

RENDERED: JANUARY 11, 2013; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001164-MR

KELLY APPELLEGATE

APPELLANT

v.

APPEAL FROM MASON CIRCUIT COURT
HONORABLE LEWIS D. NICHOLLS, JUDGE
ACTION NO. 03-CR-00058

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE, CHIEF JUDGE; MOORE AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Kelly Applegate brings an ineffective assistance of counsel claim pursuant to CR 60.02, arguing that his counsel was deficient by failing to move for the suppression of a blood alcohol test as unreliable and nonconsensual. We determine that these claims should have been presented earlier in an RCr 11.42 motion and are insufficiently pled. We affirm.

Applegate was involved in a three-car accident which resulted in three deaths and serious injuries to those who survived. Witnesses indicated that he had consumed five beers in five hours prior to the accident and two small rum and cokes. A blood alcohol test administered, while he was in the hospital unconscious from his injuries, revealed that his blood-alcohol level was .206.

Applegate was charged with three counts of murder, three counts of wanton endangerment in the first degree and a misdemeanor. Pursuant to a negotiated plea agreement, on January 30, 2004, Applegate pled guilty to three counts of manslaughter in the second degree, three counts of wanton endangerment in the first degree, and the charged misdemeanor in exchange for a twenty-year sentence. He was sentenced in accordance with this plea agreement on March 26, 2004.

Applegate did not appeal or file a motion claiming ineffective assistance of counsel pursuant to RCr 11.42. Instead, in December 2010, more than six and a half years after his conviction, he filed a CR 60.02 motion pursuant to subparts (e) and (f) claiming that his trial counsel was ineffective for failing to move for the suppression of his blood alcohol test results because his large loss of blood and elevated white cell count made the test unreliable, and the test was non-consensual because it was given while he was unconscious and probable cause was lacking.

We review the circuit court's denial of a CR 60.02 motion under an abuse of discretion standard. *Campbell v. Commonwealth*, 316 S.W.3d 315, 318 (Ky.App. 2009).

“The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. Therefore, we will affirm the lower court's decision unless there is a showing of some ‘flagrant miscarriage of justice.’”

Id. (internal citations omitted).

CR 60.02 relief is inappropriate if the movant fails to take advantage of the previous avenues of relief available for attacking a final criminal judgment:

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.

Gross v. Commonwealth, 648 S.W.2d 853, 856 (Ky. 1983). Pursuant to *Gross*, an aggrieved defendant must first directly appeal his judgment stating every ground of error of which he could be reasonably aware and, secondly, must avail himself of RCr 11.42 as to any ground of which he should be aware of during the period when this relief is available. *Id.* at 857. Waiving the opportunity to make an RCr 11.42 motion forecloses pursuing any issues that could have reasonably been presented in an RCr 11.42 motion under a CR 60.02 motion. *Id.*

Additionally, Applegate's allegations of error are vague, conclusory and legally insufficient. Applegate fails to allege that but for counsel's errors, he

would not have pled guilty but insisted on going to trial. *See Skaggs v.*

Commonwealth, 885 S.W.2d 318, 319-320. (Ky.App. 1994).

Based on the foregoing, we affirm the Mason Circuit Court's denial of Applegate's motion for CR 60.02 relief.

ALL CONCUR.

BRIEF FOR APPELLANT:

Michael J. Curtis
Ashland, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Jeffrey A. Cross
Assistant Attorney General
Frankfort, Kentucky