

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002705-MR

KELVIN ROBERSON

APPELLANT

V. APPEAL FROM TRIGG CIRCUIT COURT
HONORABLE BILL CUNNINGHAM, JUDGE
INDICTMENT NO. 84-CR-00036

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BARBER, McANULTY, AND MINTON, JUDGES.

MINTON, JUDGE: A motion under Ky. R. Civ. P. (CR) 60.02(f) provides a final avenue for collateral attack on a judgment of conviction on issues that could not reasonably have been presented in a direct appeal of the judgment or by a motion under Ky. R. Crim. P. (RCr) 11.42. In order to prevail under CR 60.02(f), the motion must be made within a reasonable time after entry of judgment; and it must demonstrate grounds "of an extraordinary nature." The Trigg Circuit Court denied Kelvin

Eugene Roberson's CR 60.02 attack on his eighteen-year-old conviction because he did not bring it within a reasonable time. We agree that not only is Roberson untimely but, also, that relief under CR 60.02(f) is precluded by his failure to raise the issues presented in this motion in his earlier direct appeal or by his earlier RCr 11.42 motion.

On November 17, 1983, an elderly Hopkinsville woman was found at home beaten into unconsciousness. She had been raped. Her home had been ransacked and spattered with her blood. Two gold chain necklaces, a flashlight, and a billfold were missing. Roberson was arrested in August 1984 and charged with crimes arising out of this incident. A grand jury indicted Roberson on first-degree burglary, first-degree assault, first-degree rape, and theft of property valued over \$100. Venue for the jury trial was transferred to Trigg Circuit Court. The jury convicted Roberson of burglary, rape, and theft. Consistent with the jury's recommendation, the judgment, entered February 15, 1985, imposed a sentence of twenty years for burglary, life for rape, and five years for theft, all to run consecutively for life and twenty-five years.¹ Roberson appealed to the Kentucky Supreme Court, which affirmed his conviction.

¹ The propriety of the 1985 judgment running a term of years consecutively with a life sentence was not addressed on direct appeal in the trial court's order denying RCr 11.42 relief, or in the CR 60.02 motion.

On December 7, 1988, Roberson filed a *pro se* motion to vacate under RCr 11.42; and the trial court appointed counsel to assist Roberson. Roberson contended in his motion that (1) he had been denied a fair trial because members of his own race had been purposefully excluded from the jury, (2) the trial court erred by allowing the same evidence of physical force as elements of both the burglary count and the rape count, (3) the trial court erred by running the sentences consecutively, and (4) he had been denied effective assistance of counsel in that his trial counsel failed to object to the Commonwealth's striking all of the African-Americans from the jury. The trial court denied the motion in an order entered February 22, 1990. Roberson later contended that he did not actually receive notice of the entry of the order until mid-1999. He has not attempted to appeal from the denial of his RCr 11.42.

Over four years after learning that his RCr 11.42 motion had been denied, Roberson filed the instant CR 60.02(f) motion. In his CR 60.02(f) motion, Roberson argues that trial counsel was ineffective because he (1) waived Roberson's presence at a deposition of two prosecution witnesses during a pretrial suppression hearing; (2) stipulated that there was no legitimate dispute over the chain of custody of a report from the FBI and a blood draw from Roberson; and (3) failed properly to cross-examine all witnesses, particularly the victim's son.

He also argued that one of the Commonwealth's witnesses lied when testifying that she had not received a "head hair standard of defendant" when, Roberson asserts, she had. He further argued that one of the Commonwealth's medical experts, Dr. George Thomas, testified that he was unsure concerning actual penetration during the alleged rape. Finally, Roberson asserts that appellate counsel on his direct appeal was ineffective. As to this last issue, the Kentucky Supreme Court has repeatedly held that ineffective assistance of appellate counsel is not a cognizable issue.²

The trial court denied Roberson's CR 60.02 motion finding that Roberson's explanation for the delay in bringing the motion eighteen years post-judgment was "insufficient." The court concluded that "[t]his motion has not been made 'within a reasonable time.'" This appeal followed.

Relief under CR 60.02 is available only when such "relief [] is not available by direct appeal and not available under RCr 11.42."³ The provision of CR 60.02 upon which Roberson relies states that

On motion a court may, upon such terms as are just, relieve a party or his legal representative from its final judgment,

² See, e.g., Harper v. Commonwealth, Ky., 978 S.W.2d 311, 318 (1998) [*citing* Vunetich v. Commonwealth, Ky., 847 S.W.2d 51 (1992)]; Commonwealth v. Davis, Ky., 14 S.W.3d 9, 14-15 (1999); Hicks v. Commonwealth, Ky., 825 S.W.2d 280 (1992).]

³ Gross v. Commonwealth, Ky., 648 S.W.2d 853, 856 (1983).

order, or proceeding, upon the following grounds: [] (f) any other reason of an extraordinary nature justifying relief. The motion shall be made within a reasonable time[].

In order to prevail under CR 60.02, "the movant must demonstrate why he is entitled to this special, extraordinary relief."⁴

It is within the trial court's discretion whether to grant relief under CR 60.02.⁵ And this Court uses an abuse of discretion standard to review the trial court's order. We will affirm the trial court unless there is a showing of some "flagrant miscarriage of justice."⁶

According to our Supreme Court, in order to attack a final judgment, one must first directly appeal the judgment, then use RCr 11.42 relief; and, finally, one may use CR 60.02.⁷ The reason that CR 60.02 relief 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."⁸

⁴ *Id.*

⁵ *Id.* at 857.

⁶ *Id.* at 858.

⁷ *Id.* at 856.

⁸ McQueen v. Commonwealth, Ky., 948 S.W.2d 415, 416 (1997); Gross at 856.

As the Kentucky Supreme Court 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.⁹

In sum, issues that could have reasonably been presented in a RCr 11.42 motion preclude a defendant from raising those issues in a CR 60.02 motion. All of the issues Roberson raises now are issues that were apparent at the time the judgment was entered against him, or when his appeal was taken, or when his 11.42 was filed. He is barred from now resorting to CR 60.02.

The circuit court concluded that Roberson failed to exercise due diligence in pursuing his claim. Under CR 60.02, since his 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

⁹ Gross at 857.

the trial court."¹⁰ 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 can rely on the record.¹¹ We agree with the trial court that eighteen years is too much time to be a "reasonable time" under the facts of this case.

For the reasons stated, we affirm the Trigg Circuit Court's order denying Roberson's CR 60.02(f) motion.

ALL CONCUR.

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¹⁰ *Id.* at 858.

¹¹ *Id.*