

Commonwealth Of Kentucky

Court of Appeals

NO. 2006-CA-000051-MR

ROY SETTLES

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE PAMELA R. GOODWINE, JUDGE
ACTION NO. 84-CR-00092

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: JOHNSON¹ AND TAYLOR, JUDGES; MILLER,² SPECIAL JUDGE.

JOHNSON, JUDGE: Roy Settles, pro se, has appealed from an order entered by the Fayette Circuit Court on December 13, 2005, which denied his pro se motion pursuant to CR³ 60.20(f) to vacate his sentence pursuant to a judgment entered on August 14, 1984.

Having concluded that the trial court did not abuse its

¹ Judge Rick A. Johnson completed this opinion prior to the expiration of his term of office on December 31, 2006. Release of the opinion was delayed by administrative handling.

² Retired Judge John D. Miller, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

³ Kentucky Rules of Civil Procedure.

discretion by denying Settles the extraordinary relief he seeks, we affirm.

On January 20, 1984, Settles was indicted by a Fayette County grand jury on two counts of murder,⁴ one count of burglary in the first degree,⁵ and one count of theft by unlawful taking.⁶ The charges arose from the July 2, 1983, murder of Charles C. Combs and his wife, Betty Combs, during Settles's attempted burglary of their home. On June 16, 1984, Settles was convicted by a jury on two counts of manslaughter in the first degree,⁷ one count of burglary in the first degree, and one count of theft by unlawful taking. He was sentenced to prison on August 14, 1984, for a total of 65 years. Settles appealed his conviction as a matter of right to the Supreme Court of Kentucky,⁸ which affirmed the conviction in an Opinion made final on December 12, 1985.

Thereafter, on September 26, 2005, Settles filed a pro se motion to vacate judgment pursuant to CR 60.02(f),⁹ as well as

⁴ Kentucky Revised Statutes (KRS) 507.020.

⁵ KRS 511.020.

⁶ KRS 514.030.

⁷ KRS 507.030.

⁸ Case No. 1985-SC-000105-MR.

⁹ CR 60.02(f) provides:

On motion a court may, upon such terms as are just, relieve a party or his legal representative from its final judgment, order, or proceeding upon the following grounds: . . . (f) any other reason of

a motion for appointment of counsel and a request for an evidentiary hearing. In the motion, Settles claimed that there was insufficient evidence of his guilt for burglary and theft by unlawful taking, and he claimed prosecutorial misconduct, ineffective assistance of counsel, and cumulative error. The Commonwealth filed its response on November 22, 2005, stating that none of Settles's claims constituted a reason of an extraordinary nature justifying relief from his sentence, and that the motion was not made within a reasonable time period. The trial court denied the CR 60.02 motion on December 13, 2005, as time-barred, without holding an evidentiary hearing. This appeal followed.

In Gross v. Commonwealth,¹⁰ the Supreme Court summarized the procedures for appellate review in criminal cases. The Supreme Court stated that the structure for appellate review is not haphazard or overlapping.¹¹ A criminal defendant must first bring a direct appeal when available, then utilize RCr 11.42 by raising every error of which he should be aware.¹² CR 60.02 should be utilized only for extraordinary situations not subject to relief by direct appeal or by way of

an extraordinary nature justifying relief. The motion shall be made within a reasonable time. . . .

¹⁰ 648 S.W.2d 853 (Ky. 1983).

¹¹ Id. at 856.

¹² Id.

RCr 11.42.¹³ The Supreme Court reaffirmed the procedural requirements described in Gross in its Opinion in McQueen v. Commonwealth:¹⁴

A defendant who is in custody under sentence or on probation, parole or conditional discharge, is required to avail himself of RCr 11.42 as to any ground of which he is aware, or should be aware, during the period when the remedy is available to him. 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.¹⁵

Gross and McQueen clearly establish that "[a]n issue raised and rejected on direct appeal may not be litigated [in an RCr 11.42 proceeding] by claiming that it amounts to ineffective assistance of counsel."¹⁶ This same logic applies to CR 60.02 motions since, by the very terms of the rule, it provides for "extraordinary relief" just as RCr 11.42 does. Settles failed to demonstrate how he could meet the high burden of showing his entitlement to extraordinary relief under CR 60.02.

¹³ Gross, 648 S.W.2d at 856.

¹⁴ 948 S.W.2d 415 (Ky. 1997).

¹⁵ Id. at 416.

¹⁶ Sanborn v. Commonwealth, 975 S.W.2d 905, 909 (Ky. 1998), cert. denied, 526 U.S. 1025, 119 S.Ct. 1266, 143 L.Ed.2d 361 (1999).

In his brief, Settles argues that his trial counsel was ineffective because counsel failed to protect his constitutional rights. However, Settles has not provided any information as to what constitutional rights counsel failed to protect, and how counsel failed to protect those constitutional rights. He also claims that counsel withheld favorable information from the jury, but he fails to provide any detail as to what the favorable information was or how it would require a reversal of his sentence. In any event, Settles is precluded from raising any issues relating to ineffective assistance of counsel because he never filed a motion pursuant to RCr 11.42, and he did not make these claims in his direct appeal to the Supreme Court.

Additionally, Settles failed to exercise due diligence in pursuing this claim. Under CR 60.02, a motion must be filed within a reasonable time if the motion is based upon an extraordinary reason justifying the relief sought. Here, Settles waited until September 26, 2005, to file his CR 60.02 motion with the trial court. A delay of over 20 years under the circumstances of this case is not reasonable and does not comply with the requirements of CR 60.02. Therefore, the trial court did not err in denying Settles's CR 60.02 motion.

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

ALL CONCUR.

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