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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2015-CA-001035-MR

LATERRANCE DUANE NEAL

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE, AUDRA J. ECKERLE, JUDGE
ACTION NO. 97-CR-000777-001

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, STUMBO AND THOMPSON, JUDGES.

STUMBO, JUDGE: Appellant, Laterrance Duane Neal, appeals from a January 28, 2014 order of the Jefferson Circuit Court denying his motion, made pursuant to Kentucky Rules of Civil Procedure (CR) 60.02, to set aside his 1999 criminal conviction and consequential life sentence. After careful review, we affirm.

Neal and co-defendant Damitrius Strong were indicted by a Jefferson County Grand Jury on March 26, 1997, for the murder and robbery of Reverend

William Lewis. The charges arose from an incident in which Neal and Strong forced their way into the minister's apartment and shot him six times at close range. The defendants absconded with a change purse, two or three rings, and the minister's blue Cadillac. The two were later arrested and charged with capital murder and first-degree robbery. On July 21, 1999, Strong agreed to plead guilty to both charges and to testify truthfully against Neal. On November 19, 1999, after a trial by jury, Neal was found guilty of wanton murder and first-degree robbery. The jury dead-locked during the penalty phase; however, a second jury was empaneled in January of 2001, and sentenced Neal to life for the murder charge and twenty years for the robbery charge, which was enhanced to life on account of his being a second-degree persistent felony offender.

Neal appealed his conviction and sentence to the Supreme Court of Kentucky which, in a published opinion rendered on January 23, 2003, affirmed. *Neal v. Commonwealth*, 95 S.W.3d 843 (Ky. 2003). On October 16, 2003, Neal, *pro se*, moved the trial court, pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42, to vacate his sentence due to ineffective assistance of trial counsel. The Department of Public Advocacy (DPA) was appointed and filed a supplement to Neal's motion. The trial court denied Neal's motion and he appealed to this Court. We affirmed in a not-to-be-published opinion rendered on October 14, 2005. *Neal v. Commonwealth*, 2005 WL 2574011 (Ky. App. 2005).

On July 23, 2013, Neal filed the CR 60.02 motion seeking to vacate and set aside his conviction and sentence that led to the present appeal. In his motion,

Neal alleged, in pertinent part, that he was incompetent at the time of trial and that no competency evaluation was ever conducted to determine his competency to stand trial. The DPA was appointed to represent Neal, but subsequently withdrew as counsel after determining that Neal’s “post-conviction proceeding... is not a proceeding that a reasonable person with adequate means would be willing to bring at his or her own expense.” Neal proceeded *pro se* with his motion and the trial court denied his motion on January 28, 2014. In so denying, the trial court found that Neal’s claim should have been raised in previous proceedings. Neal, *pro se*, moved the trial court pursuant to CR 59.05, to alter or amend its January 28, 2014 order. That motion, too, was denied. It is from the denial of both motions that Neal presently appeals.

The trial court is vested with broad discretion in determining the validity of a CR 60.02 motion and we will not disturb the court’s ruling absent an abuse of that discretion. *Brown v. Commonwealth*, 932 S.W.2d 359, 362 (Ky. 1996). On appeal, Neal insists that the trial court abused its discretion when it denied his motion for relief. In response, the Commonwealth argues that Neal’s CR 60.02 motion is untimely, procedurally barred, and meritless, and therefore the trial court properly denied it. We agree with the Commonwealth.

In its order denying relief, the trial court found that Neal’s claim was essentially a claim of ineffective assistance of counsel—in that trial counsel failed to request a competency evaluation—and should have been raised in his previous motion made pursuant to RCr 11.42. Neal argues that as a *pro se* litigant his

argument should have been construed liberally. He further argues that the circuit court, in its holding, ignored its own responsibility to Neal to assure that he was competent to stand trial.

Neal is correct that he should have been granted more leniency in his pleadings. *Pro se* pleadings are not held to the same standard as those submitted by counsel. *Beecham v. Commonwealth*, 657 S.W.2d 234, 236 (Ky. 1983).

However, regardless of how Neal's claim is characterized, it should have been raised in an earlier proceeding. In *Gross v. Commonwealth*, 648 S.W.2d 853 (Ky. 1983), the Kentucky Supreme Court set out the procedure which must be followed for post-conviction relief:

The structure provided in Kentucky for attacking the final judgment of a trial court in a criminal case is not haphazard and overlapping, but is organized and complete. That structure is set out in the rules related to direct appeals, in RCr 11.42, and *thereafter* in CR 60.02. CR 60.02 ... is for relief that is not available by direct appeal and not available under RCr 11.42.

...

Next, we hold that a defendant is required to avail himself of RCr 11.42 while in custody under sentence or on probation, parole or conditional discharge, as to any ground of which he is aware, or should be aware, during the period when this remedy is available to him.... The language of RCr 11.42 forecloses the defendant from raising any questions under CR 60.02 which are "issues that could reasonably have been presented" by RCr 11.42 proceedings.

Id. at 856-57 (emphasis in original).

In his brief to the trial court, Neal alleged that he was:

[I]ncompetent at the time of his trial and no incompetency examination or determination was ever conducted before the start of his trial for a determination of whether he was mentally incompetent as to whether he lacked the capacity to appreciate the nature and consequences of the proceedings against him, or to participate rationally in his defense although his weird behavior and actions during the course of his pre-trial and trial matters had within this case gave rise for such examination to be conducted

We believe Neal's allegation can be properly characterized either as one of ineffective assistance of counsel, for trial counsel's failure to request a competency evaluation, or one of trial court error, for the trial court's failure to *sua sponte* order an evaluation. Regardless of how his claim is characterized, it should have been raised in earlier proceedings. Neal provides no explanation as to why his claim was not raised on direct appeal, or thereafter, in his motion made pursuant RCr 11.42. Accordingly, Neal is procedurally barred from asserting his claim now under CR 60.02. *See Howard v. Commonwealth*, 364 S.W.2d 809, 810 (Ky. 1963) (stating "errors occurring during the trial should be corrected on direct appeal, and the grounds set forth under the various subsections of CR 60.02 deal with extraordinary situations which do not as a rule appear during the progress of a trial.").

Even if we were to hold that this issue is properly before us, we would find no error. Our Supreme Court in *Padgett v. Commonwealth*, 312 S.W.3d 336 (Ky. 2010), discussed two separate interests at stake in the Commonwealth when analyzing whether a defendant is competent to stand trial—a statutory right and a

United States Constitutional right. *Id.* at 348. Due process under the Fourteenth Amendment of the United States Constitution requires that a competency evaluation be ordered where substantial evidence exists that the defendant is not competent to stand trial. *Drope v. Missouri*, 420 U.S. 162, 172, 95 S.Ct. 896, 904, 43 L.Ed.2d 103 (1975); *Woolfolk v. Commonwealth*, 339 S.W.3d 411 (Ky. 2011). “Evidence of a defendant's irrational behavior, his demeanor in court, and any prior medical opinion on competence to stand trial are all relevant facts for a court to consider.” *Mills v. Commonwealth*, 996 S.W.2d 473, 486 (Ky. 1999) (*overruled on other grounds by Padgett, supra*) (*citing Drope*, 420 U.S. at 180, 95 S.Ct. at 908).

Under Kentucky Revised Statute (KRS) 504.100(1), “[i]f upon arraignment, or during any stage of the proceedings, the court has reasonable grounds to believe the defendant is incompetent to stand trial, the court shall appoint ... [a mental health professional] to examine, treat and report on the defendant's mental condition.” In order for KRS 504.100(1) to apply, the grounds for questioning the defendant's competency must be brought to the attention of the trial court by defense counsel, or be so obvious that the trial court cannot fail to be aware of them. *Gabbard v. Commonwealth*, 887 S.W.2d 547, 552 (Ky. 1994). Our Supreme Court has noted that the difference between the statutory interest and the constitutional interest is that “reasonable grounds” implicates the statutory right, whereas “substantial evidence” implicates the constitutional protections. *Padgett*, 312 S.W.3d at 347.

Neal contends that the circuit court was put on notice of competency concerns when his attorneys sought to have Neal evaluated by the Kentucky Correctional Psychiatric Center (KCPC). Therefore, Neal argues, both his constitutional and statutory rights were violated when the court did not order a competency evaluation. We disagree.

A review of the record finds no substantial evidence suggesting that Neal was not competent to stand trial. Neal cites to no inappropriate courtroom behavior or any other objective indications that would suggest incompetence, such as prior medical opinions of incompetence or a history of mental illness. Nor did we observe any indication of such upon our review of the trial tapes. Moreover, “the trial court was in the best position to observe Appellant’s conduct and demeanor from the outset of the proceedings, and to evaluate the circumstances, including Appellant’s demeanor and deportment, occurring during the course of the trial.” *Woolfolk*, 339 S.W.3d at 423. Thus, the court’s determination that a competency evaluation was unnecessary is entitled to great deference. Neal’s request for an evaluation, standing alone, does not establish the substantial evidence of incompetence necessary for a constitutional due process violation. *See e.g. Padgett*, 312 S.W.3d at 349 (Court found that trial counsel’s initial indication that he might present evidence of a mental illness or extreme emotion disturbance, standing alone, could not have been substantial evidence.).

Nor has Neal established a statutory violation. The record indicates that prior to trial, defense counsel moved the trial court to transfer Neal to the KCPC

for evaluation for the purpose of gathering possible mitigation evidence. When asked to clarify whether the evaluation was for criminal responsibility or competency, trial counsel made clear that requested evaluation was not for competency and that he did not foresee competency as an issue. Prior to the evaluation, trial counsel withdrew its motion to have Neal evaluated. On September 17, 1999, the trial court entered an order stating the KCPC shall not conduct any evaluations of Neal *as defense counsel had requested to terminate the use of the KCPC*.

It is clear from the record that defense counsel never requested that Neal be evaluated for competency to stand trial. Indeed, trial counsel clearly stated in its motion that Neal's competency was not an issue, and later withdrew his motion to have Neal evaluated for mitigation purposes. We are not convinced that, based on these facts, the trial court had reasonable grounds to believe that Neal was incompetent to stand trial. Without a motion for a competency evaluation, Neal's conduct had to be so overt and outrageous that it was impossible for the trial court not to question his competency. However, as noted earlier, the record does not establish such an inference.

Finally, we note that claims brought under CR 60.02(f) must be brought within a "reasonable time" and will only be granted when there are "extraordinary circumstances justifying relief." See CR 60.02. Neal was convicted in 1999 and judgment was entered in 2001. Neal filed his claim in 2013 - twelve years after final judgment. Neal has made no effort to explain the more than twelve-year

delay in moving to set aside his conviction and sentence. Nor has Neal demonstrated extraordinary circumstances justifying relief. Indeed, we cannot imagine a situation in which we would find that “extraordinary circumstances” exist where one waits twelve years to seek relief on a claim that he knew (or should have known) about immediately upon conviction. *See Gross v. Commonwealth, supra; Graves v. Commonwealth*, 283 S.W.3d 252 (Ky. App. 2009) (holding that a delay of seven years between pleading guilty and filing a CR 60.02 motion alleging issues regarding the defendant’s competency was too long to be considered a “reasonable time” for purposes of CR 60.02.).

Based on the foregoing, we affirm the judgment of the Jefferson Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Meridith Krause
Assistant Public Advocate
Department of Public Advocacy
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Andy Beshear
Attorney General of Kentucky

Susan Roncarti Lenz
Assistant Attorney General
Frankfort, Kentucky