

RENDERED: AUGUST 12, 2011; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000017-MR

ANGEL JUAREZ

APPELLANT

v. APPEAL FROM BOONE CIRCUIT COURT
HONORABLE JAMES R. SCHRAND, II, JUDGE
ACTION NO. 05-CR-00248

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: TAYLOR, CHIEF JUDGE; ACREE AND VANMETER, JUDGES.

VANMETER, JUDGE: Angel Juarez appeals from the Boone Circuit Court's order denying his motion for relief pursuant to CR¹ 60.02. We affirm.

Juarez was arrested and ultimately indicted for committing several sexual offenses against three minor children. Following the trial, Juarez was convicted of sodomy in the first degree (five counts), rape in the first degree (two counts), and

¹ Kentucky Rules of Civil Procedure.

sexual abuse in the first degree (three counts). Juarez directly appealed his conviction on the basis that the trial court erred by denying his motion to suppress incriminating statements he made to police officers and by permitting the child victims to testify via closed circuit television. The Supreme Court of Kentucky affirmed his conviction.² Juarez then filed a *pro se* motion for relief pursuant to RCr³ 11.42 on the basis that he received ineffective assistance of counsel, which the trial court denied. Juarez did not appeal the denial of the RCr 11.42 motion.

In the underlying action, Juarez moved *pro se* for relief under CR 60.02 alleging the trial court abused its discretion by providing instructions to the jury which failed to factually differentiate the multiple charges against him. The trial court denied the motion on grounds that Juarez failed to raise the jury instructions error in his direct appeal or his motion for RCr 11.42 relief. This appeal followed.

On appeal, Juarez argues the trial court abused its discretion by denying his CR 60.02 motion since he was deprived of his constitutional right, which requires the trial court to provide jury instructions which factually differentiate the multiple counts with which he was charged. We disagree.

This court reviews the denial of a CR 60.02 motion for an abuse of discretion by the trial court. *Stoker v. Commonwealth*, 289 S.W.3d 592, 596 (Ky.App. 2009) (citations omitted). Such an abuse occurs if the trial court's

² *Juarez v. Commonwealth*, 2007-SC-000067-MR (Ky., May 22, 2008).

³ Kentucky Rules of Criminal Procedure.

decision was “arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Id.* (citation omitted).

The mere allegation of a constitutional violation will not afford a movant relief under CR 60.02(f) when the error could have been raised in an earlier proceeding. *Gross v. Commonwealth*, 648 S.W.2d 853, 857 (Ky. 1983) (citing *Copeland v. Commonwealth*, 415 S.W.2d 842 (Ky. 1967)). Indeed, CR 60.02 motions are limited to afford extraordinary relief that is not available on direct appeal or RCr 11.42 motion. *McQueen v. Commonwealth*, 948 S.W.2d 415, 416 (Ky. 1997). The movant must demonstrate why such relief is appropriate. *Gross*, 648 S.W.2d at 856.

The procedural structure to attack a conviction in a criminal case is to “directly appeal that judgment, stating every ground of error which it is reasonable to expect that [the defendant] or his counsel is aware of when the appeal is taken.” *Gross*, 648 S.W.2d at 857. Next, the defendant must “avail himself of RCr 11.42 . . . as to any ground of which he is aware, or should be aware, during the period when this remedy is available to him.” *Id.* The final disposition of the RCr 11.42 motion, “or waiver of the opportunity to make it, shall conclude all issues that reasonably could have been presented in that proceeding.” *Id.*

In the case at bar, Juarez did not raise the jury instructions error in either his direct appeal or his motion for RCr 11.42 relief; instead, he raised it for the first time in his CR 60.02 motion for relief. Since alleged errors in jury instructions should be directly appealed or raised in a motion for RCr 11.42 relief, and Juarez

fails to assert any extraordinary basis to justify relief under CR 60.02, we hold that the trial court did not abuse its discretion by denying his motion for CR 60.02 relief concerning such alleged error. *See Martin v. Commonwealth*, 203 S.W.3d 173, 175 (Ky.App. 2006) (holding that alleged errors in jury instructions should be raised on direct appeal).

The order of the Boone Circuit Court is affirmed.

ALL CONCUR.

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