

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2002-CA-001518-MR

JEFFERY L. CRICK

APPELLANT

v. APPEAL FROM CHRISTIAN CIRCUIT COURT  
HONORABLE EDWIN M. WHITE, JUDGE  
ACTION NOS. 88-CR-00168 & 88-CR-00178

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: BUCKINGHAM, DYCHE, and JOHNSON, JUDGES.

BUCKINGHAM, JUDGE: Jeffery L. Crick appeals from an order of the Christian Circuit Court denying his CR<sup>1</sup> 60.02 motion to vacate. We affirm.

On September 18, 1988, Crick shot and killed his wife. He was convicted of murder and of being a second-degree persistent felony offender (PFO II) by a jury on March 3, 1989. He was sentenced to seventy years in prison for murder and seventy years in prison for PFO II. The seventy-year sentence for PFO II was in lieu of the seventy-year sentence he received

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<sup>1</sup> Kentucky Rules of Civil Procedure.

for murder. His conviction and sentence was affirmed by the Kentucky Supreme Court in an opinion rendered on May 24, 1990.

On January 4, 1991, Crick filed a motion to vacate the judgment pursuant to RCr<sup>2</sup> 11.42. His motion was ultimately denied by the trial court in an order entered on September 13, 1991. This court affirmed the trial court's denial of the RCr 11.42 motion in an opinion rendered on February 11, 1994.

Thereafter, Crick filed a petition for *habeas corpus* in the United States District Court, Western District of Kentucky. The petition was dismissed by an order of the court on March 28, 1996. The United States Court of Appeals for the Sixth Circuit affirmed the district court's order in an opinion rendered on April 24, 1997.

On March 23, 1998, Crick filed a motion for post-conviction relief pursuant to CR 60.02 in the Christian Circuit Court. The court entered an order denying the motion on November 20, 1998. This court affirmed the circuit court's denial of the CR 60.02 motion in an opinion rendered on April 6, 2001.

Crick also filed a petition for *writ of habeas corpus* in the Muhlenberg Circuit Court.<sup>3</sup> The court entered an order

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<sup>2</sup> Kentucky Rules of Criminal Procedure.

<sup>3</sup> We are not aware of the exact date in the year 2000 that Crick filed this petition.

denying the petition on January 5, 2001. On March 12, 2001, this court affirmed the circuit court's denial of the petition.

On June 10, 2002, Crick filed a second motion for relief pursuant to CR 60.02 in the Christian Circuit Court. On June 18, 2002, the court entered an order denying the motion. This appeal by Crick followed.

Within one year of Crick's conviction of murder in March 1989, the Kentucky Supreme Court held in Berry v. Commonwealth, 782 S.W.2d 625 (1990), that murder was a capital offense that was not subject to enhancement under the persistent felony offender statute. Id. at 626. Shortly thereafter, the Kentucky Supreme Court held in Offutt v. Commonwealth, Ky., 799 S.W.2d 815 (1990), that a conviction of a capital offense may establish PFO status but that the sentence may not be enhanced. Id. at 816. Because Crick was improperly sentenced due to his PFO status, he has sought recourse through the years to have his seventy-year sentence vacated and the matter remanded to the trial court. Ultimately, in the February 11, 1994, opinion of this court affirming the trial court's denial of Crick's RCr 11.42 motion, a panel of this court held that Crick was not prejudiced by a PFO enhancement since the sentence on the PFO conviction was the same as the sentence on the murder conviction (seventy years).

In the appeal of the trial court's denial of his second CR 60.02 motion, Crick raises two arguments. His first argument is that the trial court abused its discretion in denying his CR 60.02 motion as being time-barred. Crick's motion was filed pursuant to CR 60.02(e) and (f). As it applies to those two subsections, the rule provides that "[t]he motion shall be made within a reasonable time."

"What constitutes a reasonable time in which to move to vacate a judgment under CR 60.02 is a matter that addresses itself to the discretion of the trial court." Gross v. Commonwealth, Ky., 648 S.W.2d 853, 858 (1983). In the Gross case, the Kentucky Supreme Court held that it was not an abuse of discretion for a trial court to deny a CR 60.02 motion as not being filed within a "reasonable time" when the motion was filed five years after the conviction. In the case *sub judice*, the motion was filed thirteen years after the conviction. Furthermore, Crick filed his initial CR 60.02 motion in early 1998. Had he raised the grounds in his first motion that he raised in his second CR 60.02 motion, then he may or may not have filed the motion within a reasonable time as required by the rule. However, it was not an abuse of discretion for the trial court to deny the second motion as not having been timely filed.

Crick's second argument is that his sentences are unlawful and void under the due process and equal protection clauses of the U.S. Constitution and Kentucky Constitution. In connection with this argument, Crick first argues that his seventy-year sentence is void because his murder conviction was not subject to enhancement due to PFO status. In support of this argument, he cites Wellman v. Commonwealth, Ky., 694 S.W.2d 696 (1985), wherein the Kentucky Supreme Court held that "since sentencing is jurisdictional it cannot be waived by failure to object." Id. at 698. In Wellman, our supreme court agreed that the defendant could not be sentenced to life in prison for both the murder conviction and the PFO conviction because KRS<sup>4</sup> 532.080(1) provides that the PFO sentence shall be in lieu of the sentence for the principal offense. Id. The court further ordered the case remanded to the trial court for sentencing to a single life sentence even though trial counsel failed to object at the time judgment was entered. Id.

In the case *sub judice*, Crick was sentenced to seventy years for PFO II in lieu of, but not in addition to, the seventy-year sentence for murder. In the Offutt case, the Kentucky Supreme Court held that "conviction of a capital offense may indeed establish PFO status." Id. at 816. However, the court further noted that the sentence for the capital

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<sup>4</sup> Kentucky Revised Statutes.

offense may not be enhanced due to the PFO status. Id. In the case *sub judice*, the jury fixed Crick's sentences at seventy years in prison on both the murder and PFO II charges. However, when he was finally sentenced, he was sentenced to only one term of seventy years and that sentence was not an enhanced one. In short, his sentence was not void.

The final portion of Crick's second argument is that his sentences were unlawful and were in violation of his due process and equal protection rights. He first asserts that the jury instructions given during the 1989 trial were contrary to the law as it existed at that time. Even assuming this is true, Crick is not entitled to relief. "[R]elief under CR 60.02 is not available for judicial errors or mistakes." McMillen v. Commonwealth, Ky. App., 717 S.W.2d 508, 509 (1986); James v. Hillerich & Bradsby Co., Ky., 299 S.W.2d 92, 93 (1956).

Finally, we disagree with Crick's assertions that his due process and equal protection rights have been violated. We agree with the United States District Court, Western District of Kentucky, and its statement that "there are clearly no due process violations implicated in petitioner's sentencing." Concerning the alleged equal protection of law violation, Crick maintains that he has been denied relief while Berry, Offutt, and others were granted relief. The Berry and Offutt cases are distinguishable. Berry's life sentence for murder was enhanced

to 200 years as a PFO. Offutt's thirty-year sentence for murder was enhanced to fifty years for PFO. In each case, the Kentucky Supreme Court reversed the enhanced sentence. In the case *sub judice*, there was no sentence enhancement due to PFO status.

The order of the Christian Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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