

RENDERED: November 12, 2004; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000261-MR

JOE RAY TURNER

APPELLANT

v. APPEAL FROM ALLEN CIRCUIT COURT
HONORABLE WILLIAM R. HARRIS, JUDGE
ACTION NO. 97-CR-00087

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * **

BEFORE: COMBS, CHIEF JUDGE; GUIDUGLI AND KNOPF, JUDGES.

KNOPF, JUDGE: Joe Ray Turner appeals an order of the Allen Circuit Court, denying his motions for post-conviction relief made pursuant to CR 60.02. We affirm.

Joe Ray Turner was convicted of murder in the Allen Circuit Court for beating his father to death. He was sentenced to imprisonment for ninety-nine years. His alleged motive for the murder was anger that his father had given drugs belonging to Turner to Cathy Scruggs, his father's girlfriend. One of the

most damaging pieces of evidence offered at trial against Turner was his father's dying declaration that "my son, Joe" was the person who had severely beaten him. Turner claimed, however, that Scruggs had committed the murder because she was involved in drug trafficking with his father.

Turner's conviction was affirmed by the Kentucky Supreme Court in 1999 in a published opinion.¹

Turner thereafter filed numerous motions, including successive motions under RCr 11.42 and CR 60.02, which were denied by the Allen Circuit Court in orders dated March 29, 2002, and April 1, 2003. He filed two separate appeals of these orders. The appeals were consolidated and we affirmed the orders of the circuit court in an unpublished opinion rendered on May 21, 2004.²

Turner meanwhile filed further motions in the circuit court. In November 2003, he filed a motion under CR 60.02 alleging juror misconduct. He requested appointment of counsel and an evidentiary hearing. He also made a motion for the trial judge to recuse himself. One month later, he filed another motion under CR 60.02, claiming that the evidence presented at his trial had been insufficient to sustain his conviction for

¹ Turner v. Commonwealth, Ky., 5 S.W.3d 119 (1999).

² Turner v. Commonwealth, 2002-CA-000777 and 2003-CA-000846.

wanton murder. The Allen Circuit Court denied these motions in an order entered on January 23, 2004. This appeal followed.

We begin by delineating the limited relief available to Turner under CR 60.02, particularly at this stage of the 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. That structure is set out in the rules related to direct appeals, in RCr 11.42, and *thereafter* in CR 60.02. **CR 60.02 . . . is for relief that is not available by direct appeal and not available under RCr 11.42.**

. . .

[Furthermore] **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 the remedy is available to him. (Emphasis added.)³

The first three grounds for relief under CR 60.02, (a) mistake, inadvertence, surprise or excusable neglect; (b) newly discovered evidence; and (c) perjury, must be raised within one year after judgment.

The remaining grounds for relief must be raised within a "reasonable time." They include (d) fraud; (e) a judgment that is void, or has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or

³ Gross v. Commonwealth, Ky., 648 S.W.2d 853, 856-57 (1983).

otherwise vacated, or it is no longer equitable that the judgment should have prospective application; and (f) "any other reason of an extraordinary nature justifying relief." Although Turner made his motions pursuant to CR 60.02(e) and (f), his claims are potentially cognizable only under CR 60.02(f) because he has raised no issues that meet the requirements of CR 60.02(e). "[B]ecause of the desirability of according finality to judgments, this clause (CR 60.02(f)) must be invoked with extreme caution, and only under most unusual circumstances."⁴

The first issue on appeal is whether the circuit court erred in denying Turner's motion for recusal. Turner alleges that the judge who presided over his trial and subsequent post-conviction motions failed to include in the record a statement by Cathy Scruggs. Scruggs allegedly told Deputy Scott Wade that, if called to testify, she would deny the murder victim's involvement with drugs. Turner claims that the omission of this statement from the record resulted in the Supreme Court of Kentucky reviewing his case without the crucial evidence that his father had been trafficking in drugs at Scruggs' residence before his death.

Turner also alleges that the trial judge had an unethical and possibly illegal agreement with Turner's trial

⁴ Wine v. Commonwealth, Ky.App., 699 S.W.2d 752, 754 (1985).

counsel regarding his attorney's fees that warrants the judge's recusal.

Thirdly, he alleges that the circuit judge should be disqualified because he has a vested financial interest in sustaining Turner's conviction. This claim stems from a civil action Turner filed against the judge in December 2000, charging him and others with conspiracy. The case was dismissed, but Turner insists that if his murder conviction is overturned, the civil case will be reinstated.

Turner acknowledges in his appellate brief that the issue of Scruggs' alleged statement was raised in his RCr 11.42 motion in 1999. An evidentiary hearing was held and the motion was denied by the circuit court. A motion for additional findings of fact and conclusions of law was filed, another hearing was held and relief was again denied. This Court affirmed the denial of these motions on March 22, 2002. A motion for discretionary review was denied by the Kentucky Supreme Court a year later. This issue has therefore been fully litigated under the provisions of RCr 11.42 and may not be raised again under CR 60.02.

Similarly, Turner's allegations that the trial judge had an unethical agreement with his defense counsel, and that he is biased and impartial for financial reasons connected with the dismissed civil suit, could have been raised in any of Turner's

numerous prior motions. Turner offers no explanation as to why he did not raise this issue before. The claim is therefore not cognizable under CR 60.02.

Turner's next argument concerns alleged juror misconduct. Turner's uncle, Luther Turner, claimed that during the course of the trial, he overheard several jurors talking about the case in the court restroom. One of them allegedly commented that the "son of a bitch ought to be hanged." An affidavit in the record from Luther states that he overheard this conversation on May 21, 1998, the second day of the trial. Luther's affidavit is dated October 27, 2003. Turner has not explained why he or Luther waited more than five years after the trial to mention this alleged comment, nor has he explained why he failed to raise the issue in his RCr 11.42 motions. As the circuit court pertinently stated,

[t]he affidavit is silent as to whether or when Luther Turner related this information to the defendant or to his trial or appellate counsel. It is patently incredible to think that Luther Turner would not have made the defendant aware of such an event, or that he would not have made this event known to the defendant's trial or appellate counsel. At any rate, CR 60.02 relief must be sought within a reasonable time. Given the absence of any sworn statement verifying when the alleged juror misconduct was made known to the defendant, the Court concludes that the defendant has failed to raise this alleged ground for relief within a reasonable time.

We agree with the circuit court that this claim was not raised within a reasonable time. Turner's request for an evidentiary hearing on this issue is therefore also moot.

Turner also argues that there was insufficient evidence at trial to sustain his conviction for wanton murder. Turner points out that he called for police and medical aid and held his father in his arms to comfort him after the beating that led to his death. He argues that no reasonable mind could find extreme indifference to human life in his actions. Questions regarding the sufficiency of the evidence could have been raised on appeal and are therefore precluded from our consideration under CR 60.02. We note parenthetically that Turner's apparently solicitous actions after the beating do not negate the fact that he could have acted with murderous intent in administering the beating.

Finally, he argues that there was a "fatal variance" in his indictment at trial which constituted a palpable error warranting a new trial. This is an issue that could have been raised on direct appeal and is therefore also precluded from our consideration.

Throughout his brief, Turner makes allegations of ineffective assistance of trial and appellate counsel. Claims of ineffective assistance of trial counsel should have been and were raised in his RCr 11.42 motion. The denial of that motion

was affirmed on appeal. "[T]he appellate court has considered and decided the merits of the appeal. We will not examine anew an appeal reviewed, considered and decided by this Court."⁵

Turner assumes that when a court states that an issue is precluded from consideration because it should have been raised on direct appeal, it is affirming that he suffered from ineffective assistance of appellate counsel. An ineffective assistance of appellate counsel claim is only cognizable in extremely limited circumstances, and never by way of a motion to vacate.⁶ Furthermore, when a court states that it is precluded from considering a claim because it should have been raised on direct appeal or under RCr 11.42, it is by no means asserting or implying that the claim has any merit whatsoever, or that appellate counsel was ineffective for failing to raise it.

The Commonwealth has charged that Turner is engaging in groundless litigation and calls upon this Court to admonish him. Although pro se litigants are not held to the same procedural standards as litigants represented by counsel,⁷ "a court does not look with favor upon litigation unprofitable to the suitors and wasteful of the court's time."⁸

⁵ See Hicks v. Commonwealth, 825 S.W.2d 280,281 (1992).

⁶ See Id.

⁷ See Beecham v. Commonwealth, Ky., 657 S.W.2d 234, 236 (1983).

⁸ Citizens Tel. Co. v. Anderson, Ky., 269 S.W.2d 283, 284 (1954).

For the foregoing reasons, the order of the Allen
Circuit Court is affirmed.

ALL CONCUR.

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