

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-001788-MR

ISAIAH W. TYLER

APPELLANT

v. APPEAL FROM HENDERSON CIRCUIT COURT
HONORABLE KAREN LYNN WILSON, JUDGE
ACTION NO. 11-CR-00158

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: KRAMER, MAZE, AND L. THOMPSON, JUDGES.

KRAMER, JUDGE: Isaiah W. Tyler appeals from the Henderson Circuit Court's order denying his motion to set aside, correct, or amend judgment pursuant to CR¹ 60.02, entered November 2, 2018. Because this is an improper successive post-conviction matter, we affirm.

¹ Kentucky Rule of Civil Procedure.

This case arises from a shooting that occurred on or around July 24, 2011. Appellant Tyler was arrested in connection with the shooting and charged with possession of a handgun by a convicted felon.² Later, the grand jury indicted Tyler on that same charge.

The indictment indicates that Tyler's felony status for the underlying charge was based upon a 2009 case in Texas. In the Texas case, Tyler entered a plea of *nolo contendere*³ to a possession of marijuana charge, which is a third-degree felony in Texas. As a result of Tyler's *nolo contendere* plea, the Texas Court entered an order of deferred adjudication. From our review, we discern that deferred adjudication appears akin to Kentucky's pretrial diversion program, *i.e.* a Defendant's successful completion of the program results in the dismissal of the charge.⁴

In the present case, Tyler entered a plea of guilty to possession of a handgun by a convicted felon on October 21, 2011. Prior to the entry of judgment, Tyler did not challenge the effect of the *nolo contendere* plea on his status as a

² Kentucky Revised Statute (KRS) 527.040, a Class C felony.

³ This is a plea wherein the Defendant chooses not to contest or admit guilt. *Nolo contendere*, BLACK'S LAW DICTIONARY (abridged 9th ed. 2010).

⁴ See Tex. Code Crim. Proc. Ann. art. 42A.101 (West 2017); KRS 533.250.

convicted felon.⁵ After judgment was entered, the record does not show any significant action in Tyler's case until 2017.⁶

On September 19, 2017, nearly six years after his guilty plea in this case, Tyler filed a *pro se* motion to vacate the judgment pursuant to RCr⁷ 11.42. In his motion, Tyler essentially challenged the sufficiency of the evidence against him, and he claimed ineffective assistance of counsel. More specifically, Tyler asserted that the *nolo contendere* plea in his Texas case did not result in a conviction; therefore, it was improper for the Texas case to serve as the basis for his felony status in the Kentucky case. On October 11, 2017, the circuit court entered an order denying Tyler's motion because it was untimely,⁸ and because his

⁵ In his brief, Tyler asserts that he informed the circuit court judge, the Commonwealth, and his counsel that he did not believe the *nolo contendere* plea was a conviction. However, there is nothing in the record before us showing Tyler brought his claim to anyone's attention prior to entering a plea of guilty. Regardless, as we note later in this opinion, the circuit court determined --and we agree--that this claim lacks merit. *See* note 9.

⁶ The record shows that Tyler moved for shock probation on several occasions. Additionally, there were a number of show cause hearings for Tyler's failure to pay court costs. These are not relevant to the current appeal.

⁷ Kentucky Rule of Criminal Procedure.

⁸ Although the circuit court did not address the issue of timeliness regarding Tyler's CR 60.02 motion, we pause to note that we agree with the Commonwealth that the CR 60.02 motion was untimely. CR 60.02 requires a motion made pursuant to subsections (e) and (f) be made within a reasonable amount of time after entry of the judgment. CR 60.02.

claims lacked merit as the *nolo contendere* plea was effectively a conviction.⁹

Tyler did not appeal this decision.

Then, on October 23, 2018, Tyler filed a *pro se* motion to vacate pursuant to CR 60.02(e) and (f). The arguments contained within Tyler's CR 60.02 motion are nearly identical to those contained within his RCr 11.42 motion. The Commonwealth did not file a responsive pleading. On November 2, 2018, the circuit court entered an order denying Tyler's CR 60.02 motion. This appeal followed.

We agree with the circuit court's decision that Tyler's CR 60.02 motion is procedurally barred because CR 60.02 is not intended to give a defendant another chance to litigate issues that should have been addressed on direct appeal or through an RCr 11.42 proceeding.

The interrelationship between CR 60.02 and RCr 11.42 was carefully delineated in *Gross v. Commonwealth*, Ky., 648 S.W.2d 853 (1983). In a criminal case, these rules are not overlapping, but separate and distinct. A defendant who is in custody under sentence or on probation, parole or conditional discharge, is required to avail himself of RCr 11.42 as to any ground of which he

⁹ Although we need not reach the merits of the case, we agree with the circuit court that the *nolo contendere* plea was a "conviction". In *Thomas v. Commonwealth*, 95 S.W.3d 828 (Ky. 2003), which the circuit court relies upon in its order, the Kentucky Supreme Court determined that "conviction" is not limited to a final judgment. The Court held that "conviction" can be synonymous with a determination of guilt, depending on the statute. Therefore, if a defendant plead guilty as Tyler did in Texas with the *nolo contendere* plea, the defendant could be considered a convicted felon.

is aware, or should be aware, during the period when the remedy is available to him.

McQueen v. Commonwealth, 948 S.W.2d 415, 416 (Ky. 1997). Moreover, a litigant cannot simply repackage his RCr 11.42 motion into a CR 60.02 motion because:

CR 60.02 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. That is, CR 60.02 is not intended merely as an additional opportunity to relitigate the same issues which could reasonably have been presented by direct appeal or an RCr 11.42 proceeding. Indeed, RCr 11.42(3) makes clear that the movant shall, in his RCr 11.42 petition, 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.

Foley v. Commonwealth, 425 S.W.3d 880, 884 (Ky. 2014) (footnote and citations omitted).

Tyler's CR 60.02 motion is a successive post-judgment motion. He made an untimely RCr 11.42 motion six years after the entry of judgment, and his CR 60.02 motion was filed one year later raising the same issues. Both motions address Tyler's belief that he was wrongly convicted because the *nolo contendere* plea in Texas is not considered a conviction.

The law is clear that Tyler’s CR 60.02 motion is a successive post-judgment motion which Kentucky law prohibits.¹⁰ *Foley*, 425 S.W.3d at 884.

Accordingly, we need not address Tyler’s claims on the merits.

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

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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¹⁰ We further note that the present case is not the only time Tyler has challenged the effect of the *nolo contendere* plea in Texas. Tyler has a separate appeal before us stemming from a different criminal action, Henderson Circuit Court No. 14-CR-00034-002, in which he was convicted of complicity to first-degree robbery and of being a second-degree persistent felony offender. In that case, Tyler filed an RCr 11.42 motion asserting ineffective assistance of counsel because counsel did not challenge the use of the same *nolo contendere* plea to enhance the conviction. In an opinion rendered on August 23, 2019, we held that Tyler’s argument “could and should have been raised on direct appeal; thus, it is improper for consideration now on collateral attack.” *Tyler v. Commonwealth*, No. 2017-CA-001228-MR, 2019 WL 3990995, at *4 (Ky. App. Aug. 23, 2019). That reasoning is similarly applicable here.