

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2003-CA-000426-MR

MONTICA TERRY

APPELLANT

v. APPEAL FROM LOGAN CIRCUIT COURT  
HONORABLE TYLER L. GILL, JUDGE  
ACTION NO. 87-CR-00006

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: GUIDUGLI, McANULTY, AND MINTON, JUDGES.

McANULTY, JUDGE: Montica Terry (Terry), *pro se*, has appealed from an opinion and order entered by the Logan Circuit Court on October 21, 2002, that denied his motion for relief pursuant to Ky. R. Civ. P. (CR) 60.02 to vacate his sentence. Terry argues that he gave an invalid guilty plea due to the trial court failing to require the Commonwealth to submit a "Bill of Particulars" and ineffective assistance of counsel. Since Terry failed to demonstrate that he is entitled to extraordinary relief pursuant to CR 60.02, we affirm.

In February 1987, Terry was charged in an indictment with one count of robbery in the first degree and one count of criminal conspiracy. The charges against Terry stemmed from a February 14, 1987 robbery, whereupon the police arrested both Terry and a co-defendant. On May 20, 1987, Terry, with appointed counsel, pled guilty to robbery in the first degree. Terry was then sentenced to ten years in prison, to run consecutively with other sentences that had previously been imposed.

On September 11, 1991, more than one year after the sentence was entered, Terry filed a Ky. R. Crim. P. (RCr) 11.42 motion seeking to set aside the May 20, 1987 sentence. In that motion, Terry asserted that (1) his guilty plea was involuntary since he did not understand the nature of the charges and (2) ineffective assistance of counsel by his counsel failing to properly inform him of the charges. On November 8, 1991, Terry also filed a supplemental motion to vacate his conviction. The circuit court denied Terry's RCr 11.42 motion, as well as his supplemental motion. Terry did not appeal that order.

However, on September 13, 1993, Terry filed a *pro se* CR 60.02(b) motion to vacate his conviction based on new case law. Under this motion, Terry alleged that the indictment was not sufficiently detailed so as to make him aware of the nature of the charges being brought against him. The circuit court

denied Terry's CR 60.02(b) motion on September 30, 1993.

Although Terry filed a notice of appeal October 13, 1993, no further steps were taken to prosecute the appeal.

On September 23, 2002, Terry then filed a successive CR 60.02(e) & (f) motion seeking relief from his conviction. In that motion, Terry argued (1) that the court erred in failing to require the Commonwealth to submit a "Bill of Particulars" describing the time of day the crime took place, where the crime took place, and who was present at the crime and (2) ineffective assistance of counsel by failing to investigate the indictment. Upon examining Terry's motion and memorandum, on October 21, 2002, the circuit court denied Terry's motion based on its conclusion that Terry failed to state facts which would entitle him to relief under CR 60.02. This appeal followed.

Terry raises the same basic two issues on appeal that he has raised in his prior post-judgment motions. First, that he was not made aware of the nature of the charges brought against him, thereby causing him to enter a guilty plea that was not knowing, intelligent and voluntary. Second, Terry alleges that he had ineffective assistance of counsel since his counsel failed to investigate the nature of the charges in the indictment.

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). The sections of CR 60.02 on which Terry relies 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: . . . (e) the judgment is void, or has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is *no longer equitable* that the judgment should have prospective application; or (f) any other reason of an *extraordinary nature* justifying relief. The motion shall be made within a reasonable time, . . . (emphasis added).

In order to prevail under CR 60.02, "the 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 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 have been 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 a RCr 11.42 motion preclude the defendant from raising those issues in a CR 60.02 motion. All of the issues Terry raises are issues that were apparent at the time the judgment was entered against him, or when Terry's other motions collaterally attacking the judgment were made. As a matter of fact, many, if not all, of these issues were raised in Terry's

prior post-judgment motions, whereupon the motions were denied. The record supports the finding that these issues were apparent to Terry at the time the trial ended and could have been brought in a timely RCr 11.42 motion. If Terry believed that he did not know the nature of the charges being brought against him and that his trial counsel rendered ineffective assistance, he knew it at the time his plea was entered or very soon thereafter. To be sure, these issues are all issues that could "'reasonably have been presented' by direct appeal or RCr 11.42 proceedings." McQueen, 948 S.W.2d at 416 (quoting RCr 11.42(3); Gross, 648 S.W.2d at 856). Terry's waiver of his opportunity under RCr 11.42 (by filing an untimely RCr 11.42 motion) precludes him from now resorting to CR 60.02.

Even had Terry's CR 60.02 motion been properly invoked, Terry failed to exercise due diligence in pursuing his claim. Pursuant to CR 60.02, since Terry's claim is based on "extraordinary relief," he must file his motion 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, 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 Terry's CR 60.02 motion did not state

any facts which would entitle him to relief and we agree. Terry filed his CR 60.02 motion on September 23, 2002, 15 years after Terry pled guilty on May 27, 1987. Fifteen years hardly qualifies as a "reasonable time." Even Terry's first CR 60.02 motion, which is not the subject of this appeal, wasn't filed until September 13, 1993, six years after he pled guilty. Terry has filed several motions, including a prior CR 60.02, in the last 15 years in which he could have raised, or in some cases did raise, 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, Terry improperly invoked CR 60.02.

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

For the foregoing reasons the order of the Logan Circuit Court dismissing Appellant Terry's CR 60.02 motion is affirmed.

ALL CONCUR.

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