

RENDERED: SEPTEMBER 6, 2013; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001152-MR

LESLIE W. SOUTHWOOD

APPELLANT

v. APPEAL FROM BREATHITT CIRCUIT COURT
HONORABLE FRANK ALLEN FLETCHER, JUDGE
ACTION NO. 08-CR-00070

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: DIXON, MOORE, AND THOMPSON, JUDGES.

MOORE, JUDGE: Leslie W. Southwood appeals the Breathitt Circuit Court's order denying his CR¹ 60.02 motion for relief from judgment. After a careful review of the record, we affirm because Southwood failed to bring his CR 60.02 motion within a reasonable time.

¹ Kentucky Rule of Civil Procedure.

I. FACTUAL AND PROCEDURAL BACKGROUND

Southwood was indicted on the charge of second-degree arson. The Commonwealth subsequently provided an offer on a plea of guilty, wherein it proffered to recommend a sentence of twenty years of imprisonment, to be probated for five years, if Southwood entered a guilty plea to the charge and returned a chainsaw to Joel Brewer. Southwood moved to enter a guilty plea in accord with the Commonwealth's offer. The circuit court accepted his guilty plea to second-degree arson and sentenced him to twenty years of imprisonment, probated for five years.

Approximately two and one-half years later, the Commonwealth moved to revoke Southwood's probation on the grounds that he had been charged with: first-degree possession of a controlled substance; carrying a concealed deadly weapon; and operating a motor vehicle under the influence. The motion to revoke Southwood's probation was also based upon the allegation that Southwood had been outside the area of his supervision without the permission of his probation officer.² A hearing was held, and the court ordered the revocation of Southwood's probation and sentenced him to serve twenty years of imprisonment.

Southwood filed a motion to alter, amend, or vacate the order revoking his probation and ordering him to serve twenty years of imprisonment. The circuit court denied Southwood's motion. Southwood appealed, and this

² This allegation was based upon the fact that when Southwood was arrested on these new charges, he was at that time outside the area of his supervision.

Court affirmed the circuit court's decision. *See Southwood v. Commonwealth*, 372 S.W.3d 882 (Ky. App. 2012).

Southwood filed a CR 60.02 motion for relief from the circuit court's judgment. In his motion, Southwood essentially argued that he should not have been convicted of second-degree arson because he burned a chicken coop, and "there was no threat to the safety of any person, animal, or bird, as the coop was empty, at the time. [The coop] was well over a hundred (100) yards from any other building(s) on the property." He further contended that he had "no intention whatsoever to cause anyone physical injury. Nor, did [Southwood] have any intention to defraud any insurance company of unlawful profit." The circuit court denied Southwood's CR 60.02 motion.

Southwood now appeals, alleging that: (a) the circuit court abused its discretion in failing to hold an evidentiary hearing on his CR 60.02 claim; (b) the circuit court erred in accepting Southwood's guilty plea to a Class B felony when it should have been a Class C felony; and (c) his plea agreement runs contrary to law, so it is illegal and should not be enforced.

II. STANDARD OF REVIEW

On appeal, we review the denial of a CR 60.02 motion for an abuse of discretion. "A movant is not entitled to a hearing on a CR 60.02 motion unless he affirmatively alleges facts which, if true, justify vacating the judgment and further allege[s] special circumstances that justify CR 60.02 relief." *White v.*

Commonwealth, 32 S.W.3d 83, 86 (Ky. App. 2000) (internal quotation marks and citation omitted).

“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 or RCr³ 11.42 proceedings.” *McQueen v. Commonwealth*, 948 S.W.2d 415, 416 (Ky. 1997) (internal quotation marks omitted). Civil Rule 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.* Further, claims brought under CR 60.02(a), (b), or (c) must be brought within one year after the judgment is entered, and claims brought under the remaining sections of CR 60.02 must be brought within a “reasonable time.” *See* CR 60.02.

III. ANALYSIS

Southwood filed his CR 60.02 motion three and one-half years after the judgment was entered. Because he could have raised his claims at a much earlier time, his motion was not filed within a “reasonable time.” *See Gross v. Commonwealth*, 648 S.W.2d 853, 856 (Ky. 1983). Therefore, the circuit court did not abuse its discretion in denying Southwood’s CR 60.02 motion.

Moreover, we note that Southwood’s claims could have been brought in a timely-filed RCr 11.42 motion, but Southwood failed to file such a motion. Thus, his claims were not properly raised in his CR 60.02 motion. *See McQueen*, 948 S.W.2d at 416. Finally, because Southwood was not entitled to CR 60.02

³ Kentucky Rule of Criminal Procedure.

relief, the circuit court did not err in failing to hold an evidentiary hearing concerning his claims.

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

DIXON, JUDGE, CONCURS.

THOMPSON, JUDGE, DISSENTS.

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