

# Commonwealth of Kentucky

## Court of Appeals

NO. 2006-CA-002567-MR

WILLIAM G. CLARK

APPELLANT

v. APPEAL FROM PULASKI CIRCUIT COURT  
HONORABLE JEFFREY T. BURDETTE, JUDGE  
ACTION NO. 99-CR-00029

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: COMBS, CHIEF JUDGE; ACREE AND VANMETER, JUDGES.

ACREE, JUDGE: William Garnett Clark appeals *pro se* from the Pulaski Circuit Court's denial of his Kentucky Rules of Civil Procedure (CR) 60.02 motion. In 1999, Clark was convicted of manslaughter in the first degree and tampering with physical evidence after shooting his son-in-law. Clark argues that the evidence produced at trial established that his daughter was a victim of domestic violence and that, as a result of their kinship, he was also a victim and entitled to an exemption from the parole eligibility penalties

imposed upon violent offenders under Kentucky Revised Statutes (KRS) 439.3401.

Finding his argument to be without merit, we affirm.

CR 60.02 allows a judgment to be corrected or vacated based “upon facts or grounds, not appearing on the face of the record and not available by appeal or otherwise, which were not discovered until after rendition of judgment without fault of the parties seeking relief.” *Barnett v. Commonwealth*, 979 S.W.2d 98, 101 (Ky. 1998) (citing *Davis v. Home Indemnity Company*, 659 S.W.2d 185, 188 (Ky. 1983)). CR 60.02 is not intended as an additional opportunity to relitigate the same issues that could “reasonably have been presented” by direct appeal or pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42 proceedings. *See McQueen v. Commonwealth*, 948 S.W.2d 415, 416 (Ky. 1997), *cert. denied*, 521 U.S. 1130 (1997), *quoting* RCr 11.42(3). In order to be eligible for CR 60.02 relief, the movant must demonstrate why he is entitled to extraordinary relief. *Gross v. Commonwealth*, 648 S.W.2d 853, 856 (Ky. 1983).

“The standard of review of an appeal involving a CR 60.02 motion is whether the trial court abused its discretion.” *White v. Commonwealth*, 32 S.W.3d 83, 86 (Ky.App. 2000); *Brown v. Commonwealth*, 932 S.W.2d 359, 361 (Ky. 1996). We will affirm the lower court's decision unless there is a showing of some “flagrant miscarriage of justice.” *Gross, supra*, at 858.

Clark’s argument is fatally flawed both procedurally and substantively.

The case interpreting KRS 439.3401 and on which Clark relies, *Kirby v. Commonwealth*, 132 S.W.3d 233 (Ky.App. 2004), was decided in 2004, three years

subsequent to Clark's conviction and sentence. The Supreme Court has held that "there should be no retroactive application of a new decision . . . unless the issue was preserved and, if necessary, constitutional issues [were] properly raised during the pendency of the case." *Burns v. Level*, 957 S.W.2d 218, 222 (Ky. 1997); *see also, Maney v. Mary Chiles Hospital*, 785 S.W.2d 480, 482 (Ky. 1990); *Pendleton v. Pendleton*, 560 S.W.2d 538 (Ky. 1977). Clark failed to anticipate the holding in *Kirby* and, consequently failed to properly preserve this issue.

Even if he could clear this procedural hurdle, the circumstances of his case would not warrant reversal by application of *Kirby*. In *Kirby*, the defendant's mother was being choked by the defendant's cousin at the time the defendant shot him. The victim in this case was Clark's son-in-law. Clark shot him approximately six weeks after his daughter and son-in-law had gotten into a fight during which the daughter tried to light the son-in-law on fire and he struck her. Clark and his daughter discussed and planned the murder and his son-in-law was unarmed when Clark eventually confronted and killed him. Clark's is not the kind of conduct our legislature contemplated when drafting the domestic violence statutes cited by Clark. *See* KRS 439.3401, KRS 533.060.

We find no abuse of discretion by the trial court. Clark was not entitled to CR 60.02 relief.

For the foregoing reasons, the decision of the Pulaski Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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