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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001240-MR
AND
NO. 2014-CA-001714-MR

KEVIN ROWE

APPELLANT

v. APPEALS FROM PIKE CIRCUIT COURT
HONORABLE EDDY COLEMAN, JUDGE
ACTION NO. 05-CR-00116

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE, D. LAMBERT, AND VANMETER, JUDGES.

VANMETER, JUDGE: Kevin Rowe appeals from the Pike Circuit Court's order denying his CR¹ 60.02 motion and RCr² 11.42 motions. For the following reasons, we affirm.

¹ Kentucky Rules of Civil Procedure.

² Kentucky Rules of Criminal Procedure.

I. Factual and Procedural Background

In 2005, a jury found Rowe guilty of the murder of Tammy Hylton and the attempted murder of Robin Hylton. Rowe was sentenced to life in prison for murder, and twenty years for attempted murder, to be served concurrently. After his conviction, Rowe filed numerous post-conviction challenges. He first directly appealed his conviction to the Kentucky Supreme Court. On May 24, 2007, the Supreme Court of Kentucky affirmed his conviction. *Rowe v. Commonwealth*, 2006-SC-000356-MR 2007 WL 1532334 (Ky., May 24, 2007).

Following the exhaustion of his direct appeal, Rowe's counsel filed several motions for a new trial under RCr 10.02. Although Rowe's trial counsel failed to file several required affidavits with these motions, the trial court did consider the merits of the motions, and denied all three motions for a new trial. This court affirmed those decisions on November 18, 2011.

On October 12, 2012, Rowe filed a motion under RCr 11.42 alleging ineffective assistance of counsel, and later filed a nearly identical amended RCr 11.42 motion. The trial court denied these motions as untimely in an Opinion and Order entered June 18, 2013. On November 8, 2013, Rowe filed a motion under CR 60.02, alleging claims of fraud perpetrated by both the Commonwealth and his former trial counsel. The trial court denied that motion in an Order entered September 30, 2014. Rowe timely appealed the denials of his RCr 11.42 and CR 60.02 motions, which this court has consolidated for the current appeal.

II. Arguments

A. Motion to Vacate Pursuant to RCr 11.42

First, Rowe argues the trial court erred in dismissing his RCr 11.42 motion as untimely because he is entitled to equitable tolling.³ Second, he argues the trial court erred in denying his RCr 11.42 motion because of numerous claims of ineffective assistance of counsel.

We review a trial court's denial of an RCr 11.42 motion for abuse of discretion. *Bowling v. Commonwealth*, 981 S.W.2d 545, 548 (Ky. 1998). An abuse of discretion has occurred when 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 citation omitted). In relevant part, RCr 11.42 states that "[t]he motion . . . shall state specifically the grounds on which the sentence is being challenged and the facts on which the movant relies in support of such grounds Final disposition of the motion shall conclude all issues that could reasonably have been presented in the same proceeding."

In *Gross v. Commonwealth*, the Supreme Court of Kentucky stated

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.

³ The trial court also denied this RCr 11.42 motion, in part, based on a failure of verification. Pursuant to RCr 11.42(2), "[t]he motion shall be signed and verified by the movant Failure to comply with this section shall warrant a summary dismissal of the motion." Rowe did not sign and verify his first RCr 11.42 motion, and his amended motion was verified by Rowe's father, Kenneth, as "Kevin Rowe POA Kenneth Rowe." However, since we agree with the trial court that this motion was not timely and affirm the denial Rowe's motion, we will not further analyze whether the motion was properly verified.

648 S.W.2d 853, 856 (Ky. 1983)(original emphasis). “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.” *Gross*, 648 S.W.2d at 857. “It is fundamental that when an issue is finally determined by an appellate court, the trial court must comply with such determination. This . . . prevents an RCr 11.42 movant from relitigating issues which were raised and decided in the direct appeal or which could have been raised.” *Commonwealth v. Tamme*, 83 S.W.3d 465, 468 (Ky. 2002).

First, Rowe argues that the trial court erred in denying his RCr 11.42 as untimely since he should be entitled to equitable tolling. Section 10 of the rule states that

[a]ny motion under this rule shall be filed within **three years** after the judgment becomes final, unless the motion alleges and the movant proves either:
(a) that the facts upon which the claim is predicated were unknown to the movant and could not have been ascertained by the exercise of due diligence; or
(b) that the fundamental constitutional right asserted was not established within the period provided for herein and has been held to apply retroactively.

RCr 11.42(10) (emphasis added). This three-year time limitation begins when the judgment becomes final, which means “conclusive judgment in the case, whether it be the final judgment of the appellate court on direct appeal or the judgment of the trial court in the event no direct appeal was taken.” *Palmer v. Commonwealth*, 3 S.W.3d 763, 765 (Ky. App. 1999).

In the instant case, Rowe's conviction was affirmed by the Supreme Court of Kentucky on May 24, 2007, and became final on June 14, 2007.

Therefore, Rowe had until June, 2010 to file his RCr 11.42 motion. However, his motion was not filed until October 24, 2012, more than two years past the time limitation. Rowe, through his previous trial counsel, did file two post-conviction motions to collaterally attack his sentence under RCr 10.02; however, those motions do not toll the time limitation. *Melson v. Commonwealth*, 772 S.W.2d 631, 633 (Ky. 1989) (holding that collateral attacks do not affect finality of a judgment).

Rowe, recognizing that his motion was untimely, requested that the trial court apply equitable tolling to his RCr 11.42 motion. In *Holland v. Florida*, the United States Supreme Court held that under this doctrine, a petitioner is entitled to equitable tolling only "if he shows (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." *Holland v. Florida*, 560 U.S. 631, 632, 130 S. Ct. 2549, 2553, 177 L. Ed. 2d 130 (2010) (internal citations and quotations omitted). In its June 18, 2013, denial of Rowe's RCr 11.42 motion, the trial court held that Rowe could not satisfy either of the two requirements for equitable tolling, stating that "nothing has been demonstrated . . . that he has been pursuing his rights diligently" because his claim was filed "more than five years after his case became final." We agree.

In *Holland*, the petitioner

not only wrote his attorney numerous letters seeking crucial information and providing direction; he also repeatedly contacted the state courts, their clerks, and the Florida State Bar Association in an effort to have Collins—the central impediment to the pursuit of his legal remedy—removed from his case. And, the *very day* that Holland discovered that his [] clock had expired due to Collins' failings, Holland prepared his own habeas petition *pro se* and promptly filed it with the District Court.

Holland, 560 U.S. at 653, 130 S. Ct. at 2565 (original emphasis). Unlike in *Holland*, Rowe has not demonstrated that he pursued his case with the “reasonable diligence” required. *Id.*

Rowe argues that his trial counsel’s ineffective representation obscured that his case was not being diligently pursued, and that he thought the RCr 10.02 motions were advancing his case. Although Rowe alleges that his trial counsel was the main impediment to filing a timely motion, his trial counsel withdrew on May 12, 2010, which was more than a month prior to the expiration of Rowe’s time to file an RCr 11.42 motion. Furthermore, Rowe then waited an additional two years before actually filing this motion, without any showing that he pursued his case in a meaningful way during that delay.⁴ Under a circumstance where a petitioner “sat on his rights” for years before and months after the cause of action becomes final, “[u]nder long-established principles, petitioner's lack of diligence precludes equity's operation.” *Pace v. DiGuglielmo*, 544 U.S. 408, 419,

⁴ In fact, Rowe waited almost a year after this court affirmed the denial of his RCr 10.02 motions to file his RCr 11.42 motion. *See Rowe v. Commonwealth*, 355 S.W.3d 480 (Ky. App. 2011).

125 S. Ct. 1807, 1815, 161 L. Ed. 2d 669 (2005). The trial court did not err in finding that Rowe did not diligently pursue his rights.

The trial court further found that Rowe also failed to show any extraordinary circumstance justifying equitable tolling, stating that RCr 11.42(10)(a) allows an untimely claim only if the facts upon which the claim is based were unknown or could not have been known to the claimant with due diligence. Rowe makes vague claims of ineffective counsel as the basis for his motion; however, he was not represented by this trial counsel for the two years preceding his untimely motion.⁵ The record in this case “demonstrates that the claimant has made many of these arguments before,” thus he clearly knew or should have known the existence of the facts upon which his claims are based. Without a showing of any new facts upon which his claim is predicated, Rowe does not meet the requirements for extraordinary circumstance.

“[E]quitable tolling is not warranted for a garden variety claim of excusable neglect[.]” *Holland*, 560 U.S. at 633, 130 S. Ct. at 2553 (internal quotations and citations omitted). Rowe seems to argue that his trial counsel mistakenly believed that the two motions for a new trial tolled the statute of limitations, and thus did not file an RCr 11.42 motion in the interim. However,

⁵ Rowe argues that his trial counsel was ineffective in four respects by: 1) not moving to change venue due to jury knowledge of the crime; 2) failing to obtain independent DNA testing of the evidence and being absent during questioning of the Commonwealth’s DNA expert; 3) failing to move prior to trial for the identities of witnesses interviewed by the Kentucky State Police; and 4) failing to provide effective post-conviction counsel. However, the record reflects that these claims have either been already raised and rejected on direct appeal, or should have been raised in a prior proceeding. Rowe has not shown that the result of the motion would have been different but for his counsel’s error.

“[a]ttorney miscalculation is simply not sufficient to warrant equitable tolling, particularly in the post-conviction context where prisoners have no constitutional right to counsel.” *Lawrence v. Florida*, 549 U.S. 327, 336–37, 127 S. Ct. 1079, 1085, 166 L. Ed. 2d 924 (2007) (internal citation omitted). Rowe does not allege any additional circumstances of neglect that would rise to the extraordinary level required for equitable tolling. The trial court was correct in denying this RCr 11.42 as untimely since Rowe was not entitled to equitable tolling.

B. CR 60.02 Motion

Finally, Rowe argues that the trial court abused its discretion in denying his CR 60.02 motion. He contends that the trial court failed to address any of the substantive issues raised in his motion, and that he is entitled to an evidentiary hearing on this motion.

CR 60.02

[i]s 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.

Gross, 648 S.W.2d at 856. “Given the high standard for granting a CR 60.02 motion, a trial court’s ruling on the motion receives great deference on appeal and will not be overturned except for an abuse of discretion.” *Barnett v. Commonwealth*, 979 S.W.2d 98, 102 (Ky. 1998). As noted *supra*, the test for abuse of discretion is whether the trial judge’s decision was arbitrary,

unreasonable, unfair, or unsupported by sound legal principles. *English*, 993 S.W.2d at 945. Therefore, the lower court’s decision will be affirmed unless a showing can be made of some “flagrant miscarriage of justice.” *Gross*, 648 S.W.2d at 858. In considering whether the denial of a CR 60.02 was an abuse of discretion, the two factors to be considered are whether the movant had a fair opportunity to present his claim and whether the granting of the relief sought would be inequitable to the other parties. *Fortney v. Mahan*, 302 S.W.2d 842, 843 (Ky. 1957).

Rowe argues that he is entitled to CR 60.02 relief under sections (d) and (f) of the rule, which state

[o]n motion a court may, upon such terms as are just, relieve a party or his legal representative from its final judgment, order, or proceeding upon the following grounds: . . . (d) fraud affecting the proceedings, other than perjury or falsified evidence; . . . or (f) any other reason of an extraordinary nature justifying relief. The motion shall be made within a reasonable time.

Rowe contends that the trial court abused its discretion in failing to address any of the substantive issues described in his motion, including a sound engineer’s report, the Commonwealth’s withholding of evidence, or the affidavits of two witnesses. He further argues that numerous issues of fraud and ineffective assistance of counsel warrant an evidentiary hearing under CR 60.02.

Although CR 60.02 (d) and (f) do not have a fixed deadline, the rule requires that the motion be made within a “reasonable time,” the determination of which is “left to the discretion of the trial court.” *Foley v. Commonwealth*, 425

S.W.3d 880, 884 (Ky. 2014). The court must examine what is reasonable on a case-by-case basis and an evidentiary hearing is not required in that determination. *Gross*, 648 S.W.2d at 858.

In its denial of Rowe's CR 60.02 motion, the trial court did not rule explicitly that the motion was untimely. Rather, the trial court held that Rowe's allegations of fraud against the Commonwealth regarding a recusal of the trial judge are not supported by any fact in the record, and the rulings of the current presiding judge have been upheld on both direct and collateral appeal.⁶ The trial court continued that Rowe's remaining arguments concerning preservation of evidence could have been or had been raised many times in prior proceedings. Last, the trial court ruled that calling alleged ineffective assistance of counsel "fraud" or "a reason of extraordinary nature" so that the motion fits under CR 60.02 does not make it such, and does not cure the fact that Rowe should have brought these claims in a timely RCr 11.42 motion.⁷

As discussed previously, Rowe's case became final on June 14, 2007; however, Rowe did not file this CR 60.02 motion until November 8, 2013. Rowe provides no rationale for why he waited over six years to file this motion. Rowe's trial counsel, against whom he alleges the numerous acts of fraud, withdrew in

⁶ During Rowe's case, his father was arrested and charged for allegedly threatening the then presiding judge, who then transferred this indictment to the current presiding judge.

⁷ Rowe acknowledges that "[w]ith respect to the claims of ineffective assistance of counsel, . . . these are claims which initially should have been properly addressed pursuant to RCr 11.42." Rowe continues that the "only reason that he has requested relief under CR 60.02" is that this remains his only legal option to preserve these issues due to missing the deadline for his RCr 11.42 motion, and being denied equitable tolling by the trial court.

June 2010, over three years before the filing of this motion. Waiting six years to file this motion, especially when many of the claims alleged would have been proper under RCr 11.42, not CR 60.02(d), is not reasonable.⁸ Furthermore, “CR 60.02(f) must be invoked with extreme caution and only under the most unusual of circumstances[.]” *Reyna*, 217 S.W.3d at 276. Rowe had a fair opportunity to present his claims both on direct and collateral appeal, and has made no showing of additional extraordinary circumstances that would justify this delay. Rowe’s CR 60.02 motion was not timely, and the trial court did not abuse its discretion in denying it, nor in denying an evidentiary hearing.

Conclusion

For the foregoing reasons, we affirm the Pike Circuit Court’s order denying Rowe’s CR 60.02 and RCr 11.42 motions.

ALL CONCUR.

⁸ See *Gross*, 648 S.W.2d at 858 (“Five years was not a reasonable time.”); *Commonwealth v. Carneal*, 274 S.W.3d 420, 433 (Ky. 2008) (holding that six years after a guilty plea is not reasonable pursuant to CR 60.02); *Reyna v. Commonwealth*, 217 S.W.3d 274, 276 (Ky. App. 2007) (“Although not stated as reason for the denial of his CR 60.02(f), the trial court would certainly have been within its discretion had it held that the motion [four years after entry of guilty plea] was not brought within a reasonable time.”).

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