

# Commonwealth of Kentucky

## Court of Appeals

NO. 2005-CA-002003-MR

CHARLES MULLINS

APPELLANT

v. APPEAL FROM ROCKCASTLE CIRCUIT COURT  
HONORABLE JEFFREY T. BURDETTE, JUDGE  
ACTION NO. 96-CR-00057

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: ACREE, DIXON, AND KELLER, JUDGES.

KELLER, JUDGE: In this criminal post-conviction action, Charles Mullins has appealed from the Rockcastle Circuit Court's order denying his motion for relief pursuant to Civil Rule 60.02 and Criminal Rule 10.26. Perceiving no error, we affirm.

In the early morning hours of July 4, 1996, Mullins was driving a van northbound on Route 461 near Somerset. He crossed the center line and collided head-on with an automobile in the southbound lane driven by Carl Romie Schumaker. The Schumaker vehicle held four people: Romie; his wife, Cindy; their son, Gustin; and their

niece, Amanda Sheldon. Both Romie and Cindy died instantly, while Gustin initially survived, but passed away a short time later. Amanda, who had been sleeping in the back seat along with Gustin, survived. Edward Shannon had been following the Schumaker vehicle on their trip from Ohio to Lake Cumberland, where they were all going to spend the 4<sup>th</sup> of July holiday at Cindy's parent's lake cabin. Shannon witnessed the collision and pulled Amanda from the crushed vehicle. Mullins himself sustained serious injuries in the crash, including a broken leg, and now uses a wheelchair. Police officers obtained a sample of Mullins' blood, which revealed a blood alcohol level of 0.24.

As a result of the collision, the Rockcastle County grand jury indicted Mullins on three counts of murder pursuant to KRS 507.020, and on one count of first-degree assault pursuant to KRS 508.010, charging that he wantonly caused the deaths of Romie, Cindy, and Gustin, and wantonly caused serious physical injury to Amanda by using a motor vehicle under circumstances showing an extreme indifference for human life. The matter proceeded to trial, where the jury found Mullins guilty of three counts of second-degree manslaughter and of fourth-degree assault. Following the penalty phase, the jury recommended an eight-year sentence on each manslaughter count, to be run consecutively for a total of twenty-four years. The parties agreed to allow the judge to fix the penalty on the assault conviction. The circuit court ultimately sentenced Mullins to twenty years on the three counts of manslaughter and to twelve months on the assault count, with the sentences to run concurrently for a total of twenty years. Mullins perfected a direct appeal to the Supreme Court, arguing several unpreserved errors

involving prosecutorial misconduct. *Mullins v. Commonwealth*, No. 97-SC-473-MR.

The Supreme Court affirmed, holding that Mullins failed to establish that any manifest injustice existed. That decision became final on November 5, 1998.

Almost four years later, Mullins filed a *pro se* motion for relief pursuant to CR 60.02 and RCr 10.26, seeking a reduction of his twenty-year sentence. In support of this motion, Mullins argued that his attorney was ineffective for failing to properly investigate his case and for failing to object when the prosecutor spoke to the jury outside of his presence during its deliberation. Mullins also raised an issue concerning jury selection, arguing that one of the jurors should have been stricken for cause due to her negative view of alcohol use. Had his attorney properly tried the case, Mullins asserted, he would have been convicted of a lesser crime or been sentenced to fewer years in prison. Almost three years later, the circuit court had yet to rule on the pending motion. Therefore, Mullins filed a motion for reconsideration of his previously filed CR 60.02 motion, along with a motion to proceed in *forma pauperis* and for appointment of counsel. The circuit court quickly entered a ruling, granting him leave to proceed as a pauper, but denying the motions for appointment of counsel and for post-conviction relief. The circuit court held that Mullins did not seek CR 60.02 relief within a reasonable time, as it was filed four years after the Supreme Court affirmed his direct appeal, and that the issues he raised in the motion concerned trial matters that should have been raised in his direct appeal. Furthermore, the circuit court could not identify any manifest injustice that would justify the granting of relief under RCr 10.26.

This appeal followed.<sup>1</sup>

On appeal, Mullins continues to argue that he is entitled to relief pursuant to CR 60.02 and RCr 10.26. He argues that his attorney was ineffective and that the circuit court should have excused a particular juror for cause due to her beliefs. Additionally, Mullins argues that the court failed to properly record information about excused jurors. In its brief, the Commonwealth simply argues that Mullins is not entitled to any relief for the reasons set forth in the circuit court's order.

#### I. CR 60.02

We shall first address Mullins' argument that he is entitled to CR 60.02 relief. The rule itself provides that a court may grant a party relief from a final judgment, order or proceeding on several grounds, including mistake, inadvertence, surprise, or excusable neglect; newly discovered evidence; perjury or falsified evidence; fraud; where the judgment is void or has been satisfied; or for “any other reason of an extraordinary nature justifying relief.” CR 60.02(f). The rule provides that motions filed pursuant to CR 60.02(f) “shall be made within a reasonable time[.]” The Supreme Court of Kentucky addressed this rule as it specifically relates to criminal matters in *Gross v. Commonwealth*, 648 S.W.2d 853, 856-57 (Ky. 1983):

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,

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<sup>1</sup> The Department of Public Advocacy was appointed to represent Mullins in this appeal, but moved to withdraw pursuant to KRS 31.110(2)(c). This Court granted the motion and allowed Mullins to proceed *pro se*.

in RCr 11.42, and *thereafter* in CR 60.02. CR 60.02 is not intended merely as an additional opportunity to raise *Boykin* [*v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969),] 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.

CR 60.02 was enacted as a substitute for the common law writ of coram nobis. The purpose of such a writ was to bring before the court that pronounced judgment errors in matter of fact which (1) had not been put into issue or passed on, (2) were unknown and could not have been known to the party by the exercise of reasonable diligence and in time to have been otherwise presented to the court, or (3) which the party was prevented from so presenting by duress, fear, or other sufficient cause. *Black's Law Dictionary, Fifth Edition*, 487, 1444.

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We hold that the proper procedure for a defendant aggrieved by a judgment in a criminal case is to directly appeal that judgment, stating every ground of error which it is reasonable to expect that he or his counsel is aware of when the appeal is taken.

Next, we hold that 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.

*See also McQueen v. Commonwealth*, 948 S.W.2d 415, 416 (Ky. 1997). We review a lower court's ruling on a CR 60.02 motion for abuse of discretion. *Gross*, 648 S.W.2d at 857.

In the present case, Mullins pursued, unsuccessfully, a direct appeal of his conviction to the Supreme Court. The basis of his direct appeal was prosecutorial misconduct, raised under the palpable error rule. However, he did not seek relief pursuant to RCr 11.42 before seeking CR 60.02 relief. In his motion filed in the circuit court, Mullins indicated that he chose to seek relief pursuant to RCr 10.26 and CR 60.02 rather than RCr 11.42, as he felt “the Court is already clogged with cases and [he] decided to just file under the RCr 10.26, which lets the Judge himself change the outcome of the trial and change the sentencing, plus keeping the felony against the Petitioner. Same as the RCr [sic] 60.02, at (f). .” Because he failed to seek RCr 11.42 relief, Mullins is foreclosed from raising any issues in the present post-conviction action that could and should have been raised in an RCr 11.42 proceeding. Even had Mullins chosen to seek RCr 11.42 relief in this post-conviction action, such a motion would have been untimely: RCr 11.42(10) requires that “[a]ny motion under this rule shall be filed within three years after the judgment becomes final,” with two exceptions that do not apply in this case. The Supreme Court's opinion affirming his conviction became final on November 5, 1998, meaning that Mullins had three years from that date to seek RCr 11.42 relief. Mullins did not file his CR 60.02 motion until November 4, 2002, which was one year too late to seek RCr 11.42 relief.

Turning our attention to Mullins' CR 60.02 motion, we agree with the circuit court that it was both untimely and without merit. “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 the trial court.” *Gross*, 648 S.W.2d at 858. All of the issues Mullins raised were known to him at the time of the trial, and he has not indicated any reason for the four-year delay in seeking relief. Furthermore, the issues he raised both in his motion and his appellate brief should either have been raised on direct appeal or in an RCr 11.42 proceeding. The jury selection issues, as well as the additional allegation of prosecutorial misconduct, should have been raised in his direct appeal under RCr 10.26, as the rest of the issues in that appeal were.<sup>2</sup> As to the issues of ineffective assistance of his counsel, Mullins should have raised such issues in an RCr 11.42 proceeding prior to seeking CR 60.02 relief. Finally, the Court finds that, even had the issues been properly raised in this proceeding, none of the grounds mentioned were of an extraordinary nature justifying the relief Mullins sought.

The circuit court did not abuse its discretion in denying any relief pursuant to CR 60.02.

## II. RCr 10.26.

Next, we shall address Mullins' arguments raised pursuant to RCr 10.26.

Also known as the palpable error rule, RCr 10.26 provides that “[a] palpable error which affects the substantial rights of a party may be considered by the court on motion for a

<sup>2</sup> Mullins raises a “Golden Rule” argument in his brief, but failed to support this argument by any citation to the record. However, this argument is without merit, as our review of the Commonwealth's closing arguments fails to reveal any type of “Golden Rule” violation.

new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.” In order to determine that a manifest injustice has occurred, “upon consideration of the whole case, the reviewing court must conclude that a substantial possibility exists that the result would have been different in order to grant relief.” *Partin v. Commonwealth*, 918 S.W.2d 219, 224 (Ky. 1996). We agree with the circuit court that none of the issues Mullins raised reach the level of manifest injustice. Additionally, we rely upon the Supreme Court's statement in Mullins' direct appeal that “it is apparent from the record as a whole that there was overwhelming evidence to convict Appellant[.]” *Mullins v. Commonwealth*, 97-SC-473-MR, slip op. p. 6. We perceive no abuse of discretion in the circuit court's decision to deny relief pursuant to RCr 10.26.

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

ALL CONCUR.

BRIEF FOR APPELLANT:

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