

Commonwealth of Kentucky
Court of Appeals

NO. 2010-CA-001253-MR

DONALD STORY

APPELLANT

v. APPEAL FROM LEE CIRCUIT COURT
HONORABLE THOMAS P. JONES, JUDGE
ACTION NO. 00-CR-00011

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: CLAYTON, LAMBERT, AND VANMETER, JUDGES.

CLAYTON, JUDGE: Appellant, Donald Story, plead guilty to two counts of wanton murder and driving under the influence on December 5, 2001. A year later, Story filed a motion to alter, amend or vacate pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42 and/or Kentucky Rules of Civil Procedure (CR) 60.02(e)(f). In his motion, Story argued that he had ineffective assistance of

counsel. He contended that his counsel failed to investigate his case fully and that counsel failed to request funds to hire an independent blood expert. Story also asserted that his counsel should have suppressed blood evidence and advised him of the defense of reckless homicide since the evidence did not meet the elements required for wanton murder.

The trial court denied Story's motion and this Court affirmed the denial. The Supreme Court of Kentucky denied discretionary review of the case on March 9, 2005. On February 24, 2010, Story filed a second CR 60.02 and 60.03 motion, requesting the trial court amend or correct its judgment. In this motion, Story argued that the Commonwealth had not provided him with discovery he needed to have a post-conviction review of the evidence in his case. The trial court also denied this motion holding that the delay in filing the motion was too long from the initial judgment. Story now appeals the trial court's decision denying his motion pursuant to CR 60.02 and 60.03.

STANDARD OF REVIEW

We review the denial of a CR 60.02 motion under an abuse of discretion standard. *White v. Com.*, 32 S.W.3d 83, 86 (Ky. App. 2000); *Brown v. Com.*, 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." *Com. v. English*, 993 S.W.2d 941, 945 (Ky. 1999). Therefore, we affirm the lower court's decision unless there is a

showing of some “flagrant miscarriage of justice.” *Gross v. Com.*, 648 S.W.2d 853, 858 (Ky. 1983).

DISCUSSION

In denying Story’s motion, the trial court held that:

[U]nder CR 60.02, the relief must be sought within a reasonable time, and the Defendant has provided no sworn statement as to when he became aware that this material had not been given to him. He merely speculates that the driver of the Rogerses’ [sic] vehicle could have been intoxicated and that prescription medications could have been present in their vehicle, that the Commonwealth never informed him of what items were removed from the vehicle, and that such information was not reflected in the police reports. He further alleges that the Commonwealth never informed him of any accident reconstruction report ever being made and never provided him with the autopsy reports, toxicology reports, or accident reconstruction report. He argues that without autopsy reports, the accident has not been shown to have caused the Rogerses’ [sic] death. As previously stated, relief must be sought under a CR 60.02 Motion within a reasonable time, and the Defendant has not explained why he waited more than 8 years from the entry of the Judgment, or 5 years from the Court of Appeals affirming the denial of the RCr 11.42 Motion and the Supreme Court denying discretionary review, to mention this exculpatory evidence. The Commonwealth does not have an obligation to provide potentially exculpatory material to a defendant, and it has been held that the failure to do so deprives the defendant of a fair trial (Citation omitted); however, the mere possibility that undisclosed information may have helped the defendant or otherwise affected the outcome does not give rise to a *Brady* violation (Citation omitted).

.....

This Court concludes that the Defendant failed to raise the alleged grounds for relief within a reasonable

time (8 years or 5 years, whichever one prefers), as he has not stated in his Motions when he acquired the exculpatory information.

Opinion at 4-5.

We agree with the trial court. Story's contentions should have been brought when he filed his original RCr 11.42 motion. If he was unaware of the evidence at that time, he should have set forth in his CR 60.02/60.03 motion when he became aware of the Commonwealth's alleged withholding of exculpatory evidence. Story had done neither. Clearly, the trial court's decision that too much time had elapsed between the original guilty plea and the current motion was not an abuse of discretion. Thus, we affirm the decision of the trial court denying Story's CR 60.02 and 60.03 motion.

ALL CONCUR.

BRIEF FOR APPELLANT:

Donald Story, Pro Se
Eddyville, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Gregory C. Fuchs
Assistant Attorney General
Frankfort, Kentucky