

RENDERED: NOVEMBER 1, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000578-MR

GEORGE MALONE, JR.

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MITCHELL PERRY, JUDGE
ACTION NO. 03-CR-000494

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * **

BEFORE: JONES, KRAMER, AND TAYLOR, JUDGES.

KRAMER, JUDGE: George Malone, Jr. was convicted in 2004 on one count of kidnapping, one count of wanton endangerment, two counts of sodomy, two counts of rape in the first degree, one count of assault in the fourth degree, and persistent felony offender (PFO) in the first degree. He was sentenced to a total of seventy years' imprisonment. He now appeals the denial of his third post-conviction motion. This motion was filed pursuant to Kentucky Rule of Civil Procedure (CR)

60.02(f). Because Malone's the motion is duplicative of Malone's prior, unsuccessful motion, we affirm.

The factual history of this matter was set forth in *Malone v. Commonwealth*, No. 2004-SC-000885-MR, 2006 WL 2707443, at *1 (Ky. Sept. 21, 2006):

In the spring of 2002, the victim, Candace Bell, became a pen pal with Appellant, George Edward Malone, Jr., one who was in prison. On Bell's first prison visit with Appellant, they began a sexual relationship. After Appellant was paroled in August of 2002, the couple moved in together.

Bell and Appellant had a tumultuous relationship from the start. In January of 2003, Bell approached the apartment of Mr. Andre Owen with cries for help and screams that someone was trying to kill her. Upon opening his door, Owen observed Bell "balled up" on his doorstep. She entered Owen's apartment and he called 911 for assistance. Emergency personnel took Bell to the emergency room where the examining physician observed various abrasions and bruises on her head, arm, hand, elbow and knee, and that both eyes were swollen. During the examination Bell revealed that she had been raped and sodomized by Appellant. Specifically, she stated that Appellant had beaten her for several days, choked her with a belt to the point of loss of consciousness, sexually assaulted her both vaginally and anally with his penis and with a screwdriver and stuffed a sock in her mouth while tying her up with duct tape. She later repeated these statements to a detective, adding that Appellant would not allow her to leave the apartment.

Appellant was charged and indicted on one count of kidnapping, one count of wanton endangerment in the first degree, two counts of rape in the first degree, two

counts of sodomy in the first degree, one count of assault in the fourth degree and of being a persistent felony offender (PFO) in the first degree. At trial, Bell's testimony differed significantly from the prior statements she had made at the hospital and to detectives immediately following the incident. However, a jury returned a verdict of guilty on all counts. Appellant was sentenced to fifty years on each of the rape counts and each of the sodomy counts, all to run concurrently. He was sentenced to twenty years for kidnapping and twenty years for wanton endangerment, to run concurrently. The fifty-year and the twenty-year concurrent sentences were ordered to run consecutively for a total of seventy years.

After the Kentucky Supreme Court upheld Malone's conviction, he filed a motion for relief under RCr¹ 11.42. Malone was denied relief by the circuit court and appealed. This Court affirmed the circuit court.² In 2010, Malone sought relief under CR 60.02(f). This Court reviewed the circuit court's order denying Malone's motion and affirmed, explaining:

In September 2010, Malone moved to vacate his conviction pursuant to CR 60.02(f), alleging his constitutional rights were violated by the introduction of testimonial hearsay statements at trial and that he received ineffective assistance of appellate counsel. The trial court denied Malone's motion without a hearing, and this appeal followed.

This Court reviews the denial of a CR 60.02 motion under the abuse of discretion standard. *Brown v.*

¹ Kentucky Rule of Criminal Procedure.

² See *Malone v. Commonwealth*, No. 2008-CA-000897-MR, 2009 WL 1258098, at *1 (Ky. App. May 8, 2009).

Commonwealth, 932 S.W.2d 359, 362 (Ky. 1996). “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 v. Commonwealth*, 948 S.W.2d 415, 416 (Ky. 1997). A movant must first utilize RCr 11.42 to “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.” *Gross v. Commonwealth*, 648 S.W.2d 853, 856 (Ky. 1983) (quoting RCr 11.42(3)). Thereafter, a movant may request extraordinary relief pursuant to CR 60.02, but he cannot raise arguments that were or should have been raised on direct appeal or in an RCr 11.42 motion. *Id.*

Malone’s allegations regarding the admissibility of evidence at trial could have been raised in an earlier proceeding; consequently, we will not address these claims under CR 60.02. *See Id.* Furthermore, we need not address Malone’s argument regarding ineffective assistance of appellate counsel. Pursuant to *Hollon v. Commonwealth*, 334 S.W.3d 431 (Ky. 2010), these claims must be raised by a motion under RCr 11.42. *Id.* at 439. Here, Malone’s RCr 11.42 appeal was final before the *Hollon* decision was rendered; accordingly, “he is barred by the retroactivity provisions of *Hollon* from prosecuting the claim” under CR 60.02. *Sanders v. Commonwealth*, 339 S.W.3d 427, 435 (Ky. 2011). After careful review, we conclude the trial court correctly denied Malone’s motion for CR 60.02 relief.

Malone v. Commonwealth, No. 2011-CA-000285-MR, 2012 WL 2360158, at *1 (Ky. App. June 22, 2012).

On February 28, 2017, Malone re-filed *the same* CR 60.02 motion that had been filed seven years prior, which forms the basis of this appeal.³ Malone once again argued that his constitutional rights were violated by the introduction of what he asserts is hearsay evidence and that he received ineffective assistance of appellate counsel.

The circuit court denied his motion on the same grounds as his prior CR 60.02 motion. Malone now appeals. We affirm. The circuit court did not err in denying Malone's CR 60.02 motion. As before, the circuit court did not abuse its discretion. Further, such motions cannot rest upon grounds that could have been asserted in a direct appeal or RCr 11.42 proceedings. *Gross*, 648 S.W.2d at 856. Nor can such motions rest upon grounds that have already been asserted and rejected in prior CR 60.02 proceedings. *See, e.g., McQueen*, 948 S.W.2d at 416.

ALL CONCUR.

³ The two CR 60.02 motions are duplicative in every respect, with the exception that Malone's signature is not notarized in the 2017 motion, and it is also lacking a Notice and Certificate of Service page. Thus, the 2010 motion is sixty-three pages in length and the 2017 motion is sixty-two pages in length. The Commonwealth does not deny receipt of the motion.

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