

Commonwealth of Kentucky
Court of Appeals

NO. 2019-CA-000196-MR

JOHN D. DEVINE, SR.

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE BARRY WILLETT, JUDGE
ACTION NO. 12-CR-002333

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** **

BEFORE: CALDWELL, DIXON, AND L. THOMPSON, JUDGES.

THOMPSON, L., JUDGE: John D. Devine, Sr. (“Appellant”), *pro se*, appeals from an order of the Jefferson Circuit Court denying his motion to vacate his sentence. He argues that the circuit court erred in treating his Kentucky Rules of Civil Procedure (“CR”) 60.02(e) and (f) motion as a Kentucky Rules of Criminal Procedure (“RCr”) 11.42 motion. Appellant asserts that the circuit court should

have determined that he was insane at the time of the underlying offense, and that the court abused its discretion by accepting his guilty plea. He seeks an opinion vacating the judgment and remanding for a competency hearing or, in the alternative, for a resentencing to life in prison with the possibility of parole. For the reasons addressed below, we find no error and AFFIRM the order on appeal.

FACTS AND PROCEDURAL HISTORY

On January 24, 2014, Appellant entered an *Alford*¹ plea in Jefferson Circuit Court to three counts of murder, one count of burglary in the first degree, and one count of persistent felony offender in the second degree.² He was sentenced to life in prison without parole for the murders and 20 years for the burglary, to be served concurrently for a total sentence of life in prison without parole.

On June 5, 2017, Appellant, *pro se*, filed a motion to modify or vacate the sentence pursuant to CR 60.02(e) and (f). In support of the motion, Appellant argued that he was insane at the time of the murders, that the court should have so found, and that he had no recollection as to how the three victims died. The motion was denied by way of an order entered on May 8, 2018. In denying the

¹ *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970). “An *Alford* plea is a ‘plea of guilty,’ regardless of any denial of underlying facts[.]” *Pettitway v. Commonwealth*, 860 S.W.2d 766, 767 (Ky. 1993).

² Kentucky Revised Statutes (“KRS”) 507.020, KRS 511.020, and KRS 532.080(2).

motion, the circuit court determined that it was procedurally barred. Specifically, the court found that absent certain exceptions, a collateral attack on a prison sentence must be brought via RCr 11.42(1), and must be prosecuted within three years after the conviction becomes final under RCr 11.42(10). It further determined that even if the matter were properly adjudicated under CR 60.02(e) and (f), it was still not timely as the motion was not brought “within a reasonable time.” Having found that Appellant did not raise any issues which could have been brought under RCr 11.42, and because the motion was not timely, it denied the relief sought. This appeal followed.

ARGUMENTS AND ANALYSIS

Appellant, *pro se*, now argues that the Jefferson Circuit Court erred in characterizing his CR 60.02(e) and (f) motion as an RCr 11.42 motion, and in finding it to be untimely. He asserts that the three-year period of limitation for bringing an RCr 11.42 motion passed because he was in administrative segregation, he was transferred from prison to prison because of the nature of the crimes, and he was mentally unstable because he was dealing with the loss of his family. Appellant argues that with the passage of the three-year period under RCr 11.42, the only remaining avenue of relief was CR 60.02(e) and (f). Appellant also directs our attention to unpublished case law which he claims stands for the proposition that the three-year period should be waived because there is no

resultant prejudice. He goes on to argue that he was insane when the crimes were committed, and is entitled to a hearing on that issue. Based on the foregoing, Appellant maintains that the circuit court abused its discretion in accepting his *Alford* plea.

It has long been the policy of this court that errors occurring during the trial should be corrected on direct appeal, and the grounds set forth under the various subsections of CR 60.02 deal with extraordinary situations which do not as a rule appear during the progress of a trial. Although the rule does permit a direct attack by motion where the judgment is voidable—as distinguished from a void judgment—this direct attack is limited to the specific subsections set out in said rule[.]

Howard v. Commonwealth, 364 S.W.2d 809, 810 (Ky. 1963).

RCr 11.42 provides a procedure for a motion to vacate, set aside or correct sentence for “a prisoner in custody under sentence or a defendant on probation, parole or conditional discharge.” It provides a vehicle to attack an erroneous judgment for reasons which are not accessible by direct appeal. In subsection (3) it provides that “the motion shall 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.” (emphasis added).

Rule 60.02 is part of the Rules of Civil Procedure. It applies in criminal cases only because Rule 13.04 of the Rules of Criminal Procedure provides that “the Rules of Civil Procedure shall be applicable in criminal proceedings to the extent not superseded by or inconsistent with these Rules of Criminal Procedure.”

The structure provided in Kentucky for attacking the final judgment of a trial court in a criminal case is not haphazard and overlapping, but is organized and complete. That structure is set out in the rules related to direct appeals, in RCr 11.42, and *thereafter* in CR 60.02. . . . It is for relief that is not available by direct appeal and not available under RCr 11.42. The movant must demonstrate why he is entitled to this special, extraordinary relief. Before the movant is entitled to an evidentiary hearing, he must affirmatively allege facts which, if true, justify vacating the judgment and further allege special circumstances that justify CR 60.02 relief.

CR 60.02 was enacted as a substitute for the common law writ of coram nobis. The purpose of such a writ was to bring before the court that pronounced judgment errors in matter of fact which (1) had not been put into issue or passed on, (2) were unknown and could not have been known to the party by the exercise of reasonable diligence and in time to have been otherwise presented to the court, or (3) which the party was prevented from so presenting by duress, fear, or other sufficient cause. *Black's Law Dictionary, Fifth Edition*, 487, 1444.

In *Harris v. Commonwealth*, Ky., 296 S.W.2d 700 (1956), this court held that 60.02 does not extend the scope of the remedy of coram nobis nor add additional grounds of relief. We held that coram nobis “is an extraordinary and residual remedy to correct or vacate a judgment upon facts or grounds, not appearing on the face of the record and not available by appeal or otherwise, which were not discovered until after rendition of judgment without fault of the party seeking relief.”

Gross v. Commonwealth, 648 S.W.2d 853, 856 (Ky. 1983).

Thus, Appellant was required to address alleged errors occurring in the circuit court via direct appeal, then to file an RCr 11.42 motion to vacate, correct, or set aside a sentence, and only thereafter to employ CR 60.02 for matters which were unknown or could not have been adjudicated via direct appeal or RCr 11.42. *Gross, supra*. Appellant is “[a] prisoner in custody under sentence,” RCr 11.42(1), who raised a collateral attack to vacate, set aside, or correct his sentence. As such, and in accord with *Gross*, he was required to bring his collateral attack via RCr 11.42 within three years of the final judgment. Final judgment was entered on April 4, 2014, and Appellant did not file his motion to vacate his sentence until June 5, 2017, more than three years after the judgment.

In addition, we do not find persuasive Appellant’s argument that this period may be waived. RCr 11.42(10) allows for the filing of the motion beyond the three-year period when 1) the facts upon which the claim was predicated were unknown to Appellant and could not have been discovered by the exercise of due diligence, or 2) the fundamental constitutional right asserted was not established within the three-year period and has been held to apply retroactively. Appellant has not proven either of these elements; therefore, he is bound by the three-year filing period.

CONCLUSION

Though Appellant claimed entitlement to relief under CR 60.02(e) and (f), the Jefferson Circuit Court properly characterized his motion as brought under RCr 11.42. CR 60.02(e) and (f) are not applicable as Appellant does not allege or make any showing that the judgment is void, or any other reason of an extraordinary nature justifying relief. CR 60.02(e) and (f). Appellant's motion was not brought within three years of the judgment and therefore was untimely. RCr 11.42(10). The Jefferson Circuit Court properly so concluded, and we find no error.

For the foregoing reasons, we AFFIRM the May 8, 2018 order of the Jefferson Circuit Court denying Appellant's motion to vacate his sentence.

ALL CONCUR.

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