

Commonwealth of Kentucky
Court of Appeals

NO. 2019-CA-000224-MR

ERIC DYE

APPELLANT

v. APPEAL FROM WARREN CIRCUIT COURT
HONORABLE STEVE ALAN WILSON, JUDGE
ACTION NO. 10-CR-00507

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

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

MAZE, JUDGE: Eric Dye appeals the denial of his motion for relief from a 2012 judgment based upon his guilty plea to charges of first-degree rape, first-degree sodomy, first-degree burglary, and being a second-degree persistent felon for which he was sentenced to a term of thirty years' imprisonment. Like the trial

court, we are convinced that each of the contentions advanced in his CR¹ 60.03 and CR 61.02 motions could, and should, have been raised in his previous RCr² 11.42 motion for postconviction relief. Accordingly, we affirm.

The facts underpinning appellant Dye's guilty plea and sentencing are clearly and thoroughly set out in the opinion of this Court denying his 2013 motion for RCr 11.42 relief.³ We will not reiterate them here except to the extent necessary to an understanding of our opinion.

In March 2012, the Warren Circuit Court entered judgment and sentenced appellant in accordance with his guilty plea. On August 28, 2013, appellant filed a motion pursuant to RCr 11.42 and RCr 10.26 asserting myriad allegations of ineffective assistance of counsel, requesting an evidentiary hearing, and appointment of counsel. After conducting an evidentiary hearing, the trial court denied the RCr 11.42 motion, resulting in the previous appeal. In affirming the trial court's denial of relief, this Court stated:

Ultimately, we are not persuaded that even if trial counsel was ineffective, that it would have been rational for Dye to withdraw from his plea agreement and face a possible sentence of sixty years, given the victim's statement and his confession. Although Dye indicated that without counsel's errors and misadvice he would not

¹ Kentucky Rule of Civil Procedure.

² Kentucky Rule of Criminal Procedure.

³ *Dye v. Commonwealth*, No. 2015-CA-000521-MR, 2018 WL 1778568, (Ky. App. Apr. 13, 2018), *review denied* (Sept. 19, 2018).

have accepted the plea and would have proceeded to trial, the circuit court found that based on trial counsel's and Dye's testimony, Dye received appropriate advice given his situation and the strategy he wished to pursue, and was only seeking a further reduction in his sentence rather than to proceed to trial. **Dye's own testimony shows that proceeding to trial would not be a rational decision, which is why he sought a different remedy when asked about the relief he wanted.**

2018 WL 1778568 at *8 (emphasis added).

In October 2015, while his RCr 11.42 appeal was still pending in this Court, appellant filed the current motion for a new trial under CR 60.03 and CR 61.02 alleging various vague constitutional violations and ineffective assistance of counsel. The trial court denied that motion in December 2018, concluding that the appellant "raised no issues of fact or law that would justify setting aside the verdict, which is new or has not been addressed pursuant to the 11.42." In a subsequent motion to alter, amend, or vacate the denial of the CR 60.03 motion, appellant narrowed his contentions to five distinct complaints: 1) that he had been improperly charged; 2) that certain issues should have been raised on direct appeal; 3) that his statement to police was not voluntary; 4) that there was perjury on the part of the victim; and 5) cumulative error. Again reiterating that none of the asserted issues were sufficient for a grant of relief, the trial court denied appellant's motion to reconsider. This appeal followed.

We commence our discussion by reiterating the well-established criteria for obtaining relief pursuant to CR 60.03:

Civil Rule 60.03 permits an independent action for relief from a judgment “on appropriate equitable grounds.” However, “[r]elief shall not be granted in an independent action if the ground of relief sought has been denied in a proceeding by motion under Rule 60.02” CR 60.03.

Generally, claimants seeking equitable relief through independent actions must meet three requirements. Claimants must (1) show that they have no other available or adequate remedy; (2) *demonstrate that movants’ own fault, neglect, or carelessness did not create the situation for which they seek equitable relief*; and (3) establish a recognized ground—such as fraud, accident, or mistake—for the equitable relief.

Campaniello Imports, Ltd. v. Saporiti Italia S.p.A., 117 F.3d 655, 662 (2d Cir.1997) (emphasis added). Further, an independent action for equitable relief from a judgment is unavailable if the complaining party has, or by exercising proper diligence would have had, an adequate remedy in the original proceedings.

Bowling v. Commonwealth, 163 S.W.3d 361, 365 (Ky. 2005), *abrogated on other grounds by Woodall v. Commonwealth*, 563 S.W.3d 1 (Ky. 2018). More recently, the Supreme Court of Kentucky emphasized that CR 60.03 “is intended as an equitable form of relief when *no other avenue exists*.” *Meece v. Commonwealth*, 529 S.W.3d 281, 295 (Ky. 2017) (emphasis added.)

Meece also makes clear that that the question of a defendant's entitlement to extraordinary postconviction relief "is a matter left to the 'sound discretion of the court and the exercise of that discretion will not be disturbed on appeal except for abuse.'" *Id.* at 285 (quoting *Brown v. Commonwealth*, 932 S.W.2d 359, 362 (Ky. 1996)). The familiar "test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Foley v. Commonwealth*, 425 S.W.3d 880, 886 (Ky. 2014).

Applying these criteria to the issues advanced in this appeal, we find no abuse of discretion in the decision of the Warren Circuit Court. Returning to the criteria for CR 60.03, appellant failed to establish that he had no other available or adequate avenue of relief; failed to establish that the need for equitable relief was not a product of his own fault or neglect; and failed to establish a recognized ground for equitable relief, such as fraud, accident, or mistake.

The substance of appellant's first argument is that he was actually innocent of the charges, that he was over-charged, and that he did not receive effective assistance from his counsel in entering his guilty plea. Appellant's claims of actual innocence and ineffective assistance of counsel in the entry of the plea were rejected in this Court's opinion in his RCr 11.42 appeal:

At Dye's plea colloquy, the trial court went to great lengths to make sure that Dye's plea was made

knowingly, intelligently and voluntarily. The trial court even initially granted Dye an additional day to think about the plea and the following day asked Dye to interrupt if he had any questions or concerns. **Dye specifically agreed he was satisfied with the advice he received from counsel and was not threatened with anything other than the possible sentence he could face to induce him to plead guilty.** While Dye may now be unhappy with the choice he made among the choices available to him, “[t]here was nothing in the record indicating that [Dye] failed to understand his constitutional rights or the terms of his plea.”

* * *

There was sufficient evidence to support the circuit court’s finding that Dye confessed to raping the victim during his interview with police. Whether or not he explicitly confessed at that time, he did acknowledge his guilt when he pled guilty.

2018 WL 1778568 at *7-8 (citation omitted) (emphasis added). Our previous holding regarding the voluntary nature of appellant’s plea precludes his current attempt to raise the defenses of actual innocence and improper charging under the criminal statutes, as his voluntary plea waived those defenses. It is also clear beyond dispute that issues which have been resolved against a litigant on appeal cannot be relitigated by couching the arguments in slightly different terms in a subsequent postconviction proceeding:

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. CR 60.02 is not intended merely as an additional

opportunity to raise *Boykin* defenses. **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.**

Gross v. Commonwealth, 648 S.W.2d 853, 856 (Ky. 1983) (emphasis added). That rationale applies to motions for CR 60.03 relief as well. Nothing in appellant’s pleadings demonstrates entitlement to extraordinary relief in this case.

Similarly, evidence concerning appellant’s claims that his confession was involuntary and that the victim had committed perjury was available at the time he lodged his RCr 11.42. Appellant offers no explanation for his failure to raise those issues in that motion. Again, his current issue regarding his confession is but a slight variation on the suppression issue addressed in our previous opinion.

Finally, the plain language of RCr 11.42(3) forecloses the relief appellant seeks via CR 60.03. That subsection 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.) We fully concur in the trial court’s assessment that the facts supporting each of appellant’s contentions were either known to him at the time of his RCr 11.42 proceeding or could have been discovered in the exercise of reasonable diligence. Thus, nothing in the decision of the trial court can be said to be “arbitrary, unreasonable, unfair, or unsupported by sound legal principles.”

In sum, because we are convinced that the issues appellant raises in the current proceeding were addressed by this Court in his previous RCr 11.42 appeal, could have been raised in that proceeding, or are meritless, we perceive no basis for the invocation of the separate equitable relief provided by CR 60.03. Accordingly, we affirm the denial of that relief by the Warren Circuit Court.

ALL CONCUR.

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