

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-000115-MR

RALPH PHILPOTT

APPELLANT

v.

APPEAL FROM SPENCER CIRCUIT COURT
HONORABLE CHARLES R. HICKMAN, JUDGE
ACTION NO. 07-CR-00017 & 08-CR-00029

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, NICKELL AND TAYLOR, JUDGES.

NICKELL, JUDGE: Ralph Grady Philpott appeals the Spencer Circuit Court's denial of a motion to vacate or set aside a fifteen-year sentence imposed as a result of his guilty plea to seven counts of possession of a firearm by a convicted felon¹

¹ Kentucky Revised Statutes (KRS) 527.040, a Class D felony. Philpott was originally charged with five counts of possession of a firearm by a convicted felon and two counts of possession of a handgun by a convicted felon, KRS 527.040, a Class C felony. He successfully negotiated a reduction to seven Class D felonies.

and being a persistent felony offender in the second degree (PFO II).² A motion based on CR³ 60.02(e) and (f)—as was Philpott’s—must be filed “within a reasonable time.” Success under CR 60.02(f) is conditioned upon a “reason of an extraordinary nature justifying relief.” Upon review of the record, the briefs and the law, we discern no reason for relief—extraordinary or otherwise—and affirm.

FACTS

On July 9, 2007, police learned Philpott, a convicted felon,⁴ had firearms in his home. A search warrant was obtained and when it was executed on July 10, 2007, police found two handguns and five firearms,⁵ resulting in the return of Indictment Nos. 07-CR-00017 and 08-CR-00029.⁶ On February 5, 2009, Philpott pled guilty to seven counts of possession of a firearm by a convicted felon

² KRS 532.080.

³ Kentucky Rules of Civil Procedure.

⁴ According to Spencer County Indictment No. 08-CR-00029, charging Philpott as a persistent felon, on October 23, 2003, he was convicted of theft by unlawful taking in Bullitt County Case No. 99-CR-61. On April 22, 1998, he was convicted of trafficking in a controlled substance in the first degree in Fayette County Case No. 97-CR-936. On October 2, 1996, he was convicted of burglary in the second degree in Jefferson County Case No. 96-CR-02232. For each of the three separate offenses he was sentenced to a term of five years. Philpott has not challenged the accuracy of his criminal record as alleged by the Commonwealth.

⁵ Evidence logs contained in the record describe four rifles, one revolver, one pistol and one shotgun recovered from Philpott’s home. All were identified by serial number, with the exception of one rifle of unknown model, brand and caliber which bore no serial number.

⁶ Indictment No. 07-CR-00017 charged Philpott with seven substantive counts. Indictment No. 08-CR-00029 charged him as a PFO I, but the charge was amended to PFO II during plea negotiations. Philpott accepted the Commonwealth’s offer of two five-year terms run consecutively and five three-year terms run concurrently with each other and the two five-year terms, for a total of ten years on the substantive counts, enhanced to fifteen years due to his status as a PFO II.

and being a PFO II. He was subsequently sentenced to serve fifteen years in prison.

On June 7, 2013, Philpott filed a motion to vacate⁷ the fifteen-year sentence claiming counsel did not fully explain the intricacies of the case to him and all the charges emanated from a single criminal episode and, therefore, should not have been charged as separate crimes. He also claimed the same felony conviction was erroneously used to substantiate the possession charges and to enhance his sentence as a PFO. On July 17, 2013, Philpott moved to amend and supplement his original RCr 11.42 motion to claim his conviction on multiple counts of possession of a firearm violated both KRS 505.020 and the prohibition against double jeopardy.

On July 31, 2013, the trial court denied RCr 11.42 relief because the motions were untimely and lacked merit. RCr 11.42(10) requires a motion to be filed within three years of the judgment becoming final. Philpott's judgment of conviction was entered March 20, 2009. Philpott did not move to vacate, set aside or correct the sentence until June 7, 2013—four years later. He also failed to offer any facts to trigger an exception to the three-year window for seeking RCr 11.42 relief. Furthermore, in deeming Philpott's claims meritless, the trial court wrote:

Philpott entered a guilty plea to seven counts of Possession of a Firearm by a Convicted Felon and one count of being a Persistent Felony Offended (sic), Second Degree, and was sentenced to a term of fifteen years in conformity with the plea agreement entered into by

⁷ Kentucky Rules of Criminal Procedure (RCr) 11.42.

Philpott. (The plea deal resulted in two counts of possession of a handgun by a convicted felon, a Class C felony, being amended to possession of a firearm by a convicted felon, a Class D felony, and the charge of Persistent Felony Offender, 1st degree amended to Persistent Felony Offender, 2nd degree). As stated by Philpott, he could have received a sentence of twenty years, however, his plea deal resulted in a term of fifteen years. Philpott states that there was “miniscule” evidence to support the charges. The record reflects that Philpott had three prior felony convictions in 2007, when police officers executed a search warrant on his home and an arrest warrant on him for a charge of sodomy. As a result of the search of his home, police found seven guns in Philpott’s house which were illegal for him to possess as a convicted felon.

Without explanation, on August 26, 2013, the trial court entered another order incorporating the order entered on July 31, 2013, and noting the supplemental grounds offered by Philpott did not change the result, because the original motion was still filed outside the three-year window specified in RCr 11.42. Philpott did not appeal the denial of RCr 11.42 relief.

On September 20, 2013, and again on October 4, 2013, Philpott filed open records requests with the Commonwealth’s Attorney for Spencer County seeking grand jury hearing transcripts/minutes. No response to either request was forthcoming. Philpott’s mother personally delivered at least one of the requests to the prosecutor’s office on October 11, 2013. Mrs. Joan Philpott followed up her visit with a letter to the Commonwealth’s Attorney dated October 18, 2013, asking for the grand jury testimony pertaining to her son.

On November 26, 2013, the Office of the Attorney General (OAG) issued 13-ORD-198,⁸ styled Joan Philpott/Officer of the Commonwealth's Attorney for the 53rd Circuit, holding the Commonwealth's Attorney for Spencer County committed a procedural violation of KRS 61.880(1) by not responding to an open records request, but "nondisclosure of the grand jury transcripts was proper under KRS 61.878(1)(h)." In support of nondisclosure, the OAG cited *City of Ft. Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842, 853 (Ky. 2013). The concluding paragraph of 13-ORD-198 states:

A party aggrieved by this decision may appeal it by initiating action in the appropriate circuit court pursuant to KRS 61.880(5) and KRS 61.882. Pursuant to KRS 61.880(3), the Attorney General should be notified of any action in circuit court, but should not be named as a party in that action or in any subsequent proceeding.

Neither the appellate record nor the briefs indicate the Attorney General's opinion was appealed.

On November 15, 2013, Philpott filed a CR 60.02 motion, again claiming: 1) conviction on multiple counts of possession of a firearm violated both KRS 505.020 and the prohibition against double jeopardy; 2) the Commonwealth erroneously used the same felony conviction to both prove the possession charges and enhance his sentence as a PFO II; and, 3) the Commonwealth Attorney erroneously denied his open records request. On December 10, 2013, without convening an evidentiary hearing, the trial court denied the CR 60.02 motion.

⁸ We take judicial notice of the opinion which is not in the appellate record. However, Philpott has appended the opinion to his brief.

Specifically, the trial court found Philpott “had three prior felonies in three different counties” at the time of indictment. Citing *Eary v. Commonwealth*, 659 S.W.2d 198, 200 (Ky. 1983), the court concluded so long as a defendant indicted for possession of a handgun by a convicted felon has more than one prior felony conviction, any other felony conviction could be used for enhancement purposes. Since Philpott had three prior felonies, one provided the basis for Philpott’s status as a convicted felon, leaving the two other prior felonies for PFO purposes. Additionally, each count in the indictment pertained to a separate firearm, as evidenced by the discovery provided in Indictment No. 07-CR-00017. Finally, the trial court stated it had previously found in its denial of the RCr 11.42 motion that there was no violation of KRS 505.020 or the prohibition on double jeopardy. In light of its prior denial of the RCr 11.42 motion, the trial court found the CR 60.02 motion merely reiterated the previously unsuccessful claims and was therefore, procedurally barred. Furthermore, the claims otherwise lacked merit. This appeal follows.

ANALYSIS

We review a trial court’s denial of a CR 60.02 motion for an abuse of discretion—the question being 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) (citing 5 Am.Jur.2d Appellate Review § 695 (1995); *cf. Kuprion v. Fitzgerald*, 888 S.W.2d 679, 684 (Ky. 1994)).

CR 60.02 has a limited purpose. As explained in *Sanders v.*

Commonwealth, 339 S.W.3d 427 (Ky. 2011):

CR 60.02 allows appeals based upon claims of error that “were unknown and could not have been known to the moving party by exercise of reasonable diligence and in time to have been otherwise presented to the court.” *Young v. Edward Technology Group, Inc.*, 918 S.W.2d 229, 231 (Ky. App. 1995). The rule represents 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, which were not discovered until after rendition of judgment without fault of the parties seeking relief.” *Davis v. Home Indemnity Co.*, 659 S.W.2d 185, 188 (Ky. 1983) (citing *Harris v. Commonwealth*, 296 S.W.2d 700 (Ky. 1956)).

“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.” *Gross v. Commonwealth*, 648 S.W.2d 853, 856 (Ky. 1983). The rule is not intended as merely an additional opportunity to raise claims which could and should have been raised in prior proceedings, but, rather, “is for relief that is not available by direct appeal and not available under RCr 11.42.” *Id.* “In order to be eligible for CR 60.02 relief, the movant must demonstrate why he is entitled to this special, extraordinary relief.” *Barnett v. Commonwealth*, 979 S.W.2d 98, 101 (Ky. 1998) (emphasis added).

Id. at 437. As explained in our recitation of the facts, most of Philpott’s claims were previously raised in an RCr 11.42 motion. But CR 60.02 is to be used only for extraordinary issues that were unknown and could not have been raised in a prior proceeding—not to rehash previously raised and lost arguments.

Furthermore, final disposition of an RCr 11.42 motion concludes “all issues that could reasonably have been presented in the same proceeding.” *Sanders*, 339 S.W.3d at 438 (quoting RCr 11.42(3)). Thus, successive RCr 11.42 motions are barred. Philpott’s CR 60.02 motion was essentially another RCr 11.42 motion, and was, therefore, barred. *See Fraser v. Commonwealth*, 59 S.W.3d 448, 454 (Ky. 2001) (citing *Butler v. Commonwealth*, 473 S.W.2d 108, 109 (Ky. 1971)). Since Philpott lost on the same claims when he raised them under RCr 11.42, as the trial court found, he was not permitted to raise them again under the guise of CR 60.02, and he certainly could not succeed on them. Hence, the trial court did not abuse its discretion in denying Philpott’s ill-conceived CR 60.02 motion and we will not address the merits of the claims.

In a novel approach, between the denial of his RCr 11.42 motion and the filing of his CR 60.02 motion, Philpott filed an open records request to procure desired grand jury transcript/minutes. However, he pled guilty in 2009, and he did not file the requests until September and October of 2013, well after his conviction had become final. Thus, his requests in 2013 were not designed to help him prepare for trial—the intended purpose of RCr 5.16 which allows a person named in an indictment

to procure a transcript of any stenographic report or a duplicate of any mechanical recording relating to his or her indictment or any part thereof upon payment of its reasonable cost.

Wagner v. Commonwealth, 247 S.W.3d 540 (Ky. App. 2008). Furthermore, the Commonwealth's response to the trial court's discovery order, filed September 27, 2007, states a "tape-recording of the grand jury testimony is available upon written request to the Commonwealth's Attorney along with a CD-R." The Commonwealth's supplemental discovery response, filed May 5, 2008, states one CD of grand jury proceedings was provided to the defense. Thus, Philpott's 2013 request was duplicative and the fact that the prosecutor provided a CD to the defense in 2007 is fatal to Philpott's suggestion that no tape recording exists.

Wagner specifically holds a criminal defendant is not entitled to a grand jury transcript "solely for use in preparation of post-conviction proceedings." *Id.* at 542 (internal citations omitted). Philpott has not specified any reason for wanting or needing the transcript/minutes. The only claim he even suggests is that he was not truly indicted by a Spencer County grand jury. That sophistry is belied by inclusion of two indictments in the record, both signed by the foreman of the grand jury and both stating the date on which they were received in open court—one on September 6, 2007, and the other on August 7, 2008. As the trial court found, a CR 60.02 motion is not an appropriate vehicle for pursuing a violation of an open records request and we heartily agree.

Finally, we note an evidentiary hearing is necessary only when material issues of fact cannot be answered by the existing record. *Fraser*, 59

S.W.3d at 452. Philpott's claims were easily resolved on the face of the record.

Therefore, a hearing was not required and the request was properly denied.

WHEREFORE, the order of the Spencer Circuit Court denying Philpott's request for CR 60.02 relief without an evidentiary hearing is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Ralph Grady Philpott, *pro se*
Lexington, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Nate T. Kolb
Assistant Attorney General
Frankfort, Kentucky