

RENDERED: OCTOBER 7, 2016; 10:00 A.M.

NOT TO BE PUBLISHED

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2014-CA-001462-MR

JAMES WHISMAN

APPELLANT

v. APPEAL FROM LYON CIRCUIT COURT  
HONORABLE CLARENCE A. WOODALL, III, JUDGE  
ACTION NO. 09-CR-00024

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: CLAYTON, JONES, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: James Whisman brings this *pro se* appeal from a July 23, 2014, order of the Lyon Circuit Court denying his Kentucky Rules of Civil Procedure (CR) 60.02 motion. We affirm.

Whisman was indicted in the Lyon Circuit Court after his escape from the Western Kentucky Correctional Complex. Whisman pleaded guilty pursuant to

a plea agreement in Lyon Circuit Court, Action No. 09-CR-00024, to one count of escape in the second degree and with being a persistent felony offender (PFO) in the first degree. By judgment entered November 5, 2010, Whisman was sentenced to twenty-years' imprisonment. The Lyon Circuit Court ordered the twenty-year sentence to run concurrent with any sentence Whisman received in Caldwell Circuit Court<sup>1</sup> but consecutive to the sentence Whisman was serving when he escaped.

On June 25, 2014, Whisman filed a motion in Lyon Circuit Court pursuant to CR 60.02(e) and (f) to set aside or modify the November 5, 2010, judgment entered in Action No. 09-CR-00024. Therein, Whisman argued:

[T]hat he should be eligible for parole after serving 20% of his sentence instead of 20% of each conviction, movants Attorney J. Foster Cuttoff and the Commonwealth Attorney both told the movant before he plead guilty that he would be eligible for parole after serving 20% of his 20 year sentence after the movant was convicted he found out about 501 KAR 1:030 which states that if someone receives and escape[s] conviction that any crimes committed while on escape shall be considered as consecutive as for being eligible for parole.

If movant knew this at the time he he [sic] would not have plead guilty he would have went to trial.

CR 60.02 Motion to Modify Final Judgment at 3. By order entered July 23, 2014, the Lyon Circuit Court denied Whisman's CR 60.02 motion and reasoned:

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<sup>1</sup> Following his escape from the Western Kentucky Correctional Complex, James Whisman was also indicted upon offenses in the Caldwell Circuit Court, Action Nos. 09-CR-00064 and 10-CR-00020.

Mr. Whisman did not take the first step by pursuing this under an RCr 11.42 motion, and since even if he were misadvised, there would be no automatic prejudice given the nature and severity of the charges he entered into the Plea Agreement on, his Motion does not set forth any facts of an extraordinary nature justifying additional relief under CR 60.02.

This appeal follows.

Whisman contends that the circuit court committed error by denying his CR 60.02 motion to set aside or modify the November 5, 2010, judgment. In particular, Whisman asserts that the Commonwealth failed to honor the plea agreement. Whisman claims that as part of the plea agreement the Commonwealth “promised” that Whisman would be eligible for parole after serving 20 percent of the twenty-year sentence or 48 months. However, upon review of the plea agreement, there is no reference to parole eligibility. Rather, the plea agreement simply sets forth the offenses and recommended sentences of imprisonment. It is silent upon the issue of parole eligibility. Hence, we hold that the Commonwealth did not breach the terms of the plea agreement.

Whisman also argues he is entitled to CR 60.02 relief because he was misled into accepting the plea agreement and entering the guilty plea. Specifically, Whisman maintains that trial counsel advised him that he would be eligible for parole after serving only 48 months. However, after 48 months of imprisonment, Whisman maintains he was informed by corrections officials that he was not eligible for parole; instead, he would have to serve twelve years before becoming parole eligible. Whisman asserts that had he been informed he would have to serve

twelve years before becoming parole eligible, he would not have entered the guilty plea but would have insisted upon going to trial.

It is well-established that the structure of post-conviction review “is not haphazard and overlapping but [rather] is organized and complete.” *Gross v. Com.*, 648 S.W.2d 853, 856 (Ky. 1983). In *Gross*, the Court held that a defendant must first bring a direct appeal when available, then utilize Kentucky Rules of Criminal Procedure (RCr) 11.42 by raising every error of “which he is aware, or should be aware, during the period when this remedy is available to him.” *Id.* at 857. And, CR 60.02 may be used only in extraordinary circumstances not otherwise subject to relief by direct appeal or by RCr 11.42. *Id.* at 856. More recently, in *McQueen v. Commonwealth*, 948 S.W.2d 415 (Ky. 1997), the Court reiterated the procedural requirements set out in *Gross* and stated:

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. RCr 11.42(3); *Gross v. Commonwealth, supra*, at 855, 856. The obvious purpose of this principle is to prevent the relitigation of issues which either were or could have been litigated in a similar proceeding.

*Id.* at 416.

In the case *sub judice*, Whisman is essentially arguing that trial counsel rendered ineffective assistance and/or his original guilty plea was not knowingly entered. The proper procedural mechanism for Whisman to obtain relief is by a motion pursuant to RCr 11.42.<sup>2</sup> Whisman complains he is unable to

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<sup>2</sup> Whisman did not file a direct appeal of his underlying conviction in this case.

file an RCr 11.42 motion because such motion would be time-barred. Under RCr 11.42, there is a general three-year time limitation period upon the filing of a motion; however, there are exceptions under RCr 11.42(10). RCr 11.42(10)(a) specifically provides for the filing of a motion outside three years where the movant alleges “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[.]” Whisman claims he did not know of “the facts” until after he had served 48 months and was denied parole eligibility, which clearly occurred outside the three-year limitation period. So, under the facts as presented, Whisman may be able to file an RCr 11.42 motion under the exception of RCr 11.42(10)(a), which we do not reach or address in this appeal. Nonetheless, CR 60.02 is simply not the proper procedural mechanism to provide Whisman with relief. Accordingly, we are of the opinion that the circuit court properly denied Whisman’s CR 60.02 motion.

For the forgoing reasons, the order of the Lyon Circuit Court is therefore affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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