

RENDERED: MARCH 26, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2008-CA-002086-MR

WILLIAM GIVIDEN

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE ERNESTO M. SCORSONE, JUDGE
ACTION NO. 83-CR-00054

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, TAYLOR, AND WINE, JUDGES.

TAYLOR, JUDGE: William Gividen brings this appeal from an October 2, 2008, order of the Fayette Circuit Court denying his Kentucky Rules of Civil Procedure (CR) 60.02 motion to vacate sentence of imprisonment. We affirm.

In 1983, appellant pleaded guilty to the offense of murder. Pursuant to a plea agreement, he received a sentence of life imprisonment. The facts of the murder are particularly gruesome. Appellant and two others planned to rob the

victim, Julius Blankenship. Appellant confessed to robbing the victim, to striking the victim two or three times on the head with a tire tool, to wrapping the victim's head in a towel, and to carrying the victim from the crime scene. According to the record, the victim died from three severe blows to the head with a blunt instrument.

In 2008, twenty-five years after entry of the judgment, appellant filed a *pro se* motion pursuant to CR 60.02 to vacate his sentence of life imprisonment. In support thereof, appellant contends that he was incompetent at the time of commission of the offense and at the time he pleaded guilty. By Opinion and Order entered October 2, 2008, the circuit court denied the CR 60.02 motion. As its basis, the circuit court concluded:

[Appellant] was convicted by Final Judgment entered on June 6, 1983. The motion now before the [c]ourt was filed by [appellant] on September 10, 2008, more than twenty-five years after the Final Judgment. Clearly, a twenty-five-year delay in filing the motion, without any stated basis for the delay, is not a reasonable time period. Additionally, [appellant] has not presented extraordinary grounds for the [c]ourt to grant the requested CR 60.02 relief.

This appeal follows.

Appellant contends the circuit court erroneously denied the CR 60.02 motion to vacate his sentence of imprisonment. Specifically, appellant claims that he was incompetent at the time of his guilty plea and that he should have been evaluated for competency. In support thereof, appellant cites to a letter contained in the record from a psychiatrist, Dr. C.I. Schwartz. Dr. Schwartz recommended that appellant be evaluated for temporal lobe epilepsy or intermittent explosive

disorder at the Kentucky Correctional Psychiatric Center. Appellant contends that he was never evaluated per Dr. Schwartz's recommendation and never received a full mental evaluation.

It is well-established that a CR 60.02 motion is an extraordinary remedy. *Gross v. Com.*, 648 S.W.2d 853 (Ky. 1983). Under CR 60.02, a motion must be filed under subsections (a), (b), and (c) within one year after entry of judgment and under (e) and (f) within a reasonable time after entry of judgment. In this case, we believe appellant failed to demonstrate entitlement to relief under CR 60.02 (a) – (f).

To begin, we agree with the circuit court that appellant's CR 60.02 motion was not made within a reasonable time or within one year after entry of final judgment. Appellant offers no excuse for the twenty-five-year delay in bringing the CR 60.02 motion. In his brief, appellant argues that "incompetence tolls the CR 60.02 statute of limitations." Appellant's Brief at 7. However, there is no evidence that appellant's alleged mental incompetency was ongoing throughout the past twenty-five years.

Additionally, we do not believe that appellant is entitled to CR 60.02 relief upon the merits of his allegation. The record reveals that a competency hearing was held and that the trial court found appellant competent to stand trial by order entered May 4, 1983. Also, in his *pro se* CR 60.02 motion, appellant admitted that Dr. Schwartz testified that appellant was competent to stand trial at the hearing.

Accordingly, we hold that the circuit court properly denied appellant's CR 60.02 motion.

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

ALL CONCUR.

BRIEFS FOR APPELLANT:

Kate Dittmeier Holm
Assistant Public Advocate
Department of Public Advocacy
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Todd D. Ferguson
Assistant Attorney General
Frankfort, Kentucky