

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000443-MR

CHARLES W. DARNELL

APPELLANT

v. APPEAL FROM GREENUP CIRCUIT COURT
HONORABLE ROBERT B. CONLEY, JUDGE
ACTION NO. 76-CR-02269

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: CLAYTON, LAMBERT, AND VANMETER, JUDGES.

VANMETER, JUDGE: Charles W. Darnell appeals from an order of the Greenup Circuit Court denying his motion for post-conviction relief pursuant to CR¹ 60.02.

For the following reasons, we affirm.

¹ Kentucky Rules of Civil Procedure.

Darnell and his co-defendant, Michael Nickel, were convicted in the Greenup Circuit Court of murder and two counts of robbery for crimes committed in 1976, and were sentenced to life in prison for the murder conviction and twenty years' imprisonment on each of the robbery charges, with the sentences to run consecutively. Their convictions and sentences were upheld on direct appeal by the Kentucky Supreme Court, which held, in part, that under the circumstances, the Commonwealth's comments at trial concerning the silence of the defendants at the time of their arrest constituted only harmless error which did not require reversal. *Darnell v. Commonwealth*, 558 S.W.2d 590 (Ky. 1977).

In 1983, Nickel filed a *habeas corpus* action in federal court, alleging that his constitutional rights were violated as a result of the Commonwealth's comments at trial concerning his silence at the time of his arrest. The United States Magistrate for the Eastern District of Kentucky agreed, finding that his rights were violated; that finding was adopted by the United States District Court, Eastern District of Kentucky, and affirmed by the United States Court of Appeals for the Sixth Circuit. Nickel's petition for a writ of *habeas corpus* was granted. On retrial, Nickel was again convicted of murder and two counts of robbery.

In 2004, Darnell moved *pro se* to vacate his sentence pursuant to CR 60.02(e) and (f), based on the findings of the United States Magistrate. Darnell argued that the same prejudicial conduct by the trial court which occasioned the reversal of Nickel's conviction also applied to him. The trial court denied his

motion on the basis that Darnell had not acted within a “reasonable time” as required under CR 60.02. Darnell’s appeal from this decision was dismissed for failure to file a brief as ordered. In 2009, Darnell again moved *pro se* for relief pursuant to CR 60.02(e) and (f) on the same grounds. The trial court once more denied his motion as untimely. This appeal followed.

We review a trial court’s denial of a CR 60.02 motion for an abuse of discretion. *White v. Commonwealth*, 32 S.W.3d 83, 86 (Ky. App. 2000). 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) (citations omitted).

Darnell claims to be entitled to relief under CR 60.02(e) and (f), which provides:

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 purpose of CR 60.02 is to afford special and extraordinary relief not available in other proceedings; the rule is not to be used to relitigate previously determined issues. *Baze v. Commonwealth*, 276 S.W.3d 761, 766 (Ky. 2008). In other words, finality is crucial; CR 60.02 does not open gates to endless litigation.

In this case, on direct appeal to the Kentucky Supreme Court, Darnell and Nickel argued that their constitutional rights had been violated by the Commonwealth's comments on their silence at the time of their arrest. The Supreme Court held that the Commonwealth's comments in this regard constituted only harmless error. Though in Nickel's *habeas corpus* action, the United States Magistrate disagreed, finding that Nickel's constitutional rights had been violated as a result of the Commonwealth's comments. Darnell was not a party to this action. Thus, the Kentucky Supreme Court's decision is the law of the case as it applies to Darnell and he is precluded from having this issue relitigated in a CR 60.02 motion.

In the underlying CR 60.02 motion, Darnell contends that his sentence should be vacated based on the findings of the United States Magistrate; however, this issue was presented in his first CR 60.02 motion, which the trial court denied. The appeal of the trial court's decision was dismissed by this court. Thus, this issue has been finalized as a matter of law and Darnell has no claim for relief under CR 60.02(e) and (f).

Even so, Darnell's motion lacks substantive merit. A motion to vacate under CR 60.02(e) and (f) must be made within a "reasonable time." What constitutes a "reasonable time" under CR 60.02 is a matter that addresses itself to the discretion of the trial judge. *Gross v. Commonwealth*, 648 S.W.2d 853, 858 (Ky. 1983).

Here, the record reveals that the underlying CR 60.02 motion was filed over thirty-three years after Darnell's sentence was entered, over twenty-six years from

the time the United States District Court granted Nickel's writ of *habeas corpus*, and over five years from the time Darnell alleges he learned of the writ granted to Nickel. As such, the trial court found that Darnell failed to move for CR 60.02 relief within a "reasonable time" and accordingly denied his motion. Under the circumstances, the court's findings were not an abuse of its discretion. *See Baze*, 276 S.W.3d at 768 (holding that defendant's CR 60.02 motion filed approximately fourteen years after trial was unreasonable); *Gross*, 648 S.W.2d at 858 (holding that the trial court did not abuse its discretion by finding that the passage of five years between the final judgment and a CR 60.02 motion exceeded a reasonable time); *Ray v. Commonwealth*, 633 S.W.2d 71, 73 (Ky.App. 1982) (holding that a CR 60.02 motion filed twelve years after defendant's conviction exceeded a reasonable time).

The order of the Greenup Circuit Court is affirmed.

ALL CONCUR.

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