

Commonwealth of Kentucky
Court of Appeals

NO. 2014-CA-001521-MR

TONY GLASPER

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE A.C. MCKAY CHAUVIN, JUDGE
ACTION NO. 05-CR-000473

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: CLAYTON, DIXON AND KRAMER, JUDGES.

DIXON, JUDGE: Appellant, Tony Glasper, appeals *pro se* from an order of the Jefferson Circuit Court denying his motion for post-conviction relief pursuant to Kentucky Rules of Civil Procedure (CR) 60.02. Finding no error, we affirm.

In December 2005, a Jefferson County jury found Appellant guilty of first-degree sexual abuse, fourth-degree assault, and for being a first-degree

persistent felony offender. In March 2006, Appellant was sentenced to twenty years' imprisonment followed by three years of conditional discharge. The Kentucky Supreme Court subsequently affirmed the convictions and sentence on direct appeal. *Glasper v. Commonwealth*, 2006-SC-000300-MR (June 20, 2007).

In July 2007, Appellant filed a CR 11.42 motion in the trial court alleging that trial counsel rendered ineffective assistance by failing to investigate the victim's mental health history. On August 15, 2007, the trial court denied the motion because Appellant had failed to serve the prosecutor with a copy of his motion and had failed to comply with Kentucky Revised Statutes (KRS) 31.110(3). On August 29, 2007, Appellant resubmitted his motion under CR 59.05, and on October 25, 2007, the trial court vacated its August 15, 2007, order and denied Appellant's initial Kentucky Rules of Criminal Procedure (RCr) 11.42 motion. A panel of this Court affirmed, *Glasper v. Commonwealth*, 2007-CA-2408-MR (January 23, 2009), and Appellant did not seek discretionary review in the Kentucky Supreme Court.

Thereafter, in September 2009, Appellant filed a motion to vacate his convictions and sentence under CR 60.02, arguing that the prosecution failed to verify he was a persistent felony offender. On July 17, 2010, Appellant filed a petition for writ of mandamus in this Court, seeking an order directing the trial court to rule on his CR 60.02 motion. On October 27, 2010, a panel of this Court denied Appellant's petition as moot. On September 1, 2010, the trial court summarily denied the motion, finding that it was "entirely devoid of factual basis

or legal merit.” Again, a panel of this Court affirmed, *Glasper v. Commonwealth*, 2010-CA-1804-MR (December 22, 2011), and Appellant did not seek discretionary review.

On July 23, 2013, Appellant filed his third motion for post-conviction relief, the CR 60.02 motion at issue herein, arguing that his conviction was void because the trial court retroactively applied KRS 532.043 (requiring conditional discharge after his release) thereby violating his constitutional protection against *ex post facto* laws. On July 31, 2014, the trial court entered an order summarily denying the motion. This appeal followed.

We review the denial of a CR 60.02 motion under an abuse of discretion standard. *White v. Commonwealth*, 32 S.W.3d 83, 86 (Ky. App. 2000); *Brown v. Commonwealth*, 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. *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999) (citing 5 Am.Jur.2d *Appellate Review* § 695 (1995)). Therefore, we will affirm the trial court's decision unless there is a showing of some “flagrant miscarriage of justice.” *Gross v. Commonwealth*, 648 S.W.2d 853, 858 (Ky. 1983).

Relief may be granted under CR 60.02(f) for any reason of an extraordinary nature justifying relief. However, a CR 60.02(f) motion must be made “within a reasonable time.” *See* CR 60.02. Similarly, 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. *McQueen v. Commonwealth*, 948 S.W.2d 415, 416 (Ky. 1997), *cert. denied*, 521 U.S. 1130 (1997). In *Gross*, our Supreme Court held:

The structure provided in Kentucky for attacking the final judgment of a trial court in a criminal case is not haphazard and overlapping, but is organized and complete. That structure is set out in the rules related to direct appeals, in RCr 11.42, and thereafter in CR 60.02. . . . It is for relief that is not available by direct appeal and not available under RCr 11.42. The movant must demonstrate why he is entitled to this special, extraordinary relief. Before the movant is entitled to an evidentiary hearing, he must affirmatively allege facts which, if true, justify vacating the judgment and further allege special circumstances that justify CR 60.02 relief.

. . . .

We hold that the proper procedure for a defendant aggrieved by a judgment in a criminal case is to directly appeal that judgment, stating every ground of error which it is reasonable to expect that he or his counsel is aware of when the appeal is taken.

Next, we hold that a defendant is required to avail himself of RCr 11.42 while in custody under sentence or on probation, parole or conditional discharge, as to any ground of which he is aware, or should be aware, during the period when this remedy is available to him. Final disposition of that motion, or waiver of the opportunity to make it, shall conclude all issues that reasonably could have been presented in that proceeding. The language of RCr 11.42 forecloses the defendant from raising any questions under CR 60.02 which are “issues that could reasonably have been presented” by RCr 11.42 proceedings.

648 S.W.2d at 856-57.

CR 60.02 allows appeals based upon claims of error that “were unknown and could not have been known to the moving party by exercise of reasonable diligence and in time to have been otherwise presented to the court.” *Young v. Edward Technology Group, Inc.*, 918 S.W.2d 229, 231 (Ky. App. 1995). Appellant presents an issue that was known to him or could have been discovered prior to his direct appeal or his RCr 11.42 motion. He did not raise any issue related to the application of KRS 532.043 in either of those appeals. Accordingly, he is now barred from attempting to relitigate an issue that could have reasonably been brought in his direct appeal or in his RCr 11.42 motion. *Gross*, 648 S.W.2d at 857.

Notwithstanding the procedural bar, Appellant’s *ex post facto* argument is without merit. Appellant’s convictions stem from acts perpetrated on March 27, 2001. The version of KRS 532.043¹ in effect at that time, as amended in 2000 by the General Assembly, required a three-year period of conditional discharge. As such, the trial court herein did not err in finding Appellant’s CR 60.02 motion to be “procedurally deficient and devoid of factual basis or merit.”

The order of the Jefferson Circuit Court denying Appellant’s motion for post-conviction relief pursuant to CR 60.02 is affirmed.

ALL CONCUR.

¹ KRS 532.043 was subsequently amended in 2006 to require a five-year period of conditional discharge. In 2011 the legislature amended the statute to place revocation authority with the parole board rather than the judiciary.

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