

RENDERED: January 23, 2004; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2002-CA-002527-MR

CONNIE DALE BAKER

APPELLANT

v.

APPEAL FROM BOYLE CIRCUIT COURT
HONORABLE DARREN W. PECKLER, JUDGE
INDICTMENT NO. 92-CR-00089

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** * * *

BEFORE: McANULTY, MINTON, and SCHRODER, Judges.

MINTON, Judge: Connie Baker appeals pro se from the circuit court's denial of his third collateral attack upon his plea of guilty to the crimes of murder, attempted murder, first-degree robbery, first-degree criminal conspiracy to commit burglary, and being a first-degree persistent felony offender. In this motion, Baker filed for an enlargement of time to file a motion

for relief under Kentucky Rules of Criminal Procedure (RCr) 11.42, or in the alternative, to vacate judgment pursuant to RCr 10.26 and/or Kentucky Rules of Civil Procedure (CR) 60.02(f) and 60.03.

Baker premises his argument on an affidavit from his co-defendant which states that Baker was passed out in the back seat of an automobile during the commission of the crimes for which Baker later pled guilty. Baker argues that this affidavit proves he is innocent of the crimes, and his guilty plea is therefore null and void because it violates a number of provisions of the constitutions of the United States and the Commonwealth of Kentucky.

Ordinarily, a motion for relief under RCr 11.42 must be brought within three years after the judgment becomes final.¹ Since Baker's guilty plea became final in 1993, his motion was well outside the three-year period. Baker attempts to overcome this limitation through citation to RCr 11.42(10)(a) and (b), which provide exceptions to the three year limit in instances in which the defendant proves (a) that the facts upon which the claim is predicated were unknown and could not have been ascertained through the exercise of due diligence, or (b) that the fundamental constitutional right asserted was not

¹ Ky. R. Crim. P. (RCr) 11.42(10).

established within the period provided for in RCr 11.42(10) and has been held to apply retroactively.

As the circuit court noted, the exception contained in (a) is inapplicable because Baker would have known whether or not he was passed out drunk from the beginning of the proceedings against him. Subsection (b) is likewise inapplicable because Baker has not cited us to, nor demonstrated the applicability of, any newly ascertained constitutional protection. His claim is that he is factually innocent of the crimes charged, a condition the exculpatory nature of which was recognized long before 1993.

Relief under CR 60.02 is similarly unavailable. In instances of mistake, newly discovered evidence, or perjury or falsified evidence, a motion for relief must be made within one year of the judgment.² In instances where there has been fraud affecting the proceedings, the judgment is void, or there is some other extraordinary reason justifying relief, a post judgment motion must be made within a reasonable time.³ Viewing the co-defendant's affidavit as newly discovered evidence,⁴ Baker's motion must have been brought within one year of final

² Ky. R. Civ. P. (CR) 60.02(a), (b), and (c).

³ CR 60.02(d), (e), and (f).

⁴ This of course assumes that it could not have been discovered through due diligence, which we have already stated is unlikely.

judgment. He has not alleged any extraordinary reason which would justify the nine year delay in presenting this affidavit. Therefore, Baker was not entitled to relief under CR 60.02.

Accordingly, the circuit court was correct in denying Baker's motion. Its order is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Connie Dale Baker, Pro se
LaGrange, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler, III
ATTORNEY GENERAL

Michael L. Harned
ASSISTANT ATTORNEY GENERAL
Frankfort, Kentucky