

Commonwealth of Kentucky
Court of Appeals

NO. 2014-CA-001075-MR

ANGELO KREE HESTER

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE PAMELA R. GOODWINE, JUDGE
ACTION NO. 04-CR-00300-005

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, NICKELL, AND THOMPSON, JUDGES.

NICKELL, JUDGE: Angelo Kree Hester, *pro se*, has appealed from the Fayette Circuit Court's denial of his motion seeking post-conviction relief pursuant to CR¹ 60.02. Following a careful review, we affirm.

¹ Kentucky Rules of Civil Procedure.

Hester was convicted following a jury trial of one count each of robbery in the first degree, burglary in the first degree, and being a persistent felony offender in the second degree (PFO II). The jury recommended a sentence of ten years' imprisonment on the underlying charges, enhanced to twenty years by virtue of his PFO II status. The Supreme Court of Kentucky affirmed the convictions and sentence on direct appeal.² The Fayette Circuit Court denied Hester's subsequent RCr³ 11.42 motion seeking post-conviction relief based on claims of ineffectiveness of trial counsel. A panel of this Court reversed and remanded for an evidentiary hearing on Hester's claims.⁴ On remand, the trial court again denied the requested relief following the evidentiary hearing. Hester appealed and this Court affirmed the trial court's ruling.⁵

On June 10, 2014, Hester filed a *pro se* motion pursuant to CR 60.02 seeking modification of his parole eligibility date. In the motion, Hester conceded his underlying offense of robbery was properly classified as a violent offense requiring service of eighty-five percent of his sentence before becoming eligible for parole under KRS⁶ 439.3401(3)(a). However, he argued the enhanced portion

² *Hester v. Commonwealth*, 2006 WL 2707441, 2004-SC-000794-MR, rendered September 21, 2006, unpublished.

³ Kentucky Rules of Criminal Procedure.

⁴ *Hester v. Commonwealth*, 2009 WL 3486769, 2008-CA-001969-MR, rendered October 30, 2009, unpublished.

⁵ *Hester v. Commonwealth*, 2012 WL 28697, 2010-CA-002045-MR, rendered January 6, 2012, unpublished.

⁶ Kentucky Revised Statutes.

of his sentence—based on his conviction as a PFO II—was not controlled by the mandates of KRS 439.3401; could not be classified as a violent offense; and therefore, he was entitled to parole eligibility after serving only twenty percent of the enhanced portion of his sentence. Further, Hester alleged he received unsound advice from his trial counsel regarding parole eligibility, thereby rendering counsel ineffective. He additionally argued his sentence was disproportionately harsh compared to sentences received by his co-defendants, thereby violating his Constitutional rights to equal protection and subjecting him to cruel and unusual punishment. The trial court summarily denied Hester’s motion upon concluding CR 60.02 was not the proper vehicle for the requested relief. Hester timely appealed to this Court and now raises the same allegations as he did below.

This Court reviews the denial of a CR 60.02 motion under an abuse of discretion standard. *Brown v. Commonwealth*, 932 S.W.2d 359, 361 (Ky. 1996). The test for an 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) (citing 5 Am.Jur.2d Appellate Review § 695 (1995)). We will affirm the lower court’s decision unless there is a showing of some “flagrant miscarriage of justice.” *Gross v. Commonwealth*, 648 S.W.2d 853, 858 (Ky. 1983).

The relief provided by CR 60.02 is only given under extraordinary circumstances, and the pursuit of such relief is not a substitute for an appeal or other remedies, but rather is intended as an avenue to raise issues which cannot

properly be raised in other proceedings. *McQueen v. Commonwealth*, 948 S.W.2d 415 (Ky. 1997). Acting as a “safety valve” and “error correcting device for trial courts,” CR 60.02 provides relief where extraordinary and compelling equities exist. *Kurtsinger v. Bd. of Trustees of Kentucky Retirement Systems*, 90 S.W.3d 454, 456 (Ky. 2002); *Bishir v. Bishir*, 698 S.W.2d 823, 826 (Ky. 1985).

The rule gives a trial court the flexibility needed to correct injustice and the power to correct judgments. *Richardson v. Head*, 236 S.W.3d 17, 20 (Ky. App. 2007). For a conviction to be vacated, the movant must “demonstrate why he is entitled to this special, extraordinary relief.” *McQueen*, 948 S.W.2d at 416. CR 60.02 was not “intended merely as an opportunity to relitigate the same issues which could ‘reasonably have been presented’ by direct appeal or RCr 11.42 proceedings.” *Id.* at 416. *See also Gross*, 648 S.W.2d at 856.

Our review of the record reveals all of the claims Hester raises reasonably could have been brought on direct appeal or in his RCr 11.42 motion for post-conviction relief. He has failed to show he is entitled to the extraordinary relief provided by CR 60.02. Hester’s claims were known to him—or reasonably should have been—at the time of his earlier filings and he is not entitled to bring them at this tardy date upon his failure to raise them in a timely manner. *Gross*, 648 S.W.2d at 856. Although the trial court did not specifically set forth such reasoning in its order denying the requested relief, it is axiomatic that we may affirm the trial court for any reason supported by the record. *McCloud v. Commonwealth*, 286 S.W.3d 780, 786 (Ky. 2009).

Further, we are not persuaded by Hester's contention he could not have raised the issue regarding parole eligibility calculation at an earlier date as he had not yet completed service of his sentence on the underlying robbery and burglary convictions. Hester is apparently laboring under the erroneous belief that he received two totally separate sentences for his crimes, a ten year sentence for the underlying offenses, and a ten year sentence for being a PFO II. This position is untenable and legally incorrect.

KRS 532.080(1) clearly states the sentence imposed upon a defendant convicted of being a persistent felony offender shall be "*in lieu of the sentence of imprisonment assessed under KRS 532.060 for the crime of which such person presently stands convicted . . .*" (Emphasis added). Thus, the penalty fixed by the jury upon Hester's conviction of being a PFO II *replaced* the sentence imposed for his original convictions on the underlying charges. Moreover, a PFO conviction merely subjects a defendant to a sentencing range commensurate with the next higher class of felony than the one of which he stands convicted. The enhancement provisions have no impact on a defendant's classification as a violent offender for parole eligibility purposes. When, as here, the underlying offense is a violent crime—a fact Hester concedes—the provisions of KRS 439.3401 are controlling for the entirety of the imposed sentence. Hester's novel contention to the contrary is wholly without merit.

For the foregoing reasons, the judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

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