RENDERED: DECEMBER 11, 2015; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-001744-MR

ROGER D. CRAWLEY — APPELLANT

v.

APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE ANDREW SELF, JUDGE
ACTION NO. 81-CR-00251

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, D. LAMBERT AND VANMETER, JUDGES.

D. LAMBERT, JUDGE: Roger Crawley appeals from a Christian Circuit Court order denying his motion made pursuant to Kentucky Rules of Civil Procedure (CR) 60.02 (e) and (f). Crawley argues that his 1982 persistent felony offender (PFO) conviction should be vacated because one of the underlying felony convictions presented to the jury had been previously vacated by a federal court.

To understand the procedural history of Crawley's appeal, we must go back to 1977, when he was convicted of first-degree robbery in Jefferson Circuit Court. He subsequently filed a petition for a writ of *habeas corpus*, and, on April 30, 1981, the conviction was vacated on speedy trial grounds by the United States District Court for the Western District of Kentucky.

On June 25, 1982, Crawley was convicted in Christian County of two counts of first-degree robbery and of being a first-degree persistent felony offender (PFO). During the PFO phase of the trial, the Christian County jury was presented with evidence that Crawley had committed four prior felonies. These included the Jefferson County conviction that, unbeknownst to the trial court or to either party, had been vacated by the federal court the year before. Crawley received a sentence of twenty years on each robbery count, enhanced to a life sentence as a result of his status as a PFO.

In 1991, almost ten years later, Crawley filed a motion in Christian Circuit Court pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42, alleging that his trial counsel was ineffective for failing to discover that the Jefferson County robbery conviction had been vacated. A copy of the federal judgment was attached to the motion. There is nothing in the record to show that the Christian Circuit Court ever ruled on the motion. For the next twenty years, Crawley did nothing more to pursue the matter.

In 2008, Crawley was paroled. In 2009, he was convicted in Muhlenberg Circuit Court of first-degree trafficking in a controlled substance and

being a first-degree PFO. The judgment was affirmed on direct appeal to the Kentucky Supreme Court. See *Crawley v. Commonwealth*, No. 2009-SC-00673-MR, 2010 WL 3722783 (September 23, 2010).

Crawley thereafter filed a pro se RCr 11.42 motion in Muhlenberg Circuit Court, arguing that his appellate counsel was ineffective for failing to show that the three previous felony convictions presented to the jury during the PFO phase of the trial included the vacated 1977 Jefferson Circuit Court judgment. Crawley does not appear ever to have told his trial or appellate attorneys that the 1977 judgment had been vacated, however, even though he would have been fully aware of it at least eighteen years before as evidenced by his RCr 11.42 motion in the Christian Circuit Court. The Muhlenberg Circuit Court denied the motion, and its order was subsequently affirmed on appeal. See *Crawley v. Commonwealth*, No. 2011-CA-001555-MR, 2013 WL 3519559 (July 12, 2013).

On September 26, 2011, Crawley filed a CR 60.02 motion in Christian Circuit Court, arguing that the 1982 judgment should be vacated because evidence of the vacated 1977 conviction was presented to the jury during the penalty phase of the trial. The circuit court denied the motion on the grounds that it had not been filed within a reasonable amount of time. Its order was affirmed on direct appeal. See *Crawley v. Commonwealth*, No. 2012-CA-000103-MR, 2013 WL 2257643 (May 24, 2013).

On December 2, 2013, Crawley filed a successive CR 60.02 motion in the Christian Circuit Court, raising the same argument. It was denied by the circuit court as lacking merit in an order entered on July 10, 2014. This appeal followed.

We review the denial of a CR 60.02 motion for an abuse of discretion. *Partin v. Commonwealth*, 337 S.W.3d 639, 640 (Ky. App. 2010). The test for abuse of discretion 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) (internal citations omitted). A movant must demonstrate that "he is entitled to this special, extraordinary relief." *Gross v. Commonwealth*, 648 S.W.2d 853, 856 (Ky.1983). We will affirm the trial court's decision absent a "flagrant miscarriage of justice." *Id*. at 858.

Crawley's motion was made pursuant to section subsections (e) and (f) of CR 60.02, which permit a court to grant relief from a judgment if "the judgment is void, or has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application;" or "any other reason of an extraordinary nature justifying relief." The Rule specifies that a motion brought under these subsections "shall be made within a reasonable time[.]" The Christian Circuit Court denied Crawley's first CR 60.02 motion on the grounds that it was not made within a reasonable time, and a panel of this Court held that the court had not abused its discretion in making this determination, finding "nothing in the record to support a finding that Crawley's motion was filed

within a reasonable time under the circumstances." *Crawley v. Commonwealth*, No. 2012-CA-000103-MR, 2013 WL 2257643 (May 24, 2013).

Based on the record before us, Crawley certainly knew by 1991, when he filed his RCr 11.42 motion, that the federal court had vacated his conviction. He brought the present motion in 2014, twenty-three years later. By any measure, that is not a reasonable amount of time. See *Stoker v. Commonwealth*, 289 S.W.3d 592 (Ky. App. 2009) (trial court properly denied appellant's CR 60.02 motion, his second post-conviction motion, which was brought approximately eighteen years after his conviction); *Foley v. Commonwealth*, 425 S.W.3d 880, 884 (Ky. 2014) (trial court did not abuse its discretion in denying motion two decades after conclusion of the trial.)

Under these circumstances, the Christian Circuit Court would certainly have been justified in denying Crawley's successive CR 60.02 motion as untimely. It chose, however, to address his substantive argument and concluded that he was not entitled to relief from his 1982 conviction because the jury was presented with evidence of three other felony convictions, any one of which would have supported the finding that he was a first-degree PFO.

Crawley argues that the trial court's analysis ignored the holding of *Sanders v. Commonwealth*, 301 S.W.3d 497 (Ky. 2010), in which a PFO jury instruction listed the defendant's prior conviction for possession of drug paraphernalia under Kentucky Revised Statutes (KRS) 218A.500, even though

KRS 532.080(8) states that "[n]o conviction, plea of guilty or *Alford*[1] plea to a violation of KRS 218A.500 shall bring a defendant within the purview of or be used as a conviction eligible for making a person a persistent felony offender." The Commonwealth argued that the inclusion of the paraphernalia conviction was harmless error because the evidence at trial proved four other prior felony convictions, any two of which would support a conviction for first-degree persistent felony offender. *Sanders*, 301 S.W.3d at 500. The Kentucky Supreme Court disagreed and reversed, because the PFO conviction was improperly predicated on a crime expressly excluded from PFO considerations by statute and because errors in jury instructions are presumptively prejudicial. *Id*.

Crawley contends that the same reasoning should be applied to vacate his 1982 PFO conviction. Unlike the situation in *Sanders*, however, the inclusion of the 1977 conviction in his case did not expressly violate a statute. More importantly, the procedural posture of Crawley's case is fundamentally different from *Sanders*. It is not a direct appeal, but a successive post-conviction motion made almost thirty years after the trial. CR 60.02 motions are limited to afford special and extraordinary relief not available in other proceedings. *McQueen v. Commonwealth*, 948 S.W.2d 415, 416 (Ky.1997). CR 60.02 was enacted as a statutory codification of the common law writ of *coram nobis*. *Gross v. Commonwealth*, 648 S.W.2d at 856. The purpose of a petition for *coram nobis* was to bring fundamental errors before the court which (1) had not been heard or

[1] *North Carolina vs. Henry C. Alford,* 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970).

litigated, (2) were not known or could not have been known by the party through the exercise of due diligence, or (3) the party was prevented from presenting due to duress, fear, or some other sufficient cause. *Id*. Crawley's claim does not fall within any of these categories. The Kentucky Supreme Court "has attempted to make abundantly clear . . . that CR 60.02 and RCr 11.42 motions are not to be used to relitigate previously determined issues." *Baze v. Commonwealth*, 276 S.W.3d 761, 765-766 (Ky. 2008). The Muhlenberg Circuit Court previously ruled in a virtually identical case that Crawley was not prejudiced by the inclusion of the 1977 conviction in PFO proceedings. We see no grounds to disagree with this reasoning, nor does the structure of CR 60.02 allow us to do so.

The order denying Crawley's CR 60.02 motion is therefore affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Aaron Reed Baker
Assistant Public Advocate
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Susan Roncarti Lenz
Assistant Attorney General
Frankfort, Kentucky