clinton Circuit Court which denied his CR¹ 60.02 motion for post-conviction relief from his charge of first-degree possession of a forged instrument. We affirm.

¹ Kentucky Rules of Civil Procedure.

On May 26, 2010, Kilgore cashed a United States Social Security check made payable to Rhonda Carroll and containing Carroll's purported signed endorsement. Carroll had passed away on April 14, 2010. On October 10, 2010, Kilgore was indicted for theft by unlawful taking or disposition; criminal possession of a forged instrument, first degree; and being a persistent felony offender, second degree (PFO2). Pursuant to an agreement with the Commonwealth, Kilgore pled guilty to criminal possession of a forged instrument, first degree. The remaining two charges were dropped. On February 21, 2011, the trial court sentenced Kilgore to five years in the penitentiary, with sixty days to serve and the balance to be probated for five years. In addition, Kilgore was to pay \$323 in restitution to the estate of Rhonda Carroll within 90 days of his release from incarceration. Kilgore's probation was revoked on October 17, 2011 for failure to pay restitution.

In 2012, Kilgore filed a *pro se* "Petition for Writ of *Coram Nobis*." Therein, Kilgore argued that because the amount involved was less than \$500, the highest class of crime for which he could be charged was criminal possession of a forged instrument, third degree. The trial court denied the motion, which it treated as one for relief under CR 60.02. This appeal followed.

Kentucky case law has long recognized that

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^[2] 11.42, and *thereafter* in CR 60.02. CR 60.02 is not intended merely as an additional opportunity to raise *Boykin* defenses. It is for relief that is not available by direct appeal and not available under RCr 11.42. The movant must demonstrate why he is entitled to this special, extraordinary relief. Before the 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 v. Commonwealth, 648 S.W.2d 853, 856 (Ky. 1983). The court in *Gross* explicitly set forth

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.

Next, we hold that 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, 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.

Id. at 857. *See also Barnett v. Commonwealth*, 979 S.W.2d 98, 101 (Ky. 1998) (stating CR 60.02 is the “codification of the common law writ of coram nobis, which allows a judgment to be corrected or vacated based upon facts or grounds, not appearing on the face of the record and not available by appeal or otherwise[.]”) (internal quotations and citation omitted). We review a trial court’s disposition of

² Kentucky Rules of Criminal Procedure.

a CR 60.02 motion for an abuse of discretion. *Id.* at 102. “The test for abuse of discretion is whether the trial judge’s decision was arbitrary, unreasonable, unfair or unsupported by sound legal principles.” *Woodard v. Commonwealth*, 147 S.W.3d 63, 67 (Ky. 2004) (internal quotations and citations omitted).

Kilgore’s sole argument on appeal is that the trial court abused its discretion by denying his CR 60.02 motion on the basis that his actual conduct does not fall within the purview of the statute under which he was convicted. He cites *Frazier v. Commonwealth*, 613 S.W.2d 423 (Ky. 1981), in support of his claim. In *Frazier*, the Court held that a forged endorsement on a United States Treasury check did not support a conviction for criminal possession of a forged instrument, first degree. *Id.* at 425. The court further held that a forged endorsement on such a check does support a charge of criminal possession of a forged instrument, second degree, under KRS³ 516.060, a class D felony. *Id.* at 425-26. *See also Johnson v. Commonwealth*, 709 S.W.2d 838, 839 (Ky. App. 1986) (holding forged endorsement supports charge of criminal possession of a forged instrument, second degree), *abrogated on other grounds by Goncalves v. Commonwealth*, 404 S.W.3d 180 (Ky. 2013).

Irrespective of Kilgore’s substantive argument, he ignores the fact that he pled guilty to criminal possession of a forged instrument, first degree. In return, the Commonwealth dismissed the PFO2 charge and the misdemeanor charge. Unfortunately for Kilgore, a guilty plea forfeits any post-conviction challenge to

³ Kentucky Revised Statutes.

sufficiency of the evidence. *Johnson v. Commonwealth*, 103 S.W.3d 687, 696 (Ky. 2003); *Bishop v. Commonwealth*, 357 S.W.3d 549, 552 (Ky. App. 2011).

Furthermore, the holding in *Frazier* was approximately 30 years old when Kilgore was charged and pled guilty. Kilgore presents no facts or issues that were unknown or could not have been known at the time of his guilty plea. Perhaps Kilgore, as set forth in his motion to the trial court, may have had an ineffective assistance of counsel claim under RCr 11.42. In his brief to this court, however, Kilgore concedes that the trial court properly treated his motion as one for relief under CR 60.02.⁴ Try as we might to grant Kilgore relief on the substance of his claim,⁵ we are constrained by the prior holdings of the Kentucky Supreme Court and this court that lead to the conclusion that Kilgore's claim is procedurally barred. Accordingly, we hold that the trial court did not abuse its discretion by denying Kilgore's CR 60.02 motion.

For the foregoing reasons, the April 3, 2012, order of the Clinton Circuit Court is affirmed.

ALL CONCUR.

⁴ Kilgore's motion filed in the trial court is defective under RCr 11.42 since Kilgore failed to verify it. RCr 11.42(2).

⁵ Again, criminal possession of a forged instrument, second degree, is a class D felony. KRS 516.060(2). Kilgore's sentence, five years, falls within the authorized range for that charge. KRS 532.060(2)(d). By pleading guilty, Kilgore avoided the PFO2 charge which could have resulted in an enhanced sentence of up to ten years. KRS 532.060(2)(c), 532.080(5).

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