

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2004-CA-000962-MR

MARK A. SHANNON, SR.

APPELLANT

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

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: BARBER, DYCHE, AND MINTON, JUDGES.

MINTON, JUDGE: Mark Shannon appeals from an order of the Simpson Circuit Court denying his successive Kentucky Rules of Civil Procedure (CR) 60.02 motion for post-conviction relief. Finding no error, we affirm.

In July 1999, Shannon was convicted of trafficking in a controlled substance and of being a persistent felony offender in the first degree (PFO 1) and was sentenced to a maximum of twenty years' imprisonment. This was Shannon's eighth felony conviction. In his direct appeal of that conviction to the

Kentucky Supreme Court, he did not contest his PFO 1 status. The Kentucky Supreme Court affirmed Shannon's convictions on appeal in an unpublished opinion.<sup>1</sup>

Two years post conviction, Shannon filed a motion to correct or vacate his sentence and conviction citing Kentucky Rule of Criminal Procedure (RCr) 11.42. Although that motion contained an extensive list of perceived errors, it does not contain an argument concerning the propriety of the PFO 1 conviction. The trial court denied Shannon's RCr 11.42 motion without a hearing. While Shannon's appeal of that order was pending, Shannon filed a motion to vacate his sentence under CR 60.02. Again, Shannon, apparently, failed to contest his PFO 1 conviction. The trial court denied that motion, and Shannon appealed to this court. Shortly after that, a panel of this Court affirmed the trial court's denial of the RCr 11.42 motion in an unpublished opinion rendered in April 2003.<sup>2</sup>

In October 2003, while his appeal from the first CR 60.02 motion was still pending, Shannon filed a second CR 60.02 motion with the trial court. In that motion, he alleges for the first time that he should not have been found to be a PFO 1 because he had not been incarcerated twice before his 1999 trafficking in a controlled substance conviction, as

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<sup>1</sup> Case No. 1999-SC-0898-MR.

<sup>2</sup> Case No. 2002-CA-000423-MR.

required for PFO 1 status in Kentucky Revised Statute (KRS) 532.080.<sup>3</sup> The trial court denied the second CR 60.02 motion resulting in this appeal. Since this appeal was filed, another panel of this Court affirmed the trial court's denial of Shannon's first CR 60.02 motion.<sup>4</sup>

On appeal, Shannon repeats his argument that his 1999 PFO 1 conviction was improper. We need not discuss the merits of Shannon's contention, or lack thereof, however, because we agree with the trial court's conclusion that Shannon's second CR 60.02 motion is untimely filed.

CR 60.02 "is not intended merely as an additional opportunity to relitigate the same issues that could 'reasonably have been presented' by direct appeal or RCr 11.42 proceedings."<sup>5</sup> Thus, CR 60.02 "is available only to raise issues which cannot be raised in other proceedings."<sup>6</sup> We are unaware of any external

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<sup>3</sup> In its current form, KRS 532.080(4) provides that:

For the purpose of determining whether a person has two (2) or more previous felony convictions, two (2) or more convictions of crime for which that person served concurrent or uninterrupted consecutive terms of imprisonment shall be deemed to be only one (1) conviction, unless one (1) of the convictions was for an offense committed while that person was imprisoned.

<sup>4</sup> Case No. 2003-CA-000838-MR, rendered June 18, 2004.

<sup>5</sup> McQueen v. Commonwealth, 948 S.W.2d 415, 416 (Ky. 1997) (quoting RCr. 11.42(3)).

<sup>6</sup> *Id.*

forces or circumstances that prevented Shannon from raising all issues pertaining to his PFO 1 conviction on either direct appeal or in his previous post-conviction motions. Furthermore, the CR 60.02 motion at hand was filed over four years after Shannon's conviction and approximately three years after that conviction was affirmed on direct appeal. We agree with the trial court that such a delay means that this CR 60.02 motion was not filed within a reasonable time, as required by the express terms of CR 60.02.

"The standard of review of an appeal involving a CR 60.02 motion is whether the trial court abused its discretion."<sup>7</sup> And we find that the trial court did not abuse its discretion in denying Shannon's second CR 60.02 motion without a hearing. Accordingly, the trial court's decision is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Mark A. Shannon, Sr., *Pro se*  
Fredonia, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo  
Attorney General of Kentucky

Dennis W. Shepherd  
Assistant Attorney General  
Frankfort, Kentucky

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<sup>7</sup> See, e.g., White v. Commonwealth, 32 S.W.3d 83, 86 (Ky.App. 2000).