

RENDERED: SEPTEMBER 1, 2017; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2015-CA-001827-MR

KEVIN JETT

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE AUDRA J. ECKERLE, JUDGE
ACTION NO. 05-CR-001759

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING
** ** ** ** **

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

THOMPSON, JUDGE: Kevin Jett, *pro se*, appeals the Jefferson Circuit Court's order denying his motion to supplement his Kentucky Rules of Civil Procedure (CR) 60.02 motion to vacate. The circuit court treated Jett's motion to supplement as a successive CR 60.02 motion and denied it because it raised issues that could and should have been raised in previous motions. After careful review, we affirm.

In 2005, Jett was indicted for murder, first-degree robbery, first-degree burglary, and tampering with physical evidence. He was sentenced to thirty-five years' imprisonment. The Commonwealth initially sought the death penalty, but after a psychological evaluation showed Jett to have intelligence in the range of mental retardation, the Commonwealth reconsidered and removed death as a potential penalty. Shortly thereafter, the Commonwealth offered to recommend a sentence of thirty-five years in return for Jett's plea of guilty. Jett accepted the offer and the circuit court later sentenced him in accordance with the Commonwealth's recommendation.

Approximately two years after final sentencing, Jett filed a motion under Kentucky Rules of Criminal Procedure (RCr) 11.42 seeking to vacate his guilty plea and sentence. In his motion, Jett alleged that he was incompetent at the time of the crime and at the time of his guilty plea. He further asserted that, prior to his guilty plea hearing, the circuit court should have held a competency hearing. The circuit court denied Jett's motion and this Court affirmed the denial on appeal. *Jett v. Commonwealth*, No. 2008-CA-000769-MR, 2009 WL 3486645 (Ky.App. 2009) (unpublished).

Thereafter, Jett filed a motion to modify his sentence pursuant to CR 60.02. In that motion, he alleged the circuit court permitted him to enter a plea agreement he did not understand; did not investigate his mental health background and prior mental health records; and permitted him "to enter a plea agreement which he didn't voluntarily enter due to the fact that he was of unsound mind."

The circuit court denied the motion, finding that Jett failed to establish grounds for extraordinary relief under CR 60.02 and merely rehashed issues raised in his RCr 11.42 motion. Jett appealed and this Court affirmed. *Jett v. Commonwealth*, No. 2011-CA-000920-MR, 2014 WL 3887774 (Ky.App. 2014) (unpublished).

While the appeal of the denial of Jett's CR 60.02 motion was pending, Jett moved the circuit court to supplement his CR 60.02 motion, apparently so that he could add ineffective assistance of counsel claims. In his supplemental motion, Jett again alleged he did not have the mental capacity to commit the crime and that he did not understand the plea because he was "not thinking clearly." He also alleged trial counsel failed to have him psychologically evaluated by the Kentucky Correctional Psychiatric Center (KCPC); permitted him to speak to the circuit court without assistance; and failed to fully explain the rights he was giving up by pleading guilty.

After the Department of Public Advocacy (DPA) was appointed to assist Jett with his supplemental motion, the circuit court granted a DPA motion to hold the case in abeyance until Jett's CR 60.02 appeal was decided. When the appeal was finally decided, the circuit court granted a DPA motion to withdraw as counsel.

Thereafter, the circuit court denied Jett's supplemental motion as successive. Jett moved the court, pursuant to CR 59.05, to alter or amend the denial of his supplemental motion, but the court denied that motion. Jett appeals

from the orders denying his supplemental CR 60.02 and CR 59.05 motion to alter or amend.

We review a circuit court's denial of a petitioner's CR 60.02 motion for abuse of discretion. *Bethlehem Minerals Co. v. Church and Mullins Corp.*, 887 S.W.2d 327, 329 (Ky. 1994). The test for abuse of discretion is whether the circuit court's decision was "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

On appeal, Jett argues the circuit court abused its discretion when it "allowed the Commonwealth attorney to make the decision whether appellant could file a supplemental pleading pursu[ant] to CR 15.03." However, the Commonwealth merely responded to Jett's motion and argued it was a successive CR 60.02 motion. The circuit court weighed each argument and agreed with the Commonwealth. We find Jett's assertion that the Commonwealth made the ultimate decision to be without merit.

Jett also argues CR 15.03 and CR 15.04 read in conjunction permit him to amend his motion at any time if the amendment arose out of the same conduct in the original motion. Therefore, he contends, the circuit court abused its discretion when it denied his supplemental CR 60.02 motion as successive. We disagree. CR 15.03 provides in part: "(1) Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading."

We first note that “a motion is not a pleading[.]” *Ramsey v. Commonwealth*, 399 S.W.2d 473, 475 (Ky. 1966). However, the Kentucky Supreme Court has previously applied CR 15.03 to post-conviction motions brought under RCr 11.42. *See Roach v. Commonwealth*, 384 S.W.3d 131, 135 (Ky. 2012). Regardless, Jett’s assertion that CR 15.03’s relation back doctrine applies to supplemental pleadings is incorrect. CR 15.03 specifically deals with the relation back of *amendments* to pleadings. The rule does not address supplemental pleadings.

Supplemental pleadings are specifically addressed by CR 15.04. That rule allows the circuit court considerable discretion in permitting such pleadings. CR 15.04 (emphasis added) reads:

Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth **transactions or occurrences or events which have happened since the date of the pleading** sought to be supplemented. Permission may [be] granted, even though the original pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefor[e].

Here, Jett’s motion to supplement does not set forth “transactions or occurrences or events which have happened since the date of the pleading[.]” as required by CR 15.04. His motion refers to occurrences Jett alleges took place at the time of the crime and leading up to his guilty plea. Therefore, even if appellants were permitted to supplement their CR 60.02 motions after a judgment

has been entered and the appeal is pending, the circuit court did not abuse its discretion when it did not permit Jett to do so.

Jett's motion to supplement was properly characterized by the circuit court as a successive motion brought under CR 60.02, and the motion was properly denied.

CR 60.02 was enacted as a substitute for the common law writ of coram nobis. The purpose of such a writ was to bring before the court that pronounced judgment errors in matter of fact which (1) had not been put into issue or passed on, (2) were unknown and could not have been known to the party by the exercise of reasonable diligence and in time to have been otherwise presented to the court, or (3) which the party was prevented from so presenting by duress, fear, or other sufficient cause.

Gross v. Commonwealth, 648 S.W.2d 853, 856 (Ky. 1983). Each of the issues raised in Jett's motion to supplement either was or could have been raised in his RCr 11.42 motion or in his CR 60.02 motion. All of the issues were known to Jett at the time he filed those motions and Jett does not allege that he was somehow prevented from presenting the issues in his previous motions. "Our courts do not favor successive collateral challenges to a final judgment of conviction which attempt to relitigate issues properly presented in a prior proceeding." *Stoker v. Commonwealth*, 289 S.W.3d 592, 597 (Ky.App. 2009). The circuit court, therefore, did not abuse its discretion when it denied Jett's successive CR 60.02 motion.

For the foregoing reasons, the order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Kevin Jett, *pro se*
LaGrange, Kentucky

BRIEF FOR APPELLEE:

Andy Beshear
Attorney General of Kentucky

Todd D. Ferguson
Assistant Attorney General
Frankfort, Kentucky