

RENDERED: AUGUST 25, 2006; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2003-CA-002499-MR

SAMUEL DEAN WADE

APPELLANT

v. APPEAL FROM BREATHITT CIRCUIT COURT
HONORABLE LARRY MILLER, JUDGE
ACTION NO. 97-CR-00021

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** *

BEFORE: GUIDUGLI AND JOHNSON, JUDGES; HUDDLESTON,¹ SENIOR JUDGE.
JOHNSON, JUDGE: Samuel Dean Wade, pro se, has appealed from an
order entered by the Breathitt Circuit Court on November 7,
2003, denying his CR² 60.02 motion to vacate his sentence
pursuant to a judgment entered on November 10, 1997.³ Having

¹ Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

² Kentucky Rules of Civil Procedure.

³ We note that several important orders in this case were handwritten and very difficult to read.

concluded that the trial court did not abuse its discretion by denying Wade relief, we affirm.

Because this Court affirmed Wade's appeal⁴ from the denial of his RCr⁵ 11.42 motion, we quote the pertinent facts from that Opinion as follows:

On May 23, 1997, [a] Breathitt County grand jury indicted Wade on thirty-five (35) counts of first-degree rape, eighteen (18) counts of second-degree rape, thirty-five (35) counts of first-degree sodomy and twelve (12) counts of second-degree sodomy. According to information contained in the Commonwealth's bill of particulars, these acts were committed between June 1995 and April 1997. Ninety-four (94) offenses were committed against Wade's step-daughter and six (6) offenses were committed against two other females.

Wade pled guilty to all counts of the indictment and on November 10, 1997, was sentenced to a total of twenty (20) years in prison pursuant to a plea bargain agreement. On September 11, 2000, Wade filed a [pro se] motion to vacate, set aside or correct the judgment pursuant to RCr 11.42. . . .

. . . .

Without an evidentiary hearing, the trial court dismissed Wade's motion based upon its finding that the record clearly refuted every allegation stated therein.

⁴ Case No. 2000-CA-002761-MR, rendered July 5, 2002, not-to-be-published. This case was made final on September 10, 2002.

⁵ Kentucky Rules of Criminal Procedure.

Wade did not file a motion for discretionary review of this Court's affirmation of the trial court's denial of the RCr 11.42 motion with the Supreme Court of Kentucky.

On October 24, 2003, Wade filed his pro se motion to vacate judgment pursuant to CR 60.02(e) and (f)⁶ along with an accompanying memorandum of law. He alleged that his trial counsel was ineffective and that the indictment was void because it did not contain the statement "A TRUE BILL". The trial court denied Wade's motion without holding an evidentiary hearing noting that the motion was "not [filed] within a reasonable time."⁷ This appeal followed.

In Gross v. Commonwealth,⁸ our Supreme Court set forth a detailed, sequential procedure governing post-conviction

⁶ CR 60.02(e) and (f) provides:

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[.]

⁷ The trial court entered an order appointing counsel to represent Wade on appeal. However, the Department of Public Advocacy filed a motion with this Court requesting that it be allowed to withdraw as counsel because it had determined that Wade's case was "not a proceeding that a reasonable person with adequate means would be willing to bring at his own expense." This Court granted the Department's motion on September 7, 2004, and allowed Wade to proceed pro se on appeal.

⁸ 648 S.W.2d 853 (Ky. 1983).

proceedings. "The structure provided in Kentucky for attacking the final judgment of a trial court in a criminal case is not haphazard and overlapping, but is organized and complete."⁹ The Supreme Court then held in McQueen v. Commonwealth,¹⁰ that a criminal defendant must first bring a direct appeal when available, and only then should he utilize the provisions of RCr 11.42 by addressing every error of which he was, or should have been, aware.¹¹ The Court emphasized that CR 60.02¹² relief is "special, extraordinary relief" and "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."¹³

Wade claims that the trial court erred in denying his CR 60.02 motion to his prejudice for several reasons. First, he claims that the indictment was invalid because it failed to name the particular person he criminally assaulted, since it only

⁹ Gross, 648 S.W.2d at 856.

¹⁰ 948 S.W.2d 415 (Ky. 1997).

¹¹ Id. at 416.

¹² The Court in Gross, 648 S.W.2d at 856 stated:

Rule 60.02 is part of the Rules of Civil Procedure. It applies in criminal cases only because Rule 13.4 of the Rules of Criminal Procedure provides that "the Rules of Civil Procedure shall be applicable in criminal proceedings to the extent not superseded by or inconsistent with these Rules of Criminal Procedure.

¹³ McQueen, 948 S.W.2d at 416.

stated that he committed the charged offenses with "A" minor. Also in relation to this argument is Wade's claim that the indictment was wholly invalid because it did not contain the phrase "A TRUE BILL". However, Wade has failed to preserve the issue for appellate review because he did not object to the indictment by filing a pretrial motion pursuant to RCr 8.18.¹⁴ Furthermore, "any error in the omission of the phrase 'A TRUE BILL' is harmless and must be disregarded."¹⁵

Wade's second claim of error is that counsel failed to investigate certain aspects of his case, including whether or not he was in Kentucky when the crimes occurred. This claim was raised in Wade's RCr 11.42 motion and decided adversely to him in his appeal to this Court. Therefore, the law-of-the-case doctrine precludes any further review of this issue.¹⁶

Third, Wade claims that the trial court erred in failing to appoint counsel to represent him in bringing his CR 60.02 motion. The constitutional right to representation exists at the trial and direct appeal stages, but our Supreme Court has previously held there is no constitutional right to counsel in

¹⁴ See Thomas v. Commonwealth, 931 S.W.2d 446 (Ky. 1996).

¹⁵ Topass v. Commonwealth, 80 S.W.3d 795 (Ky.App. 2002).

¹⁶ See Thomas, 931 S.W.2d at 450 (quoting Martin v. Frasure, 352 S.W.2d 817, 818 (Ky. 1961) (stating that "'[a] final decision of [an appellate court], whether right or wrong, is the law of the case and is conclusive of the questions therein resolved'").

post-conviction proceedings.¹⁷ KRS 31.110 limits an indigent person's right to appointed counsel in post-conviction proceedings to "a proceeding that a reasonable person with adequate means would be willing to bring at his own expense. . . ." RCr 11.42(5) provides that if the movant is without counsel of record and is financially unable to employ counsel, the trial court shall appoint counsel to represent him in the proceedings, including appeal; however, there is no corresponding provision in CR 60.02, and our Supreme Court has declined to extend KRS 31.110 to apply to CR 60.02 motions.¹⁸ Consequently, the trial court did not abuse its discretion in denying Wade's request for counsel.

Regardless of the foregoing, perhaps the most compelling reason for denying Wade's CR 60.02 motion is the fact that Wade failed to exercise due diligence in pursuing his claims. CR 60.02 requires that the motion shall be made within a "reasonable time."¹⁹ More than six years have passed between the time Wade pled guilty and the time he filed his CR 60.02 motion; and under the circumstances of this case, this period of delay is not reasonable. In Wade's RCr 11.42 motion attacking the judgment, he could have raised, or in some respects did

¹⁷ Fraser v. Commonwealth, 59 S.W.3d 448 (Ky. 2001).

¹⁸ See Gross, 648 S.W.2d at 857.

¹⁹ Ray v. Commonwealth, 633 S.W.2d 71, 73 (Ky.App. 1982).

raise, the present issues. Absent evidence of extraordinary circumstances, we cannot conclude that six years qualifies as a reasonable time.

The decision on whether to grant relief under CR 60.02 "is one that is generally left to the sound discretion of the trial court[.]"²⁰ As such, we have examined whether the trial court abused its discretion in denying Wade's CR 60.02 motion. Given the circumstances, particularly the issues raised and the lengthy delay before this motion was filed, we conclude that it was not an abuse of discretion for the trial court to deny Wade's motion as he is not entitled to relief under the provisions of CR 60.02.

Accordingly, the order of the Breathitt Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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²⁰ Schott v. Citizens Fidelity Bank & Trust Co., 692 S.W.2d 810, 814 (Ky.App. 1985).