

Commonwealth of Kentucky
Court of Appeals

NO. 2014-CA-000898-MR

JOHNNY COWHERD

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES D. ISHMAEL, JR., JUDGE
ACTION NO. 93-CR-000395

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: DIXON, KRAMER, AND THOMPSON, JUDGES.

KRAMER, JUDGE: Johnny Cowherd appeals the Fayette Circuit Court’s order denying his CR¹ 60.02 motion for relief from the court’s judgment against him.

After a careful review of the record, we affirm because Cowherd’s claim regarding the jury instructions was raised previously; his claim of “invidious discrimination”

¹ Kentucky Rule of Civil Procedure.

is a conclusory allegation and it should have been raised previously; and his claim of entitlement to an evidentiary hearing lacks merit.

I. FACTUAL AND PROCEDURAL BACKGROUND

In 1993, Cowherd was convicted, following a jury trial, of: two counts of first-degree rape; four counts of first-degree sodomy; and one count of first-degree criminal trespass. He was sentenced to serve sixteen years of imprisonment for each of the first-degree rape convictions; eighteen years of imprisonment for each of the first-degree sodomy convictions; and six months of imprisonment for the first-degree criminal trespass conviction. Cowherd's sentences for his first-degree rape and first-degree sodomy convictions were all ordered to be served consecutively to each other, and his sentence for first-degree criminal trespass was ordered to run concurrently with them. The Kentucky Supreme Court affirmed the trial court's judgment in 1994.

In a prior opinion, this Court stated the following regarding the procedural history of Cowherd's case:

Over the years which followed [the Supreme Court's decision on direct appeal], Cowherd filed [numerous] motions for post-judgment relief. These include an RCr^[2] 11.42 motion filed in 1994, three motions for CR 60.02 relief which were filed in 1997, 1999, and 2008, and a motion to vacate and motion for declaratory judgment filed in 2000. Each of these motions was denied, and each Order denying was affirmed on appeal to this Court. Cowherd also unsuccessfully sought relief from judgment in [the] United States District Court.

² Kentucky Rule of Criminal Procedure.

Cowherd v. Commonwealth, No. 2010-CA-000261-MR, 2010 WL 4026096, *1 (Ky. App. Oct. 15, 2010) (unpublished).

In 2010, Cowherd filed his fourth CR 60.02 motion. In that motion, he “argued that the sentence and the jury instructions were improper, thus entitling him to have the judgment vacated.” *Cowherd*, No. 2010-CA-000261-MR, 2010 WL 4026096, at *1 (Ky. App. Oct. 15, 2010) (unpublished). The circuit court held that his “motions were repetitive and meritless, and . . . found that the sentencing issue was previously raised by Cowherd.” *Id.* The court also “found that the jury instruction argument should have been raised, if at all, in one of Cowherd’s previous motions for relief.” *Id.* Therefore, the circuit court denied Cowherd’s motion. *See id.* On appeal, this Court affirmed the circuit court’s decision. *Id.* at *2.

Cowherd then filed his fifth CR 60.02 motion, which is the subject of the present appeal. In that motion, he alleged that he had suffered “invidious discrimination” when the courts did not grant his fourth CR 60.02 motion. Cowherd contended that there had been a change in the law concerning jury instructions entitling him to relief, yet the courts did not grant him that relief. Cowherd alleged that a convict in another case had been granted relief based on a change in the law, but due to “invidious discrimination,” Cowherd was not given the same consideration. Cowherd also contended that the courts previously erred in concluding that his jury instruction argument could have or should have been raised in a previous proceeding. He further asserted that it was error for the jury

instructions to fail to factually distinguish between multiple offenses. Finally, Cowherd argued that the circuit court was biased, resulting in Cowherd being treated differently, in violation of his rights under the Fifth and Fourteenth Amendments of the United States Constitution and Section 2 of the Kentucky Constitution.

The circuit court denied Cowherd's motion, holding that the issues he raised were either previously raised or they should have been raised in prior appeals or motions. The court also held that there was no issue of material fact that required an evidentiary hearing.

Cowherd now appeals, contending that: (a) the circuit court erred in finding that his arguments were previously raised, or they could have been raised, in a prior appeal or motion; (b) the court erred in finding there was no issue of fact requiring an evidentiary hearing and that there was no factual basis in the record to support any of the issues he raised in his motion; and (c) the courts and the Commonwealth have been biased and prejudiced against Cowherd, amounting to "invidious discrimination," and resulting in him being deprived of a fair process to present his objections.

II. STANDARD OF REVIEW

On appeal, we review the denial of a CR 60.02 motion for an abuse of discretion. *See White v. Commonwealth*, 32 S.W.3d 83, 86 (Ky. App. 2000).

"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.” *McQueen v. Commonwealth*, 948 S.W.2d 415, 416 (Ky. 1997) (internal quotation marks omitted). Civil Rule 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.” *Id.* “The [CR 60.02] 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). Additionally, claims brought under CR 60.02(a), (b), or (c) must be brought within one year after the judgment is entered, and claims brought under the remaining sections of CR 60.02 must be brought within a “reasonable time.” *See* CR 60.02.

III. ANALYSIS

We first note that to the extent Cowherd continues to challenge the jury instructions, those claims were raised in a prior post-conviction motion and in a prior appeal in which this Court denied relief. Consequently because those claims were raised previously, they are not properly before us in the present appeal.

Cowherd also contends he has suffered “invidious discrimination” because the courts have not granted him relief during the proceedings involving his prior motions and appeals, particularly his fourth CR 60.02 motion and the appeal

which followed it, while the courts have granted relief to another appellant in an unrelated case, *i.e.*, the appellant in *Sparks v. Commonwealth*, No. 2011-CA-000820-MR, 2012 WL 3136943, *1 (Ky. App. Aug. 3, 2012) (unpublished), *modified and superseded by Sparks v. Commonwealth*, No. 2011-CA-000820, 2013 WL 1701812, *1 (Ky. App. Apr. 19, 2013) (unpublished).³ Cowherd argues that his circumstances are the same as Sparks's. However, Cowherd provides no evidence of bias or prejudice to support his "invidious discrimination" claim. Therefore it is a conclusory allegation, and we will not consider it. Moreover, this is a claim that Cowherd could have raised on appeal from his fourth CR 60.02 motion, so it is not properly before us in the present appeal.

Finally, because Cowherd did not "affirmatively allege facts which, if true, justify vacating the judgment and [he also did not] allege special circumstances that justify CR 60.02 relief," *Gross*, 648 S.W. 2d at 856, he was not entitled to an evidentiary hearing.

Accordingly, the order of the Fayette Circuit Court is affirmed.

ALL CONCUR.

³ We note that the opinion cited by Cowherd was unpublished. Pursuant to CR 76.28(4)(c), unpublished opinions "Shall not be cited or used as binding precedent in any other case in any court of this state; however, unpublished Kentucky appellate decisions, rendered after January 1, 2003, may be cited for consideration by the court if there is no published opinion that would adequately address the issue before the court."

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