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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001527-MR

ANTHONY G. HARVELL — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE STEPHEN P. RYAN, JUDGE
INDICTMENT NO. 01-CR-000096

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: BARBER AND JOHNSON, JUDGES; HUDDLESTON, SENIOR JUDGE.[1]

HUDDLESTON, SENIOR JUDGE: Anthony G. Harvell appeals *pro se* from a Jefferson Circuit Court order that denied his Kentucky Rules of Civil Procedure (CR) 60.02 motion seeking relief from a judgment convicting him of several criminal offenses. Because we agree with the circuit court that Harvell has not provided

[1] Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

the grounds necessary to invoke the extraordinary relief available under CR 60.02, we affirm the order.

In January 2001, Harvell was charged in an indictment with two counts of first degree rape, one count of first degree sodomy, two counts of kidnapping and two counts of impersonating a peace officer. On two occasions, Harvell had identified himself as a police officer and forced women to have sexual intercourse with him by threatening to arrest them if they refused. Both victims identified Harvell as the man who raped them.

The Commonwealth eventually proposed a plea agreement which Harvell accepted. Under the terms of the agreement, the kidnapping charges were reduced to charges of unlawful imprisonment. The Commonwealth agreed to recommend a sentence of ten years for each count of rape, sodomy and kidnapping, and five years for each count of unlawful imprisonment and impersonation. All sentences were to run concurrently for a total of ten years. On December 31, 2001, Harvell entered a plea of guilty pursuant to North Carolina v. Alford[2] under the terms of the agreement, and judgment of conviction was entered

[2] 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1977). A defendant entering a plea of guilty under Alford refuses to admit guilt but acknowledges that the Commonwealth can present sufficient evidence to support a conviction. An Alford plea "is a guilty plea in all material respects." United States v. Tunning, 69 F.3d 107, 111 (6th Cir. 1995).

on February 28, 2002. Harvell was sentenced to ten years' imprisonment in accordance with the terms of the plea agreement.

More than one year later, on March 11, 2003, Harvell filed a motion pursuant to CR 60.02, requesting that his sentence be modified or amended from ten to two years. He made general allegations that his constitutional rights were violated throughout the course of events leading up to his guilty plea. He also moved the court for appointment of counsel and an evidentiary hearing. Jefferson Circuit Court denied his motions in an order entered on April 14, 2004, stating that Harvell had failed to demonstrate why he was entitled to the "special, extraordinary relief" provided by CR 60.02. This appeal followed.

Harvell argues that his sentence should be reduced because it is unreasonable and violates the 14th Amendment's prohibition against arbitrary action. Although his arguments are unclear, he appears to be claiming that his plea agreement was illegal because he was not informed that he was plea bargaining to a long term in prison. He acknowledges that the circuit court may not direct the Parole Board to grant parole, but maintains that the court does have the authority to ensure that a sentence is not arbitrarily construed or increased.

These claims were not appropriate for resolution via a CR 60.02 motion. We quote from Gross v. Commonwealth:[3]

> 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. CR 60.02 is not intended merely as an additional opportunity to raise *Boykin*[4] 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.[5]

Harvell's arguments could have been raised in a motion pursuant to RCr 11.42. His motion is therefore procedurally barred.

Apart from this fatal procedural flaw, the substantive arguments that we are able to discern in his motion are without merit. In Turner v. Commonwealth,[6] this Court held that an appellant's guilty plea was not rendered involuntary under the standards established in Boykin v. Alabama[7] if he was not

[3] 648 S.W.2d 853 (Ky. 1983).
[4] 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969). In Boykin, the U.S. Supreme Court held that a constitutionally-valid guilty plea must be knowing, voluntary and intelligent and may not be presumed from a silent record.
[5] Supra, note 3, at 856.
[6] 647 S.W.2d 500 (Ky. App. 1983).
[7] See supra, note 4.

informed that he would be ineligible for parole for ten years. We stated as follows:

> *Boykin* does not mandate that a defendant must be informed of a "right" to parole. This is especially true since, unlike the rights specified in *Boykin*, parole is not a constitutional right.[8] *Boykin* does require a knowing, voluntary and intelligent waiver of all important constitutional rights. However, a knowing, voluntary and intelligent waiver does not necessarily include a requirement that the defendant be informed of every possible consequence and aspect of the guilty plea. A guilty plea that is brought about by a person's own free will is not less valid because he did not know all possible consequences of the plea and all possible alternative courses of action. To require such would lead to the absurd result that a person pleading guilty would need a course in criminal law and penology.[9]

We concluded by stating that

> [w]e do not feel that the failure of a trial court to inform a defendant before accepting a guilty plea of mandatory service of sentence before eligibility for parole

[8] United States v. Timmreck, 441 U.S. 780, 99 S. Ct. 2085, 60 L. Ed. 2d 634 (1979).
[9] Supra, note 6, at 500-501.

is a violation of constitutional due process or that such failure is a ground to vacate judgment under RCr 11.42.[10]

This analysis conclusively resolves the claim in Harvell's motion.

As to Harvell's claim that he was entitled to an evidentiary hearing, before a 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."[11] Harvell has not alleged any such facts; the circuit court therefore correctly denied his motion for an evidentiary hearing. The circuit court's denial of his request for appointed counsel was also proper because the right to appointed counsel does not generally extend to motions made pursuant to CR 60.02.[12]

For the foregoing reasons, the order denying Harvell's CR 60.02 motion is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Anthony G. Harvell, *pro se*
LaGrange, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
ATTORNEY GENERAL OF KENTUCKY

Dennis W. Shepherd
ASSISTANT ATTORNEY GENERAL
Frankfort, Kentucky

[10] Id. at 502.
[11] Supra, note 3, at 856.
[12] Id. at 857.