

RENDERED: JULY 12, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2017-CA-001631-MR
AND
NO. 2017-CA-001735-MR

KARL KRAUS, JR.

APPELLANT

v. APPEALS FROM LIVINGSTON CIRCUIT COURT
HONORABLE CLARENCE A. WOODALL, III, JUDGE
ACTION NOS. 02-CR-00018 AND 04-CR-00006

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * **

BEFORE: DIXON, LAMBERT, AND L. THOMPSON, JUDGES.

LAMBERT, JUDGE: Karl Kraus, Jr., proceeding *pro se*, appeals the Livingston Circuit Court's order denying his combined motions, pursuant to Kentucky Rules of Criminal Procedure (RCr) 10.26, RCr 10.06, and RCr 11.42, and Kentucky Rules of Civil Procedure (CR) 60.02, for post-judgment relief. After a careful review of the record, we affirm.

The facts and procedural history of Kraus's current convictions are best summarized in this Court's 2017 decision on a previous appeal filed by Kraus in the Livingston Circuit Court, and we repeat that language here:

Kraus was indicted on two counts of first-degree rape, two counts of first-degree sodomy, and two counts of first-degree sexual abuse. One of the counts of first-degree sodomy was dismissed. Following a jury trial (i.e., trial # 1), he was convicted of one count of first-degree sexual abuse, and a mistrial was declared regarding the remaining four counts because the jury was deadlocked. The jury recommended a sentence of five years of imprisonment for the first-degree sexual abuse conviction. The court sentenced him accordingly. Kraus appealed that conviction, and this Court affirmed the circuit court's judgment. *See Kraus v. Commonwealth*, No. 2004-CA-000183-MR, 2005 WL 790778, *1 (Ky. App. Apr. 8, 2005).

After the completion of trial # 1, Kraus was indicted on one count of being a first-degree persistent felony offender (PFO-1st). A second jury trial (i.e., trial # 2) was held concerning the counts for which a mistrial had been declared during trial # 1. Following trial # 2, Kraus was convicted of two counts of first-degree rape, one count of first-degree sodomy, and one count of first-degree sexual abuse. Prior to the sentencing phase of the trial, the parties reached an agreement concerning punishment, in which Kraus agreed, against counsel's advice, to the maximum term of imprisonment on all four counts. Therefore, he agreed to serve twenty years of imprisonment for each rape conviction and for the sodomy conviction, and to serve five years of imprisonment for the sexual abuse conviction, with all four sentences to run consecutively for a total of sixty-five years of imprisonment. Additionally, Kraus entered a guilty plea to the charge of PFO-1st, for which the Commonwealth recommended a sentence of life

imprisonment. The court entered its judgment and sentenced Kraus to: twenty years of imprisonment for each count of first-degree rape; twenty years of imprisonment for the one count of first-degree sodomy; and five years of imprisonment for the one count of first-degree sexual abuse. All of these sentences were ordered to run consecutively for a total of sixty-five years of imprisonment, and this total sentence was enhanced to life imprisonment due to the PFO–1st conviction.

On direct appeal, the Kentucky Supreme Court affirmed the circuit court’s judgment in a 3-3 decision without an opinion, and with one Justice not sitting. *See Kraus v. Commonwealth*, 2005-SC-000304-MR, *1 (Ky. Sept. 21, 2006) (order). Kraus then filed an RCr 11.42 motion to vacate his sentence. His motion was denied. Kraus appealed, and this Court affirmed the denial of his RCr 11.42 motion. *See Kraus v. Commonwealth*, No. 2007-CA-000802-MR, 2008 WL 2065803, *1 (Ky. App. May 16, 2008).

Kraus subsequently filed his first RCr 10.26 and RCr 10.06 motion, alleging that a substantial error had occurred during trial # 2 when he was removed from the courtroom “and held incommunicado.” He claimed that this violated his right “to be present during every critical stage of trial, as well as [his] right to be in continuous audio contact with his attorney.” The circuit court denied the motion. Kraus appealed, and this Court dismissed the appeal as untimely filed. *See Kraus v. Commonwealth*, No. 2011-CA-000476-MR, *1 (Ky. App. July 18, 2011) (order dismissing appeal). Kraus appealed again, and the Kentucky Supreme Court denied discretionary review. *See Kraus v. Commonwealth*, No. 2012-SC-000207-D, *1 (Ky. Oct. 22, 2012) (discretionary review denied).

Kraus filed his second RCr 10.26 and RCr 10.06 motion in the circuit court in 2015. In that motion, he essentially argued that the circuit court had erred in denying his first RCr 10.26 and RCr 10.06 motion

because, according to Kraus, the Commonwealth had not filed an “appellee’s brief” in the circuit court in response to his first RCr 10.26 and RCr 10.06 motion and, pursuant to CR 76.12(8)(c), the court should have either accepted Kraus’s statements of facts and issues as correct; reversed the judgment if Kraus’s brief reasonably appeared to sustain such action; or regarded the Commonwealth’s failure to file a brief as a confession of error and reverse the judgment without considering the merits of the case. Kraus also re-asserted the claims he had raised in his first RCr 10.26 and RCr 10.06 motion concerning his alleged removal from the courtroom; his right to confront witnesses; and his right to communicate with his attorney during trial. The circuit court denied Kraus’s motion, reasoning that CR 76.12 only applies to appeals of cases, not to original actions in the circuit court; and reasoning that the remainder of Kraus’s claims were already addressed in the court’s order denying his first RCr 10.26 and RCr 10.06 motion.

Kraus now appeals, contending that: (a) his constitutional rights were violated when he was removed from the courtroom during the testimony of two witnesses via closed circuit television during trial; and (b) the circuit court erred in not abiding by CR 76.12(8)(c) in its ruling on Kraus’s first RCr 10.26 and RCr 10.06 motion.

We agree with the circuit court’s decision concerning Kraus’s second RCr 10.26 and RCr 10.06 motion. First, Kraus’s claim that his constitutional rights were violated when he was removed from the courtroom is a claim that he already raised in his first RCr 10.26 and RCr 10.06 motion, relief for which was denied by the circuit court, and the appeal of which was dismissed as untimely filed. Kraus cannot relitigate that same claim now. He had a chance to appeal it the first time around, but he failed to timely file his notice of appeal at that time. He is now foreclosed from raising this claim again. Second, as the circuit court found, CR 76.12(8)(c) applies

to appeals, not to original actions in the circuit court. Therefore, CR 76.12(8)(c) was inapplicable in the circuit court proceeding. Consequently, Kraus's claims fail.

Kraus v. Commonwealth, 2015-CA-000967-MR, 2017 WL 1806781, at *1-2 (Ky. App. May 5, 2017) (footnote omitted).

Meanwhile, Kraus filed two petitions for writs of habeas corpus in federal court. Relief was ultimately denied. *Kraus v. White*, 136 S. Ct. 251, 193 L. Ed. 2d 187 (2015) (petition for writ of *certiorari* to the United States Court of Appeals for the Sixth Circuit denied). In his federal claims, Kraus had argued, among other things, that he was entitled to relief because of insufficiency of evidence during the second trial and violations of his right to confront witnesses in both trials.

On September 21, 2017, Kraus filed yet another motion for post-conviction relief, as well as motions for the following: copies of all his records, appointment of counsel, an evidentiary hearing, and recusal of the circuit court judge. All motions were denied, without an evidentiary hearing, one week after they were filed. The circuit court found that “[t]he current Motions are primarily duplications of previous filings and are without legal merit.” This appeal now follows.

We agree with the circuit court that Kraus's motions are prohibited as repetitive of his prior motions for post-conviction relief. RCr 11.42(3) provides

that a defendant must state all grounds for relief in his RCr 11.42 motion and is barred from bringing successive motions seeking relief under this Rule: “The motion shall state all grounds for holding the sentence invalid of which the movant has knowledge. Final disposition of the motion shall conclude all issues that could reasonably have been presented in the same proceeding.”

As with RCr 11.42, CR 60.02 also does not permit successive post-judgment motions, and the rule may be utilized only in extraordinary situations when relief is not available on direct appeal or under RCr 11.42. *Foley v. Commonwealth*, 425 S.W.3d 880, 884 (Ky. 2014); *McQueen v. Commonwealth*, 948 S.W.2d 415, 416 (Ky. 1997). Kraus fails to demonstrate that any extraordinary situations existed that would support granting CR 60.02 relief.

RCr 10.06(1) provides:

The motion for a new trial shall be served **not later than five (5) days after return of the verdict**. A motion for a new trial based upon the ground of **newly discovered evidence shall be made within one (1) year after the entry of the judgment or at a later time if the court for good cause so permits**.

(Our emphasis.) Kraus claims that his recently acquired affidavit from trial counsel and the letter from the attorney (a professor of law from Michigan) who assisted him with his federal claims sufficed to meet the definition of “newly discovered evidence.” We disagree. The affidavit revealed nothing new; in fact, it bolsters the Commonwealth’s position that Kraus’s rights were protected during

the proceedings. The law professor's letter merely offers sympathy to Kraus for his unsuccessful attempt to seek habeas corpus relief. We affirm the circuit court's denial of relief pursuant to RCr 10.06.

RCr 10.26 permits review for substantial error and allows for relief "upon a determination that manifest injustice has resulted from the error." "We may grant relief only where we find that manifest injustice has resulted from the error." *Gray v. Commonwealth*, 479 S.W.3d 94, 98 (Ky. App. 2015). Kraus fails, as he did on previous litigation, to meet the threshold requirements of demonstrating that manifest injustice resulted from the alleged error.

"Our rules of civil procedure do not permit successive motions or the relitigation of issues which could have been raised in prior proceedings. 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) (citing *Gross v. Commonwealth*, 648 S.W.2d 853, 856-57 (Ky. 1983)). All of these allegations brought by Kraus in this appeal either were or could have been presented in prior proceedings.

Accordingly, the Livingston Circuit Court's September 27, 2017, order denying appellant's combined motions for post-judgment relief pursuant to Kentucky Rules of Criminal Procedure (RCr) 10.26, RCr 10.06, and RCr 11.42,

and Kentucky Rule of Civil Procedure (CR) 60.02, as well as his other motions filed in conjunction with same, is affirmed.

ALL CONCUR.

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