

RENDERED: SEPTEMBER 29, 2006; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth Of Kentucky**  
**Court of Appeals**

NO. 2005-CA-001366-MR

KEVIN JOHNSON

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE JAMES D. ISHMAEL, JR., JUDGE  
ACTION NOS. 85-CR-00165 & 85-CR-00166

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: ABRAMSON AND VANMETER, JUDGES; KNOPF,<sup>1</sup> SENIOR JUDGE.  
KNOPF, SENIOR JUDGE: The single question in this appeal is whether the trial court erred in dismissing appellant's second CR 60.02 motion stemming from his 1986 conviction for wanton murder and second-degree burglary. In denying appellant's motion, the trial judge concluded that the matters asserted in the motion could, and should, have been raised in appellant's direct appeal to the Supreme Court. We agree and affirm.

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<sup>1</sup> Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110 (5) (b) of the Kentucky Constitution and KRS 21.580.

The convictions in question resulted from the beating death of a 62 year-old man, Shih-Yuen Pi, for which appellant was sentenced to a total sentence of thirty years' imprisonment. In his latest CR 60.02 motion, appellant argued: 1) that the murder indictment was erroneously amended by variance; 2) that the robbery indictment failed to state an offense; and 3) that the Juvenile Code was violated when he was committed to a penal institution inappropriate for juvenile offenders. A review of the record in this case makes clear that the avenue of extraordinary relief afforded under CR 60.02 has been procedurally foreclosed by appellant's previous post-conviction proceedings.

The brief history of those proceedings commences with the 1987 affirmance of his direct appeal by the Supreme Court of Kentucky. Appellant next filed a motion pursuant to RCr 11.42 which was denied by order of the circuit court entered March 22, 1994. It does not appear that appellant appealed that decision. On December 1, 1999, appellant filed his initial CR 60.02 motion. The denial of that motion produced an appeal to this Court which was dismissed by order entered June 20, 2001 for failure to file a brief. Appellant's current CR 60.02 motion was filed in May, 2005.

Although appellant attempts in his reply brief to offer facts excusing the dismissal of his previous CR 60.02

appeal for lack of notice, it is clear from a review of that proceeding that appellant had ample notice prior to dismissal. After the Department of Public Advocacy was permitted to withdraw from the case, appellant was given an additional 60 days in which to file a pro se brief. Because that brief was not filed in the time provided, a show cause order issued to which appellant failed to respond. Thus, it is clear that appellant did receive notice prior to the dismissal of that appeal.

The oft-cited principles set out in Gross v. Commonwealth<sup>2</sup> are dispositive of this appeal:

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 not intended merely as an additional opportunity to raise *Boykin* defenses. **It is for relief that is not available by direct appeal and not available under RCr 11.42. The movant must demonstrate why he is entitled to this special, extraordinary relief.** Before the movant is entitled to an evidentiary hearing, he must affirmatively allege facts which, if true, justify vacating the judgment and further allege special circumstances that justify CR 60.02 relief.

Because no such showing of special circumstances appears in the matters presented for our review, we are in accord with the

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<sup>2</sup> 648 S.W.2d 853, 856 (Ky. 1983), emphasis added.

trial judge's conclusion that the extraordinary remedy of CR 60.02 cannot be invoked under the procedural posture of this case.

Accordingly, the judgment denying appellant's motion for relief is affirmed.

ALL CONCUR.

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