

RENDERED: May 6, 2005; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000090-MR

JESSE PAYNE

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE GEOFFREY P. MORRIS, JUDGE
ACTION NO. 78-CR-000114

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: GUIDUGLI AND MINTON, JUDGES; EMBERTON, SENIOR JUDGE.¹

GUIDUGLI, JUDGE: Jesse Payne appeals from an order of the Jefferson Circuit Court denying his motion for CR 60.02(e) relief. Payne argued before the circuit court that he was improperly convicted of multiple offenses arising out of one bad act. For the reasons stated below, we affirm.

¹ Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 100(5)(b) of the Kentucky Constitution and KRS 21.580.

On February 1, 1978, Payne was indicted by the Jefferson County grand jury on several counts of first-degree robbery. Payne also was charged with being a persistent felony offender.

The charges arose from a robbery that occurred on December 31, 1977, during which three employees of a Holiday Inn had their wallets and personal effects taken at gunpoint.

The matter proceeded to trial, whereupon Payne was convicted on four counts of first-degree robbery and one count of second-degree PFO. He was sentenced to 60 years in prison. Thereafter, he prosecuted a direct appeal to the Kentucky Supreme Court, which affirmed his conviction.

In 1998, Payne filed a motion for RCr 11.42 relief. The motion was denied by order of the Jefferson Circuit Court. A panel of this Court affirmed the order on November 6, 1998.

In 2002, Payne filed a motion with the Jefferson Circuit Court seeking relief from judgment pursuant to CR 60.02(e). As a basis for the motion, he argued that he was improperly convicted of multiple counts of robbery arising from a single bad act, that the indictment failed to state an offense, and that robbery is a crime against persons rather than business entities. On November 7, 2003, the circuit court rendered an opinion and order denying the motion. This appeal followed.

Payne now argues that that circuit court erred when it denied his motion for CR 60.02(e) relief. Specifically, he contends that certain rights enumerated by the constitutions of the United States and Kentucky were violated when he received multiple punishments for the same offense. He claims that he was improperly subjected to double jeopardy when he allegedly committed one bad act, but was subjected to multiple criminal charges, and he seeks an order reversing his conviction and remanding the matter to the circuit court.²

We find no basis for tampering with the order on appeal. Payne could have raised this issue on direct appeal to the Kentucky Supreme Court, or in the alternative by way of his RCr 11.42 motion. CR 60.02 is meant to provide relief which is not available by direct appeal or under RCr 11.42.³ It states in relevant part that,

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: (a) mistake, inadvertence, surprise or excusable neglect; (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

² The Commonwealth contends that this is a new issue which Payne did not raise before the circuit court. As there are other reasons for affirming the order on appeal, we will not address this argument.

³ Gross v. Commonwealth, 648 S.W.2d 853 (Ky. 1983); McQueen v. Commonwealth, 948 S.W.2d 415 (Ky. 1997).

evidence; (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.

CR 60.02 allows a judgment to be corrected or vacated based "upon facts or grounds, not appearing on the face of the record and not available by appeal or otherwise, which were not discovered until after rendition of judgment without fault of the parties seeking relief."⁴ In order to be eligible for CR 60.02 relief, the movant must demonstrate why he is entitled to extraordinary relief.⁵

In the matter at bar, Payne is barred by operation of CR 60.02 and the case law from prosecuting his claim by way of CR 60.02 when it could have been brought on direct appeal. The fact that he could have raised this argument before the Kentucky Supreme Court is by itself a basis for affirming the order denying his motion for CR 60.02 relief.

Arguendo, even if this were not the case, Payne's claim of error is time-barred. A motion for relief under CR

⁴ Barnett v. Commonwealth, 979 S.W.2d 98 (Ky. 1998), citing Davis v. Home Indemnity Company, 659 S.W.2d 185 (Ky. 1983).

⁵ Barnett, supra, citing Gross at 856.

60.02(e) must be brought within a "reasonable time".⁶ Payne was convicted in 1978 and he brought the motion for CR 60.02(e) relief in 2002. CR 60.02 exists to correct errors only upon a showing of facts or grounds not appearing on the face of the record and that were discovered only after the judgment without fault of the party seeking relief.⁷ The basis for the CR 60.02 motion, whether meritorious or not, existed in 1978 and should have been raised if at all on direct appeal. This is not simply a matter of judicial economy; rather, it is a requirement of the civil rules and supported by case law. Accordingly, we find no error in the denial of Payne's motion for relief from judgment.

For the foregoing reasons, we affirm the order of the Jefferson Circuit Court denying the motion for CR 60.02(e) relief.

ALL CONCUR.

BRIEF FOR APPELLANT:

Jesse I. Payne, pro se
Frankfort, KY

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General

Clint E. Watson
Assistant Attorney General
Frankfort, KY

⁶ CR 60.02 states, "[T]he motion shall be made within a reasonable time, and on grounds (a), (b), and (c) not more than one year after the judgment, order, or proceeding was entered or taken."

⁷ Harris v. Commonwealth, 296 S.W.2d 700 (Ky. 1956).