

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001884-MR

NEWELL STACY

APPELLANT

v.

APPEAL FROM BOYLE CIRCUIT COURT
HONORABLE DARREN W. PECKLER, JUDGE
ACTION NO. 10-CR-00037

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING

** ** * * * * *

BEFORE: DIXON, LAMBERT AND TAYLOR, JUDGES.

DIXON, JUDGE: Newell Stacy appeals a Boyle Circuit Court order denying his motion for post conviction relief. Because we believe the trial court improperly dismissed Stacy's motion, we reverse and remand for proceedings consistent with this opinion.

On August 21, 2009, a riot broke out at the Northpoint Training Facility in Burgin, Kentucky. During the riot, inmates set fire to buildings, tore

down fences and threw rocks and other items at correctional officers. Correction Officer Tim Peavyhouse observed Stacy attempting to break into the multipurpose center door using a concrete slab. Being unsuccessful in breaking into the door, Stacy broke some of the windows, lit toilet paper on fire, and threw it inside the building. He also set fire to a trashcan and threw it on top of the roof of the building. This, along with fires set by other inmates, eventually led to the destruction of the multipurpose building.

A Boyle County grand jury indicted Stacy for first-degree arson, first-degree riot, and being a first-degree persistent felony offender (PFO). After a jury trial in which Stacy was represented by the Department of Public Advocacy, he was found guilty of first-degree riot and first-degree PFO. The jury hung on the charge of first-degree arson. The Boyle Circuit Court entered a judgment against Stacy, sentencing him to a total of twenty years' imprisonment. He thereafter appealed, as a matter of right and the Kentucky Supreme Court affirmed the judgment of the Boyle Circuit Court. *Stacy v. Commonwealth*, 396 S.W.3d 787 (Ky. 2013).

On August 28, 2013, Stacy filed a motion, which he styled "Motion for Vacatur", with the Boyle Circuit Court. In his motion, Stacy made several arguments alleging various errors of both trial and appellate counsel. The motion's style being in a manner not recognized by Kentucky courts, the circuit court construed it as a motion to vacate under CR 60.02. As such, the court denied Stacy's motion, finding that the issue of conflict had been raised and decided on

direct appeal, and that CR 60.02 is not the appropriate avenue in which to attack ineffective assistance of trial counsel and/or appellate counsel. It is from the denial of his motion to vacate that Stacy appeals.

On appeal, Stacy raises four issues all based upon the argument that the Boyle Circuit Court abused its discretion when it construed his motion as brought under CR 60.02. We address Stacy's argument that the trial court improperly construed his "motion for vacatur" as it is dispositive of this appeal.

The decision to grant or deny a motion under CR 60.02 rests within the trial judge's sound discretion. *See Copas v. Copas*, 359 S.W.3d 471, 475 (Ky.App.2012). Thus, we review to ascertain whether the trial court abused its discretion when it characterized Stacy's motion as brought under CR 60.02. The test for abuse of discretion is "whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

The Commonwealth argues that the Boyle Circuit Court was correct when it determined Stacy's motion as seeking relief pursuant to CR 60.02. Stacy, however, contends that "vacatur is nothing but a fancy [L]atin word meaning vacate", and that his motion was brought under RCr 11.42. We agree with Stacy that his motion should have been construed as made pursuant to RCr 11.42.

In Stacy's "motion for vacatur" to the Boyle Circuit Court, he alleged three grounds for error:

- (1) The trial court failed to discharge its duty to *sua sponte* inquire into the propriety of DPA representation of Stacy when it knew or should have known that a certain conflict existed;
- (2) He was denied right to effective assistance of counsel when counsel, operating under an actual conflict, refused to present a complete defense against the charges; and
- (3) He was denied the right to effective assistance of appellate counsel when counsel, operating under an actual conflict, refused to advocate some of his claims on appeal.

Stacy asked the Boyle Circuit Court to vacate his judgment and sentence based on these arguments. In its order denying his motion, the trial court, noting that Stacy had failed to articulate a specific applicable rule as the basis for his motion, construed the motion as pursuant to CR 60.02. The court then found that Appellant's first issue had been decided on appeal and that the remaining issues should have been raised in an RCr 11.42 motion.

“RCr 11.42 provides a procedure for a motion to vacate, set aside or correct a sentence for ‘a prisoner in custody under sentence or a defendant on probation, parole or conditional discharge.’ It provides a vehicle to attack an erroneous judgment for reasons which are not accessible by direct appeal.” *Gross v. Commonwealth* , 648 S.W.2d 853, 856 (Ky. 1983). Moreover, Kentucky courts have consistently held that RCr 11.42 provides the exclusive state remedy to attack

an error in a criminal conviction that could not have been raised on direct appeal.

Id. at 857; *Howard v. Ingram*, 452 S.W.2d 410, 411 (Ky. 1970).

On the other hand, CR 60.02 is limited to “relief that is not available by direct appeal, nor available under RCr 11.42.” *Gross*, 648 S.W.2d, at 856. As succinctly stated there:

Rule 60.02 is part of the Rules of Civil Procedure. It applies in criminal cases only because Rule 13.04 of the Rules of Criminal Procedure provides that “the Rules of Civil Procedure shall be applicable in criminal proceedings to the extent not superseded by or inconsistent with these Rules of Criminal Procedure.”

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. . . . 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.

Id.

Here, Stacy’s first argument that the court should have addressed the alleged conflict by trial counsel was properly disposed of by the court pursuant to the holding in *Gross*. Clearly, this issue could and should have been raised on direct appeal. Consequently, Stacy is procedurally barred from raising that issue now, whether the motion was brought pursuant to RCr 11.42 or CR 60.02.

However, Stacy's two remaining issues for the Boyle Circuit Court to consider both related to ineffective assistance of counsel. Both of these issues could properly be addressed under RCr 11.42. It is unclear from the face of the record as to why the court chose to consider Stacy's motion pursuant to CR 60.02 rather than RCr 11.42. It is our view that the trial court should have treated the "motion to vacatur" as an 11.42 motion because that is the substance of the motion. While it is important for a criminal defendant to specify the rule under which they are requesting relief, "pro se pleadings are not required to meet the standard of those applied to legal counsel [as long as such pleadings] give at least fair notice of the claim for relief" *Beecham v. Commonwealth*, 657 S.W.2d 234, 236 (Ky. 1983). *See also Commonwealth v. Miller*, 416 S.W.2d 358, 360 (Ky.1967) (pro se motion required to give court and opposing party fair notice of nature of the claim.) Here, Stacy clearly gave both the court and the Commonwealth "fair notice" of the nature of his claims and the relief sought.

Additionally, we note that Stacy's motion to the Boyle Circuit Court, styled "motion to vacatur", requesting that the court vacate his judgment and sentence based on constitutional issues is similar to the purpose of a motion brought pursuant to RCr 11.42, which is "to review a judgment and sentence for constitutional validity of the proceedings prior to judgment or in the sentence and judgment itself." *Bowling v. Commonwealth*, 981 S.W.2d 545, 552 (Ky. 1998).

Based on the foregoing reasons, we reverse the order of the Boyle Circuit Court characterizing the Appellant's motion as brought under RC 60.02,

and remand with instructions to consider Stacy's ineffective assistance of counsel claims as brought pursuant to RCr 11.42.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Newell Stacy
Eddyville, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Perry T. Ryan
Assistant Attorney General
Frankfort, Kentucky