

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-001151-MR

ANDRA DEWAYNE KILLEBREW

APPELLANT

v. APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE JOHN L. ATKINS, JUDGE
ACTION NOS. 07-CR-00644 AND 08-CR-00110

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, JONES, AND TAYLOR, JUDGES.

JONES, JUDGE: Andra Killebrew, Appellant, brings this *pro se* appeal from an order of the Christian Circuit Court denying his request for post-conviction relief pursuant to CR¹ 60.02. After a careful review of the record and the applicable law, we affirm.

¹ Kentucky Rules of Civil Procedure.

I. Background

On September 21, 2007, Killebrew was indicted for rape in the first degree, kidnapping, burglary in the first degree, and fleeing or evading police in the first degree. Subsequently, Killebrew was also indicted for being a persistent felony offender in the second degree. Killebrew's two-day trial began on March 17, 2008. On March 18, 2008, Killebrew entered a plea of guilty to each charge in both indictments. He received twenty years for each charge of rape in the first degree, kidnapping, and burglary in the first degree, and received five years on the fleeing or evading police charge. Each sentence was enhanced by the persistent felony offender in the second degree charge and ran concurrently, for a total of twenty years. Killebrew's judgment was entered on May 22, 2008.

Killebrew filed his *pro se* RCr² 11.42 motion on November 6, 2008. The Christian Circuit Court denied relief on August 30, 2010. On December 27, 2010, Killebrew filed a motion for a belated appeal of the circuit court's denial of his RCr 11.42 motion. The circuit court denied his motion on July 5, 2011. Killebrew appealed that decision to this Court and on April 21, 2011, this Court remanded the matter back to the Christian Circuit Court to hold an evidentiary hearing concerning whether Killebrew waived his right to appeal.³ The circuit court held a hearing on the matter on June 15, 2011, and determined that Killebrew

² Kentucky Rules of Criminal Procedure.

³ *Killebrew v. Commonwealth*, 2010-CA-02321-MR, (Ky. App. Apr. 21, 2011).

had waived his right to appeal his RCr 11.42 motion. This Court affirmed the circuit court's decision on August 11, 2011.⁴

Killebrew filed his motion for relief pursuant to CR 60.02 in the circuit court on August 14, 2013, and the circuit court denied relief on April 22, 2014. Killebrew filed a motion in this Court for a belated appeal from the order denying relief, and on October 23, 2014, this Court remanded the matter back to the circuit court to hold an evidentiary hearing concerning whether Killebrew had waived his right to an appeal.⁵ On January 13, 2015, the Christian Circuit Court entered findings of fact and conclusions of law that Killebrew did not waive his right to appeal his CR 60.02 motion. On February 20, 2015, this Court entered an order granting Killebrew's motion to file a belated appeal of his CR 60.02 motion.⁶ This appeal follows.

II. Analysis

A. Ineffective Assistance of Counsel

Killebrew alleges several arguments pertaining to ineffective assistance of counsel, including that his guilty plea was invalid because he relied

⁴ *Killebrew v. Commonwealth*, 2010-CA-02321-MR, (Ky. App. Aug. 11, 2011).

⁵ *Killebrew v. Commonwealth*, 2010-CA-001151-MR, (Ky. App. Oct. 23, 2014).

⁶ *Killebrew v. Commonwealth*, 2014-CA-001151-MR, (Ky. App. Feb. 20, 2015).

on counsel's misadvice, that he was not competent to plead guilty, and that prejudice should be presumed because Killebrew's trial counsel was suspended from the practice of law during part of Killebrew's trial. These arguments are inappropriate for our review.

Killebrew filed his RCr 11.42 motion in Christian Circuit Court, and it was denied. The circuit court held an evidentiary hearing and entered findings of fact, stating that Killebrew waived his right to appeal the denial of his RCr 11.42 motion. Later, this Court affirmed that order. Because we have previously held that Killebrew is precluded from filing an appeal of the circuit court's denial of his RCr 11.42 motion, and because Killebrew's ineffective assistance of counsel arguments actually were raised or could have been raised in that motion, we will not entertain those arguments in depth now. "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." *McQueen v. Commonwealth*, 948 S.W.2d 415, 416 (Ky. 1997).

We note, however, that the Christian Circuit Court's analysis of the voluntariness of Killebrew's plea in its denial of Killebrew's RCr 11.42 motion was well reasoned and exhaustive, and we cannot say that it was clearly erroneous. Regardless, we have previously determined that Killebrew waived his right to appeal his RCr 11.42 motion, and so he is not entitled to an appellate review of these arguments.

B. Prior Psychological Evaluation

Killebrew's sole remaining argument on appeal is that he is entitled to relief under CR 60.02(f) because he only recently became aware of a previous psychological evaluation performed at the Pennyroyal Mental Health Center. This evaluation stated, among other things, that Killebrew had schizophrenia and experienced auditory hallucinations. Killebrew contends that this report would have established that he was not competent to stand trial or plead guilty. The psychological report for Killebrew's case at trial was prepared by Dr. Amy Trivette, who determined that, although Killebrew claimed that he suffered from hallucinations, he was most likely malingering. Her report stated that

[W]hile Mr. Killebrew reported hallucinations, he did not appear to be responding to internal stimuli. Objective evidence of hallucinations would be expected if he was actively psychotic. In addition to the absence of observable symptoms, his descriptions of hallucinations are atypical of persons with genuine psychosis. He appeared eager to draw attention to his symptoms in contrast to those with psychotic illnesses who often are reluctant to discuss their symptoms. In addition, he did not report or demonstrate other symptoms expected in genuine psychotic disorders, such as delusions, disorganized thoughts, sleep or appetite disturbance, and negative symptoms.

Dr. Trivette also stated during a competency hearing before the circuit court that she believed that Killebrew would be able to participate in his own defense and could appreciate his criminal responsibility.

Relief under CR 60.02 "is generally left to the sound discretion of the trial court[.]" and "one of the chief factors guiding [the trial court is] the moving party's ability to present his claim prior to the entry of the order sought to be set

aside.” *Schott v. Citizens Fidelity Bank and Trust Co.*, 692 S.W.2d 810, 814 (Ky. App. 1985). CR 60.02(f) “may be invoked only under the most unusual circumstances...” *Howard v. Commonwealth*, 364 S.W.2d 809, 810 (Ky. 1963).

“In order to be eligible for CR 60.02 relief, the movant must demonstrate why he is entitled to this special, extraordinary relief.” *Sanders v. Commonwealth*, 339 S.W.3d 427, 437 (Ky. 2011) (quoting *Barnett v. Commonwealth*, 979 S.W.2d 98, 101 (Ky. 1998)). As our Supreme Court has explained, “[a] criminal judgment may be set aside only in extraordinary and emergency cases where the showing made is of such a conclusive character as to indicate the verdict most probably would not have been rendered and there is a strong probability of a miscarriage of justice.” *Harris v. Commonwealth*, 296 S.W.2d 700, 702 (Ky. 1956).

Killebrew’s judgment from his guilty plea was entered on May 22, 2008. Killebrew first filed his underlying motion pursuant to CR 60.02 and RCr 10.06 on August 14, 2013. A motion under 60.02(f) must be made within “a reasonable time.” The circuit court’s order states that Killebrew belatedly filed his CR 60.02 motion, because Killebrew knew about the psychological evaluation when he pled guilty. We review such a determination for an abuse of discretion. “What constitutes a reasonable time is left to the discretion of the trial court...” *Commonwealth v. Carneal*, 274 S.W.3d 420, 433 (Ky. 2008).

In *Carneal*, our Supreme Court reviewed motions pursuant to both RCr 11.42 and CR 60.02 in which the appellant alleged that he was entitled to

relief due to his mental incapacity. *Id.* at 425-26; 429. Our Supreme Court held that both claims failed due to a lack of diligence on the part of the appellant, stating:

Even if we assume that Dr. Cornell's report constitutes newly discovered evidence, we cannot agree that it was undiscoverable at the time Carneal pled guilty. Obviously, Carneal and his trial counsel were aware of a mental condition, ultimately accepting a plea of "guilty but mentally ill." Before the plea, Dr. Cornell diagnosed Carneal with schizotypal personality disorder, which he indicated may involve temporary psychotic episodes. While his present diagnosis of schizophrenia is much more severe, the possibility that Carneal was in the midst of a psychotic episode at the time of the shooting was recognized prior to sentencing. More notably, Carneal was given the more severe diagnosis of schizophrenia as early as 1999, yet his motion for a new trial was not filed until 2004. For these reasons, we do not believe the trial court abused its discretion in rejecting Carneal's motion for a new trial as untimely.

Id. at 432.

Our Supreme Court came to a similar conclusion in *Commonwealth v. Stacey*, 177 S.W.3d 813, 816 (Ky. 2005), in which the court held that the defendant was not excused from complying with the three-year limitations in RCr 11.42(10) because "the report was known to Stacey at both the time of his plea and at the time of sentencing[]" and "[e]ven assuming that Stacey does suffer from some level of mental impairment, the record is devoid of any evidence as to how such impairment prevented him from complying with the three-year limitations requirement." *Id.*

The circumstances of this case are similar to *Carneal* and *Stacy*.

Killebrew's sole reason for the filing his CR 60.02 motion five years after his judgment was entered is that he had allegedly not discovered that his trial counsel had been suspended until June, 2013. Though the letter that Killebrew has attached to his motion indicates that Killebrew's counsel was briefly suspended from his employment at the Department of Public Advocacy (although apparently not the practice of law) prior to Killebrew's trial, this could not have had an effect on Killebrew's ability to file his motion in the trial court. Killebrew was aware of the recent diagnosis of his mental health issues, and Killebrew should have known of the existence of these medical records, given the fact that he was a resident at the Pennyroyal Mental Health Center. Additionally, Dr. Trivette's report stated that the "[r]ecords were requested from Pennyroyal Mental Health in Hopkinsville and Kentucky Department of Corrections, but were not available prior to this dictation." Again, this disclosure should have alerted Killebrew to the existence of the records in the present case. Even if the records could not have been obtained before Killebrew pled guilty, they surely could have been obtained prior to five years after Killebrew's plea, given that he was on notice of the existence.⁷ "Newly discovered evidence is evidence that could not have been obtained at the time of trial through the exercise of reasonable diligence." *Commonwealth v. Harris*, 250

⁷ We note that our Supreme Court previously ruled that a trial court did not abuse its discretion in holding that a CR 60.02(f) motion was untimely filed five years after judgment. *Gross v. Commonwealth*, 648 S.W.2d 853, 858 (Ky. 1983). Furthermore, five years is the exact amount of time that the appellant waited to file his motion in *Carneal*. 274 S.W.3d at 432.

S.W.3d 637, 642 (Ky. 2008). Under *Carneal* and *Stacy*, Killebrew did not act with such diligence here.

Second, though the medical evaluation did contain comments to the effect that Killebrew was experiencing auditory hallucinations and was schizophrenic, this assessment was made approximately a year before the circumstances of the circuit court case. Prior to his release, the staff notes in the Pennyroyal Mental Health Center evaluation reflect that Killebrew denied any auditory or visual hallucinations. Finally, Dr. Trivette's evaluation of Killebrew before he pled guilty was not arbitrary, and her opinions were subject to cross-examination by defense counsel during Killebrew's competency hearing before the circuit court.

Because Killebrew has failed to demonstrate that he is entitled to the "special, extraordinary relief[]" provided in CR 60.02(f), his request for relief is denied. *Sanders*, 339 S.W.3d at 437. As we deny Killebrew's request for relief under CR 60.02, we also deny his request for a new trial under RCr 10.06.

III. Conclusion

In sum, we hold that Killebrew was not entitled to raise ineffective assistance of counsel claims to this Court after we have previously held that he is barred from filing a belated appeal of his RCr 11.42 motion, and we hold that Killebrew was not entitled to relief under CR 60.02 for a mental health evaluation which had been made available to him previously.

The Christian Circuit Court's order dismissing Killebrew's motion pursuant to CR 60.02 is affirmed.

ALL CONCUR.

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