

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-001484-MR

MICHAEL LEMON

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE OLU A. STEVENS, JUDGE
ACTION NO. 14-CR-001531

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: DIXON, MAZE, AND SPALDING, JUDGES.

DIXON, JUDGE: Michael Lemon appeals from the Jefferson Circuit Court's order denying his motion to set aside, correct, or amend judgment pursuant to CR¹ 60.02(e), entered December 20, 2017. We affirm.

A full recitation of the facts in this case may be found in this Court's opinion stemming from Lemon's direct appeal of his conviction. *Lemon v.*

¹ Kentucky Rule of Civil Procedure.

Commonwealth, No. 2014-CA-002088-MR, 2016 WL 7414524 (Ky. App. Dec. 22, 2016). Briefly stated, on March 6, 2014, an intoxicated Lemon stumbled and fell while getting off a bus in Louisville, whereby he suffered a significant facial injury. When paramedics arrived to assist Lemon, he became combative and intentionally spat blood in a paramedic’s face, telling her he hoped she became infected with “[his] AIDS.” Lemon was not HIV-positive, but he did suffer from hepatitis C. He was subsequently charged and convicted at jury trial for third-degree assault² and for being a persistent felony offender.³ The Jefferson Circuit Court sentenced Lemon to thirteen years’ imprisonment on November 20, 2014. We affirmed Lemon’s conviction and sentence on direct appeal.

On November 9, 2017, Lemon filed a motion *pro se* to set aside his guilty plea pursuant to CR 60.02(e) arguing that the judgment is void because the evidence was insufficient to convict him. Specifically, he argued that the act of spitting or coughing was involuntary, and the Commonwealth failed to prove that he intentionally expelled blood upon the paramedic. Additionally, Lemon contended his trial counsel was ineffective for failing to preserve this argument in a motion for directed verdict and, likewise, appellate counsel was ineffective for failing to present the issue in his direct appeal. The trial court summarily denied

² Kentucky Revised Statute (KRS) 508.025(1)(a)(4), a Class D felony.

³ KRS 532.080.

relief on Lemon's CR 60.02 motion in an order entered on December 20, 2017.

This appeal followed.

This is an appeal of the trial court's denial of a CR 60.02 motion.

"We review the denial of a CR 60.02 motion for an abuse of discretion." *Diaz v. Commonwealth*, 479 S.W.3d 90, 92 (Ky. App. 2015) (citing *Partin v. Commonwealth*, 337 S.W.3d 639, 640 (Ky. App. 2010)). "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). "The burden of proof in a CR 60.02 proceeding falls squarely on the movant to affirmatively allege facts which, if true, justify vacating the judgment and further allege special circumstances that justify CR 60.02 relief." *Foley v. Commonwealth*, 425 S.W.3d 880, 885 (Ky. 2014) (citations and internal quotation marks omitted). "[W]e will affirm the lower court's decision unless there is a showing of some 'flagrant miscarriage of justice.'" *Id.* at 886 (quoting *Gross v. Commonwealth*, 648 S.W.2d 853, 858 (Ky. 1983)).

Lemon presents two arguments on appeal. First, he contends that the trial court abused its discretion in failing to grant relief on his motion. He bases this argument on the alleged insufficiency of the evidence to convict him. Second, Lemon contends that the trial court denied him due process when it failed to render

specific findings of fact and conclusions of law in its summary denial of his CR 60.02 motion. The Commonwealth argues that denial of relief was proper because Lemon's claims should have been raised in his direct appeal or in a motion pursuant to RCr⁴ 11.42, and, therefore, the motion was procedurally barred.

We agree with the Commonwealth and hold that Lemon has presented no grounds for relief cognizable under CR 60.02. Lemon's claims as to the sufficiency of the evidence were known to him, or should have been known to him, at sentencing, or shortly thereafter. These evidentiary claims should have been raised on direct appeal. "CR 60.02 is not properly invoked where the movant is alleging errors which could have, in the exercise of due diligence, been raised in a direct appeal." *Owens v. Commonwealth*, 512 S.W.3d 1, 15 (Ky. App. 2017) (quoting *Goldsmith v. Fifth Third Bank*, 297 S.W.3d 898, 903 (Ky. App. 2009)). Similarly, his allegations of ineffective assistance of trial and appellate counsel should have been brought in an RCr 11.42 motion. "CR 60.02 is *not* intended to provide relief for grounds that could be attacked through direct appeals or collateral motions such as grounds under RCr 11.42." *Meece v. Commonwealth*, 529 S.W.3d 281, 285 (Ky. 2017).

Lemon's second argument, asserting that the trial court erred by summarily denying his motion, is also without merit. "[F]indings of fact and

⁴ Kentucky Rule of Criminal Procedure.

conclusions of law are not required in a case involving a CR 60.02 motion.”

McNew v. Commonwealth, 320 S.W.3d 129, 131 n.9 (Ky. App. 2010) (citing CR 52.01; *Clay v. Clay*, 424 S.W.2d 583, 584 (Ky. 1968)).

For the foregoing reasons, we affirm the Jefferson Circuit Court’s order denying relief pursuant to CR 60.02.

ALL CONCUR.

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