

RENDERED: AUGUST 7, 2020; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2019-CA-001137-MR

DEVRON WADLINGTON

APPELLANT

v. APPEAL FROM TRIGG CIRCUIT COURT
HONORABLE CLARENCE A. WOODALL, III, JUDGE
ACTION NO. 05-CR-00047-001

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: CALDWELL, DIXON, AND L. THOMPSON, JUDGES.

DIXON, JUDGE: Devron Wadlington appeals from the Trigg Circuit Court's order denying his motion for post-conviction relief pursuant to CR¹ 60.02(e)-(f).

Finding no error, we affirm.

¹ Kentucky Rules of Civil Procedure.

A full recitation of the facts can be found in *Wadlington v. Commonwealth*, No. 2014-CA-001612-MR, 2015 WL 2445088 (Ky. App. May 22, 2015). Therefore, only the relevant procedural history is discussed herein.

PROCEDURAL BACKGROUND

In July 2006, Wadlington was convicted of capital murder related to a shooting at a night club and sentenced by the trial court to twenty years' imprisonment. He appealed his sentence to the Supreme Court of Kentucky, where his conviction was affirmed.

In 2008, Wadlington filed a *pro se* motion to vacate his conviction pursuant to RCr² 11.42, alleging ineffective assistance of counsel. He was granted an evidentiary hearing, but his motion was denied. Wadlington appealed, and another panel of our Court affirmed, holding "counsel's performance was adequate and his decisions were based upon reasonable trial strategy." *Wadlington v. Commonwealth*, No. 2011-CA-001260-MR, 2013 WL 1003490, at *4 (Ky. App. Mar. 15, 2013). The Supreme Court denied discretionary review.

Thereafter, Wadlington filed a CR 60.02 motion in Trigg Circuit Court. In 2014, the trial court denied the motion, specifically holding that inmates cannot make successive post-conviction motions. Once again, Wadlington

² Kentucky Rules of Criminal Procedure.

appealed, and another panel of our Court affirmed on the merits. However, the Court noted,

[T]his is Wadlington's appeal from the dismissal of his second post-conviction relief motion, this time filed under 60.02. Kentucky Courts have repeatedly ruled that once a criminal defendant files a motion to vacate sentence under RCr 11.42, he is not entitled to another bite at the apple. Secondly, the courts have ruled under the law of the case doctrine that litigants may not raise issues which could have been decided in a previous proceeding. . . . Arguably, under [*Gross v. Commonwealth*, 648 S.W.2d 853 (Ky. 1983)], Wadlington's CR 60.02 motion is repetitive and improper[.]

Wadlington, 2015 WL 2445088, at *3-4.

In 2018, Wadlington filed another CR 60.02 motion in Trigg Circuit Court. The trial court reiterated that successive post-judgment motions are not allowed and,

Mr. Wadlington creatively seeks to file a successive RCr 11.42 Motion through a CR 60.02 Motion seeking to amend his original RCr 11.42 Motion. . . . Mr. Wadlington has had the opportunity by direct appeal, a RCr 11.42 motion, and a CR 60.02 motion and the current Motion is simply an attempt for a successive RCr 11.42 Motion.

The Trigg Circuit Court denied the motion, and this appeal followed.

STANDARD OF REVIEW

We review a trial court's denial of a CR 60.02 motion under the abuse of discretion standard. *White v. Commonwealth*, 32 S.W.3d 83, 86 (Ky. App.

2000). “The test for an abuse of discretion is whether the trial judge’s decision was arbitrary, unreasonable, unfair, or unsupported by sound reasonable principles.” *Penner v. Penner*, 411 S.W.3d 775, 779-80 (Ky. App. 2013) (citation omitted).

ANALYSIS

The Commonwealth contends that Wadlington’s claims should have been raised on direct appeal or in a prior post-conviction motion. We agree.

Where, as here, a movant seeks relief pursuant to CR 60.02(e) or (f), the rule requires the motion be filed “within a reasonable time.” Furthermore, in *Gross v. Commonwealth*, 648 S.W.2d 853, 857 (Ky. 1983), the Kentucky Supreme Court outlined the availability of post-conviction relief as follows:

[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.

Here, appellate review is foreclosed as this is a successive post-conviction motion. Wadlington could have raised—and, indeed, did raise—these claims in a prior post-conviction proceeding. “CR 60.02 is not a separate avenue

of appeal to be pursued in addition to other remedies, but is available only to raise issues which cannot be raised in other proceedings.” *McQueen v. Commonwealth*, 948 S.W.2d 415, 416 (Ky. 1997). Wadlington failed to bring any new evidence or present any new arguments in his motion. Additionally, because Wadlington waited approximately twelve years following his conviction to advance his latest collateral attack, he failed to bring his motion within a reasonable time as required by CR 60.02. Therefore, we conclude that the trial court did not abuse its discretion by denying Wadlington’s CR 60.02 motion.

CONCLUSION

For the reasons stated herein, we affirm the order of the Trigg Circuit Court.

ALL CONCUR.

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