

RENDERED: JANUARY 15, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001554-MR

THEODORE MAYNARD

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MITCHELL PERRY, JUDGE
ACTION NO. 146515

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: MOORE, NICKELL, AND WINE, JUDGES.

MOORE, JUDGE: Theodore Maynard appeals the Jefferson Circuit Court's order denying his CR¹ 60.02(e) and (f) motion for relief from the judgment against him.

After a careful review of the record, we affirm because Maynard failed to file his motion within a reasonable time after entry of the judgment.

¹ Kentucky Rule of Civil Procedure.

I. FACTUAL AND PROCEDURAL BACKGROUND

Maynard was convicted in 1972 of the rape and willful murder of Laura Hefley, a University of Louisville music student. He was sentenced to life imprisonment for both convictions, and those sentences were ordered to be served consecutively. Maynard filed a direct appeal, and Kentucky's highest court remanded the case for a hearing to determine whether Maynard was prejudiced by the failure to order production of a police detective's report. *See Maynard v. Commonwealth*, 497 S.W.2d 567, 570 (Ky. 1973).

The trial court conducted the hearing and determined that Maynard was not prejudiced by the failure to produce the report. The Kentucky Supreme Court subsequently affirmed the judgment against Maynard.

Maynard moved to vacate the judgment against him pursuant to RCr² 11.42. In his motion, he raised various claims of the ineffective assistance of counsel. After holding a hearing, the circuit court denied Maynard's RCr 11.42 motion. Maynard appealed that ruling, and this Court affirmed.

Maynard then filed a petition for a writ of habeas corpus in the United States District Court. In 1982, the Court granted Maynard's petition with respect to his rape conviction, but denied the petition concerning his murder conviction. *See Maynard v. Sowders*, No. 3:07-CV-P658-R, 2009 WL 799741, *1 (W.D. Ky. Mar. 25, 2009) (slip copy) (discussing its prior decision regarding Maynard's petition for a writ of habeas corpus).

² Kentucky Rule of Criminal Procedure.

Twenty-six years later, Maynard moved for relief from the judgment, pursuant to CR 60.02(e) and (f). Maynard claimed he was actually innocent of the crime under the Commonwealth's theory of the case, which Maynard alleged was the theory that "the crime of murdering the victim Laura Hefley was committed . . . as an attempt to cover up or otherwise obstruct the result of having committed the crime of First Degree Rape against Ms. Hefley in the first instance." Maynard argued he was actually innocent of the murder because the medical examiner testified he could not substantiate whether Ms. Hefley was raped or not, yet the Commonwealth had asserted that the rape of Ms. Hefley was the motive for her murder. Maynard also moved for a DNA analysis of some non-motile sperm that the medical examiner had found in Ms. Hefley's vagina because Maynard contended that the DNA analysis would show that the rape was not committed by Maynard. The circuit court denied Maynard's motion for a DNA analysis, as well as his CR 60.02 motion.

Maynard now appeals, contending that: (a) a DNA analysis should be conducted because it will allegedly show that he is actually innocent of the murder based on the Commonwealth's theory of the case; and (b) the circuit court entered insufficient findings of fact in its order denying his CR 60.02 motion to allow for proper appellate review.

II. ANALYSIS

On appeal, we review the denial of a CR 60.02 motion for an abuse of discretion. "A movant is not entitled to a hearing on a CR 60.02 motion unless he

affirmatively alleges facts which, if true, justify vacating the judgment and further allege[s] special circumstances that justify CR 60.02 relief.” *White v. Commonwealth*, 32 S.W.3d 83, 86 (Ky. App. 2000) (internal quotation marks omitted).

Kentucky Rule of Civil Procedure 60.02(e) and (f) state as follows:

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: . . . (e) the judgment is void, or has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (f) any other reason of an extraordinary nature justifying relief. The motion shall be made within a reasonable time. . . .

“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.” *McQueen v. Commonwealth*, 948 S.W.2d 415, 416 (Ky. 1997) (internal quotation marks omitted). Civil Rule 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.” *Id.*

A. CLAIM REGARDING DNA ANALYSIS AND ACTUAL INNOCENCE

Maynard first alleges that he is actually innocent of the murder. He contends the circuit court should have granted his request for DNA analysis of the non-motile sperm found in the victim’s vagina because such analysis would show that Maynard was actually innocent of the murder conviction, based upon the

Commonwealth's theory that the person who raped the victim also murdered her. However, Maynard waited twenty-six years from the time that his petition for a writ of habeas corpus was partially granted by the United States District Court before he filed his CR 60.02 motion in the present case. Furthermore, it appears that Kentucky began DNA testing in or around 1990, *see Shane v. Commonwealth*, 243 S.W.3d 336, 342 (Ky. 2007), *as modified* (2008), yet Maynard waited eighteen years after DNA testing began in Kentucky before he filed his CR 60.02 motion and requested DNA testing. A motion brought under CR 60.02 must be brought within a reasonable time. *See* CR 60.02. We do not find that Maynard brought his CR 60.02 motion within a reasonable time and, thus, the circuit court did not abuse its discretion in denying his motion.

Moreover, even if the DNA analysis was conducted and it showed that the non-motile sperm found in Ms. Hefley's vagina was not Maynard's, this still would not prove that Maynard was actually innocent of the crime of murder. Rather, it would only prove the semen belonged to a third individual, but Maynard has already been granted habeas relief from his rape conviction. As for the murder conviction, even the United States District Court, in denying Maynard's habeas petition concerning his murder conviction, reasoned that there was corroborating evidence to support his murder conviction. Thus, in addition to being time barred, Maynard's actual innocence claim lacks merit, and the circuit court did not abuse its discretion in denying Maynard's CR 60.02 motion.

B. CLAIM REGARDING FINDINGS OF FACT

Maynard next alleges that the circuit court erred in failing to enter findings of fact concerning his CR 60.02 motion. However, because his motion was time barred, the circuit court did not need to review the merits of Maynard's claim and it therefore was unnecessary for the circuit court to enter such findings.

Accordingly, the order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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