

Commonwealth of Kentucky
Court of Appeals

NO. 2016-CA-001385-MR

DAVID MICHAEL OWENS

APPELLANT

v. APPEAL FROM HARLAN CIRCUIT COURT
HONORABLE KENT HENDRICKSON, JUDGE
ACTION NO. 09-CR-00309

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: MAZE, TAYLOR, AND THOMPSON, JUDGES.

TAYLOR, JUDGE: David Michael Owens brings this *pro se* appeal from an August 16, 2016, opinion and order of the Harlan Circuit Court denying a Kentucky Rules of Civil Procedure (CR) 60.02 motion. We affirm.

On May 4, 2009, appellant was indicted by the Harlan County Grand Jury upon two counts of first-degree assault or complicity to commit first-degree assault (Kentucky Revised Statutes (KRS) 508.010; KRS 502.020) and with being a second-degree persistent felony offender (KRS 532.080(2)). The charges

stemmed from an incident in 2006 where appellant intentionally inflicted injuries to his twin infant daughters resulting in subdural hematomas, brain bruising, fractured skull, and detached retinas.

In 2010, the Commonwealth and appellant entered into a plea agreement. Under the terms of the plea agreement, appellant would enter a guilty plea to two counts of second-degree assault, and the Commonwealth would recommend ten years on each to run consecutively for a twenty-year sentence of imprisonment. Appellant entered the guilty plea and was sentenced to a total of twenty-years' imprisonment on November 19, 2010.

On July 21, 2015, appellant filed a CR 60.02 motion to vacate his sentence of imprisonment. Appellant maintained that due to ineffective assistance of trial counsel, he entered an involuntary guilty plea. Appellant also filed a "supplemental" CR 60.02 motion. Therein, appellant claimed that the trial judge erroneously failed to *sua sponte* recuse himself. By opinion and order entered August 16, 2016, the circuit court denied appellant's CR 60.02 motion. This appeal follows.

Appellant contends that the circuit court erred by denying his CR 60.02 motion to vacate his sentence of imprisonment. Appellant maintains that the trial court committed error by failing to *sua sponte* recuse and that his guilty plea

was involuntary due to ineffective assistance of trial counsel. Appellant specifically seeks relief under subsection (e) and (f) of CR 60.02.

CR 60.02 reads:

On motion a court may, upon such terms as are just, relieve a party or his legal representative from its final judgment, order, or proceeding upon the following grounds: (a) mistake, inadvertence, surprise or excusable neglect; (b) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59.02; (c) perjury or falsified evidence; (d) fraud affecting the proceedings, other than perjury or falsified evidence; (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. The motion shall be made within a reasonable time, and on grounds (a), (b), and (c) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this rule does not affect the finality of a judgment or suspend its operation.

It is well-established that the remedy provided under CR 60.02 is extraordinary and only available to raise issues that could not have been raised in other proceedings. *McQueen v. Commonwealth*, 948 S.W.2d 415 (Ky. 1997). CR 60.02 is unavailable “to raise claims which could and should have been raised in prior proceedings, but, rather, ‘is for relief that is not available by direct appeal and not available under RCr 11.42.’” *Sanders v. Commonwealth*, 339 S.W.3d 427, 437 (Ky. 2011) (quoting *Gross v. Commonwealth*, 648 S.W.2d 853, 856 (Ky. 1983)).

In this case, appellant's contentions of error raised in his CR 60.02 motions should have been asserted in an RCr 11.42 motion, direct appeal, or other proceeding. Simply stated, these contentions of error are not cognizable in a CR 60.02 motion. *See McQueen*, 948 S.W.2d 415. We, therefore, conclude that the circuit court properly denied appellant's CR 60.02 motion.

For the foregoing reasons, the opinion and order of the Harlan Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

David Michael Owens, *Pro Se*
Burgin, Kentucky

BRIEF FOR APPELLEE:

Andy Beshear
Attorney General of Kentucky
Frankfort, Kentucky

Perry T. Ryan
Assistant Attorney General
Frankfort, Kentucky