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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2026-CA-0193-MR

LUILLY RODRIGUEZ-MONTANER — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JESSICA E. GREEN, JUDGE
ACTION NO. 15-CR-000347

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: THOMPSON, CHIEF JUDGE; EASTON AND ECKERLE, JUDGES.

EASTON, JUDGE: This case was "set aside" and expunged. The Defendant in the circuit court and now Appellant here asked for relief under both RCr[1] 11.42 and CR[2] 60.02 to reopen the case and address his prior guilty plea. The circuit court denied relief. We affirm.

[1] Kentucky Rules of Criminal Procedure.

[2] Kentucky Rules of Civil Procedure.

FACTUAL AND PROCEDURAL BACKGROUND

The record presented to us is sparse. Because this case has been expunged, the circuit court clerk simply reported: "This case does not exist." So, we have been limited to the filings after the expungement, which include some parts of the pre-existing record.[3] From this we gather that, in 2015, Appellant was charged with receiving stolen property and engaging in organized crime. In November 2015, he pled guilty and was later sentenced to a probated sentence.

Upon entry of his guilty plea, Appellant was immediately detained by United States Immigration and Customs Enforcement (ICE) and was held for some months. In May 2016, ICE entered an Order of Supervision. According to this Order, Appellant was not to be deported because ICE had not effected such a removal "during the period prescribed by law." He was to be supervised with various notification and reporting requirements. He says he is still subject to this supervision and the continuing threat of deportation.

Appellant successfully completed his probation in 2021. In 2024, Appellant *pro se* filed a motion pursuant to CR 60.02 asking for relief in the form of setting aside the case and having it expunged. The Commonwealth did not

[3] We need not express an opinion about whether an expunged record should be provided to this Court when a defendant asks this Court to review an expunged case. The record was not provided at the insistence of either party in this case, and the material provided was sufficient to determine the merits of the appeal.

object. The order entered by the circuit court does not say the case was dismissed with or without prejudice, but that is the effect, given that the case was "set aside" and expungement granted. *See generally* KRS[4] 431.073; KRS 431.076.

Because Appellant says he is still subject to ICE supervision, he filed the motion subject to this appeal in 2026. He claimed his attorney failed to discover his non-citizen status and did not advise him of deportation consequences. The contents of the record strongly suggest that Appellant did not tell his attorney or anyone else about his non-citizen status. To compound this first error, the attorney also told Appellant that there was nothing that could be done about the initial error when ICE involvement began back in 2015.[5]

[4] Kentucky Revised Statutes.

[5] A failure to advise about so-called mandatory or "automatic" deportation in response to certain criminal convictions was determined to be enough of a failure by counsel to be actionable for post-conviction relief. *Padilla v. Kentucky*, 559 U.S. 356 (2010). As this case clearly shows, there is nothing automatic or even mandatory about deportation in practice. The rule persists, and *Padilla* has been expanded to other consequences.

Initially after *Padilla*, a defendant had to make an objective showing of prejudice resulting from the error by counsel. The decision not to take the plea had to be rational and related to the merits and other circumstances of the case itself. We do not know if such a lack of prejudice was part of Appellant's counsel's advice given in 2015 or 2016 that nothing could be done regardless of any risk of eventual deportation. We will not speculate about this. With later developments in the law, a defendant now must simply say that he would have "rolled the dice" and gone to trial had he known about a risk of deportation. *See Lee v. United States*, 582 U.S. 357 (2017). This later expansion may lead to abuse of the criminal justice process. Even if a defendant would be grossly irrational in proceeding to trial, perhaps because there is no defense to the crimes or he would not have given up agreed-upon probation, he has the right to use this issue solely for the purpose of delay, which has not been recognized in other contexts as a proper purpose for court proceedings.

The circuit court denied the latest CR 60.02 motion. Appellant, again *pro se*, appeals. His main contention is that he should have been given the opportunity to establish facts about his counsel's ineffective representation at an evidentiary hearing.

STANDARD OF REVIEW

We need not state the standard of review for an RCr 11.42 decision. As we will explain shortly, that rule cannot apply in these circumstances. A decision on a CR 60.02 motion is reviewed for an abuse of discretion. *Brown v. Commonwealth*, 932 S.W.2d 359, 362 (Ky. 1996). An abuse of discretion occurs if the trial court's ruling is "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

ANALYSIS

RCr 11.42 applies only to "[a] prisoner in custody under sentence or a defendant on probation, parole or conditional discharge who claims a right to be released on the ground that the sentence is subject to collateral attack[.]" Appellant cannot meet this definition. Regardless of the timeliness of the belated RCr 11.42 motion, it cannot be granted in this case now. *See Parrish v. Commonwealth*, 283 S.W.3d 675, 677 (Ky. 2009). This makes the analysis of the CR 60.02 motion all the more critical to Appellant's case.

We do not discern from the wording of CR 60.02 that it was intended to allow reopening of closed and expunged cases. But the scope of relief under that rule is broad. There could be extremely rare situations where CR 60.02 could be used in such cases. But not in this case.

With respect to Appellant's CR 60.02 motion, the Commonwealth insists that Appellant could have filed an RCr 11.42 motion in a timely manner when the case still existed to address ineffective assistance of counsel claims. Under the circumstances of this case, we can give the Appellant the benefit of the doubt on this. His whole point is that his counsel misled him on this subject, and he did not get to prove that. We can assume he could prove that; it still would not change the outcome.

Appellant created this odd procedural status. He filed a prior CR 60.02 motion in 2024. If there was a problem with his prior representation or if he had any other argument, that was the time to say so. Instead, Appellant chose to make the case go away perhaps in the hope that ICE would accept that and release him from supervision.

"CR 60.02 does not permit successive post-judgment motions[.]" *Foley v. Commonwealth*, 425 S.W.3d 880, 884 (Ky. 2014). Regardless of its repeated nature, the present CR 60.02 motion had to be filed within "a reasonable time." Appellant knew there was a problem immediately after his guilty plea.

Even if his attorney initially misled him on this, he definitely knew by 2024, when he was still under supervision from ICE, that the problem persisted. He chose a path that may not have worked. In these circumstances, the latest CR 60.02 motion was untimely.

The CR 60.02 motion also did not compel relief even if timely. "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." *Gross v. Commonwealth*, 648 S.W.2d 853, 856 (Ky. 1983). The problem is not this case. This case is gone and expunged. The problem may be how ICE has decided to apply these developments. Nothing more can be done in state court than to vacate or dismiss and expunge the case, which in effect eliminates the impact of the guilty plea as to the charges applied by the state court. Relief, if any, is a matter to be addressed to the federal authorities applying federal law to Appellant's situation.

CONCLUSION

RCr 11.42 is inapplicable to this case, and the circuit court did not abuse its discretion in denying the second CR 60.02 motion. The Jefferson Circuit Court is AFFIRMED.

ALL CONCUR.

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