

RENDERED: OCTOBER 27, 2006; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2005-CA-002601-MR

RANDALL LAMONT GRIFFITH

APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE LISABETH HUGHES ABRAMSON, JUDGE
ACTION NO. 98-CR-001837 AND 98-CR-003201

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: DIXON AND TAYLOR, JUDGES; KNOPF,¹ SENIOR JUDGE.

KNOPF, SENIOR JUDGE: On October 12, 1999, appellant, Randall Lamont Griffith, was convicted of first degree trafficking in a controlled substance (cocaine) and tampering with physical evidence following a jury trial in Jefferson Circuit Court. He thereafter pled guilty to being a persistent felony offender (PFO) in the first degree and was sentenced to fifteen years' imprisonment. This Court affirmed his conviction in its

¹ 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.

entirety on November 5, 2001. 2000-CA-001607-MR. On September 2, 2004, Griffith filed a motion to amend and set aside the judgment pursuant CR 60.02 claiming that the PFO indictment was defective and that he received ineffective assistance of counsel. In a thorough opinion and order, the trial court denied the motion finding that Griffith's arguments were both time barred and not cognizable under CR 60.02. We agree.

Griffith, *pro se*, argues that his delay in seeking relief under CR 60.02 should be tolled because he was prescribed various "psychotropic" medications after incarceration that prevented him from timely filing any post-conviction motions.

Motions made pursuant to CR 60.02 must be made within a reasonable time and motions made under subsections (a), (b), and (c) must be made within one year after the judgment was entered. The determination of what constitutes "reasonable time" is committed to the discretion of the trial court. Gross v. Commonwealth, 648 S.W.2d 853, 858 (Ky. 1983). In Commonwealth v. Stacey, 177 S.W.3d 813 (Ky. 2005), our Supreme Court discussed the effect of mental incompetence on the statute of limitations in the context of RCr 11.42. A claim of mental incompetence does not constitute a *per se* reason to toll a statute of limitations. Id. at 817. We find that the same reasoning applies here.

Griffith concedes that the facts upon which he based his CR 60.02 motion were known to him at the time final judgment was entered in his two cases. The trial court found that a five year delay was simply not a reasonable time. Moreover, there is no evidence in the record regarding the effect or type of medication on Griffith beyond his conclusionary assertion. Regardless of the timing issue, a defective indictment and ineffective assistance of counsel are both claims that could have been brought either on direct appeal or in a motion pursuant to RCr 11.42. CR 60.02 does not permit the re-litigation of issues that could have "reasonably been presented" by direct appeal or RCr 11.42. McQueen v. Commonwealth, 948 S.W.2d 415, 416 (Ky. 1997).

Griffith next argues that he was entitled to an evidentiary hearing on his motion. However, as noted above, the allegations of a defective indictment and ineffective assistance of counsel are both claims that should have been presented either on direct appeal or RCr 11.42. The decision to conduct an evidentiary hearing on a motion under CR 60.02 is within the discretion of the trial court. Land v. Commonwealth, 986 S.W.2d 440, 442 (Ky. 1990). The trial court properly refused to hold an evidentiary hearing because the validity of Griffith's claims was clearly refuted by the face of the record.

Finally, Griffith argues that the trial court erred by not appointing him counsel to represent him on the CR 60.02 motion. However, while appointment of counsel is available in RCr 11.42 proceedings, it does not extend to CR 60.02 motions. Gross, 648 S.W.2d at 857.

Accordingly, the order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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pro se
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BRIEF FOR APPELLEE:

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