

Commonwealth of Kentucky
Court of Appeals

NO. 2013-CA-001326-MR

THOMAS NEAL JACKSON

APPELLANT

v.

APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE THOMAS L. JENSEN, JUDGE
ACTION NO. 00-CR-00126

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: MAZE, THOMPSON AND VANMETER, JUDGES.

MAZE, JUDGE: Thomas Neal Jackson appeals from a Laurel Circuit Court order denying his Kentucky Rules of Civil Procedure (CR) 60.02 motion.

In 2002, Jackson was sentenced to serve thirty-three years after a jury found him guilty of murder. His conviction was affirmed by the Kentucky

Supreme Court on direct appeal. *Jackson v. Commonwealth*, 2003 WL 21994029 (Ky. 2003) (2002-SC-00253-MR).

In 2004, Jackson filed a pro se motion to vacate his conviction pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42. Appointed counsel later supplemented the motion, which raised several claims of ineffective assistance of counsel. Following an evidentiary hearing, the trial court denied the motion, and a panel of this Court affirmed the trial court's order. *Jackson v. Commonwealth*, 2007 WL 2460727 (Ky. App. 2007) (2006-CA-001821-MR).

Six years later, on February 4, 2013, Jackson filed a motion to vacate his conviction pursuant to CR 60.02(f), again alleging ineffective assistance of counsel. The trial court denied the motion on the grounds that Jackson was merely restating the arguments made in his unsuccessful RCr 11.42 motion. This appeal followed.

We review the denial of a CR 60.02 motion for an abuse of discretion. *Partin v. Commonwealth*, 337 S.W.3d 639, 640 (Ky. App. 2010). The test for abuse of discretion is whether the trial court's decision was "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999) (internal citations omitted). A movant must demonstrate that "he is entitled to this special, extraordinary relief." *Gross v. Commonwealth*, 648 S.W.2d 853, 856 (Ky. 1983). We will affirm the trial court's decision absent a "flagrant miscarriage of justice." *Id.* at 858.

Jackson argues, relying on a transcript of a portion of a pretrial hearing, that he was denied effective assistance of counsel because his attorney was unprepared for trial and failed to communicate adequately with him, and that the trial court ignored the verbal objections he made in open court about the quality of his attorney's representation. Jackson's attempt to raise these arguments in a CR 60.02 motion violates the structure provided in Kentucky for attacking the final judgment of the trial court in a criminal case, which 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." *Id.* at 856.

A defendant who is in custody under sentence or on probation, parole or conditional discharge, is required to avail himself of RCr 11.42 as to any ground of which he is aware, or should be aware, during the period when the remedy is available to him. 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. The obvious purpose of this principle is to prevent the 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) (internal citations omitted).

RCr 11.42(3) requires that a motion under the rule "shall state all grounds for holding the sentence invalid of which the movant has knowledge" and that "[f]inal disposition of the motion shall include all issues that could reasonably have been presented in the same proceeding." Because Jackson's current claims were, or could have been, raised, addressed and resolved in the earlier RCr 11.42

proceedings, they may not be relitigated under the guise of a CR 60.02 proceeding. “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.” *McQueen*, 948 S.W.2d at 416. Jackson has simply failed to show that any of his current arguments, which are all based on material known to him and readily available in the record, could not have been raised in the earlier proceedings.

As to Jackson’s claim that he was entitled to a hearing on his motion, such a hearing is required only if the movant “affirmatively alleges facts which, if true, justify vacating the judgment and further allege[s] special circumstances that justify CR 60.02 relief.” *White v. Commonwealth*, 32 S.W.3d 83, 86 (Ky. App. 2000). Because Jackson’s claims are procedurally barred, the trial court did not abuse its discretion in refusing to hold a hearing.

The order denying Jackson’s CR 60.02 motion without a hearing is therefore affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Thomas Neal Jackson, pro se
LaGrange, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

James C. Shackelford
Assistant Attorney General
Frankfort, Kentucky