

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2003-CA-000838-MR

MARK A. SHANNON

APPELLANT

v. APPEAL FROM SIMPSON CIRCUIT COURT  
HONORABLE WILLIAM R. HARRIS, JUDGE  
ACTION NO. 98-CR-00128

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

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BEFORE: GUIDUGLI, McANULTY, AND TAYLOR, JUDGES.

McANULTY, JUDGE. Mark A. Shannon (hereinafter appellant) appeals from an opinion and order of the Simpson Circuit Court denying his motion for relief from his judgment of conviction pursuant to CR 60.02. We affirm.

In 1999, a jury found appellant guilty of trafficking in a controlled substance in the first degree and with being a persistent felony offender in the first degree. The judgment of conviction was affirmed on appeal by the Kentucky Supreme Court

in an unpublished opinion. Appellant's motion to vacate, set aside or correct his sentence pursuant to RCr 11.42 was denied by the trial court, and this court affirmed on April 25, 2003.

Appellant then filed a pro se motion for relief pursuant to CR 60.02 in the trial court, together with a motion for appointment of counsel. He alleged he was denied due process of law because his counsel fell asleep during trial, and so failed to note or draw the court's attention to the fact that some of the jurors were asleep as well. Appellant argues that "sleeping counsel is tantamount to no counsel at all," citing United States v. DiTommaso, 817 F.2d 201 (2d Cir. 1987).

Appellant claims he attempted to call counsel's attention to the sleeping jurors but could not because counsel was asleep.

Appellant also alleges he urged appellate counsel to raise this issue on direct appeal and in the RCr 11.42 motion, but against his wishes it was never raised.

The court below denied appellant appointment of counsel and a hearing on the motion. The trial court found that appellant's CR 60.02 motion was not timely filed. The court cited a delay of three and a half years from the jury trial until filing of the CR 60.02 motion to raise an allegation that was obvious and apparent. In addition, the court found that it was fatal to the motion that appellant could have raised these claims in either his direct appeal or RCr 11.42 motion but did

not. CR 60.02 is not intended merely as an additional opportunity to relitigate the same issues which reasonably could have been presented by direct appeal or RCr 11.42 proceedings. McQueen v. Commonwealth, Ky., 948 S.W.2d 415, 416 (1997). CR 60.02 is not a separate avenue of appeal to be pursued in addition to other remedies, but is available only to raise issues which cannot be raised in other proceedings. Id.

On appeal, appellant claims the time delay should be ignored in the interests of justice. He argues that he should be permitted to raise these issues pursuant to CR 60.02(f): "any other reason of an extraordinary nature justifying relief." Appellant contends that because he was not pro se before, he could not control what was raised in his earlier appeals. Appellant asserts that the failure of trial counsel and appellate counsel to raise the issue in the direct appeal amount to ineffective assistance of counsel by both. He notes that he informed his appellate counsel of the sleeping juror and sleeping counsel, and his request for leave to supplement counsel's RCr 11.42 motion was denied by the trial court. At the same time, appellant concedes that he needed counsel at each stage of the proceedings. Appellant argues that it was only after receiving some legal training that he was able to file the present litigation alleging violation of his rights.

Appellant's claim is essentially that his CR 60.02 motion raises extraordinary circumstances because of the failure of his counsel to raise the issues he wanted to be raised. We disagree. A claim of attorney ineffectiveness on appeal due to failure to raise an issue is not cognizable in the courts of the Commonwealth. Hicks v. Commonwealth, Ky., 825 S.W.2d 280 (1992). Moreover, post-conviction proceedings are not an occasion for appellate courts to reconsider cases reviewed, considered, and decided on appeal. Id. The Kentucky Supreme Court has stated that appellate counsel is not ineffective for failing to raise every conceivable issue on appeal. Moore v. Commonwealth, Ky., 983 S.W.2d 479, 487 (1998). Thus, we find that appellant does not make a valid claim in his CR 60.02 motion by claiming that counsel did not raise the issues appellant urged. The trial court correctly denied appellant's CR 60.02 motion, as well as his motions for appointment of counsel and an evidentiary hearing.

For the foregoing reasons we affirm the order of the Simpson Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Mark A. Shannon, Pro Se  
Beattyville, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler III  
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