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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001940-MR

JEFFREY D. HARLOW — APPELLANT

v.

APPEAL FROM BARREN CIRCUIT COURT
HONORABLE JOSEPH W. CASTLEN III, JUDGE
ACTION NO. 04-CR-00291

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; CLAYTON AND KRAMER, JUDGES.

ACREE, CHIEF JUDGE: Appellant Jeffrey Harlow appeals the October 10, 2013 order of the Barren Circuit Court denying his motion for relief made pursuant to Kentucky Rules of Civil Procedure (CR) 60.02. We affirm.

In November 2006, Harlow pleaded guilty to first-degree burglary, complicity to first-degree robbery, and complicity to theft by unlawful taking over $300. He was sentenced to ten-years' imprisonment, probated for five years.

Harlow failed to comply with the terms of his probation and, in 2009, Harlow's probation officer requested a probation-revocation hearing. The revocation hearing was held on June 12, 2009. The circuit court found that Harlow had violated the terms and conditions of his probation by using drugs and alcohol, and by failing to complete Drug Court. The circuit court then ordered Harlow to serve out his ten-year sentence.

In November 2009, Harlow, through counsel, filed a motion to vacate the sentence pursuant to CR 60.02 and Kentucky Rules of Criminal Procedure (RCr) 11.42. In his motion, Harlow argued, *inter alia*, that his guilty plea was not intelligently and voluntarily entered due to ineffective assistance of counsel. Specifically, Harlow asserted his trial counsel failed to inform him that he would be required to serve 85% of his sentence before being eligible for parole. He also claimed that trial counsel failed to object to him being sentenced to probation when he was, in fact, not eligible for that sentence. The circuit court denied Harlow's motion. Harlow appealed to this Court.

In the interim, Harlow filed a second CR 60.02 motion in May 2010 asserting many of the same allegations raised in his first post-conviction motion. The circuit court again denied Harlow's motion, and Harlow appealed.

This Court consolidated those appeals, and affirmed the circuit court's decisions. *Harlow v. Commonwealth*, 2010-CA-000725-MR & 2011-CA-000029-MR, 2011 WL 51054, at *1 (Ky. App. Oct. 28, 2011). In denying Harlow's appeal, we held that while the sentence of probation was erroneous, Harlow was not prejudiced by that sentence. We further held that the evidence in the record suggested that Harlow entered his plea knowingly, voluntarily, and intelligently, and that the lack of knowledge of parole consequences was not a reason to vacate a judgment under RCr 11.42.

In May 2013, Harlow filed a third motion to vacate his judgment and sentence pursuant to CR 60.02(e) and (f). In his latest motion, Harlow argued: (1) his plea should be set aside because, had he been apprised by trial counsel that he would not be eligible for parole until he had served 85% of his sentence, he would not have pleaded guilty; (2) the judgment sentencing him to probation was unconstitutional and void *ab initio*; and (3) because his plea was void, it was not knowing and voluntary. The circuit court denied Harlow's motion, finding that the issues were previously raised, denied, and affirmed on appeal by this Court. This appeal followed.

We review a circuit court's ruling on a CR 60.02 motion for an abuse of discretion. *White v. Commonwealth*, 32 S.W.3d 83, 86 (Ky. App. 2000). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Miller v. Eldridge*, 146 S.W.3d 909, 914 (Ky. 2004) (citation omitted).

On appeal, Harlow argues that the circuit court abused its discretion when it declined to hold an evidentiary hearing and denied him relief pursuant to CR 60.02(e) and (f).[1] Specifically, he argues: (1) he was entitled to an evidentiary hearing because his counsel failed to advise him of the requirement that he serve eighty-five percent of his sentence under KRS[2] 439.3401 before being eligible for probation or parole; (2) the sentence imposed was illegal because he was not eligible for probation; and (3) because his sentence was illegal, his plea could not have been knowing and voluntary.

CR 60.02 affords relief only in extraordinary circumstances and only for extraordinary reasons. *U.S. Bank, NA v. Hasty*, 232 S.W.3d 536, 541 (Ky. App. 2007). "It is for relief that is not available by direct appeal and not available under RCr 11.42." *Gross v. Commonwealth*, 648 S.W.2d 853, 856 (Ky. 1983). It cannot be said often enough that CR 60.02 is not to be used as a vehicle to relitigate the same issues which were or could reasonably have been raised on direct appeal, in an RCr 11.42 proceeding, or in a prior CR 60.02 motion. *See McQueen v. Commonwealth*, 948 S.W.2d 415, 416 (Ky. 1997); *Goldsmith v. Fifth Third Bank*, 297 S.W.3d 898, 903 (Ky. App. 2009). "The obvious purpose of this principle is to prevent the relitigation of issues which either were, should or could have been

[1] These sections authorize the circuit court to set aside a final judgment if "(e) 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 (f) any other reason of an extraordinary nature justifying relief." CR 60.02(e), (f).

[2] Kentucky Revised Statute.

litigated in a similar proceeding." *Stoker v. Commonwealth,* 289 S.W.3d 592, 597 (Ky. App. 2009).

Some of the arguments currently before us were raised by Harlow, and denied by this Court, in Harlow's prior appeal from the circuit court's August 2010 order denying Harlow's first two post-conviction motions. Those arguments are: (1) that his plea was not knowing and voluntary; and (2) that his trial counsel was ineffective for failing to inform him that he would have to serve 85% of his sentence before becoming parole eligible. Our law is clear: a final decision of this Court is the law of the case, and is conclusive of the questions it resolved. It is binding upon the parties and the courts. *See Union Light, Heat & Power Co. v. Blackwell's Adm'r*, 291 S.W.2d 539, 542 (Ky. 1956) (explaining the law of the case doctrine holds "an opinion or decision of an appellate court in the same cause is the law of the case for a subsequent trial or appeal however erroneous the opinion or decision may have been"); *Martin v. Frasure*, 352 S.W.2d 817, 818 (Ky. 1961) ("A final decision of this Court, whether right or wrong, is the law of the case and is conclusive of the questions therein resolved."). Accordingly, Harlow is precluded from raising those same issues in this successive appeal.

Harlow also argues the sentence of probation was both illegal and violated the separation of powers doctrine. While the substance of Harlow's argument is the same – that is, the circuit court granted him probation when he was not eligible for probation – the packaging has changed. Harlow's original post-conviction motions framed the issue as one of ineffective assistance of counsel under RCr

11.42. In this appeal, Harlow asserts a direct error committed by the circuit court when it imposed an alleged illegal sentence.

This distinction, while not unimportant,[3] still does not entitle Harlow to the relief he seeks. Harlow has been battling the "improper probation" issue since 2009. It was certainly known to him at that time. He could have brought this very same claim in his previous post-conviction motions. He failed to do so. Instead, he seeks successive CR 60.02 relief. We decline to allow CR 60.02 to be abused in this fashion. *Foley v. Commonwealth*, 425 S.W.3d 880, 884 (Ky. 2014) ("CR 60.02 does not permit successive post-judgment motions[.]"). Harlow is not entitled to "a second [or third] bite at the apple." *Alvey v. Commonwealth*, 648 S.W.2d 858, 860 (Ky. 1983).

> No rule is more firmly established in this jurisdiction than the one that the opinion on the first appeal becomes the law of the case not only as to the errors there relied upon for reversal but also as to errors appearing in the first record that might have been but were not there relied upon for a reversal.

Aetna Oil Co. v. Metcalf, 300 Ky. 817, 190 S.W.2d 562, 563-64 (1945). Harlow is precluded from raising this argument – and all other issues – in this appeal that could, and should, have been raised in his prior CR 60.02 motions.

Finally, Harlow claims the circuit court abused its discretion when it denied his motion without first conducting an evidentiary hearing. In support, Harlow cites to *Commonwealth v. Pridham*, 394 S.W.3d 867 (Ky. 2013) and

[3] The Kentucky Supreme Court has "recognized the difference between an alleged error and a separate collateral claim of ineffective assistance of counsel related to the alleged error[.]" *Leonard v. Commonwealth*, 279 S.W.3d 151, 158 (Ky. 2009).

Jacobi v. Commonwealth, 2009-CA-001572-MR, 2011 WL 1706528, at *1 (Ky. App. May 6, 2011).

An evidentiary hearing, while often requested by a CR 60.02 movant, is not always warranted. Indeed, "[b]efore [a] 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*, 648 S.W.2d at 856. As explained, Harlow has identified no special circumstances justifying relief pursuant to CR 60.02. Accordingly, the circuit court committed no error when it denied Harlow's request for an evidentiary hearing.

Our decision is not at odds with *Pridham*, *supra*. There, the defendant stated a viable sixth amendment claim of ineffective assistance of counsel, entitling him to an evidentiary hearing. *Pridham*, 394 S.W.3d at 879. This time, Harlow does not present a claim of ineffective assistance of counsel. His motion is for relief under CR 60.02, not RCr 11.42. More importantly, unlike in *Pridham*, Harlow has raised no viable claim.

To the extent Harlow seeks relief under *Jacobi*, *supra*, we need only note that *Jacobi* is an unpublished opinion. It has no precedential value. CR 76.28(4)(c). *Jacobi* is not binding. *Bell v. Bell*, 423 S.W.3d 219, 224 (Ky. 2014).

We affirm the October 10, 2013, order of the Barren Circuit Court denying Harlow's successive CR 60.02 motion.

ALL CONCUR.

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