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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-000123-MR

JOHN WILLIAM HULSMAN

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE A.C. MCKAY CHAUVIN, JUDGE
ACTION NO. 94-CR-001622

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: JONES, D. LAMBERT, AND TAYLOR, JUDGES.

JONES, JUDGE: Appellant, John William Hulsman, *pro se*, appeals from the Jefferson Circuit Court's denial of his CR 60.02 motion. Following review of the record and applicable law, we affirm.

I. BACKGROUND

In 1994, John William Hulsman (“Hulsman”) pleaded guilty to two counts of Rape of a Child over Twelve; six counts of Indecent or Immoral Practices with Another; one count of Rape in the Third Degree; and one count of Sodomy in the Third Degree. Hulsman additionally entered *Alford*¹ pleas to two counts of Rape of a Child Under Twelve; one count of Rape of a Child Over Twelve; and four counts of Indecent or Immoral Practices with Another. All charges pleaded to arose out of incidents taking place between 1960 and 1975 against Hulsman’s daughters and other young relatives. Following a sentencing hearing, the trial court sentenced Hulsman to the maximum term of imprisonment for each charge, each to run consecutively for a total sentence of 235 years.

Following his sentencing, Hulsman retained new counsel and filed numerous motions contending that his prior counsel had been ineffective. Hulsman requested relief pursuant to RCr² 11.42 and CR³ 60.02 to vacate and set aside his sentence and requested an evidentiary hearing, recusal of the trial judge, a supplemental record, and leave to correct a reply brief. Additionally, Hulsman filed a motion requesting shock probation. The trial court denied all motions and Hulsman appealed the orders denying his motions to this Court.

¹ *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970).

² Kentucky Rules of Criminal Procedure.

³ Kentucky Rules of Civil Procedure.

On appeal, a panel of this Court held that the trial judge had not erred in finding that there was no need for him to recuse himself from the proceedings. Additionally, the Court concluded that Hulsman's CR 60.02 motion had not been timely filed and that there was no abuse of discretion in the trial court's denying Hulsman's motion to amend and supplement his reply brief. However, the Court held that the trial court had erred in failing to conduct an evidentiary hearing as to whether Hulsman had received ineffective assistance of counsel. Accordingly, we vacated the trial court's orders inasmuch as it had denied Hulsman RCr 11.42 relief in that vein, and remanded for further proceedings.⁴

On remand, the trial judge recused himself from presiding over the hearing on Hulsman's RCr 11.42 motion and the matter was assigned to a special judge. Following a hearing and briefing by Hulsman and the Commonwealth, the trial court entered Findings of Fact, Conclusions of Law, and Judgment on Hulsman's ineffective assistance of counsel claims on December 30, 1999. Therein, the trial court concluded that Hulsman's prior counsel had acted competently and that Hulsman had failed to show a reasonable likelihood that the outcome of the charges against him would have been different had Hulsman been represented by different, perhaps more competent counsel. Accordingly, the trial court denied Hulsman's motion to vacate or set aside his conviction under RCr 11.42 and CR 60.02.

⁴ See *Hulsman v. Commonwealth*, Nos. 1996-CA-1579-MR and 1996-CA-2747-MR (Ky. App. Mar. 27, 1998) (available at <http://opinions.kycourts.net>).

In November of 2006, Hulsman filed a second motion to vacate the judgment of conviction under RCr 11.42, RCr 10.26, and CR 60.02(f). In that motion, Hulsman again alleged that he had received ineffective assistance of trial counsel. Additionally, Hulsman contended that counsel representing him on his previous RCr 11.42 motion had been ineffective, that his pleas of guilty were given involuntarily as he suffered from mental retardation disorder and had been medicated at the time he pleaded guilty, and that his sentence was illegal and violative of KRS⁵ 532.110(1) and KRS 532.080. The trial court denied Hulsman's motion.

In March of 2008, Hulsman filed his third motion to vacate judgment under CR 60.02(e) & (f) and RCr 10.26. In that motion, Hulsman again contended that he had received ineffective assistance of counsel at all levels of the proceedings against him and that the trial court had committed palpable error by sentencing him to a judgment that exceeded the statutory cap found in KRS 532.110(1)(c). The trial court denied Hulsman's motion.

In August of 2011, Hulsman filed a motion to dismiss the charges against him as the deadline to report offenses under KRS 500.050(4) had not been met in his case. Additionally, Hulsman filed a motion to reopen RCr 11.42 proceedings, in which he alleged he had discovered new ways in which his counsel had been ineffective. Hulsman contended that his trial counsel had failed to inform him of a plea offer – a plea that Hulsman contends he would have taken; that

⁵ Kentucky Revised Statutes.

counsel had failed to investigate information concerning allegations of where the crimes of which Hulsman was accused took place; and that counsel had failed to argue that the charges against Hulsman should be dismissed as they were untimely under KRS 500.050. The trial court denied both motions and Hulsman appealed to this Court. A panel of this Court affirmed the trial court on the grounds that “Hulsman should have and could have raised his claims in his prior RCr 11.42 motion.” *Hulsman v. Commonwealth*, No. 2011-CA-000917-MR, 2012 WL 3137096 at *1 (Ky. App. Aug. 3, 2012).

At some point in 2016, Hulsman appears to have filed another motion under CR 60.02(f) and RCr 10.26 requesting to be relieved of the trial court’s final judgment and for an order correcting unlawful sentence.⁶ On December 15, 2016, the trial court denied that motion, finding that there were no grounds for relief under CR 60.02. It is from that order that Hulsman now appeals.

II. STANDARD OF REVIEW

We review denials of CR 60.02 motions for an abuse of discretion. *Blaze v. Commonwealth*, 276 S.W.3d 761, 765 (Ky. 2008). “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).

⁶ The motion was not included in the record on appeal, so it is unclear when the motion was filed. The Commonwealth filed a motion to supplement the record on April 5, 2017, which was granted. The order ruling on Hulsman’s CR 60.02(f) motion was included in the supplemental record, but the motion itself was not. An affidavit from the Jefferson County Circuit Court Clerk included in the supplemental record indicates that the motion could not be located in the circuit court clerk’s office.

III. ANALYSIS

Before we can address the merits of Hulsman’s appeal, we must discuss the fact that Hulsman’s most recent CR 60.02 motion – the motion giving rise to the order at issue in this appeal – is not included in the record. Additionally, it is only because of the Commonwealth’s motion to supplement the record that the order itself is now included in the record. “Appellant has a responsibility to present a ‘complete record’ before the Court on appeal.” *Hatfield v. Commonwealth*, 250 S.W.3d 590, 600 (Ky. 2008) (citing *Steel Techs., Inc. v. Congleton*, 234 S.W.3d 920, 926 (Ky. 2007)). “Further, ‘[i]t has long been held that, when the complete record is not before the appellate court, that court must assume that the omitted record supports the decision of the trial court.’” *Id.* at 601 (quoting *Commonwealth v. Thompson*, 697 S.W.2d 143, 145 (Ky. 1985)).

While Hulsman did request the complete record of his case in his motion for designation of records for appeal, R. 1084, it was his duty to ensure that the record was, in fact, complete. As the supplemental record includes a date-stamped copy of the trial court’s order denying a motion made by Hulsman pursuant to RCr 10.26 and CR 60.02 in its brief, we can assume that Hulsman made such motion. Based on the Jefferson Circuit Court Clerk’s affidavit concerning the missing motion, we cannot definitively place the blame for the incomplete record solely on Hulsman as it appears the missing motion may be the result of a clerical error. Nonetheless, without a copy of Hulsman’s motion in the record, we are unable to determine what issues he raised in that motion. Therefore,

we must assume that the trial court was correct in finding that nothing in Hulsman's motion warranted relief under CR 60.02(f). *Porter v. Harper*, 477 S.W.2d 778 (Ky. 1972).

Even assuming that the issues Hulsman raises in his brief are the same as the issues he raised in his CR 60.02(f) motion, we must find that Hulsman is procedurally barred from relief under CR 60.02. In Hulsman's brief to this Court, he argues the following: that his 235-year sentence is unlawful under KRS 532.080 and KRS 532.110(1)(c); that his conviction was in clear violation of the former version of KRS 500.050(4); and that the trial court should have considered his history of mental and emotional health issues when sentencing him. Hulsman's argument that his conviction is in violation of KRS 500.050(4) has been raised in front of the trial court on several occasions and was raised by Hulsman in one of his previous appeals to this Court. The law-of-the-case doctrine prohibits us from considering it again on this appeal. *See Bowling v. Commonwealth*, 377 S.W.3d 529, 530 (Ky. 2012).

As to Hulsman's remaining contentions, both could have been raised either on direct appeal or in Hulsman's first RCr 11.42 motion. "CR 60.02 is not intended merely as an additional opportunity to relitigate the same issues which could 'reasonably have been presented' by direct appeal or by RCr 11.42 proceedings." *Stoker v. Commonwealth*, 289 S.W.3d 592, 597 (Ky. App. 2009) (citing *McQueen*, 948 S.W.2d at 416). Both of Hulsman's remaining contentions involve sentencing issues. "A 'sentencing issue' constitutes 'a claim that a

sentencing decision is contrary to statute” *Spicer v. Commonwealth*, 442 S.W.3d 26, 35 (Ky. 2014) (quoting *Jones v. Commonwealth*, 382 S.W.3d 22, 27 (Ky. 2011)). Hulsman contends that, because his alleged errors concern sentencing issues, the trial court was required to correct them despite the fact that he may have waived the issues by not raising them earlier.

Hulsman is correct inasmuch as “appellate review of a sentencing issue is not waived by the failure to object at the trial court level.” *Jones*, 382 S.W.3d at 27. “[T]he imposition of an unauthorized sentence is an error correctable by appeal, by writ, or by motion pursuant to RCr 11.42 or CR 60.02.” *Id.* This is true even in the context of a guilty plea. *See Windsor v. Commonwealth*, 250 S.W.3d 306, 307 (Ky. 2008). We must note, however, that Hulsman chose not to file a direct appeal. Hulsman’s first RCr 11.42 motion and first CR 60.02 motion, which were appealed to this Court, did not address these sentencing issues. As noted by this Court in *Stoker*,

Our rules of civil procedure do not permit successive motions or the relitigation of issues which could have been raised in prior proceedings. . . . Our courts do not favor successive collateral challenges to a final judgment of conviction which attempt to relitigate issues properly presented in a prior proceeding.

289 S.W.3d at 597 (citing *Gross v. Commonwealth*, 648 S.W.2d 853, 856-57 (Ky. 1983)). Therefore, Hulsman is procedurally barred from raising the issues now.

IV. CONCLUSION

Based on the foregoing, we affirm the order of the Jefferson Circuit

Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

John William Hulsman, *pro se*
LaGrange, Kentucky

BRIEF FOR APPELLEES:

Andy Beshear
Attorney General of Kentucky

James C. Shackelford
Assistant Attorney General
Frankfort, Kentucky