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NOT TO BE PUBLISHED

# Commonwealth of Kentucky

# Court of Appeals

NO. 2008-CA-000720-MR

WILLIAM MULLINS — APPELLANT

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE STEVEN R. JAEGER, JUDGE
ACTION NO. 01-CR-00253

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KELLER, STUMBO, AND VANMETER, JUDGES.

STUMBO, JUDGE: William Mullins (Appellant) appeals the denial of his Kentucky Rule of Civil Procedure (CR) 60.02 post-conviction motion wherein he alleged that his guilty plea was unconstitutional and violated due process. The lower court held that the motion was not timely and that his claims could have been addressed on direct appeal or with a Kentucky Rule of Criminal Procedure (RCr) 11.42 motion. The Commonwealth contends that we should affirm the

lower court's order because Appellant's claim is not cognizable via a CR 60.02 motion and that, even if it were, it was untimely. We agree with the Commonwealth and the lower court and find that the motion was untimely and that Appellant's claims should have been brought via RCr 11.42.

On November 16, 2000, Appellant called the Covington Police Department and requested assistance. He believed someone had broken into his house and may still have been inside. Police officers arrived and, with Appellant's consent, searched the house. The officers found no intruders, but did discover an indoor marijuana cultivation operation containing over ten marijuana plants. Appellant was then arrested.

On May 4, 2001, a Kenton County grand jury indicted Appellant on one count of cultivation of marijuana, five plants or more, a violation of Kentucky Revised Statute (KRS) 218A.1423. KRS 218A.1423 states:

> (1) A person is guilty of marijuana cultivation when he knowingly and unlawfully plants, cultivates, or harvests marijuana with the intent to sell or transfer it.
>
> (2) Marijuana cultivation of five (5) or more plants of marijuana is:
> (a) For a first offense a Class D felony.
> (b) For a second or subsequent offense a Class C felony.
>
> (3) Marijuana cultivation of fewer than five (5) plants is:
> (a) For a first offense a Class A misdemeanor.
> (b) For a second or subsequent offense a Class D felony.
>
> (4) The planting, cultivating, or harvesting of five (5) or more marijuana plants shall be prima facie evidence that the marijuana plants were planted, cultivated, or harvested for the purpose of sale or transfer.

On July 16, 2001, Appellant filed a motion to enter a guilty plea based on an offer from the Commonwealth of a five-year sentence, probated for five years. Appellant entered the guilty plea and the court followed the Commonwealth's recommendation for probation. On October 26, 2005, Appellant's probation was revoked and he was ordered to serve his original five-year sentence.

Appellant filed his CR 60.02 motion on May 17, 2007. As stated above, the lower court overruled the motion. This appeal followed.

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.

Appellant first argues that his guilty plea was unconstitutional because it was not entered voluntarily, knowingly, and intelligently. He argues this by

claiming that he was never informed that the offense of cultivation of marijuana had an element of intent to sell or transfer,[1] that the plea was an illusory agreement,[2] and that he did not receive effective assistance of counsel. Appellant also argues that the delay in his filing the motion should be excused because he was not aware that the cultivation of marijuana had an element of intent to sell and nothing in the trial record indicated that element was necessary. Also, in the alternative, he requests that we reinstate his right to appeal his plea agreement due to ineffective assistance of counsel.

> Application of the Civil Rules is required in criminal cases by RCr 13.04. This allows CR 60.02 motions to be used by criminal defendants to present additional issues not specifically available through direct appeals or RCr 11.42 motions. *Gross v. Commonwealth*, 648 S.W.2d 853, 856 (Ky. 1983). As we have previously stated, CR 60.02 motions are limited to afford special and extraordinary relief not available in other proceedings. *McQueen v. Commonwealth*, 948 S.W.2d 415, 416 (Ky. 1997). The rule is not intended to provide an avenue for defendants to relitigate issues which could have been presented in a direct appeal or an RCr 11.42 proceeding. *Id.*

*Baze v. Commonwealth*, 276 S.W.3d 761, 765 (Ky. 2008).

> 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

[1] During Appellant's plea colloquy and sentencing, he, his attorney, and the Commonwealth Attorney all stated that the evidence showed that the marijuana plants were intended for personal use only.

[2] Appellant claims that because he was given the maximum penalty under the law, he received no benefit from the plea agreement. We note, however, that the Commonwealth recommended probation under the plea, which Appellant received.

> 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. 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).

> On review of the denial of a CR 60.02 motion, we review for an abuse of discretion. *White v. Commonwealth*, 32 S.W.3d 83, 86 (Ky. App. 2000). The test for abuse of discretion is "whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

*Baze*, *supra*.

We find that the trial court did not abuse its discretion in overruling Appellant's motion. Appellant filed his motion almost six years after he entered his guilty plea. He was also not incarcerated until over four years later, giving him ample opportunity to review his plea agreement, case, and indictment. Appellant does not bring this motion under CR 60.02(a)-(c) so it must be brought within a reasonable time. Under these circumstances, we find it was not brought within a reasonable time.

Furthermore,

> we hold that a defendant is required to avail himself of RCr 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* at 857. In the case at hand, Appellant did not file an RCr 11.42 motion. All of his claims should have been brought via an RCr 11.42 motion. These issues are not of the extraordinary nature as is contemplated by CR 60.02.

As for Appellant's request to reinstate his right to appeal due to ineffective assistance of counsel, Appellant has not proven ineffective assistance of counsel, has not filed an RCr 11.42 motion to do so, and the time for that motion has expired.

For the above reasons, we affirm the order overruling Appellant's CR 60.02 motion.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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