

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-000956-MR

KEVIN SHEGOG

APPELLANT

v. APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE JULIE REINHARDT WARD, JUDGE
ACTION NO. 01-CR-00386

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: DIXON AND KELLER, JUDGES; KNOPF,¹ SENIOR JUDGE.

KNOPF, SENIOR JUDGE: Kevin Shegog appeals the May 6, 2009, order of the Campbell Circuit Court which denied him post-conviction relief. Because we find no abuse of discretion and no error by the trial court, we affirm.

¹ Judge William L. Knopf completed this opinion prior to the expiration of his term of Senior Judge service on May 7, 2010. Release of this opinion was delayed by administrative handling.

The history of this case is lengthy. The pertinent facts of the underlying case were set out in Shegog's direct appeal to the Supreme Court of Kentucky and are as follows:

Appellant's convictions stem from a robbery that was committed on May 28, 2001, at a BP gas station in Highland Heights, Kentucky. Joy Powell, a witness who was inside the gas station at the time of the robbery, stated that she observed an African-American male wearing a red and white sports jacket and a nylon stocking on his head pass by the front glass window and then enter the store. Once inside, Powell stated that the man grabbed her and, as he pulled the stocking down over his face, announced that he had a gun. Powell was ordered behind the counter with the store clerk and both were told to lie on the floor. After taking the money from the register, the robber fled the scene. Powell's husband Steve, who had been pumping gas, observed the man get into a dark colored vehicle with a vanity license plate that read "Shegog."

The following day, Powell was shown a photo line-up, but was unable to identify the robber due to the poor quality of the computer-generated images. Police thereafter compiled a second line-up of color photographs, from which Powell identified Appellant. Appellant was indicted for and ultimately convicted of first-degree robbery. The jury recommended a fifteen year sentence enhanced to twenty years by virtue of Appellant's persistent felony offender status. Judgment was entered accordingly and this appeal ensued.

Shegog v. Commonwealth, 142 S.W.3d 101, 103-04 (Ky. 2004).

Shegog was indicted of first-degree robbery and first-degree persistent felony offender on September 27, 2001. On June 13, 2002, Shegog was convicted of both charges and sentenced to twenty years' imprisonment. Shegog filed a direct appeal with the Kentucky Supreme Court, which rendered an opinion

affirming the convictions and sentencing on August 26, 2004. *See Shegog*, 142 S.W.3d 101. On December 8, 2004, Shegog filed a motion to vacate sentence and conviction with the Campbell Circuit Court, pursuant to RCr² 11.42. That motion was denied in an order entered on December 30, 2004. On January 10, 2005, Shegog filed a motion requesting findings of fact and conclusions of law in regard to the trial court's order denying his RCr 11.42 motion. On January 25, 2005, the trial court denied Shegog's motion for findings of fact and conclusions of law, and Shegog subsequently appealed. On June 2, 2006, this Court rendered an opinion vacating and remanding the trial court's December 30, 2004, order for further proceedings. *See Shegog v. Commonwealth*, 2006 WL 1514294 (Ky. App. 2006) (2005-CA-000367-MR). On remand, an evidentiary hearing was held, and Shegog's RCr 11.42 motion was again denied in an order entered on March 12, 2007. Shegog appealed that order to this Court, and an opinion affirming was rendered on July 25, 2008. *See Shegog v. Commonwealth*, 275 S.W.3d 728 (Ky. App. 2008).

On December 29, 2008, Shegog filed a motion to compel the Commonwealth to provide him with a copy of the 911 tape. On March 24, 2009, Shegog filed a motion to vacate his sentence pursuant to RCr 11.42 and CR³ 60.02, wherein he alleged ineffective assistance of counsel and also alleged that the

² Kentucky Rules of Criminal Procedure.

³ Kentucky Rules of Civil Procedure.

Commonwealth had used false or perjured testimony. The trial court denied both motions in an order entered on May 6, 2009. This appeal followed.

Shegog makes four arguments on appeal. They are: 1) his trial counsel rendered ineffective assistance by failing to conduct a reasonable and/or adequate investigation into Charles Spencer Akers;⁴ 2) he was denied compulsory process to subpoena Charles Akers in order to confront and cross-examine him as a material witness to the robbery; 3) the Commonwealth knowingly used false and/or perjured testimony by alleging the 911 call was made by Charles Akers on a cell phone; and 4) he was improperly denied an audio copy of the 911 tape during pre-trial discovery and post-conviction proceedings.

RCr 11.42 allows a party to file a motion to vacate, set aside or correct a sentence based on a collateral attack. An RCr 11.42 motion “is limited to [the] issues that were not and could not be raised on direct appeal.” *Sanborn v. Commonwealth*, 975 S.W.2d 905, 909 (Ky. 1998) (*overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009)). We review the trial court’s denial of an RCr 11.42 motion for an abuse of discretion. *Bowling v. Commonwealth*, 981 S.W.2d 545, 548 (Ky. 1998).

The trial court gave several reasons for denying Shegog relief pursuant to RCr 11.42, including the fact that Shegog’s motion was not timely filed. We agree. Relief afforded under RCr 11.42 is not without its limits. The statute specifically states:

⁴ Mr. Akers was an alleged witness to the May 28, 2001, robbery who dialed 911 with his cell phone and then gave the phone to Steven Powell.

Any motion under this rule shall be filed *within three years after the judgment becomes final*, unless the motion alleges and the movant proves either:

(a) that the facts upon which the claim is predicated were unknown to the movant and could not have been ascertained by the exercise of due diligence; or

(b) that the fundamental constitutional right asserted was not established within the period provided for herein and has been held to apply retroactively.

RCr 11.42(10) (emphasis added).

For purposes of RCr 11.42, the date that a “judgment becomes final” refers to “the conclusive judgment in the case, whether it be the final judgment of the appellate court on direct appeal or the judgment of the trial court in the event no direct appeal was taken.” *Palmer v. Commonwealth*, 3 S.W.3d 763, 765 (Ky. App. 1999). The Kentucky Supreme Court rendered its opinion confirming Shegog’s conviction on August 26, 2004. Therefore, any RCr 11.42 motions should have been filed by August 26, 2007. Shegog’s RCr 11.42 motion was filed on March 24, 2009. Accordingly, it was not timely filed, and we find no abuse of discretion in the trial court’s denial of relief therefrom.

CR 60.02 allows a party to seek relief of a final judgment based on several grounds, such as mistake, newly discovered evidence, and fraud. In his motion for relief, Shegog also alleged to the trial court that he had newly discovered evidence pertaining to Charles Spencer Akers. Issues may be raised via CR 60.02 only when other procedural mechanisms are unavailable. *McQueen v. Commonwealth*, 948 S.W.2d 415 (Ky. 1997). CR 60.02 requires that all motions

be made within a reasonable time and specifically requires that motions made on the grounds of newly discovered evidence be made not more than one year after judgment. Accordingly, Shegog's CR 60.02 allegations were also untimely filed.

We lastly note that an RCr 11.42 motion is not a proper means for attempting discovery. *Haight v. Commonwealth*, 41 S.W.3d 436, 442 (Ky. 2001) (*overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009)). Furthermore, and as the trial court pointed out in its order denying relief to Shegog, there is no requirement that the Commonwealth provide a defendant with post-conviction discovery. *Sanborn*, 975 S.W.2d at 910. Accordingly, the trial court's denial of Shegog's request for a copy of the 911 tape was also without error.

For the foregoing reasons, the May 6, 2009, order of the Campbell Circuit Court is affirmed.

ALL CONCUR.

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