

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000207-MR

ROWLAND GAZAWAY

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE IRV MAZE, JUDGE
ACTION NO. 97-CR-001896

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, THOMPSON, AND VANMETER, JUDGES.

THOMPSON, JUDGE: Roland Gazaway appeals an order of the Jefferson Circuit Court denying his CR 60.02 motion.

In 1998, a jury found Gazaway guilty of murder, assault in the first degree, and burglary in the first degree. An agreement was reached between Gazaway and the Commonwealth pursuant to which Gazaway waived jury

sentencing but was permitted to argue for a sentence less than life. Gazaway also agreed to waive his right to directly appeal any pretrial and trial issues. On December 23, 1998, a judgment of conviction and sentence was entered convicting Gazaway of murder, assault in the first degree, and burglary in the first degree. He was sentenced to forty-five years' imprisonment.

The instant CR 60.02 motion is the second filed by Gazaway and his fourth post-judgment motion. We conclude that his most recent CR 60.02 motion was properly denied as a successive motion for relief.

In 2001, Gazaway filed an RCr 11.42 motion alleging ineffective assistance of counsel and prosecutorial misconduct. That motion was denied by the trial court and was affirmed by this Court. He subsequently filed a CR 60.02 motion alleging that: (1) his attorney had a conflict of interest; (2) his convictions were barred by double jeopardy; (3) the evidence was insufficient to support the verdict; and (4) his counsel was ineffective. The trial court denied the motion, and this Court affirmed.

In 2005, Gazaway again sought post-judgment relief when he filed a motion to vacate pursuant to CR 60.03 and CR 61.02. The trial court denied the motion and the order was not appealed.

The most recent CR 60.02 motion was filed in 2008, ten years after Gazaway's judgment of conviction and sentence. He now alleges that he is innocent of the crimes and seeks to invoke CR 60.02(f).

We review the trial court's denial of a CR 60.02 motion based on the abuse of discretion standard. *Brown v. Commonwealth*, 932 S.W.2d 359, 362 (Ky. 1996). Gazaway asserts that "newly discovered evidence" exists (an unidentified ballistic test), that he received ineffective assistance of counsel, and that the agreement to forgo jury sentencing was not voluntarily entered. It is unnecessary to address the merits of Gazaway's contentions.

CR 60.02 does not permit successive post-judgment motions and may only be utilized in extraordinary situations when relief is not available on direct appeal or under RCr 11.42. *McQueen v. Commonwealth*, 948 S.W.2d 415, 416 (Ky. 1997). Prior to the instant CR 60.02 motion, Gazaway had already filed three prior post-judgment motions, including a CR 60.02 motion. He is now precluded from seeking further relief.

Furthermore, Gazaway's bare allegation that a new method of ballistic testing is available to prove his innocence cannot meet the stringent requirements of CR 60.02. Although he asserts his claim under CR 60.02(f), which permits relief for an extraordinary reason, the initial basis for his claim is based on his suggestion that there is newly discovered evidence to prove his innocence. CR 60.02(b). However, he has failed to allege with specificity the nature of the test or the result that would be obtained. Absent specific allegations, Gazaway cannot set forth a claim for relief under CR 60.02(b). *Stoker v. Commonwealth*, 289 S.W.3d 592, 597 (Ky.App. 2009). Moreover, any motion pursuant to CR 60.02(b) must have been filed within one year of his judgment of conviction and sentence.

Gazaway cannot elude the one-year time limitation in CR 60.02(b) by invoking CR 60.02(f), which requires that a motion be filed within a reasonable time. It has been ten years since the judgment of conviction and sentence was entered, yet Gazaway offers no justification for his ten-year delay in seeking relief. Gazaway's delay in seeking his most recent request for CR 60.02 relief is an additional basis for the summary denial of his motion

We conclude that the trial court acted properly within its discretion in denying Gazaway's CR 60.02 motion. The order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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