

Commonwealth Of Kentucky
Court of Appeals

NO. 2005-CA-000557-MR

LESTER KNOX COLEMAN

APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. CLARK, JUDGE
ACTION NO. 99-CR-00995

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BARBER, BUCKINGHAM, AND JOHNSON, JUDGES.

JOHNSON, JUDGE: Lester Knox Coleman,¹ pro se, has appealed² from the May 28, 2004, order of the Fayette Circuit Court which denied his motion to vacate his sentence pursuant to CR³ 60.02(f).⁴ Having concluded that the trial court did not err in

¹ The record indicates that Coleman had the following aliases during this time period: Thomas Leavy, Thomas O'Leavy, and Lex Coleman.

² Coleman has a second appeal pending before this Court regarding a separate order in the same case, Case No. 2004-CA-001134-MR.

³ Kentucky Rules of Civil Procedure.

⁴ Coleman references the order denying his motion for relief under CR 59.01 throughout his brief. However, this order was not included in his notice of appeal filed March 10, 2005, and we will not address its validity herein.

finding Coleman competent to stand trial and in finding he received effective assistance of counsel, we affirm.

On September 28, 1999, Coleman was indicted on 42 counts of criminal possession of a forged instrument in the second degree,⁵ and on one count of being a persistent felony offender in the second degree (PFO II).⁶ He pled not guilty to all counts on October 1, 1999. The charges against Coleman arose from his attempt to pass forged checks in the total amount of approximately \$7,300.00, allegedly drawn on overseas banks, and his use of various forged documents of identification, such as Social Security numbers, passports, driver's licenses, and credit cards.⁷

Coleman's legal aid attorney filed a motion for evaluation on September 17, 1999. On September 20, 1999, Coleman filed a pro se motion requesting that he be relocated to a medical facility based on a letter from Dr. Harvey Berman, his treating clinical psychologist, stating that Coleman suffered from major depression and post-traumatic stress disorder. On September 21, 1999, the trial court entered an order for Coleman to be evaluated to stand trial and a pre-mental examination form

⁵ Kentucky Revised Statutes (KRS) 516.060.

⁶ KRS 532.080(2).

⁷ These facts were set out in this Court's unpublished opinion of Coleman's first appeal, Case No. 2000-CA-001158-MR.

was filled out by Coleman on September 20, 1999. On October 25, 1999, Coleman was evaluated by Dr. Harwell F. Smith and his evaluation report was filed with the trial court on November 1, 1999. Dr. Smith gave a provisional diagnosis and opinion of Coleman's competency to stand trial. In this evaluation, Dr. Smith found Coleman's "memory for immediate and recent events is good." Dr. Smith found that Coleman knew his attorney and could specify the terms of the deal being offered to him. Smith further opined that Coleman knew "the roles of the principal actors in the courtroom," and was "aware of his right not to testify." Smith further stated, "Since [Coleman] doesn't have a symptom complex that would go along with an elaborate delusional system, the conclusion is that [Coleman] knows his story is untrue."

In conclusion, Dr. Smith stated as follows:

[Coleman] has the mental capacity to appreciate the nature of the charges against him. He has the mental capacity to participate rationally in his own defense.

Regarding criminal responsibility, not enough is known about [Coleman's] level of involvement in the alleged crime and about the details of the case against him to fairly assess his criminal responsibility without extensive observation, interviewing and collateral interviews. Accordingly, [Coleman] will need to be examined as an inpatient for his Criminal Responsibility. If the defense attorney still desires a Criminal Responsibility evaluation, the court will want to write a new order

specifying that [Coleman] be examined at the Kentucky Correctional Psychiatric Center. The court will want to order the examining doctor to express opinions about both [Coleman's] Competency to Stand Trial and his Criminal Responsibility. . . [emphasis original].

Neither Coleman, nor his trial counsel, made any further requests for a mental evaluation of Coleman to determine his competency to stand trial.

A jury trial was held on March 13 through 16, 2000. At trial, Coleman presented the expert testimony of Dr. Berman, who had been treating Coleman since February 1997. Dr. Berman testified that Coleman suffered from major depression, global amnesia, post-traumatic stress disorder (PTSD) and severe anxiety. Dr. Berman stated that these conditions resulted from abuse Coleman suffered while held in federal custody in August 1996, until February 1997.⁸

⁸ Coleman argues that Dr. Berman's testimony is supported by the state-authorized mental evaluation conducted by Rosa Kathleen Riggs, a few days after September 11, 2001, to determine whether Coleman was entitled to disability benefits. In this report, Riggs states that Coleman was afflicted with the mental conditions described by Dr. Berman at the time of his arrest and trial. She further noted that Coleman had had "a regressive mental breakdown" due to the terrorist attacks of September 11, 2001, which led to his leaving the state and violating the terms of his probation in 2002. Further, he alleges that his attorney had a copy of Riggs's report, but neglected to introduce it before the trial court at any time prior to the warrant for his arrest being issued in 2002. Coleman stated that he was not aware of the contents of this report until he received it in August 2004 from the Kentucky Department of Corrections Mental Health Services. The trial court addressed this report in its January 25, 2005, order, noting that it was dictated some 18 months following Coleman's conviction. The trial court stated: "The report references information regarding treatment by Dr. Berman, which is consistent with the testimony offered at trial by Dr. Berman on behalf of [Coleman]. . . . As such [Coleman] presents no new information or

The jury found Coleman guilty on 36 counts of criminal possession of a forged instrument in the second degree.⁹ Coleman was sentenced on April 10, 2000, to ten years in prison, with two, four-year sentences, and two, one-year sentences to run consecutively with each other, and the one-year sentences on the remaining 32 counts to run concurrently with all other sentences. The trial court then suspended imposition of Coleman's ten-year prison sentence and granted him probation for five years.¹⁰ Coleman directly appealed his convictions to this Court on May 10, 2000;¹¹ however, he did not raise in his appeal claims that the trial court abused its discretion in finding him competent to stand trial, or that he received ineffective assistance of counsel regarding his competency to stand trial.

On June 11, 2002, the office of probation and parole filed an affidavit stating that Coleman had violated the terms of his probation.¹² Following several delays in serving a bench

evidence, which would justify the relief requested under CR 60.02." We agree.

⁹ Six counts of criminal possession of a forged instrument in the second degree, as well as the PFO II charge, were dismissed.

¹⁰ Under Coleman's probation restrictions he was required, among other things, to maintain good behavior, submit to physical examinations, and not to leave the state without permission.

¹¹ A panel of this Court affirmed Coleman's direct appeal on August 2, 2002, in Case No. 2000-CA-001158-MR. The Supreme Court of Kentucky denied discretionary review of the case on September 3, 2002, in Case No. 2002-SC-000701.

¹² The June 11, 2002, affidavit to revoke Coleman's probation stated grounds as follows: "On May 14, 2002 the probationer was sent a letter instructing

warrant on Coleman for the probation violation,¹³ the trial court held a probation revocation hearing on May 23, 2003. An order was entered on May 29, 2003, revoking Coleman's probation and formally sentencing him to serve ten years in prison.¹⁴

On September 5, 2003,¹⁵ Coleman filed a motion to vacate his sentence pursuant to RCr¹⁶ 11.42.¹⁷ Coleman did not allege any issue as to his competency to stand trial in this

him to report to the Probation Office at Lexington on June 4, 2002 at 11:00 AM. The probationer failed to report at that time. On June 6, 2002 this officer talked with probationer by telephone. It was agreed that the probationer would visit in person in the Probation Office at Lexington on June 7, 2002 at 1:00 PM. The probationer again failed to report." The August 14, 2002 addendum to the affidavit to revoke probation states additional grounds as follows: "1. On or about March 13, 2002 probationer left Garrard County, Kentucky and relocated to Fort Campbell, Kentucky where he did not have permission to be. 2. On July 19, 2002 in open Court the probationer's Attorney advised that the probationer was in Saudi Arabia, where he did not have permission to be."

¹³ Coleman was arrested on May 16, 2003.

¹⁴ Coleman filed a motion for sentence modification, which the trial court denied by order entered on July 3, 2003. Then, on July 24, 2003, Coleman filed a motion for shock probation, which was denied by the trial court by order entered on September 4, 2003.

¹⁵ Coleman filed a motion for shock probation reconsideration on October 29, 2003, which was denied by the trial court on October 30, 2003. He then filed another motion for shock probation reconsideration on December 19, 2003, and a motion rehearing-shock probation on December 29, 2003, both of which the trial court denied by order entered December 31, 2003. Coleman filed another motion to vacate probation revocation on January 12, 2004, which was denied by the trial court by order entered January 26, 2004. Coleman then filed a notice of appeal in this Court on January 26, 2004, Case No. 2004-CA-000201-MR, which was dismissed on September 10, 2004, for failure to file a brief. The order was final on October 27, 2004.

¹⁶ Kentucky Rules of Criminal Procedure.

¹⁷ RCr 11.42(1) states, in relevant part, that "[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 may at any time proceed directly by motion in the court that imposed the sentence to vacate, set aside or correct it."

motion.¹⁸ The trial court entered an order on May 28, 2004, denying Coleman's RCr 11.42 motion, and Coleman appealed. This appeal is currently before our Court and an opinion is forthcoming.¹⁹

On September 30, 2004, Coleman filed a motion for hearing and/or to vacate sentence and/or to vacate probation revocation pursuant to CR 60.02(f). In support of his motion, Coleman argued that he was not competent to stand trial and that he received ineffective assistance of counsel because his counsel did not seek a court-ordered psychological evaluation either before trial or before his probation revocation hearing.²⁰ He further requested an evidentiary hearing as to these issues. The trial court denied Coleman's CR 60.02(f) motion by order entered on January 25, 2005, including his motion for an evidentiary hearing. Subsequently, on February 7, 2005, Coleman

¹⁸ Coleman argued that he was denied his statutory right to a "jury fixed" sentence because the trial court ran his sentences consecutively, rather than concurrently as recommended by the jury. Coleman further argued that counsel was ineffective for failing to object to the trial court's failure to follow his "jury fixed" sentence.

¹⁹ Case No. 2004-CA-001134-MR.

²⁰ On November 8, 2004, the trial court entered an order that Coleman's psychiatric evaluation be released by the Kentucky Correctional Psychiatric Center (KCPC). On November 15, 2004, Coleman filed a motion for the trial court to order release of the psychologist's reports prepared by the Department of Corrections, Division of Mental Health. On November 15, 2004, Coleman also filed a motion to proceed as no psychological evaluation was ever done by the KCPC. The trial court sustained Coleman's motion to receive a copy of the psychologist's report on November 17, 2004, which the trial court acknowledged receipt of on November 24, 2004, by order providing the competency evaluation to Coleman and the Commonwealth. On December 8, 2004, the Commonwealth filed a response to Coleman's RCr 60.02(f) motion and on December 20, 2004, Coleman filed a reply to the Commonwealth's response.

filed a "petition to set aside and set for cause of action pursuant to CR 59.01(a)." ²¹ The trial court denied this motion by order entered on February 10, 2005. This appeal followed.

CR 60.02 "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.'" ²² The sections of CR 60.02 on which Coleman relies state as follows:

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: . . . (f) any other reason of an extraordinary nature justifying relief. The motion shall be made within a reasonable time. ²³

The decision on whether to grant relief under CR 60.02 "is one that is generally left to the sound discretion of the trial

²¹ CR 59.01(a) states: "A new trial may be granted to all or any of the parties and on all or part of the issues for any of the following causes: (a) Irregularity in the proceedings of the court, jury or prevailing party, or an order of the court, or abuse of discretion, by which the party was prevented from having a fair trial."

²² Gross v. Commonwealth, 648 S.W.2d 853, 856 (Ky. 1983).

²³ It is well settled that a CR 60.02(f) motion must be filed within a reasonable time, and it is within the trial court's sound discretion to determine, on a case-by-case basis, what constitutes a reasonable time. See Gross, 648 S.W.2d at 858. The trial court did not discuss the timeliness issue of Coleman's CR 60.02 motion, and we do not believe that its timeliness is an issue, but rather its substance.

court[,]”²⁴ and its ruling will not be overturned on appeal absent an abuse of discretion.²⁵ “A [] court abuses its discretion when it relies on clearly erroneous findings of fact, or when it improperly applies the law or uses an [] erroneous legal standard” [citations omitted].²⁶

The process for attacking a final judgment “is organized and complete . . . [and] is set out in the rules related to direct appeals, in RCr 11.42, and thereafter in CR 60.02” [emphasis original].²⁷ The purpose of CR 60.02 is to allow the trial court a method to correct errors in judgment upon a showing of “facts or grounds, not appearing on the face of the record and not available by appeal or otherwise, which were discovered after the rendition of the judgment without fault of the party seeking relief.”²⁸ “[A] CR 60.02 movant must demonstrate why he is entitled to this special, extraordinary relief.”²⁹ Coleman has already had a direct appeal and has an RCr 11.42 appeal pending before this Court. The trial court found that the grounds of the CR 60.02 motion were known, or

²⁴ Schott v. Citizens Fidelity Bank & Trust Co., 692 S.W.2d 810, 814 (Ky.App. 1985). See also Gross, 648 S.W.2d at 858.

²⁵ Barnett v. Commonwealth, 979 S.W.2d 98, 102 (Ky. 1998).

²⁶ Romstadt v. Allstate Insurance Co., 59 F.3d 608, 615 (6th Cir. 1995).

²⁷ Gross, 648 S.W.2d at 856.

²⁸ Harris v. Commonwealth, 296 S.W.2d 700, 701 (Ky. 1956).

²⁹ McQueen v. Commonwealth, 948 S.W.2d 415, 416 (Ky. 1997).

should have been known, at the time of his first appeal and should have been argued in his earlier appeal.³⁰ Upon our review of the record, we agree and find no abuse of discretion.

"[T]he Due Process Clause of the Fourteenth Amendment prohibits the criminal prosecution of a defendant who is not competent to stand trial" [citations omitted].³¹ "[T]he standard for competence to stand trial is whether the defendant has 'sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding' and has 'a rational as well as factual understanding of the proceedings against him'" [citations omitted].³² There is an initial presumption that a criminal defendant is mentally competent to stand trial, which disappears "when there are reasonable grounds to hold a competency hearing."³³ "An incompetency hearing is only required when the trial judge is presented with sufficient evidence of reasonable doubt of competency to stand trial"³⁴ and upon such determination, the trial court must appoint a qualified person "to report on the defendant's competency"

³⁰ McQueen, 948 S.W.2d at 416; Gross, 648 S.W.2d at 856.

³¹ Medina v. California, 505 U.S. 437, 439, 112 S.Ct. 2572, 120 L.Ed.2d 353 (1992).

³² Godinez v. Moran, 509 U.S. 389, 396, 113 S.Ct. 2680, 125 L.Ed.2d 321 (1993).

³³ Gabbard v. Commonwealth, 887 S.W.2d 547, 551 (Ky. 1994).

³⁴ Lear v. Commonwealth, 884 S.W.2d 657, 659 (Ky. 1994).

[citations omitted].³⁵ In viewing a challenge to the trial court's failure to hold a competency hearing, Kentucky courts "have long followed the criterion that reasonable ground must be called to the attention of the trial court by the defendant or must be so obvious that the trial court cannot fail to be aware of them."³⁶

In his CR 60.02 motion, Coleman claims that he was not competent to stand trial at the time; however, he states that he is fully recovered now.³⁷ He claims that he only vaguely remembers what occurred during the time of his trial, sentencing hearing, and probation revocation hearing. However, Dr. Berman, his expert witness, did not identify any specific evidence that should have alerted the trial court to Coleman's alleged incompetency. The record reveals that Coleman stated that he was symptom-free of his mental conditions at the time he was reincarcerated in 2003. A few months later in September 2003, he filed an RCr 11.42 motion, with no mention of his incompetency to stand trial. Almost one year later, Coleman filed this appeal based on CR 60.02, after acknowledging that he had been competent since at least 2003. The record shows that

³⁵ Gabbard, 887 S.W.2d at 550.

³⁶ Smith v. Commonwealth, 567 S.W.2d 304, 307 (Ky. 1978). See also Lear, 884 S.W.2d at 659.

³⁷ Coleman stated that he "ultimately obtained, with the assistance of friends and his family, private therapy" and that he is currently "symptom free and does not require medication."

Coleman could have raised this issue on direct appeal, or in the prior RCr 11.42 proceeding. He failed to raise the issue either time.

The record contains several letters that Coleman wrote to the trial court that demonstrate that he was aware of the legal procedure and the nature of the charges against him, and, thus, negate his allegations of incompetency. Coleman wrote his first letter to the trial court on October 10, 1999, in which he requested bail that he could afford and he attached three letters from different persons stating that he was an upstanding citizen, husband, and father. There were no references in these letters concerning Coleman's claims that he was mentally ill or incompetent to stand trial. On October 27, 1999, Coleman wrote a letter to the trial court informing it of witnesses he would call at trial. On December 10, 1999, Coleman wrote a letter to the trial court asking for a bond reduction. In the letter, Coleman informed the trial court that he was disabled and suffering from PTSD, and he gave the trial court personal references to his good name. Never in this letter does Coleman mention his alleged incompetency to stand trial. On March 8, 2000, Coleman wrote the trial court a letter regarding correspondence sent by a friend on his behalf, and apologized for the contents of the letter. On March 24, 2000, two of Coleman's friends wrote letters to the trial court asking for

"clemency" in Coleman's sentencing. On April 10, 2000, Coleman wrote a letter to the trial court explaining that, despite his disabilities, he was able to support his family and pay his debts.

From March 28, 2000, through April 14, 2000, the trial court received more than ten letters from different individuals informing the trial court that Coleman was a great family man and asking that he be released to take care of his family. There was no concern shown in any of the letters as to Coleman's competency to stand trial. On November 11, 2001, Coleman wrote a letter to the clerk regarding his disability and his medical maltreatment while in custody, and on November 26, 2001, he wrote a letter to the clerk informing him that he was still suffering with PTSD. On May 23, 2003, the trial court received more letters from individuals asking the trial court not to revoke Coleman's probation. On June 11, 2003, Coleman wrote the trial court apologizing for violating his probation and explained that he did not appear for the probation-related hearing because he was afraid. In this letter, Coleman asked the trial court for shock probation and told the trial court that he was going to pay restitution. On June 19, 2003, the trial court received two more letters from individuals on Coleman's behalf, and on June 30, 2003, the trial court received a letter regarding the loss of Coleman's job.

On July 3, 2003, Coleman asked the trial court to modify his sentence because he was a productive member of society, a responsible head of household, who could contribute much to the community. At this time, Coleman also became more involved in directly working on his case. On July 16, 2003, he sent a letter to the clerk requesting parts of the record, and on July 24, 2003, he filed his own motion to obtain court records. On August 4, 2003, Coleman filed his own motion for shock probation, stating that he realized that "he, and he alone, caused himself to be in this position and acknowledge[d] the seriousness of his prior actions. . . ," and he took full responsibility for his actions, now able to function with a "clear mind."

Then, on August 14, 2003, Coleman wrote a letter to the trial court regarding his probation revocation. He stated: "Please allow me to clarify that Attorney Meehan is not at fault regarding my admitted violation of probation on May 23, 2003. Mr. Meehan has not acted 'ineffectively' regarding the motion before you. . . . The actions leading to my present incarceration are my responsibility, despite any mitigating circumstance." Then, on October 5, 2003, Coleman filed his motion for relief under RCr 11.42, and in a letter dated October 29, 2003, Coleman proposed his own parole stipulations. On October 28, 2003, Coleman also wrote a letter to the trial court

acknowledging that he had made a terrible mistake. On February 2, 2004, Coleman wrote the trial court regarding pending motions that he had filed. In a February 23, 2004, letter Coleman stated that he has been symptom-free since his reincarceration in 2003.

In all of his letters Coleman appears lucid. The letters are coherent and well-written, and none of the letters mention that Coleman did not understand the legal process, because of his incompetency. Further the failure of defense counsel, the Commonwealth's Attorney, or the trial court to raise the issue of competency, the out-pouring of support from friends for his release, and Coleman's letters to the trial court, all indicate that Coleman was competent. Regardless, the record indicates that both, at the time of trial and at the time of the probation revocation hearing, Coleman acknowledged having a mental condition upon his initial arrest. Thus, there is no doubt that if a competency issue existed, Coleman was aware of it at the time of his direct appeal. Specifically, as early as August 2003, he wrote to the trial court that he was no longer having mental problems, and one month later he filed his motion for RCr 11.42 relief, leaving no doubt that he could have raised this issue at that time, but did not do so for almost another year.

Coleman also claims that he was entitled to an evidentiary hearing on his CR 60.02 (f) motion.³⁸ "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."³⁹ "The decision to hold an evidentiary hearing is within the trial court's discretion and we will not disturb such absent any abuse of that discretion" [citation omitted].⁴⁰ The record clearly details the evidence necessary for the trial court to rule on the CR 60.02 motion; and therefore, it did not abuse its discretion in denying a hearing on the related matters.

As the grounds of Coleman's motion are matters which should have been known to him at the time of conviction and were proper for the direct appeal of that conviction, absent a claim of ineffective assistance of counsel, these issues may not now be raised in a post-conviction proceeding.⁴¹ Coleman argues that his trial counsel was ineffective for failing to have his competency evaluated prior to trial or the probation revocation

³⁸ He also requested an evidentiary hearing for his CR 59.01 motion.

³⁹ Gross, 648 S.W.2d at 856.

⁴⁰ Land v. Commonwealth, 986 S.W.2d 440, 442 (Ky. 1999).

⁴¹ Bronston v. Commonwealth, 481 S.W.2d 666, 667 (Ky. 1972).

hearing. However, the record indicates that Coleman was evaluated and found competent to stand trial.

In order to establish ineffective assistance of counsel, a person must satisfy a two-part test showing both "that counsel's performance was deficient" and that the deficiency "prejudiced the defense, depriv[ing] the defendant of a fair trial".⁴² The burden is on the defendant to overcome a strong presumption "that under the circumstances [counsel's] action 'might be considered sound trial strategy'" [citations omitted].⁴³ A court must be "highly deferential" in reviewing defense counsel's performance and should avoid second-guessing counsel's actions based on hindsight.⁴⁴

Coleman fails to identify any objective evidence that would have alerted counsel to the possibility of his incompetence. The record refutes any claim that but for counsel's errors, there was a reasonable probability that Coleman would not have been found guilty or the outcome of a competency hearing would have been different.⁴⁵ Trial counsel's alleged failure to determine Coleman's competency prior to trial

⁴² Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

⁴³ Strickland, 466 U.S. at 689. See also Moore v. Commonwealth, 983 S.W.2d 479, 482 (Ky. 1998); and Sanborn v. Commonwealth, 975 S.W.2d 905, 911-12 (Ky. 1998).

⁴⁴ Harper v. Commonwealth, 978 S.W.2d 311, 315 (Ky. 1998).

⁴⁵ See Strickland, 466 U.S. at 694.

or the revocation of his probation fails to satisfy either prong of Strickland.

In conclusion, Coleman filed a direct appeal to this Court, and later sought RCr 11.42 relief. He was required to raise the instant issues, if at all, via one of these proceedings. The basis for this requirement is well-established and is geared toward increasing judicial economy and bringing finality to the proceedings.⁴⁶ We conclude that the trial court properly denied Coleman's motion for CR 60.02 relief.

For the foregoing reasons, the order of the Fayette Circuit Court is affirmed.

ALL CONCUR.

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⁴⁶ McQueen, 948 S.W.2d at 416.