

RENDERED: JANUARY 31, 2020; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2018-CA-001884-MR

AARON CAMPBELL

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS CLARK,¹ JUDGE
ACTION NO. 10-CR-01585

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE, CALDWELL, AND KRAMER, JUDGES.

KRAMER, JUDGE: Aaron Campbell was convicted in 2014 on one count of first-degree robbery and second-degree persistent felony offender after entering a

¹ Hon. Pamela R. Goodwine presided over this action until her election to the Court of Appeals in November 2018. The order at issue in this appeal, dated December 4, 2018, was signed by Hon. Thomas Clark.

conditional plea of guilty.² He was sentenced to twenty years' imprisonment. He now appeals the denial of his second post-conviction motion. This motion was filed pursuant to Kentucky Rule of Civil Procedure (CR) 60.02. After careful review, we affirm.

The factual history of this matter was set forth in *Campbell v. Commonwealth*, No. 2014-SC-000140-MR, 2015 WL 5652016, at *1 (Ky. Sept. 24, 2015):

In August 2009, intruders entered David Norris's home, tied him up, hit him in the head, and robbed him of \$70,000. A police investigation failed to produce any suspects for over a year.

Norris was robbed at home again in October 2010. This time, two men entered his home, tied him up, and made off with his credit card. Police began another investigation, aided in this instance by surveillance videos of individuals using credit cards at local stores and by Crimestoppers. Within a short time, Michael Washington emerged as a suspect.

Washington eventually confessed to the crime and implicated Campbell, his cousin, as the other participant. After arresting Campbell, police questioned him about the robbery multiple times. Ultimately, Campbell confessed to being involved. In light of the information gained from Campbell's statement, police became suspicious that Washington and Campbell were involved

² Campbell also entered a conditional plea of guilty to second degree robbery in Fayette County Case No. 11-CR-00639 on the same date. He was sentenced to ten years' imprisonment to run consecutively with the case at bar. Campbell did not file a motion pursuant to CR 60.02 in Fayette County Case No. 11-CR-00639; therefore, it is not before us.

in the earlier robbery of Norris's home. Forensic evidence verified this suspicion. Campbell eventually confessed to the second robbery, as well.

Campbell was separately indicted for each robbery of Norris's home. Before trial, Campbell filed a motion to suppress both of his confessions on grounds that police made promises of leniency and coerced him into confessing. The trial court denied Campbell's motions following a hearing. As a result, Campbell entered a conditional guilty plea, reserving the right to appeal the trial court's decision. For the 2010 robbery, Campbell pleaded guilty to second-degree robbery and was sentenced to ten years' imprisonment. And for the 2009 robbery, Campbell pleaded guilty to first-degree robbery and being a second-degree Persistent Felony Offender (PFO 2) and, accordingly, was sentenced to twenty years' imprisonment. Campbell's sentences were ordered to run consecutively.

Campbell now appeals under CR 60.02. We review the denial of a CR 60.02 motion under an abuse of discretion standard. *Brown v. Commonwealth*, 932 S.W.2d 359, 361 (Ky. 1996). "The test for abuse of discretion is whether the trial [court's] decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). We affirm the lower court's decision unless there is a showing of some "flagrant miscarriage of justice." *Gross v. Commonwealth*, 648 S.W.2d 853, 858 (Ky. 1983).

Campbell makes two arguments on appeal. First, he asserts that fraud or perjury was committed by the Commonwealth at the suppression hearing.

Second, he asserts that “mistake, inadvertence, or fraud” was committed by this Court. We disagree.

CR 60.02 states:

On motion a court may, upon such terms as are just, relieve a party or his legal representative from its final judgment, order, or proceeding upon the following grounds: (a) mistake, inadvertence, surprise or excusable neglect; (b) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59.02; (c) perjury or falsified evidence; (d) fraud affecting the proceedings, other than perjury or falsified evidence; (e) the judgment is void, or has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (f) any other reason of an extraordinary nature justifying relief. The motion shall be made within a reasonable time, and on grounds (a), (b), and (c) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this rule does not affect the finality of a judgment or suspend its operation.

Although plain reading of the rule indicates that a motion pursuant to perjured testimony must be brought within one year, “a criminal conviction based on perjured testimony can be a reason of an extraordinary nature justifying relief pursuant to CR 60.02(f) and subject to the reasonable time limitation of the rule.”

Commonwealth v. Spaulding, 991 S.W.2d 651, 657 (Ky. 1999).

For his first argument, Campbell contends that Detective Reid Bowles committed perjury in his testimony at the suppression hearing when he testified

that Campbell signed a card indicating he had been given *Miranda*³ warnings prior to Campbell's interrogation. Campbell asserts that the recorded interrogation, played at the suppression hearing, shows that detectives actually asked Campbell to sign the card during the interrogation, rather than prior to it.

The Kentucky Supreme Court has held that,

the proper procedure for a defendant aggrieved by a judgment in a criminal case is to directly appeal that judgment, *stating every ground of error which it is reasonable to expect that he or his counsel is aware of when the appeal is taken.*

Next, we hold that a defendant is required to avail himself of RCr^[4] 11.42 while in custody under sentence or on probation, parole or conditional discharge, *as to any ground of which he is aware, or should be aware, during the period when this remedy is available to him.* Final disposition of that motion, or waiver of the opportunity to make it, shall conclude all issues that reasonably could have been presented in that proceeding. The language of RCr 11.42 forecloses the defendant from raising any questions under CR 60.02 which are "issues that could reasonably have been presented" by RCr 11.42 proceedings.

Gross, 648 S.W.2d at 857 (emphases added).

The suppression hearing was held by the trial court on August 21, 2013. The trial court entered its final judgment and sentence of imprisonment on February 20, 2014. Campbell filed a direct appeal immediately following his

³ *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

⁴ Kentucky Rule of Criminal Procedure.

conviction, and the Kentucky Supreme Court upheld his conviction. Campbell next filed a motion pursuant to RCr 11.42, which was denied by the trial court, and which this Court affirmed. Finally, Campbell filed his motion pursuant to CR 60.02 on June 13, 2018, alleging, in part, that Detective Bowles had committed perjury at the suppression hearing. We agree with the trial court that the information forming the basis of Campbell's perjury allegations is not new. It has been known to Campbell since 2013, and should have been included in his direct appeal and/or his RCr 11.42 motion.

We also agree with the trial court that the evidence presented during the suppression hearing in no way satisfies Campbell's burden "to show both that a reasonable certainty exists as to the falsity of the testimony and that the conviction probably would not have resulted had the truth been known before he can be entitled to such relief." *Spaulding*, 991 S.W.2d at 657. During the portion of the interrogation cited by Campbell, one of the detectives states, "I forgot to get you to sign this. I need to get you to sign this." It is unclear what document Campbell signs at that point, but the detective's request was not met with protest by Campbell. We agree with the trial court's reasoning that,

Arguendo, assuming that the statement was in reference to the Miranda card makes no difference. Defendant Campbell does not assert that the officers failed to read him Miranda warnings entirely or cut out the audio, read him his rights at a later time and then had him sign the

card. If the officers had not read him Miranda warnings, he would not have signed it.

Accordingly, the trial court did not abuse its discretion in refusing to grant Campbell relief regarding his perjury argument.

Campbell next argues that mistake, inadvertence, or fraud was committed by this Court because it found that Campbell had filed a *pro se* motion to run his sentences concurrently. Specifically, this Court stated

After the entry of the plea and prior to final sentencing, Campbell's attorney filed a motion requesting the sentences to be imposed concurrently and for the 85 percent rule to apply to the ten-year sentence only. Campbell also filed a *pro se* motion requesting concurrent sentencing.

Campbell v. Commonwealth, No. 2016-CA-001666-MR, 2018 WL 297262, at *4 (Ky. App. Jan. 5, 2018).

The record before us shows that Campbell's trial counsel filed a motion for concurrent sentencing prior to Campbell's sentencing hearing. We agree with Campbell that the record before us is devoid of a similar *pro se* motion filed by Campbell. However, this Court presently has only the record from Fayette County Case No. 10-CR-01585 before it and does *not* have the record of Fayette County Case No. 11-CR-00639. Therefore, it is unknown to this Court if Campbell filed a *pro se* motion for concurrent sentencing in that action. Regardless, Campbell's argument fails for several reasons. First, it is not properly

preserved. In the CR 60.02 motion filed in the trial court, Campbell points out what he believes are errors in the trial court's opinion regarding his RCr 11.42 motion. To this Court, however, he argues a mistake in *this* Court's opinion regarding his RCr 11.42 motion. "Our jurisprudence will not permit an appellant to feed one kettle of fish to the trial judge and another to the appellate court." *Owens v. Commonwealth*, 512 S.W.3d 1, 15 (Ky. App. 2017) (citing *Elery v. Commonwealth*, 368 S.W.3d 78, 97 (Ky. 2012) (citing *Kennedy v. Commonwealth*, 544 S.W.2d 219, 222 (Ky. 1976))). "It goes without saying that errors to be considered for appellate review must be precisely preserved and identified in the lower court." *Elwell v. Stone*, 799 S.W.2d 46, 48 (Ky. App. 1990) (citation omitted).

Second, *if* this Court's prior opinion contained a factual error, it should have been corrected by a petition for rehearing pursuant to CR 76.32(1)(a), which allows for modifications of this Court's opinions to correct errors of fact. As the Commonwealth correctly points out, Campbell failed to file a petition for rehearing regarding his RCr 11.42 motion. His attempt to correct a possible factual error by this Court in a CR 60.02 motion is improper.

Finally, Campbell's second argument is simply a repackaging of his RCr 11.42 motion, in which he contended that his sentences should run concurrently based on the plea agreement. He now presents the same argument

under the guise of “mistake, inadvertence or fraud” by this Court. We are unpersuaded.

Accordingly, the decision of the Fayette Circuit Court is affirmed.

ALL CONCUR.

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