

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-001207-MR

EDWARD T. BOWLES

APPELLANT

v. APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE ANDREW SELF, JUDGE
ACTION NO. 94-CR-00438

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: CAPERTON AND CLAYTON, JUDGES; BUCKINGHAM,¹ SENIOR JUDGE.

CAPERTON, JUDGE: Edward T. Bowles appeals the denial of his Kentucky

Rules of Civil Procedure (CR) 60.02 motion by the Christian Circuit Court. In its

June 5, 2009, order, the court determined that Bowles's motion was untimely

¹ Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

brought as Bowles's conviction had been final since 1998. After a review of the parties' arguments, the record, and the applicable caselaw, we find no error and, accordingly, affirm.

Bowles's current appeal challenges his conviction, and as such, a brief review of Bowles's history with this Court is in order. Bowles was indicted by the Christian County Grand Jury on December 14, 1994, for the strangling death of Jackie Leavell and for being a second-degree persistent felony offender. A jury trial commenced on April 22, 1996, but a mistrial was declared on the second day of trial following witness testimony concerning a polygraph examination. Upon retrial five months later, the jury found Bowles guilty of the murder of Jackie Leavell and sentenced him to life in prison.

On direct appeal, the Kentucky Supreme Court affirmed Bowles's conviction. In *Commonwealth v. Bowles*, 237 S.W.3d 137, 139 (Ky. 2007),² the Kentucky Supreme Court summarized the evidence in the case, as follows:

In our opinion affirming the judgment of the trial court, we summarized the evidence as follows. The murder victim was a young woman by the name of Jackie Lovell.³ Appellee, his brother James Bowles, and Lovell had been partying together one evening. They had smoked cocaine and had engaged in consensual sex. At some point an argument ensued, and Appellee accused his brother and the victim of stealing money from him. According to the prosecution's evidence, Appellee found a butcher knife and, after his brother had left the house, Appellee stabbed Lovell. James testified that he returned

² The appeal in *Bowles*, 237 S.W.3d 137, concerned Bowles's Kentucky Rules of Criminal Procedure (RCr) 11.42 motion. However, the Court set out the facts related to his direct appeal.

³ Victim's name is spelled "Leavell" throughout the trial record.

to the house and assisted Appellee in loading the victim's body into a car. The body was later dumped off Interstate 24 near Clarksville, Tennessee.

Commonwealth v. Bowles, 237 S.W.3d 137, 139 (Ky. 2007).

On May 27, 1998, Bowles, *pro se*, filed a motion to vacate under RCr 11.42. Following appointment of counsel, the trial court conducted a hearing on Bowles's RCr 11.42 motion on July 11, 2002, and subsequently on March 27, 2003, overruled the RCr 11.42 motion. Bowles appealed the trial court's denial of his motion and raised various claims of ineffective assistance of counsel. On December 17, 2004, a divided panel of this Court reversed the trial court's ruling and remanded for a new trial. By order entered February 15, 2006, the Kentucky Supreme Court granted the Commonwealth's motion for discretionary review. On November 1, 2007, the Kentucky Supreme Court reversed the opinion of this Court and reinstated the trial court's order.

On June 3, 2009, Bowles filed a motion to vacate under CR 60.02. Therein, Bowles alleged that the indictment failed to state a criminal offense and that the indictment should be dismissed because his intoxication negated the intent element of murder. On June 5, 2009, the trial court denied Bowles's motion, noting that his conviction was approximately fifteen years old and determined that Bowles failed to bring his claim within a reasonable time. It is from this order that Bowles now appeals.

On appeal Bowles argues that the indictment was defective for two reasons. First, Bowles asserts that the indictment failed to state that Bowles

intended to cause the death of the victim, thus it failed to allege all elements of murder. Second, he argues that his intoxication rendered the death accidental and that this was a defense to specific intent. In support of his argument that the indictment was insufficient, Bowles argues that his brother James was the true killer and that the government cannot rely on details contained in a bill of particulars to cure a defective indictment. Additionally, Bowles argues that his CR 60.02 motion was not time-barred and that the trial court should have granted his motion based on the extraordinary nature justifying relief of his case because the record is devoid of any truth.

The Commonwealth disagrees and instead argues that the trial court properly denied Bowles's CR 60.02 motion for three reasons. First, Bowles failed to bring his CR 60.02 motion in a reasonable time. Second, Bowles should have raised these issues in a prior proceeding. Third, the indictment was sufficient.

In support of its first argument, that Bowles failed to bring his CR 60.02 motion in a reasonable time, the Commonwealth argues that the trial court properly exercised its discretion when it determined that Bowles's motion was untimely because Bowles was sentenced in 1996 and then filed his CR 60.02 motion approximately thirteen years later. The Commonwealth asserts that Bowles had ample opportunity during this time to bring his CR 60.02 motion and that he offers nothing on appeal explaining why it took thirteen years to notice the alleged defects.

In support of its second argument, that Bowles should have raised these issues in a prior proceeding, the Commonwealth notes that Bowles pursued both a direct appeal and an appeal from the denial of his RCr 11.42 motion. Thus, the Commonwealth asserts that his complaint that the indictment was defective should have been raised on direct appeal. Moreover, the Commonwealth asserts that Bowles raised a similar issue in his RCr 11.42 motion that he did not pursue on appeal following the trial court's denial of the motion. Last, the Commonwealth asserts that these issues are not of the extraordinary nature as contemplated by CR 60.02.

In support of its third argument, that the indictment was sufficient, the Commonwealth refers this Court to the language of the indictment, wherein it stated: "The Grand Jury Charges: 1. On or about the 15th day of September, 1994, in Christian County Kentucky, the above named defendant committed the offense of Murder by strangling Jackie Leavell or by acting as an accomplice thereto" The Commonwealth argues that while Bowles claims that the indictment was not legally sufficient because the murder count did not allege a culpable *mens rea*, the indictment was sufficient under RCr 6.10. It states that Bowles was charged for murder under KRS 507.020 and that Bowles committed said murder by strangling Jackie Leavell or by acting as an accomplice thereto. Thus, the Commonwealth asserts that the language in the indictment may lack specificity but it is not insufficient. With these arguments in mind, we turn to our established jurisprudence.

We review the denial of a CR 60.02 motion under an abuse of discretion standard. *White v. Commonwealth*, 32 S.W.3d 83, 86 (Ky.App. 2000); *Brown v. Commonwealth*, 932 S.W.2d 359, 361 (Ky. 1996). The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999) (citing 5 Am. Jur. 2d *Appellate Review* § 695 (1995)). Therefore, we will affirm the lower court's decision unless there is a showing of some “flagrant miscarriage of justice.” *Gross v. Commonwealth*, 648 S.W.2d 853, 858 (Ky. 1983).

Bowles seeks relief on appeal pursuant to CR 60.02(f).⁴ Relief may be granted under CR 60.02(f) for any reason of an extraordinary nature justifying relief. A CR 60.02(f) motion must be made within a reasonable time. *See* CR 60.02 and *Gross* at 858. An evidentiary hearing is not required to assess the reasonable time restriction inherent in CR 60.02 motions as such is left to the discretion of the Court. *Id.*

The burden of proof falls squarely on the movant to “affirmatively allege facts which, if true, justify vacating the judgment and further allege special circumstances that justify CR 60.02 relief.” *McQueen v. Commonwealth*, 948 S.W.2d 415, 416 (Ky.1997) citing *Gross* at 856. To justify relief, the movant must

⁴ Bowles also seeks relief under CR 60.02(e) which states: “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.” The application of CR 60.02(e) is without merit in the case *sub judice*.

specifically present facts which render the “original trial tantamount to none at all.”

Brown at 361.

Moreover, CR 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 an RCr 11.42 proceeding. *See McQueen v. Commonwealth*, 948 S.W.2d 415 (Ky. 1997). Indeed, as RCr 11.42(3) makes clear, the movant shall state all grounds for holding the sentence invalid of which the movant has knowledge. Thus, final disposition of a movant’s RCr 11.42 motion shall conclude all issues which could reasonably have been presented in the same proceeding. *See Gross v. Commonwealth*, 648 S.W.2d 853 (Ky. 1983).

In the case *sub judice* we agree with the trial court that Bowles’s CR 60.02 motion was untimely brought. Bowles was convicted in 1996 and presented the trial court his CR 60.02 motion approximately thirteen years later. He has not adequately explained the delay; thus, the trial court did not abuse its discretion in finding that the motion was not brought in a reasonable time. *See Stoker v. Commonwealth*, 289 S.W.3d 592 (Ky.App. 2009) (Trial court properly denied Appellant’s CR 60.02 motion, his second post-conviction motion, which was brought approximately eighteen years after conviction).

Bowles’s CR 60.02 motion was properly denied for three additional reasons. First, Bowles has failed to allege specific facts that would entitle him to the extraordinary relief offered by CR 60.02. *See Gross, supra*, and *McQueen, supra*. Second, he has previously litigated both a direct appeal and a RCr 11.42

motion. As such, he is precluded from presenting all issues which could reasonably have been presented in the same proceeding, which include both of the arguments he has presented on this appeal. *See Gross, supra*, and *McQueen,*

supra. Third, under RCr 6.10⁵ Bowles's indictment was sufficient. As held in *Thomas v. Commonwealth*, 931 S.W.2d 446, 449 (Ky. 1996):

The notice pleading of the Rules of Criminal Procedure, unlike the fact pleading it replaced, does not require exact, precise details. It is unnecessary under RCr 6.10 "to restate all the technical requisites of the crime of which a defendant is accused, if the language of the indictment, coupled with the applicable statute, unmistakably accomplishes this end result." *Runyon v. Commonwealth*, Ky., 393 S.W.2d 877, 880 (1965). An indictment is sufficient if it fairly informs the accused of the nature of the charged crime, without detailing the

⁵ RCr 6.10 states:

- (1) The indictment or information shall contain a caption setting forth the name of the court and the names of the parties, and the caption shall be a part of the indictment or information.
- (2) The indictment or information shall contain, and shall be sufficient if it contains, a plain, concise and definite statement of the essential facts constituting the specific offense with which the defendant is charged. It need not contain any other matter not necessary to such statement, nor need it negative any exception, excuse or proviso contained in any statute creating or defining the offense charged.
- (3) Allegations made in one count may be incorporated by a reference in another count. It may be alleged in any count that the means by which the defendant committed the offense are unknown or that the defendant committed it by one or more specified means. The indictment or information shall state for each count the official or customary citation of any applicable statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated; but error in the citation or its omission shall not be ground for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to his or her prejudice.
- (4) The date on which it was returned in open court shall be endorsed on the indictment by the clerk.

formerly “essential” factual elements, *Finch, supra*, 419 S.W.2d at 147, and “if it informs the accused of the specific offense with which he is charged and does not mislead him.” *Wylie, supra*, 556 S.W.2d at 2

. . . .

All that is necessary to “charge an offense,” as required by RCr 8.18, is to name the offense. For example, in *Brown v. Commonwealth, Ky.*, 555 S.W.2d 252, 257-58 (1977), we found that an indictment charging Mark and Jim Brown “murdered Bryant Victor Dudley,” was unquestionably defective and “loose, but not invalid” even though the indictment did not specify the manner or means by which the murder was allegedly committed.

A lack of jurisdiction or failure to charge an offense may be raised “at anytime during the proceedings.” RCr 8.18. However, all other defects in the indictment, such as failure to comply with RCr 6.10, must be “raised only by motion before trial.” RCr 8.18.

This difference in the need for factual completeness and specificity between the old Code of Criminal Practice and the present-day Rules of Criminal Procedure is due to the changed purpose of an indictment. Under the Code, the indictment was intended to provide the defendant information concerning the details of the charges to enable the defense to adequately prepare. “The old Code of Criminal Practice, under which *Duncan, [supra]*, was decided, did not provide as liberally for amending indictments as do the Rules of Criminal Procedure, nor did it authorize a bill of particulars as now provided in RCr 6.22.” *Brown, supra*, at 258. However, with notice pleading under the Rules, if the defense needs details to adequately prepare, the defense “should be supplied them through a requested bill of particulars, rather than that a requirement be made that every indictment set forth all details of the charge.” *Finch, supra*, 419 S.W.2d at 147.

Thomas at 449-450.

Thus, Bowles's CR 60.02 motion was properly denied by the trial court.

In light of the aforementioned, we affirm the denial of Bowles's CR 60.02 motion.

ALL CONCUR.

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