

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001952-MR

NORMAN EDWIN JONES

APPELLANT

APPEAL FROM HOPKINS CIRCUIT COURT
v. HONORABLE TOMMY W. CHANDLER, SPECIAL JUDGE
ACTION NOS. 86-CR-00172 & 86-CR-00174

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: DYCHE AND SCHRODER, JUDGES; ROSENBLUM, SENIOR JUDGE.¹

SCHRODER, JUDGE: Norman Edwin Jones appeals the denial of his latest CR 60.02 motion based on alleged conflicts between one of his attorneys and some trial witnesses. We agree that it was error for the trial court to use the three-year statute of limitations in RCr 11.42(10) for Jones's CR 60.02 motion. However, Jones's motion was still untimely under CR 60.02(b) and (f). Hence, we affirm.

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

In 1988, Jones was convicted of murder, robbery, kidnapping, and sodomy, before a jury of the Hopkins Circuit Court. He was sentenced to life without parole for a minimum of twenty-five years. The conviction was affirmed April 6, 1989, by the Kentucky Supreme Court on direct appeal. In 1991, Jones filed an RCr 11.42 motion, which was supplemented numerous times but ultimately denied in 1994. Our Court affirmed and the Supreme Court denied discretionary review on February 14, 1996. Subsequently, Jones filed for a writ of habeas corpus in federal court which was denied. Allegedly, Jones first learned of a potential conflict of interest between one of his four trial counsel and two witnesses, at an August 25, 1997, hearing in the federal proceeding.

In July of 2000, Jones filed a CR 60.02 motion which did not raise the aforementioned claim of error discovered in 1997, but raised an issue that counsel presented stipulations rather than live testimony in the defense. This CR 60.02 motion was summarily denied in April, 2001, and no appeal was taken therefrom. In January of 2004, Jones filed a second CR 60.02 motion alleging that counsel was ineffective due to the alleged conflict discovered on August 25, 1997. The trial court denied the motion, ruling that the motion did not constitute a valid basis for relief and ruling that the claim for relief was barred by the three-year statute of limitations in RCr 11.42(10).

On appeal to this Court, Jones argues that the trial court erred in applying the three-year statute of limitations for RCr 11.42 relief to CR 60.02 motions. We agree. Gross v. Commonwealth, 648 S.W.2d 853, 856 (Ky. 1983), recognized that a CR 60.02 motion "is for relief that is not available by direct appeal and not available under RCr 11.42." Here, Jones contends he did not discover the alleged conflict until the August 25, 1997, hearing in federal court. This was well after the original conviction was final, more than the three years in RCr 11.42(10). Also, RCr 11.42 (10)(a) excepts out of the three-year limitation, "facts upon which the claim is predicated were unknown to the movant and could not have been ascertained by the exercise of due diligence[.]"

Although we agree with Jones that the three-year statute of limitations in RCr 11.42 does not apply to CR 60.02 motions, we agree with the trial court that his second CR 60.02 motion is untimely, but for another reason. This is Jones's second CR 60.02 motion and the issue raised therein was known to Jones when he filed his first CR 60.02 motion in July of 2000. The alleged newly discovered evidence was discovered August 25, 1997. CR 60.02 has a one-year statute of limitations for newly discovered evidence and the catch-all provision of CR 60.02(f) (a reason of extraordinary nature justifying relief) requires the motion be "made within a reasonable time" "What

constitutes a reason of extraordinary nature is left to judicial construction." Commonwealth v. Spaulding, 991 S.W.2d 651, 655 (Ky. 1999). The catch-all provision is a substitute for the old writ of *coram nobis*, judicial correction of a wrong committed, a remedy for a defendant deprived of liberty without due process. Id. Here, Jones knew at least by August 25, 1997, of a potential conflict. His first CR 60.02 motion was filed almost three years later, in July, 2000, and did not raise the subject. The January, 2004, motion was filed almost six and one-half years after the alleged conflict was discovered, without a sufficient explanation for why it was filed so late. We agree with the trial court that Jones's motion was untimely, but on different grounds.

For the foregoing reasons, the judgment of the Hopkins Circuit Court is affirmed.

ALL CONCUR.

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