

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000949-MR

GEORGE E. MCGINNIS, JR.

APPELLANT

v. APPEAL FROM McCracken Circuit Court
HONORABLE R. JEFFREY HINES, JUDGE
ACTION NO. 87-CR-00015

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: MOORE AND WINE, JUDGES; BUCKINGHAM,¹ SENIOR JUDGE.

WINE, JUDGE: George E. McGinnis appeals from an order of the McCracken Circuit Court denying his CR 60.02 motion to set aside his 1987 conviction and sentence. We agree with the trial court that McGinnis's current motion is untimely as it raises issues which either were raised or could have been raised in prior appeals. Hence, we affirm.

¹ Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Following a jury trial in 1987, McGinnis was found guilty of two counts of first-degree sodomy, KRS 510.070(1)(a); two counts of first-degree rape, KRS 510.040(1)(a); and one count of kidnapping, KRS 509.040(1)(b). The jury fixed consecutive sentences totaling seventy years, which the trial court imposed. The Kentucky Supreme Court affirmed his conviction in an unpublished opinion. *McGinnis v. Commonwealth*, No. 87-SC-381-MR (Rendered November 5, 1987).

Thereafter, McGinnis filed a motion to set aside his conviction and sentence pursuant to RCr 11.42. The trial court denied the motion, and this Court affirmed. *McGinnis v. Commonwealth*, No. 89-CA-1097-MR (Rendered March 30, 1990). Fourteen years later, McGinnis filed a motion to set aside his conviction pursuant to CR 60.02(e) and (f). In that motion, he asserted that the trial court undermined his defense by conducting the trial within two and a half months of his criminal acts, and that the trial court erred by allowing the prosecution to shift the burden of proof to the defense. The trial court denied the motion, and this Court affirmed. *McGinnis v. Commonwealth*, No. 2005-CA-000102-MR (Rendered March 17, 2006). Both Courts concluded that relief under CR 60.02 was inappropriate because McGinnis was asserting matters which either were raised or could have been raised in the prior appeals.

After this Court's denial of his prior appeal, McGinnis filed another motion to set aside his conviction pursuant to CR 60.02(e) and (f). In his instant motion, he alleges that he was deprived of a fair trial because of inflammatory and improper statements by the prosecutor during closing argument, his trial counsel was ineffective for failing to object to these statements, and the cumulative effect of these errors. The

trial court denied the motion, concluding that McGinnis had failed to timely raise these issues. McGinnis requested and was granted the appointment of counsel on this appeal but the Department of Public Advocacy declined to represent him, stating that the appeal was not a proceeding that a reasonable person with adequate means would be willing to bring at his own expense. *Anders v. California*, 386 U.S. 738, 744, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967). This *pro se* appeal followed.

As noted by this Court in the recent appeal, CR 60.02 is for relief that is not available by direct appeal and not available collaterally under RCr 11.42. *Gross v. Commonwealth*, 648 S.W.2d 853, 856 (Ky. 1983). CR 60.02 is not intended to afford individuals an additional opportunity to relitigate issues that have already been presented in an earlier direct appeal or collateral attack or present new issues that could have been raised in those proceedings. *McQueen v. Commonwealth*, 948 S.W.2d 415, 416 (Ky. 1997); RCr 11.42(3). CR 60.02 should only be used to provide relief when the movant demonstrates why he is entitled to the special, extraordinary relief provided by the rule. *Gross*, 648 S.W.2d at 856. Finally, claims under CR 60.02(e) and (f) must be raised within a reasonable time.

McGinnis has met none of the requirements for raising these issues on a subsequent motion for relief under CR 60.02. The issues raised by McGinnis involve matters which are entirely of record. Even if his objections to the prosecutor's comments during closing argument were unpreserved, McGinnis could have raised this issue on direct appeal under the palpable error standard. RCr 10.26. Likewise, he could have raised his claim of ineffective assistance of counsel in his RCr 11.42 motion. McGinnis makes no effort to explain why he waited twenty years before pursuing these issues.

Moreover, McGinnis has not shown that the judgment is void, has been satisfied, released or discharged, CR 60.02(e), or any other extraordinary circumstances warranting relief under CR 60.02(f). *Commonwealth v. Bustamonte*, 140 S.W.3d 581, 583 (Ky.App. 2004). Consequently, the trial court did not abuse its discretion by denying his motion.

Accordingly, the order of the McCracken Circuit Court denying McGinnis's CR 60.02 motion is affirmed.

ALL CONCUR.

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