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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001869-MR

ANTHONY HOPE — APPELLANT

v.

APPEAL FROM BRECKINRIDGE CIRCUIT COURT
HONORABLE ROBERT A. MILLER, JUDGE
ACTION NO. 04-CR-00079

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: MAZE, NICKELL AND TAYLOR, JUDGES.

NICKELL, JUDGE: Anthony Hope, *pro se,* appeals two orders entered by the Breckinridge Circuit Court on September 17, 2013. One denied a motion to amend sentence filed pursuant to CR[1] 60.02(e) and (f); the other denied a motion for the

[1] Kentucky Rules of Civil Procedure.

trial court to disqualify itself from ruling on the CR 60.02 motion. Having reviewed the record, the briefs and the law, we affirm.

We quote the underlying facts of this case from a prior Opinion in which another panel of this Court affirmed the 2007 denial of a post-judgment motion to modify a sentence of twenty years in favor of chemical castration.

> The Appellant, Anthony Hope (Hope), appeals the September 6, 2007, order of the Breckenridge Circuit Court, denying his post-judgment motion to modify the sentence imposed upon a guilty plea. After thorough review of the record and applicable law, we affirm.
>
> Hope was indicted in Breckenridge Circuit Court for five counts of sodomy in the first degree (in 2003 and 2004), seven counts of use of a minor in a sexual performance (in 1991, 2002, 2003 and 2004), and four counts of sexual abuse in the first degree (in 1991, 2003, and 2004), as well as persistent felony offender. Hope entered a guilty plea to five counts of sodomy in the first degree pursuant to Kentucky Revised Statutes (KRS) 510.070, seven counts of use of a minor in a sexual performance as set forth in KRS 531.310, and four counts of sexual abuse in the first degree as set forth in KRS 510.110. Hope's guilty plea was accepted, and he was convicted of the aforementioned offenses. The charge of persistent felony offender second degree was dismissed in exchange for Hope's guilty plea to the other offenses. He was sentenced to twenty years (sic) imprisonment in accordance with a plea agreement on November 7, 2005. No appeal was taken.
>
> Subsequently, Hope filed a motion for shock probation, and the Commonwealth responded, arguing that he was ineligible for same pursuant to KRS 439.3401. The court summarily denied Hope's motion on April 21, 2006, finding that he was ineligible for probation. Thereafter, on August 22, 2007, Hope filed a motion to modify his twenty-year sentence of imprisonment to chemical castration as an alternative to incarceration.

> The Commonwealth objected, and the circuit court denied the motion as frivolous.

Hope v. Commonwealth, 2007-CA-002084-MR, 2009 WL 50184, at *1 (Ky. App. Jan. 9, 2009). The panel affirmed the trial court's denial because Hope was ineligible for an alternative sentencing plan due to his conviction for sodomy making him a violent offender under KRS[2] 533.010(2). Further, had he qualified for an alternative sentencing plan, the trial court would have lacked jurisdiction to modify the sentence because judgment had been entered more than ten days when the motion to modify was filed.

We skip ahead to August 14, 2012, when Hope filed a *pro se* CR 60.02 motion—supported by a memorandum of law—alleging two errors by the trial court—failure to hold a competency hearing prior to accepting and entering Hope's guilty plea, and failure to recuse from presiding over the CR 60.02 motion. That same day, Hope also filed a motion to disqualify the trial court from hearing the CR 60.02 motion due to "preexisting bias." Neither motion provided details.

The Department of Public Advocacy (DPA) was appointed to represent Hope on the CR 60.02 motion, but upon reviewing the record, concluded a reasonable person with adequate means would not pursue the motion. After a hearing, DPA was allowed to withdraw without supplementing Hope's motion.

[2] Kentucky Revised Statutes.

Thereafter, on September 17, 2013, the trial court entered two separate orders denying all relief. We quote salient language from the order denying the CR 60.02 motion:

> [Hope's guilty plea colloquy indicates he] was sworn and testified under oath he had never been confined to a mental hospital or treated for a mental disease (p. 159). He testified he understood his constitutional rights and was waiving same. He further testified he understood the Commonwealth's Offer on a Plea of Guilty and wanted to accept same. He entered his Guilty Plea and responded in the following manner:
>
> THE COURT: Are you telling the court that you're guilty because you are guilty and for no other reason?
>
> DEFENDANT: Yes, your honor. (p. 161).
>
> On November 7, 2005, [Hope] appeared with counsel at his sentencing hearing. Defendant was asked if there was any legal cause to show why judgment should not be pronounced. No reason was offered.
>
> . . . .
>
> [Hope] also had a Comprehensive Sex Offender Presentence Evaluation performed. (Page 174). That report does not give any indication [Hope] was incompetent to be evaluat[ed] or suffering any mental deficiency.
>
> Hope filed a pro se motion for shock probation on April 12, 2006. In his Affidavit in support of his motion, Hope makes no reference to any irregularities in the proceedings or any mental deficiency.
>
> By Order entered April 21, 2006, the motion for shock probation was denied.
>
> . . . .

Subsequently, nearly seven (7) years after his Judgment and Sentence became final and non-appealable, Hope has filed new motions seeking recusal of this Judge and to Amend Sentence Pursuant to CR 60.02(e) and (f).

The Court has denied Hope's motion for recusal as no basis with any merit exists and [Hope cites] no applicable statute.

. . . .

RCr[3] 11.42 provides the process for a prisoner who claims a basis for collateral attack of a judgment and (sic) to have the sentence vacated, set aside or corrected. RCr 11.42(10) mandates the motion **shall** be filed within three years after the judgment becomes final, unless the motion alleges and the movant proves either:

(a) that the facts upon which the claim is predicated were unknown to the movant and could not have been ascertained by the exercise of due diligence; or

(b) that the fundamental constitutional right asserted was not established within the period provided for herein and has been held to apply retroactively.

Hope has not styled his motion as an RCr 11.42 motion. Therefore, he has waited well over three (3) years from his judgment to assert any claim.
Hope instead attempts to employ civil rules CR 60.02 (e) and (f) to circumvent the criminal rules. This type pleading was addressed by the Court of Appeals in Hope's prior appeal. In the Opinion Affirming, *Commonwealth v. Gross,* 936 S.W.2d 85 (Ky. 1996), was cited for the rule that the circuit court was without jurisdiction to modify a sentence more than ten days following the entry of judgment.

Hope has known the underlying facts upon which his motion relies since, on or before, he entered his guilty plea freely, knowingly, intentionally and voluntarily.

[3] Kentucky Rules of Criminal Procedure. (Footnote added).

> The alleged facts he tries to raise now as a basis for relief were available for him to appeal since November 7, 2005.
>
> He can't reasonably assert he doesn't understand how to challenge the judgment because he filed an appeal already on his alternative sentencing motion.
>
> There is no legal basis under the appropriate rules for this Court to grant Hope's motion.
>
> **NOW, THEREFORE IT IS HEREBY ORDERED** the motion of the Defendant, Anthony Hope, for a hearing to set aside his judgment under CR 60.02 (e) & (f) is **OVERRULED**.

(Emphasis in original). In a separate order filed the same day, the trial court succinctly ruled "the motion to disqualify the Court from presiding over the motion for relief pursuant to CR 60.02 (e) & (f) shall be overruled." Hope appeals both orders.

ANALYSIS

We review a trial court's denial of a CR 60.02 motion for an abuse of discretion. *Richardson v. Brunner*, 327 S.W.2d 572, 574 (Ky. 1959). The test 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). To justify CR 60.02(f) relief, Hope had to give the circuit court a "reason of an extraordinary nature justifying relief." CR 60.02(f). What

constitutes a reason of extraordinary nature is open to judicial construction.

Commonwealth v. Spaulding, 991 S.W.2d 651, 655 (Ky. 1999).

The Supreme Court of Kentucky explained the limited purpose of CR 60.02 in *Gross v. Commonwealth*, 648 S.W.2d 853, 856-57 (Ky. 1983):

> In *Howard v. Commonwealth,* Ky., 364 S.W.2d 809, 810 (1963), we stated:
>
> "It has long been the policy of this court that errors occurring during the trial should be corrected on *direct* appeal, and the grounds set forth under the various subsections of CR 60.02 deal with *extraordinary* situations which do not as a rule appear during the progress of a trial. Although the rule does permit a direct attack by motion where the judgment is voidable—as distinguished from a void judgment—this direct attack is *limited to specific subsections* set out in said rule . . ." (emphasis added).
>
> RCr 11.42 provides a procedure for a motion to vacate, set aside or correct 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. In subsection (3) it provides that "the motion shall state *all* grounds for holding the sentence invalid of which the movant has knowledge. Final disposition of the motion shall conclude *all* issues that could reasonably have been presented in the same proceeding." (emphasis added).
>
> 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. CR 60.02 is not intended merely as an additional opportunity to raise *Boykin* [*v. Alabama,* 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969)] 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.

CR 60.02 was enacted as a substitute for the common law writ of *coram nobis*. The purpose of such a writ was to bring before the court that pronounced judgment errors in matter of fact which (1) had not been put into issue or passed on, (2) were unknown and could not have been known to the party by the exercise of reasonable diligence and in time to have been otherwise presented to the court, or (3) which the party was prevented from so presenting by duress, fear, or other sufficient cause. *Black's Law Dictionary, Fifth Edition,* 487, 1444. In *Harris v. Commonwealth,* Ky., 296 S.W.2d 700 (1956), this court held that 60.02 does not extend the scope of the remedy of *coram nobis* nor add additional grounds of relief. We held that *coram nobis* "is an extraordinary and residual remedy to correct or vacate a judgment 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 party seeking relief."

In *Jones v. Commonwealth,* 269 Ky. 779, 108 S.W.2d 816, 817 (1937), this court held that the purpose for the writ is to obtain a new trial in situations in "which the real facts, as later presented on application for the writ, rendered the original trial tantamount to none at all, and when to enforce the judgment as rendered would be an absolute denial of justice and analogous to the taking of life or property without due process of law."

Thus, while the remedies formerly available in criminal cases by writ of *coram nobis* have been preserved by CR 60.02 (*Balsley v. Commonwealth,* Ky., 428 S.W.2d 614, 616 (1967)), the remedies have not been extended, but have been limited by the language of that rule.

CR 60.02 limits relief in these particulars:

1) The first three grounds specified in the rule [(a) mistake, inadvertence, surprise or excusable neglect, (b) newly discovered evidence, (c) perjury] are limited to application for relief "not more than one year after the judgment."

2) The additional specified grounds for relief are (a) fraud, (b) the judgment is void, vacated in another case, satisfied and released, or otherwise no longer equitable, or (c) other reasons of an "extraordinary nature" justifying relief. These grounds are specific and explicit. Claims alleging that convictions were obtained in violation of constitutionally protected rights do not fit any of these grounds except the last one, "any other reason of an extraordinary nature justifying relief." In *Copeland v. Commonwealth*, Ky., 415 S.W.2d 842 (1967), we refused to grant CR 60.02 relief where the alleged constitutionally impermissible act (failure to provide counsel when taking a guilty plea) could have been raised in an earlier proceeding. This establishes as precedent that such grounds are not automatic, but subject to the qualification that there must be circumstances of an extraordinary nature justifying relief.

3) CR 60.02 relief is discretionary. The rule provides that the court "may, upon such terms as are just, relieve a party from its final judgment . . ." (emphasis added).

4) CR 60.02 further provides, as a threshold to relief, that "the motion shall be made within a reasonable time. . . ."

> We hold that 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, or should be 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.
>
> We adopt in this case, from the opinion in *Alvey v. Commonwealth,* Ky., 648 S.W.2d 858 (1983), published this day, the following:
>
> "(W)e should not afford the defendant a second bite at the apple. Moreover, we fail to perceive that there is any constitutional impediment in following such a course since we do not believe that the persistent felony offender type of situation was anticipated or was it meant to be encompassed in *Boykin v. Alabama.*" (Citation omitted).

Applying *Gross* and *Alvey,* we find several miscues. Since Hope pled guilty, he waived his right to a direct appeal. Inexplicably, he chose not to file an RCr 11.42 motion, even though that option was available to him—and required by *Gross*. Instead, he waited seven years and filed a CR 60.02 motion. However, as explained in *Gross,* CR 60.02 is not a substitute for RCr 11.42—nor is it a second bite at the apple.

Both CR 60.02 and RCr 11.42 have strict time frames. An RCr 11.42 motion must be filed within three years of the judgment becoming final. RCr 11.42(10). A CR 60.02 motion—depending upon the grounds asserted—must be filed within one year of the judgment being entered, or "within a reasonable time." Since Hope chose to seek relief under CR 60.02 (e) and (f), his motion had to be filed within a reasonable time.

In *Graves v. Commonwealth,* 283 S.W.3d 252, 257 (Ky. App. 2009), we deemed a delay of seven years to be unreasonable. We see no reason to depart from that course here. The main thrust of Hope's motion was the trial court did not question his competence to plead guilty and hold a hearing. As noted by the trial court, any proof of incompetence would have been known to Hope by at least the time of sentencing on November 7, 2005. He would have had at least an inkling of a claim in January 2004 when Dr. Glenna Major, a staff psychiatrist with Communicare in Hardinsburg, Kentucky, diagnosed him as being alcohol dependent—although in early full remission—and having antisocial personality disorder when she performed a psychiatric evaluation. Her findings parroted those of a Certified Psychological Associate (signature illegible) who concluded in December 2003 Hope was alcohol dependent and had antisocial personality disorder. For Hope to sit on this information until August of 2012, was clearly "unreasonable." Furthermore, while Hope's motion should have been brought under RCr 11.42, his failure to abide by the time limits in that rule did not make

CR 60.02 an option for him. Therefore, the CR 60.02 motion was properly denied as untimely.

Additionally, the trial court properly found Hope's claims wholly lacked merit. First,

> [a]n incompetency hearing is only required when the trial judge is presented with sufficient evidence of reasonable doubt of competency to stand trial. *Hunter v. Commonwealth,* Ky., 869 S.W.2d 719 (1994). If no reasonable grounds exist for doubting a defendant's competency, no error occurred in not holding a hearing. *Gilbert v. Commonwealth,* Ky., 575 S.W.2d 455 (1978). Reasonable grounds must be called to the attention of the trial court or must be so obvious that the trial judge cannot fail to be aware of them. *Henley v. Commonwealth,* Ky., 621 S.W.2d 906 (1981).

Lear v. Commonwealth, 884 S.W.2d 657, 659 (Ky. 1994).

Here, defense counsel sent a letter to Hope stating she would "attempt to get a motion filed for psychiatric evaluation," but no such motion was ever filed. Without a motion, Hope's conduct had to be so overt and outrageous the trial court could not help but suspect he was incompetent. The record simply does not support such a suspicion.

Hope claims during arraignment he mentioned receiving " 'psych drugs' . . . to help him sleep."[4] In reviewing the record, we saw notations for only Doxepin (an antidepressant) at bedtime; Ranitidine (Zantac) at supper; and Prilosec (to reduce stomach acid) at bedtime.

[4] We reviewed the videotaped arraignment but due to poor audio quality we did not hear Hope say anything.

Furthermore, as noted by the trial court, during the guilty plea colloquy, Hope stated he had never been confined or treated for mental disease and was not currently under the influence of intoxicants or drugs. His testimony was inconsistent with Dr. Major's report documenting Hope's "long history of polysubstance dependence." Her report also indicated Hope had "never participated in outpatient therapy," but had been "admitted to Central State Hospital in 1993 and he was at KCPC in 1988." One must bear in mind that not every mental condition equates to incompetence. *Pate v. Commonwealth*, 769 S.W.2d 46, 48 (Ky. 1989). Here, there was simply no evidence Hope could not appreciate the nature and consequences of pleading guilty and could not rationally participate in the proceedings. *Id.* Absent such proof in 2005, no hearing was required.

Moreover, Hope has not offered new proof to substantiate such a theory. Examinations between entry of the guilty plea and final sentencing showed no lingering effects of any mental illness. The presentence investigation report completed on October 13, 2005, stated the only medication Hope was taking was Zantac and there were "[n]o mental health problems/concerns." Spaces for "[e]xisting mental health problems/concerns;" "[p]revious mental health problems/concerns;" "[p]rior [s]uicide attempts;" and "[p]sychiatric [h]ospitalizations" were all left blank. A Comprehensive Sexual Offender Presentence Evaluation completed by a licensed clinical psychologist on October 26, 2005, noted Hope had said "his biological father was 'in and out of psychiatric

hospitals,' " but there was no mention of inpatient or outpatient care for Hope himself. Instead, the report described Hope as a veteran in good health, under no medical treatment, and showing "no symptoms of psychological disturbance." In light of the evidence presented to us, there was no reason for the trial court to schedule a competency hearing. Thus, there was no abuse of discretion and no reason for reversal.

Hope's other claim—that the trial court should have recused from hearing the CR 60.02 motion—is likewise without merit. Without offering any specifics, Hope boldly states the court "has a preexisting bias against this Movant, His Honor having failed to uphold the state and Federal Rules of Criminal Procedure, as outlined in the attached CR 60.02(e) & (f)." We are a Court of review. We do not compose arguments for litigants, nor do we search the record for support of bare claims. *Milby v. Mears*, 580 S.W.2d 724, 727 (Ky. App. 1979). In light of Hope's undeveloped argument, we affirm the trial court's denial of relief.

WHEREFORE, discerning no reason of an extraordinary nature justifying relief, we affirm the orders of the Breckinridge Circuit Court.

ALL CONCUR.

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