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NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

# Court of Appeals

NO. 2005-CA-002270-MR

JEFFERY L. CRICK APPELLANT

v.

APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE EDWIN M. WHITE, JUDGE
ACTION NO. 88-CR-00168

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; HENRY, JUDGE; PAISLEY,[1] SENIOR JUDGE.

COMBS, CHIEF JUDGE: Jeffery L. Crick appeals from an order of the Christian Circuit Court that denied his petition filed pursuant to Kentucky Rule of Civil Procedure (CR) 60.03 for writ *venire facias de novo* and his subsequent motions for judgment by default. We affirm.

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[1] Senior Judge Lewis G. Paisley sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

On March 3, 1989, a jury convicted Crick of murder and of being a persistent felony offender in the second degree. He received sentences of seventy years on each of the charges. He was ordered to serve seventy years on the PFO charge in lieu of the seventy-year murder sentence. On direct appeal, the Kentucky Supreme Court affirmed the convictions and sentence (89-SC-211-MR).

Crick later filed numerous post-conviction motions and petitions, which included a motion pursuant to RCr 11.42 and two successive motions made pursuant to CR 60.02. These motions were denied by the trial court, and their denial was subsequently affirmed by this court. See 1992-CA-000302-MR, 1999-CA-002015-MR, 2002-CA-001518-MR. Crick also filed petitions for writs of *habeas corpus* in Muhlenberg Circuit Court (the circuit court's denial of the petition was affirmed by this court on March 12, 2001) and in the United States District Court, Western District of Kentucky (the district court's denial of the petition was affirmed in an unpublished opinion, Crick v. Ashley, 113 F.3d 1234 (6th Cir. 1997)).

The motion which is the subject of the present appeal was filed on December 21, 2004. It was entitled Petition for Writ *Venire Facias de Novo*. Crick argued: (1) that he was denied the right to present mitigating evidence at sentencing

and (2) that the indictment charging him as a persistent felony offender was an illegal "bill of attainder."

Without addressing the merits of Crick's arguments, the circuit court denied the petition upon the grounds that the subject matter had previously been ruled on and affirmed by our appellate courts, that the petition was not timely filed, and that the errors raised should have been raised on direct appeal.

Crick has attempted to revive the petition for writ *venire facias de novo* as a means of circumventing the stringent procedural requirements of Kentucky Rule of Criminal Procedure (RCr) 11.42 and CR 60.02. Such a writ is essentially a motion for a new trial which also carries with it significant time limitations. It is loosely translated from the Latin as follows: "may you [*i.e.*, the jury] be made to come back again." Black's Law Dictionary defines a writ *venire facias de novo* as:

> [a] writ for summoning a jury panel anew because of some impropriety or irregularity in the original jury's return or verdict so that no judgment can be given on it. The result of a new venire is a new trial. **In substance, this is a motion for new trial**, but when the party objects to the verdict because of an error in the course of the proceeding (and not on the merits), the form of motion was traditionally for a venire facias de novo.

*Black's Law Dictionary* 1553 (7th ed. 1999)(emphasis added).

Under our rules of criminal procedure, a motion for a new trial must be "served not later than five (5) days after

return of the verdict." RCr 10.06(1). If the motion is based upon the ground of newly discovered evidence, it must be made "within one (1) year after the entry of the judgment or at a later time if the court for good cause so permits." Id. Crick's petition is, therefore, time-barred as there is no suggestion that it is based upon the ground of newly discovered evidence. Even if he could overcome the rule as to newly discovered evidence, Crick has provided no good cause to warrant the fourteen-year delay.

Crick has also argued that this is an independent action brought under CR 60.03 and that it is, therefore, subject to the time limitations of CR 60.02. CR 60.03 provides that

> [r]elief shall not be granted in an independent action if the ground of relief sought has been denied in a proceeding by motion under Rule 60.02, or would be barred because not brought in time under the provisions of that rule.

CR 60.03.

Crick contends that his petition does not fall within the one-year time limitation of CR 60.02 because it was made pursuant to CR 60.02(e) or (f); therefore, it had to have been made "within a reasonable time[.]" CR 60.02. "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 v. Commonwealth, 648 S.W.2d 853, 858

(1983). In this case, the petition was filed fourteen years after Crick's conviction without any explanation as to why the issues could not have been raised in any of his earlier pleadings. Indeed, the record indicates that Crick raised substantially the same issue regarding his sentencing in his motion for re-trial on guilt or innocence filed on June 19, 1991. Our rules of civil procedure do not permit successive motions or the re-litigation of issues which could have been raised in prior proceedings.

> Civil Rule 60.02 is not intended merely as an additional opportunity to relitigate the same issues which could "reasonably have been presented" by direct appeal or RCr 11.42 proceedings. The obvious purpose of this principle is to prevent the relitigation of issues which either were or could have been litigated in a similar proceeding.

McQueen v. Commonwealth, 948 S.W.2d 415, 416, (Ky. 1997) citing Gross v. Commonwealth, 648 S.W.2d 853, 855, 856 (Ky. 1983); RCr 11.42(3).

Crick had ample opportunity to raise his current arguments in his prior motions. Therefore, the trial court did not abuse its discretion in ruling that his petition was untimely filed.

Finally, we address Crick's argument that his petition was not time-barred because an alleged error in sentencing

rendered the entire judgment void. Even if the sentence were improper, which the Supreme Court has ruled was not the case,

> [i]t is simply incorrect to say that a court is without jurisdiction to impose an unauthorized sentence. Rather, the imposition of an unauthorized sentence is an error correctable by appeal, by writ, or by motion pursuant to RCr 11.42 or CR 60.02.

Myers v. Commonwealth, 42 S.W.3d 594, 596 (Ky. 2001). Crick has already exhausted these remedies to no avail.

We affirm the order of the Christian Circuit Court.

ALL CONCUR.

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