

Commonwealth of Kentucky
Court of Appeals

NO. 2004-CA-002476-MR

LESTER LOWE

APPELLANT

v. APPEAL FROM TAYLOR CIRCUIT COURT
HONORABLE DOUGHLAS M. GEORGE, JUDGE
ACTION NO. 86-CR-00052

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: HENRY AND VANMETER, JUDGES; MILLER, SENIOR JUDGE.¹

HENRY, JUDGE: Lester Lowe appeals, pro se, from an order of the Taylor Circuit Court denying his petition for post conviction relief pursuant to Kentucky Rules of Civil Procedure (CR) 60.02. For the reasons stated below, we affirm.

In August 1986, Grover Whitehead was beaten to death and robbed at his home in Taylor County. A tree limb found near the body was believed to have been used to beat the victim to death. A whiskey bottle with Lowe's fingerprints was found near

¹ Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statute 21.580.

the body. A witness, Maxine Hitch, testified that she dropped Lowe off near the victim's residence on the night of the murder, and later picked him up. With others, Hitch also witnessed that Lowe had a large amount of money after the murder, and was later told by Lowe that if "she ever told he killed that old man or robbed him, she would go down with him."

On August 19, 1986, the Taylor County Grand Jury returned an indictment against Lowe charging him with the murder of Whitehead and first-degree-robbery. The Commonwealth subsequently notified Lowe that it intended to seek the death penalty in the case. Following a jury trial, Lowe was found guilty of the murder of Whitehead and sentenced to life without the possibility of parole for 25 years, and of first-degree robbery, for which he was sentenced to 20 years. Lowe's conviction and sentence was upheld on direct appeal to the Supreme Court.

Lowe has previously filed two petitions for post-conviction relief pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42, and a petition for relief pursuant to CR 60.02, all of which were denied. Lowe's present petition for post-conviction relief was filed on March 24, 2004. On August 25, 2004, the circuit court entered an order denying Lowe's motion for relief. This appeal followed.

Before us, Lowe contends that the circuit court erred in denying his motion for relief under CR 60.02. Lowe alleges that the following irregularities associated with his conviction entitle him to relief: 1) the Commonwealth failed to disclose prior to trial that a confidential informant met with witness Maxine Hitch, and that the informant then took Hitch to meet with police; 2) the Commonwealth failed to disclose before trial that the footprints of another suspect, Charlie Bagby, were found at the scene of the crime; and 3) the Commonwealth failed to comply with a circuit court order to send a whisky bottle located at the scene of the crime to the Kentucky State Police Crime Lab for fingerprint analysis.

The claims raised by Lowe may not be considered in a CR 60.02 motion. In Gross v. Commonwealth, 648 S.W.2d 853 (Ky. 1983), the Kentucky Supreme Court explained that the structure of post-conviction review is not haphazard or overlapping. Id. at 856. It held that a criminal defendant must first bring a direct appeal when available, then utilize RCr 11.42 by raising every error of which "he is aware, or should be aware, during the period when this remedy is available to him." Id. at 857. CR 60.02 may be used only in extraordinary circumstances not otherwise subject to relief by direct appeal or by way of RCr 11.42. Id. at 856.

More recently, in McQueen v. Commonwealth, 948 S.W.2d 415 (Ky. 1997), the Court reiterated the procedural requirements set out in Gross when it stated: "Civil Rule 60.02 is not intended merely as an additional opportunity to relitigate the same issues which could 'reasonably have been presented' by direct appeal or RCr 11.42 proceedings. RCr 11.42(3); Gross v. Commonwealth, supra, at 855, 856. The obvious purpose of this principle is to prevent the relitigation of issues which either were or could have been litigated in a similar proceeding." Id. at 416.

Lowe could reasonably have raised the claims stated herein in the two previous RCr 11.42 proceedings he has filed. Moreover, the issues raised by Lowe do not amount to an extraordinary circumstance and, accordingly, may not be raised in the present CR 60.02 motion. In addition, the rule under which Lowe seeks relief, CR 60.02, requires that the motion be made within a "reasonable time." Lowe's conviction was in May, 1987, almost 17 years prior to the filing of Lowe's present CR 60.02 motion. The motion was, therefore, not brought within a reasonable time, and was correctly denied without a hearing by the circuit court. As such, we will not address Lowe's claims on the merits.

For the foregoing reasons, the order of the Taylor Circuit Court is affirmed.

ALL CONCUR.

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