

RENDERED: SEPTEMBER 17, 2004; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-000001-MR

ROBERT LEE MARTIN

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE TOM MCDONALD, JUDGE
ACTION NO. 90-CR-001319

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: COMBS, CHIEF JUDGE; KNOPF AND McANULTY, JUDGES.

McANULTY, JUDGE. Robert Lee Martin (Martin), *pro se*, has appealed from an opinion entered by the Jefferson Circuit Court on November 7, 2002, that denied his motion for relief pursuant to Ky. R. Civ. P. (CR) 60.02. Martin argues that upon enhancing the trial court videotape sound, he overheard a conversation at the bench where his defense counsel, the prosecutor and the judge had a discussion about the prosecutor's having instructed

a witness not to mention on the stand that Martin had requested an attorney. Martin argues this violated his constitutional rights. We affirm.

On July 1990, Martin was indicted for murder. On December 5, 1991, a jury found him guilty of this charge and he was sentenced to sixty years imprisonment. Martin appealed his conviction to the Supreme Court, whereupon the conviction was upheld on March 11, 1993.

On November 8, 1994, Martin filed a Ky. R. Crim. P. (RCr) 11.42 motion. In that motion, Martin claimed that jurors were improperly excused from the grand jury panel and that he had ineffective assistance of counsel since his counsel did not properly investigate the charges or properly advise Martin of defenses. The circuit court denied this motion by order entered November 23, 1994. Martin then appealed the denial of his RCr 11.42 motion to this Court on December 2, 1994. We entered a show cause order on October 6, 1995, giving Martin another 15 days to show cause as to why his appeal should not be dismissed for failure to file a brief. On October 19, 1995, Martin filed a motion seeking a stay of appeal, in which he stated he lacked knowledge of the appellate procedures and sought an enlargement of time in which to perfect his brief. After denying Martin's motion to stay the appeal and for enlargement of time, we then dismissed his appeal by order entered January 11, 1996.

On February 10, 2000, Martin then filed a Petition for Writ of Mandamus in the Court of Appeals against the Jefferson Circuit Court Chief Judge and the Commonwealth of Kentucky. Martin asserted in his petition that the respondents had failed to respond to his CR 60.02 motion, and thereby delayed his motion. Those respondents replied by stating a CR 60.02 motion had not been filed by Martin and thus the judge could not rule on that motion. Martin responded by providing a copy of a CR 60.02 motion, but there was not a file-stamp date on this copy to show whether it had actually been filed. We denied Martin's petition for a writ on June 20, 2000, stating that Martin's CR 60.02 motion was never filed in the circuit court.

On August 2, 2000, Martin then filed a CR 60.02 motion seeking to vacate his judgment and sentence. Martin alleged ineffective assistance of counsel, this time claiming his attorney was a civil attorney, not a criminal attorney, and was thus not experienced and competent to undertake criminal representation. Martin specifically claimed his attorney was ineffective because his attorney failed to advise Martin to take a plea offer instead of going to trial, whereupon Martin received a longer sentence. On August 29, 2000, the circuit court denied this motion. Martin appealed and on October 3, 2001, we affirmed the circuit court's denial, stating "appellant

could have reasonably presented his ineffective assistance of counsel claim in a RCr 11.42 proceeding." (citations omitted).

Martin then filed a successive CR 60.02 motion on September 30, 2002. In this motion, he states that he enhanced the trial videotape sound, whereupon he heard the judge, the prosecutor and his defense counsel discussing how the prosecutor instructed the witness (police officer) not to discuss Martin's request for an attorney. Martin claimed this bench discussion violated his constitutional rights by not informing the jury that he made a Miranda¹ assertion. On November 7, 2002, the circuit court denied Martin's successive CR 60.02 motion, stating the motion was improper because the issues could have, and should have, been asserted in an earlier motion for post-conviction relief. This appeal followed.

On appeal, Martin contends that the circuit court abused its discretion by denying his CR 60.02 motion. In support of his motion, Martin argues he could not have raised the issues he now asserts because he had not had a reason to think to enhance the trial videotape until now. Specifically, Martin alleges that the prosecutor, his defense counsel and the trial judge conspired to violate his constitutional rights. Martin claims the enhanced version of the trial tape, which has

¹ Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694.

not been presented to us for review, reveals a bench conference where the prosecutor informed the Court and the defense counsel that he had instructed the witness (police officer) to not mention that Martin had requested an attorney after Martin had gone to the police officer's house and confessed. Martin claims this proved a violation of his Miranda rights.

One may seek relief under CR 60.02 only when such "relief [] is not available by direct appeal and not available under RCr 11.42." Gross v. Commonwealth, Ky., 648 S.W.2d 853, 856 (1983). It is not clear which sections Martin is relying on, but the sections that appear to be the relevant sections, and the sections he quotes in his CR 60.02 motion, state as follows:

On motion a court *may*, upon such terms as are just, relieve a party or his legal representative from its final judgment, order, or proceeding, upon the following grounds: . . . (b) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59.02; (c) perjury or falsified evidence; (d) fraud affecting the proceedings, other than perjury or falsified evidence; . . . or (f) any other reason of an extraordinary nature justifying relief. The motion shall be made within a *reasonable time*, and on grounds . . . (b)[] and (c) not more than *one year* after the judgment, order, or proceeding was entered or taken. (emphasis added.)

In order to prevail under CR 60.02, "[t]he movant must demonstrate why he is entitled to this special extraordinary

relief." Gross, 648 S.W.2d at 856. For a movant to receive 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." Id. The trial court has the discretion on whether or not to grant relief under CR 60.02. Id. at 857. Thus, our review of the trial court's decision is an abuse of discretion standard and we will affirm that decision unless there is a showing of some "flagrant miscarriage of justice." Id. at 858.

According to our Supreme Court, in order to properly attack a final judgment, one must first directly appeal the judgment, then use RCr 11.42 relief, and finally one may use CR 60.02. Id. at 856. The reason why CR 60.02 should be sought last is because this rule "is not intended merely as an additional opportunity to relitigate the same issues which could 'reasonably have been presented' by direct appeal or RCr 11.42 proceedings." McQueen v. Commonwealth, Ky., 948 S.W.2d 415, 416 (1997) (quoting RCr 11.42(3); Gross, 648 S.W.2d at 856.)

As the Supreme Court of Kentucky has held:

A defendant is required to avail himself of RCr 11.42 while in custody under sentence or on probation, parole or conditional discharge, as to any ground of which he is aware, or *should be aware*, during the period when this remedy is available to him. *Final disposition of that motion*, or waiver of the opportunity to make it, shall conclude all issues that reasonably could have been

presented in that proceeding. The language of RCr 11.42 forecloses the defendant from raising any questions under CR 60.02 which are "issues that could reasonably be presented" by RCr 11.42 proceedings.

Gross, 648 S.W.2d at 857 (emphasis added) (quoting RCr 11.42(2)). Thus, issues that could have reasonably been presented in an RCr 11.42 motion preclude the defendant from raising those issues in a CR 60.02 motion. The issues Martin now raises are issues that were apparent at the time the judgment was entered against him, or when Martin's other motions collaterally attacking the judgment were made. Martin claims this is newly discovered evidence because he was not able to hear the discussion until he enhanced the videotape. Although Martin decided to wait almost eleven years to enhance the videotape, he has had since the trial ended in order to do so. Waiting until now does not make the information "newly discovered" evidence because he has had access to this videotape the entire time. He merely put off the discovery of information he could have uncovered anytime during any of his prior appeals. By failing to bring these issues in his prior RCr 11.42 motion, Martin is now precluded from resorting to CR 60.02.

Even had Martin's CR 60.02 motion been properly invoked, Martin failed to exercise due diligence in pursuing his claim. Although it is not clear which sections of CR 60.02 Martin is relying on, he seems to be relying on a variety of

sections, including sections (b) and (c). CR 60.02 establishes that claims under sections (b) and (c) must be brought forth within one year of judgment. Martin's claims of newly discovered evidence and perjured or falsified evidence clearly have not been invoked properly since the judgment against him was entered December 5, 1991, well over the one year statute of limitations provided in CR 60.02.

The other CR 60.02 sections that Martin appears to be relying on are sections (d) and (f). Claims alleging "fraud affecting the proceedings" and extraordinary relief must be filed within a reasonable time. CR 60.02. "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, 648 S.W.2d at 858. In making the decision whether the CR 60.02 motion was timely filed, the trial court does not have to hold a hearing to decide, but rather can rely on the record. Id. The circuit court ruled that the issues Martin now asserts were issues that could have been brought in his prior post-judgment motions, and we agree. Martin's CR 60.02 motion does not state any facts which would entitle him to the extraordinary relief provided by CR 60.02. Martin filed this CR 60.02 motion on September 30, 2002, almost eleven years after Martin was found guilty on December 5, 1991. Eleven years hardly qualifies as a "reasonable time." Even Martin's first CR

60.02 motion, which is not the subject of this appeal, wasn't filed until August 2, 2000, almost nine years later. Martin has filed several motions, including a prior CR 60.02, in the last eleven years in which he could have raised the issues he is now attempting to argue in his successive CR 60.02 motion. As stated above, CR 60.02 is to be used "only to raise issues which cannot be raised in other proceedings." McQueen, 948 S.W.2d at 416 (emphasis added). Since these issues could have easily been raised in other timely post-judgment motions, Martin improperly invoked CR 60.02.

Martin also attempts to rely on Deemer v. Finger to support his case. In Deemer, the court permitted the appellant to bring forth an issue regarding juror misconduct that was not discovered until the trial videotape had been viewed. Deemer v. Finger, Ky., 817 S.W.2d 435 (1990). The juror had a conversation with the trial judge, unheard by either counsel, where the juror potentially revealed she had discussed the case with her husband. Id. That case is distinguishable, however, in that the appellant in Deemer viewed the videotape within a few months of the trial. Id. at 436. Martin, however, has waited almost eleven years to discover the alleged misconduct on his trial videotape. Although he states he had to have the video enhanced in order to hear the discussion, he has had almost eleven years to do so. Since the finality of judgments

in criminal cases is so important, CR 60.02 (f) should be granted "only under most unusual circumstances." Wine v. Commonwealth, Ky. App., 699 S.W.2d 752, 754 (1985). Martin has not shown such an "unusual circumstance" since he would have known of any Miranda violation and could have viewed this tape anytime after trial or during any one of his many appeals.

Since Martin has failed to timely invoke CR 60.02 and failed to show a "reason of an extraordinary nature justifying relief" pursuant to CR 60.02 (f), it was not an abuse of discretion for the circuit court to deny Martin's motion.

For the foregoing reasons, the order of the Jefferson Circuit Court dismissing Appellant Martin's CR 60.02 motion is affirmed.

KNOPF, JUDGE, CONCURS.

COMBS, CHIEF JUDGE, DISSENTS AND FILES SEPARATE
OPINION.

COMBS, CHIEF JUDGE, DISSENTING: Mr. Martin has certainly raised an issue which arguably constitutes a serious violation of his *Miranda* rights. Although this issue has been raised more than eleven years after the trial, CR 60.02 is available for extraordinary relief. The fact that enhancement of the tape had not been available until long after sentencing should not preclude his resort to CR 60.02 relief under these circumstances. He invoked the proper rule in timely fashion

after having discovered evidence that had lain hidden for many years. It is just such a case for which CR 60.02 was fashioned.

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