

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2014-CA-001266-MR

JAMES SALLEE

APPELLANT

v. APPEAL FROM MONTGOMERY CIRCUIT COURT  
HONORABLE BETH LEWIS MAZE, JUDGE  
ACTION NOS. 08-CR-00184-001 & 08-CR-00185-002

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: DIXON, NICKELL, AND VANMETER, JUDGES.

VANMETER, JUDGE: James Sallee appeals from a Montgomery Circuit Court order denying his Kentucky Rules of Civil Procedure (CR) 60.02 motion to modify orders of restitution.

On August 14, 2009, Sallee entered guilty pleas in two cases. In case number 08-CR-00184-001, Sallee entered a plea of guilty to engaging in organized crime, two counts of complicity to kidnapping, complicity to second-degree

assault, complicity to fourth-degree assault, and two counts of theft by unlawful taking. He received a total sentence of twelve years, and was also ordered to pay restitution, jointly and severally with his co-defendants, in the amount of \$6,200, to the complainant, Brian Blevins.

In case number 08-CR-00185-002, Sallee entered a plea of guilty to one count of third-degree burglary, and was sentenced to three-years' imprisonment to be served concurrently with the sentence in 08-CR-00184-001. He was ordered to pay restitution, jointly and severally with his co-defendants, in the amount of \$297.50, to Route 11 Liquors.

On June 3, 2013, almost four years after the entry of his plea, Sallee filed a motion pursuant to CR 60.02(e) and (f) in case number 08-CR-00184-001, seeking to modify the restitution amount. On October 22, 2013, he filed a similar motion in case number 08-CR-00185-002. He explained that his parole had been revoked in 2012, in part because he was not making the restitution payments. He asked the court to rescind its restitution order, claiming that he would be unable to afford to make the payments when released from prison. He also complained that he was being denied parole supervision credit for his failure to pay the restitution. The trial court denied the motions, and Sallee did not appeal.

Then, on January 29, 2014, Sallee filed a motion pursuant to CR 60.02(e) and (f), arguing that he was denied due process of law because he was not given notice of the restitution amount prior to sentencing, was not afforded an opportunity to rebut the restitution, and that there was no substantial evidence to

support the amount of restitution ordered. The trial court denied the motion, in part because it was repetitive. This appeal by Sallee followed.

Restitution is defined as “any form of compensation paid by a convicted person to a victim for counseling, medical expenses, lost wages due to injury, or property damage and other expenses suffered by a victim because of a criminal act[.]” Kentucky Revised Statutes (KRS) 532.350(1)(a). Restitution is mandatory under KRS 532.032(1), which states:

Restitution to a named victim, if there is a named victim, shall be ordered in a manner consistent, insofar as possible, with the provisions of this section and KRS 439.563, 532.033, 533.020, and 533.030 in addition to any other part of the penalty for any offense under this chapter. The provisions of this section shall not be subject to suspension or nonimposition.

When the issue of restitution has not been resolved by an agreement between the Commonwealth and the defendant, the following due process protections must be provided:

- reasonable notice to the defendant in advance of the sentencing hearing of the amount of restitution claimed and of the nature of the expenses for which restitution is claimed; and
- a hearing before a disinterested and impartial judge that includes a reasonable opportunity for the defendant, with assistance of counsel, to examine the evidence or other information presented in support of an order of restitution; and
- a reasonable opportunity for the defendant with assistance of counsel to present evidence or other information to rebut the claim of restitution and the amount thereof; and

- the burden shall be upon the Commonwealth to establish the validity of the claim for restitution and the amount of restitution by a preponderance of the evidence, and findings with regard to the imposition of restitution must be supported by substantial evidence.

*Jones v. Commonwealth*, 382 S.W.3d 22, 32 (Ky. 2011).

Sallee argues that the record in his cases does not show that he was aware, prior to his sentencing hearing, of the amount of restitution claimed and the nature of the expenses. He points out that the Commonwealth's written offers in both cases do not specify the exact amount of restitution to be paid or the factual basis for that amount. In one case, the offer states that "Restitution shall be paid to the victims," while the other offer states that restitution will be paid "if applicable."

At the guilty plea hearing, the amount of restitution or how it was to be calculated was not mentioned. At sentencing, the trial court imposed restitution jointly and severally with Sallee's co-defendants, and informed him that restitution was to be paid in the amount of \$200 per month to the complainant, Blevins, in 08-CR-00184-001. The court also imposed restitution jointly and severally on Sallee and his co-defendants in 08-CR-00185-002, with Sallee ordered to pay Route 11 Liquors \$100 per month after any obligations to Blevins were satisfied. The court did not state the total amount of restitution owed in either case or how the court arrived at these amounts. Although the trial court did not include the total amounts of restitution in the final judgment and sentence in either of these cases, it did enter

separate restitution orders indicating the total amounts to be paid to Blevins (\$6,200) and Route 11 Liquors (\$297.50).

Sallee argues that there is no way to determine from the record whether he was given notice in advance of the amount of restitution, or how the circuit court arrived at the restitution amounts.

We review the denial of a CR 60.02 motion for an abuse of discretion. *Partin v. Commonwealth*, 337 S.W.3d 639, 640 (Ky. App. 2010). The test for abuse of discretion is whether the trial court's decision was "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999) (internal citations omitted). A movant must demonstrate that "he is entitled to this special, extraordinary relief." *Gross v. Commonwealth*, 648 S.W.2d 853, 856 (Ky. 1983). We will affirm the trial court's decision absent a "flagrant miscarriage of justice." *Id.* at 858.

Significantly, in light of the fact that Sallee has already filed prior CR 60.02 motions requesting modification of his restitution, "CR 60.02 does not permit successive post-judgment motions, and the rule may be utilized only in extraordinary situations when relief is not available on direct appeal or under RCr 11.42." *Foley v. Commonwealth*, 425 S.W.3d 880, 884 (Ky. 2014).

Sallee argues that he could not have brought this claim on direct appeal or in his previously-filed CR 60.02 motions because he has remained without counsel since the entry of his guilty pleas. He contends that his prior CR

60.02 motions were filed pro se, and that he cannot be held to the same standard as litigants represented by counsel.

We agree that, as a pro se litigant, Sallee is not subject to the same standards as litigants represented by counsel. *Beecham v. Commonwealth*, 657 S.W.2d 234, 236 (Ky. 1983). “However, the judiciary’s conciliatory attitude toward unrepresented parties is not boundless.” *Cardwell v. Commonwealth*, 354 S.W.3d 582, 585 (Ky. App. 2011). “Proceeding pro se does not provide one with ‘a license not to comply with relevant rules of procedural and substantive law.’” *Faretta v. California*, 422 U.S. 806, 835 n. 46, 95 S.Ct. 2525, 2541, 45 L.Ed.2d 562 (1975).” *Smith v. Bear, Inc.*, 419 S.W.3d 49, 55 (Ky. App. 2013), review denied (Feb. 12, 2014). Sallee has simply failed to provide any convincing explanation for his failure to raise this argument in his prior motions. His earlier motions were coherent, well-written and showed a full awareness of the implications of his failure to pay restitution. He was fully aware of the amounts of restitution he was required to pay at the time of the entry of the restitution orders, yet he waited almost four years to bring his claims alleging due process violations. Sallee’s motion was made pursuant to section subsections (e) and (f) of CR 60.02. The Rule specifies that a motion brought under these subsections “shall be made within a reasonable time[.]” Under the circumstances, four years does not constitute a reasonable time.

CR 60.02 was enacted as a statutory codification of the common law writ of coram nobis. *Gross v. Commonwealth*, 648 S.W.2d at 856. The purpose of

coram nobis was to bring pronounced judgment errors before the court which (1) had not been heard or litigated, (2) were not known or could not have been known by the party through the exercise of due diligence, or (3) the party was prevented from presenting due to duress, fear, or some other sufficient cause. *Id.* Sallee has failed to show that the due process violations he alleges fall within any of these categories.

Finally, Sallee argues that, at a minimum, he is entitled to an evidentiary hearing to determine whether he was afforded due process. Such a hearing is required only if the movant “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). Because Sallee failed to make such a showing, the trial court did not abuse its discretion in denying his motions without a hearing.

For the foregoing reasons, the order denying the CR 60.02 motions without a hearing is affirmed.

ALL CONCUR.

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