

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000286-MR

JAMES DAVID ADKINS

APPELLANT

v. APPEAL FROM OHIO CIRCUIT COURT
HONORABLE THOMAS O. CASTLEN, SPECIAL JUDGE
ACTION NO. 06-CR-00051

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: GOODWINE, SPALDING, AND L. THOMPSON, JUDGES.

GOODWINE, JUDGE: James David Adkins (“Adkins”), *pro se*, appeals an order of the Ohio Circuit Court denying his request for post-conviction relief under CR¹ 60.02. After careful review, we affirm.

¹ Kentucky Rules of Civil Procedure.

In February 2006, an Ohio County grand jury indicted Adkins on two counts of first-degree rape, two counts of first-degree unlawful transaction with a minor, twenty counts of promoting a sexual performance by a minor, and twenty counts of use of a minor in a sexual performance. Following several continuances, Adkins' case was scheduled for a jury trial on November 5, 2008.

A few days prior to trial, Adkins moved to suppress evidence seized from his home during the execution of a search warrant. The trial court conducted a suppression hearing beginning on November 3, 2008, which continued through the morning of trial on November 5, 2008. At the center of the hearing was the alleged illegal search of Adkins' residence on January 24, 2006.

After said hearing, the trial court denied Adkins' motion to suppress. Immediately thereafter, Adkins accepted the Commonwealth's plea offer of a fifteen-year sentence in exchange for pleading guilty to two counts of first-degree unlawful transaction with a minor and five counts of second-degree unlawful transaction with a minor. The Commonwealth agreed to dismiss the remainder of the indictment. We note that Adkins' plea was not conditioned upon him challenging the trial court's suppression ruling on appeal.

Prior to accepting Adkins' plea, the trial court conducted a standard plea colloquy pursuant to *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). Adkins participated in the colloquy and expressed both an

understanding of the plea agreement and satisfaction with his attorney's representation. When asked if he had any questions regarding the plea agreement, Adkins only questioned whether he would be required to serve 20% or 85% of his sentence before being parole eligible. After resolving this issue, the trial court finished the plea colloquy; determined Adkins' plea was made knowingly, intelligently, and voluntarily; and accepted it.

Immediately thereafter, the Commonwealth asked the trial court to reiterate to Adkins that he would be required to register as a sex offender. Adkins' counsel stated that he had advised Adkins he wasn't sure if Adkins had to register or not but explained to him that if he was found guilty of any of the charges by the jury, it would have the same effect as the plea insofar as sex-offender registration. The trial court then explained the sex-offender registration requirements to Adkins and Adkins stated he understood those requirements. The trial court scheduled final sentencing for January 22, 2009.

Prior to final sentencing, Adkins filed several *pro se* motions, including a motion to withdraw his guilty plea. Therein, Adkins argued his plea was not entered knowingly, intelligently, and voluntarily due to ineffective assistance of counsel, prosecutorial misconduct, and intimidation. The trial court held a hearing on the motion, after which the trial court denied Adkins' motion to withdraw his guilty plea.

Adkins appealed the denial of his motion to withdraw his guilty plea to this Court, which affirmed. *Adkins v. Commonwealth*, No. 2009-CA-000575-MR, 2010 WL 4879581 (Ky. App. Nov. 12, 2010). Thereafter, Adkins filed an RCr² 11.42 motion to vacate his conviction, arguing his trial counsel had been ineffective. He also requested an evidentiary hearing, and filed a separate motion requesting that the trial court disclose “any possible basis for judicial disqualification before the court reviews or renders a decision on [Adkins’] pending RCr 11.42 motion.” (R. at 30). The court denied Adkins’ motion without a hearing.

Adkins appealed the denial of his RCr 11.42 motion to this Court, which affirmed. *Adkins v. Commonwealth*, No. 2012-CA-000212-MR, 2014 WL 631516 (Ky. App. Feb. 14, 2014). Thereafter, Adkins filed a petition for writ of habeas corpus in the United States District Court for the Western District of Kentucky on April 28, 2014. *Adkins v. Bottom*, 14-CV-00047. On March 2, 2015, the federal court denied Adkins’ petition on the merits, and the United States Court of Appeals for the Sixth Circuit denied Adkins’ request for a certificate of appealability on August 14, 2015.

Thereafter, Adkins returned to the trial court and on August 7, 2017, filed a motion to vacate the judgment pursuant to CR 60.02. (R. at 81-114).

² Kentucky Rules of Criminal Procedure.

Specifically, Adkins alleged he was entitled to relief because (1) there was an illegal search of his residence on January 24, 2006; (2) the investigating detective gave perjured testimony during the suppression hearing on November 3, 2008 regarding when the warrant was obtained; and (3) his guilty plea was not entered knowingly, voluntarily, freely, intelligently, and understandingly. The trial court entered its order on December 8, 2017, denying Adkins' CR 60.02 motion. (R. at 160-172). This appeal followed.

“We review the denial of a CR 60.02 motion under an abuse of discretion standard.” *Foley v. Commonwealth*, 425 S.W.3d 880, 886 (Ky. 2014) (citing *Brown v. Commonwealth*, 932 S.W.2d 359, 361 (Ky. 1996)). “The test for abuse of discretion is whether the trial judge’s decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999) (citations omitted).

Successive post-judgment motions are prohibited, and CR 60.02 “may be utilized only in extraordinary situations when relief is not available on direct appeal or under RCr 11.42.” *Foley*, 425 S.W.3d at 884 (citing *McQueen v. Commonwealth*, 948 S.W.2d 415, 416 (Ky. 1997)). Criminal defendants may not use the rule “as an additional opportunity to relitigate the same issues which could reasonably have been presented by direct appeal or an RCr 11.42 proceeding.” *Id.* RCr 11.42(3) requires the movant “state all grounds for holding the sentence

invalid of which the movant has knowledge. Thus, final disposition of a movant's RCr 11.42 motion shall conclude all issues which could reasonably have been presented in the same proceeding." *Id.* (footnote omitted and citing *Gross v. Commonwealth*, 648 S.W.2d 853 (Ky. 1983)). "In summary, CR 60.02 is not a separate avenue of appeal to be pursued in addition to other remedies but is available only to raise issues which cannot be raised in other proceedings." *McQueen*, 948 S.W.2d at 416.

In his CR 60.02 motion, Adkins renews his prior claims. First, he argues again that the search of his residence was conducted illegally, namely, before the detective received a search warrant authorizing the search. He argues that telephone records he received on July 17, 2017, constituted "newly discovered evidence" under CR 60.02, and "factually proves that Whittaker's request for a search warrant . . . had not been returned that day." (R. at 88).

The trial court disagreed and noted that the explicit language of CR 60.02 provides that a motion for relief based upon newly discovered evidence must be made "not more than one year after the judgment, order, or proceeding was entered or taken." CR 60.02. The judgment in this case was entered on March 2, 2009. Adkins' motion for relief pursuant to CR 60.02 was filed August 7, 2017, eight years and five months after the judgment. Consequently, Adkins' claim for

relief based upon newly discovered evidence is totally deficient on a procedural basis.

Moreover, relief sought pursuant to CR 60.02(f) for “any other reason of an extraordinary nature justifying relief” is similarly unavailable to Adkins under the circumstances of this case. The rule requires that such a motion be made “within a reasonable time.” Eight years and five months is not a reasonable time. “Newly discovered evidence is evidence that could not have been obtained at the time of trial through the exercise of reasonable diligence.” *Commonwealth v. Harris*, 250 S.W.3d 637, 642 (Ky. 2008) (citation omitted).

The same is true of Adkins’ second claim alleging Detective Whittaker gave perjured testimony. The “newly discovered” evidence Adkins obtained in July of 2017, which he argues refutes Detective Whittaker’s testimony, could certainly have been obtained by the time of the suppression hearing through the exercise of reasonable diligence. *Id.* The trial court further noted that “an interpretation of the telephone record would require surmise, speculation and conjecture to support Adkins’ conclusion. It would also require the Court to conclude that a judge sitting in open court could not take a few minutes to review an application for a search warrant.” (R. at 168). More importantly, the validity of the search warrant was the subject of a suppression hearing, the denial of which was the subject of Adkins’ claim for relief pursuant to RCr 11.42. Adkins’ claim

of ineffective assistance of counsel was denied by the trial court and affirmed on appeal.

Finally, Adkins again argues that his trial counsel was ineffective for not adequately challenging the search of his residence. Adkins claims that because of that inadequate challenge, the evidence seized (50 Polaroid photographs) was not suppressed. Consequently, he accepted “the plea deal” on advice of trial counsel “because movant was looking at the possibility of eighty (80) plus years.” (R. at 97).

Adkins reasons his guilty plea was induced by illegally obtained evidence and that a plea induced by illegally obtained evidence is a violation of his constitutional rights and “failed to represent a voluntary and intelligent choice among alternative courses.” *Id.* Again, Adkins raised the same claims in two prior appeals alleging his guilty plea was involuntary due to ineffective assistance of counsel. *See Adkins v. Commonwealth*, No. 2012-CA-000212-MR, 2014 WL 631516 (Ky. App. Feb. 14, 2014), and *Adkins v. Commonwealth*, No. 2009-CA-000575-MR, 2010 WL 4879581 (Ky. App. Nov. 12, 2010).

The trial court exercised sound discretion in denying Adkins’ CR 60.02 motion. Each of Adkins’ claims is successive or could have been raised previously. He may not continue to relitigate issues already raised or that could have been raised either on direct appeal or in his RCr 11.42 motion. As such,

Adkins failed to “demonstrate why he is entitled to this special, extraordinary relief.” *Gross*, 648 S.W.2d at 856.

For the foregoing reasons, we affirm the order of the Ohio Circuit Court.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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