

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-000651-MR

AND

NO. 2015-CA-000899-MR

SHAWN WILLIAM ERNST

APPELLANT

v.

APPEAL FROM BOONE CIRCUIT COURT
HONORABLE JAMES R. SCHRAND II, JUDGE
ACTION NOS. 00-CR-00154 AND 02-CR-00024

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING
* * * * *

BEFORE: CLAYTON, D. LAMBERT, AND J. LAMBERT, JUDGES.

D. LAMBERT, JUDGE: Acting *pro se*, Shawn William Ernst appeals the Boone Circuit Court's March 4, 2014 order denying his motion for a new trial under CR¹ 60.02 and 60.03. After review, we affirm.

¹ Kentucky Rules of Civil Procedure.

On August 28, 2002, a Boone Circuit Court jury convicted Ernst of kidnapping and murdering 59-year-old Sandra Kay Roberts. He was later sentenced to life without parole. The Kentucky Supreme Court provided the following background of Ernst's case in *Ernst v. Commonwealth*, 160 S.W.3d 744, 749-50 (Ky. 2005):

Roberts and her sister, Betty Davidson, resided together in a house in Florence, Kentucky, that they rented from Roberts's ex-husband. Neither was employed and both drew social security disability benefits. For additional income, they subleased a room in their home to Donald Durbin. On March 18, 2000, Roberts subleased another room to Appellant. At that time, Davidson was an inpatient at a rehabilitation clinic on the campus of the St. Elizabeth's Medical Center. Roberts visited Davidson at the clinic virtually every day and also talked to her on the telephone several times a day.

Appellant's fiancée, Denise Arrington, had moved to Texas and a dispute arose between Appellant and Roberts concerning a \$145.00 long-distance telephone bill that Appellant incurred without Roberts's permission. The disagreement escalated, and by the weekend of April 1–2, 2000, Roberts decided to evict Appellant from her residence and confiscated his television and videocassette recorder (VCR) as collateral for the payment of the telephone bill. She began locking her purse and Davidson's purse in the trunk of her automobile. On the evening of April 2, 2000, while Appellant was engaged in another long-distance telephone conversation with Arrington, Roberts picked up an extension phone and berated Appellant about incurring long-distance telephone bills.

The following day, several members of Roberts's family attempted to contact her to no avail. They went to her residence where they noticed several things out of place, including that Roberts's dentures were still in a cup beside her bed even though her automobile was not in the

garage. They also found Appellant's room completely empty of his belongings. They reported Roberts as a missing person to the Florence Police Department and identified Appellant as a possible suspect. In the early morning of April 4, 2000, police officers found Appellant's automobile parked behind his place of employment, the "Just For Fun" arcade in Dayton, Kentucky, and noted that it was filled with clothing and other personal belongings, including a television and a VCR. Unable to locate anyone inside the arcade, the officers impounded the vehicle. Police officers also found Roberts's vehicle in the parking garage of St. Elizabeth's Hospital, and a hospital employee found Roberts's and Davidson's purses in a trash receptacle inside the hospital.

Florence Police Department detectives interviewed Appellant later in the day on April 4, 2000. Appellant initially denied any involvement in Roberts's disappearance; but upon being advised (as a ruse) that a security camera at St. Elizabeth's had filmed him exiting Roberts's vehicle, Appellant responded, "I goofed," and told the detectives where they could find Roberts's body. He gave the detectives a statement in which he claimed that Roberts had collapsed on the floor of his bedroom during an argument over a telephone bill and that he had panicked and driven her body to property in Gallatin County owned by relatives of Mark Crossen, a co-worker of Appellant's, where he set it afire and attempted to conceal it under some debris.

The police found Roberts's dead and partially burned body at a salvage yard in Gallatin County. An autopsy revealed that she died as a result of asphyxia due to a compression injury to her neck. Because there was no soot in Roberts's lungs, the medical examiner concluded that she died before being set afire. The autopsy also revealed an elevated level of carbon monoxide in Roberts's blood, indicating she was exposed to carbon monoxide gas while still alive.

At trial, Appellant testified that Roberts came to his bedroom on the evening of April 2, 2000, yelling and

swinging a vase at him. The argument became physical, and, according to Appellant, he accidentally choked Roberts while trying to push her away. Believing he had killed her and fearing that he would be arrested, Appellant loaded the body into the trunk of his car and drove it to Gallatin County where he set it afire. The Commonwealth presented evidence of prior statements by Appellant that conflicted with his trial testimony. Arrington testified that Appellant told her several different versions of how he killed Roberts. Richard Siegel, a jailhouse informant, testified that Appellant told him that he shook Roberts to death during an argument over a telephone bill. Samuel O'Koon, another jailhouse informant, testified that Appellant told him that he confronted Roberts after she interrupted his telephone conversation with Arrington, that he choked her, and that he believed she was dead because she urinated on the bed while he was choking her. Starrett Palmer, another cellmate, testified that he overheard the conversation between Appellant and O'Koon.

The Kentucky Supreme Court then upheld Ernst's convictions, concluding his direct appeal.

Following the Supreme Court's decision, Ernst challenged his convictions via a series of collateral attacks.² Each has been denied by the circuit court and affirmed by this Court. In his latest challenge, a motion for a new trial pursuant to CR 60.02 (e) and (f), Ernst claimed that the jury instructions were improper at his trial, that his Due Process rights were violated due to his counsel's

² In 2008, Ernst filed a motion under Kentucky Rules of Criminal Procedure (RCr) 11.42. This Court affirmed the circuit court's denial of that motion. *Ernst v. Commonwealth*, 2011 WL 1706532 (Ky. App. 2011). Ernst followed with a motion for a new trial. That motion was filed in 2012, and this Court once again affirmed the dismissal of that motion in November 2013. *Ernst v. Commonwealth*, 2013 WL 5888268 (Ky. App. 2013). Ernst also filed a separate action in the United States District Court for the Western District of Kentucky, requesting that court to review the Kentucky Supreme Court's denial of his direct appeal. *Ernst v. Cooper*, No. 5:2015cv00071 (W.D. Ky. 2015). That court dismissed Ernst's action.

failure to raise all applicable defenses, that newly discovered evidence would change the outcome of his trial, that the circuit court improperly allowed testimony from jailhouse informants, and that his counsel perpetrated fraud on the court by pretending to discuss the jury instructions. The circuit court denied these claims after finding they were procedurally barred. Ernst also filed a motion pursuant to CR 60.03, in which he argued a violation of his right to a speedy trial and that he should have been entitled to a manslaughter in the first degree instruction. The trial court also denied this motion as procedurally barred.³ This appeal followed.

I. CR 60.02

On appeal, Ernst claimed the following six errors occurred during his trial: (1) the circuit court failed to grant a directed verdict under KRS⁴ 501.030 and KRS 501.070; (2) the circuit court failed to grant a directed verdict as to his kidnapping charge because he qualified for the kidnapping exception; (3) the circuit court failed to grant a directed verdict as to his murder charge because he was acting under an extreme emotional disturbance; (4) the circuit court failed to include a proper jury instruction as to first-degree manslaughter; (5) the circuit court failed to give a proper jury instruction as to tampering with physical evidence; and (6) the circuit court denied Ernst a unanimous verdict by giving a combination murder instruction. The Commonwealth maintained that these

³ Because Ernst's motions under CR 60.02 and CR 60.03 were before this Court concurrently they were consolidated on appeal.

⁴Kentucky Revised Statutes.

arguments were procedurally barred because they could have been raised on direct appeal. For the following reasons, we agree with the Commonwealth.

Under Kentucky law, the structure “for attacking the final judgment of a trial court in a criminal case . . . is set out in the rules related to direct appeals, in RCr 11.42, and *thereafter* in CR 60.02.” *Gross v. Commonwealth*, 648 S.W.2d 853, 856 (Ky. 1983). Moreover, “[CR 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 RCr 11.42 proceedings. *McQueen v. Commonwealth*, 948 S.W.2d 415, 416 (Ky. 1997) (citing RCr 11.42(3)); *Gross*, 648 S.W.2d at 855, 56) (internal quotations omitted)). Instead, the purpose of CR 60.02 is like the common law writ of coram nobis,

to bring before the court that pronounced judgment errors in matter of fact which (1) had not been put into issue or passed on, (2) were unknown and could not have been known to the party by the exercise of reasonable diligence and in time to have been otherwise presented to the court, or (3) which the party was prevented from so presenting by duress, fear, or other sufficient cause.

Gross, 648 S.W.2d at 856.

Here, all six of Ernst’s claims could reasonably have been presented on direct appeal. The jury instructions were available at trial, as was the Commonwealth’s evidence. Thus, Ernst reasonably could have known about, and challenged, the circuit court’s alleged errors as soon as they occurred. And if

unpreserved at trial, he could have sought palpable error review under RCr 10.26.⁵

His failure to raise them before now does not justify CR 60.02 relief.

II. CR 60.03

Ernst also sought relief under CR 60.03. Under that rule, he alleged that the trial court violated his right to a speedy trial⁶ and that he is “actually innocent” and he should have been entitled to a manslaughter in the first degree instruction. Similarly to the relief Ernst alleged under CR 60.02, both of these issues could have been brought in his direct appeal. CR 60.03 provides as follows:

Rule 60.02 shall not limit the power of any court to entertain an independent action to relieve a person from a judgment, order or proceeding on appropriate equitable grounds. Relief shall not be granted in an independent action if the ground of relief sought has been denied in a proceeding by motion under Rule 60.02, or would be barred because not brought in time under the provisions of that rule.

In *Foley v. Commonwealth*, 425 S.W.3d 880, 888 (Ky. 2014), our Supreme Court held that the appellant in that case was not entitled to relief under CR 60.03 because he was not entitled to relief under CR 60.02. This logic is applicable here; because Ernst’s claims were untimely under CR 60.02, they are untimely under CR 60.03.

Furthermore, Ernst has failed to argue the existence of any of the factors established in *Bowling v. Commonwealth*, 163 S.W.3d 361 (Ky. 2005), for

⁵ Ernst made several RCr 10.26 arguments in *Ernst v. Commonwealth*, 160 S.W.3d 744 (Ky. 2005).

⁶ Ernst raised an alleged violation of his right to a speedy trial for the first time on appeal in his reply brief in his CR 60.02 motion, though this does not change our analysis of this issue.

relief under CR 60.03. “Claimants must (1) show that they have no other available or adequate remedy; (2) demonstrate that movants’ own fault, neglect, or carelessness did not create the situation for which they seek equitable relief; and (3) establish a recognized ground—such as fraud, accident, or mistake—for the equitable relief.” *Id.* at 365 (quoting *Campaniello Imports, Ltd. v. Saporiti Italia S.p.A.*, 117 F.3d 655, 662 (2nd Cir. 1997)). The issues raised in Ernst’s appeal should have been brought in an earlier proceeding and he has not alleged that he could not have raised them earlier with the exercise of due diligence. Furthermore, neither of the claims he makes under CR 60.03 are recognized grounds for equitable relief. *See generally Young v. Richardson*, 267 S.W.3d 690, 697 (Ky. App. 2008) (denying relief under CR 60.03 for failing to establish entitlement to relief under the factors in *Bowling, supra*).

In *Cardwell v. Commonwealth*, upon the filing of a *pro se* litigant’s fourth successive post-conviction motion, a panel of this Court noted that “where a *pro se* litigant files repetitious and frivolous claims, a court may bar prospective filings to prevent the deleterious effect of such filings on scarce judicial resources.” 354 S.W.3d 582, 585 (Ky. App. 2011). This Court then “direct[ed] the circuit court to deny all future requests for in forma pauperis status [the defendant] files to pursue subsequent collateral attacks on this conviction.” *Id.* Ernst’s motions under CR 60.02 and CR 60.03, which were consolidated on appeal, constitute Ernst’s third and fourth successive collateral attacks. This Court has previously declined

to hear the merits of Ernst’s appeal on the grounds that it was successive,⁷ and Ernst has now filed as many successive post-conviction motions as the appellant in *Caldwell*. This Court now formally warns Ernst that “the judiciary’s conciliatory attitude toward unrepresented parties is not boundless.” *Id.*

Ernst has not demonstrated that he is entitled to relief under CR 60.02 or CR 60.03. The decision of the Boone Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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⁷ *Ernst v. Commonwealth*, 2013 WL 5888268, at 1 (Ky. App. 2013).