

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2010-CA-000095-MR

HARRY L. SMITH

APPELLANT

v. APPEAL FROM CAMPBELL CIRCUIT COURT  
HONORABLE FRED A. STINE, JUDGE  
ACTION NO. 86-CR-00193

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: CLAYTON AND KELLER, JUDGES; ISAAC,<sup>1</sup> SENIOR JUDGE.

ISAAC, SENIOR JUDGE: Harry L. Smith appeals from an order denying his motion for post-conviction relief pursuant to Kentucky Rule of Civil Procedure (CR) 60.02. He argues that: (1) his sentence is illegal because he received a life sentence in state court that was ordered to run consecutively with the life sentence he received in federal court; and (2) his subsequent state prosecution violated double jeopardy protections. We affirm.

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<sup>1</sup> Senior Judge Sheila R. Isaac sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

In 1987, a federal jury found Smith guilty of Theft of a Controlled Substance Resulting in Murder, Conspiracy to Obtain a Controlled Substance by Robbery, Carrying a Firearm in Furtherance of a Crime of Violence, and Intent to Possess Narcotics for the Purposes of Distribution. For the respective convictions, Smith received a sentence of life imprisonment, a term of ten years of imprisonment, a term of five years of imprisonment, and a term of twenty years of imprisonment with all terms to be served consecutively.

Subsequent to the federal trial, Smith was tried by jury in the Campbell Circuit Court and found guilty of capital murder. He received a sentence of life imprisonment without the benefit of parole for a minimum of twenty-five years. The trial court ordered that the state sentence run consecutively to the previously imposed federal sentence. The Supreme Court of Kentucky affirmed his state court conviction on direct appeal in an unpublished opinion. *Smith v. Commonwealth*, 88-SC-67-MR (rendered February 16, 1989). On May 1, 2009, Smith filed a motion for post-conviction relief pursuant to CR 60.02, which the trial court denied. This appeal followed.

Smith argues that he is entitled to relief because the trial court impermissibly ordered his life sentence to run consecutively to the life sentence he received in federal court. He also argues that his state prosecution was pursued in violation of double jeopardy protections.

CR 60.02 “is designed to provide relief where the reasons for the relief are of an extraordinary nature.” *Ray v. Commonwealth*, 633 S.W.2d 71, 73

(Ky.App. 1982). “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 . . . .” *McQueen v. Commonwealth*, 948 S.W.2d 415, 416 (Ky. 1997) (internal quotation marks omitted). CR 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.*

The sentencing and double jeopardy issues could both have been raised on direct appeal or on a motion for relief pursuant to RCr 11.42, had Smith chosen to pursue this remedy. Moreover, Smith did not file his CR 60.02 motion for over twenty years after his direct appeal became final. This is simply an unreasonable delay under the circumstances of this case. *See Gross v. Commonwealth*, 648 S.W.2d 853, 858 (Ky. 1983)(holding five years did not constitute a reasonable time for filing); *Ray, supra*, (holding twelve years did not constitute a reasonable time for filing).

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

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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