

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2014-CA-0001417-MR

CURTIS ROBERTSON

APPELLANT

v. APPEAL FROM MCCRACKEN CIRCUIT COURT  
HONORABLE CRAIG Z. CLYMER, JUDGE  
ACTION NO. 98-CR-00256

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

\*\* \*\* \* \*\* \* \*\*

BEFORE: J. LAMBERT, TAYLOR, AND THOMPSON, JUDGES.

LAMBERT, J., JUDGE: Curtis Robertson appeals from the McCracken Circuit Court's order denying his Kentucky Rules of Civil Procedure (CR) 60.02 motion seeking to vacate his conviction for murder. Finding no error, we affirm the trial court's August 12, 2014, order.

In December 1998, Robertson was indicted for the murder of his friend, Jewell Ray Mathis. The indictment arose from an altercation between Robertson and Mathis that occurred on November 12, 1998, at a bar called Jimbo's Tavern in Paducah, Kentucky. Prior to the day of the shooting, Robertson and Mathis had a misunderstanding, and on the day in question, both were drinking and playing pool at Jimbo's. The testimony of patrons at the tavern indicated that Robertson drank about twenty beers and smoked marijuana, and that after several exchanges with Mathis, he shot him at close range. Police later found Robertson asleep in a ditch behind Jimbo's and arrested him.

Robertson pleaded not guilty, and the case went to trial. On November 3, 1999, a jury found Robertson guilty of murder, and he was sentenced to life imprisonment at his sentencing hearing on December 21, 1999. Robertson appealed his conviction, but the Supreme Court of Kentucky affirmed his direct appeal on April 25, 2002. Robertson filed a petition for rehearing, but that motion was denied by the Court.

Robertson then filed a Kentucky Rules of Criminal Procedure (RCr) 11.42 motion on January 22, 2003. The McCracken Circuit Court denied that motion without an evidentiary hearing on February 20, 2003. Robertson appealed the denial of his RCr 11.42 to this Court, and we affirmed the trial court's order, finding that Robertson did not receive ineffective assistance of counsel. Robertson then sought discretionary review with the Supreme Court of Kentucky, but the Court denied review on December 8, 2004.

Subsequently, Robertson sought relief in federal court, but relief was denied by the Sixth Circuit on June 19, 2012, and by the United States Supreme Court on August 10, 2012. Robertson then filed the instant CR 60.02 motion for relief on July 9, 2014. The McCracken Circuit Court entered its order denying Robertson relief on August 12, 2014. The court held that Robertson had not filed his motion for relief under CR 60.02(e) and (f) within a reasonable amount of time, as almost fifteen years had passed since final judgment was entered. The court also noted that Robertson had already raised his claims in previous post-conviction motions and in his direct appeal to the Supreme Court, and that he had not demonstrated that he was entitled to extraordinary relief under CR 60.02 or RCr 10.26. This appeal now follows.

CR 60.02 is an extraordinary remedy that is used to remedy a “substantial miscarriage of justice[.]” *See Wilson v. Commonwealth*, 403 S.W.2d 710, 712 (Ky. 1966). Our standard of review of a trial court’s denial of a CR 60.02 motion is whether the trial court abused its discretion. *Brown v. Commonwealth*, 932 S.W.2d 359, 362 (Ky. 1996). An abuse of discretion occurs when a trial court’s decision is “arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999) (citations omitted).

On appeal, Robertson makes several arguments, and we will address each in turn. First, Robertson argues that the trial court erred when it denied his CR 60.02 without conducting an evidentiary hearing. Within this argument, he

also alleges he was entitled to assistance of counsel and that the trial court failed to make specific findings in its order denying relief. Robertson contends that the record does not refute his arguments, and therefore a hearing was justified.

Further, he takes issue with the trial court's holding that his CR 60.02 motion was not filed within a reasonable time.

In its order denying relief, the trial court stated that motions for relief under CR 60.02(e) and (f) must be brought within a reasonable amount of time and that the interpretation of a reasonable amount of time is left up to the trial court, citing *Gross v. Commonwealth*, 648 S.W.2d 853, 858 (Ky. 1983). The trial court determined that, as almost fifteen years had passed since his conviction, Robertson had not brought his motion for relief in a reasonable amount of time. Robertson contends on appeal to this Court that he was pursuing relief in federal court during this time, and accordingly that his motion was filed within a reasonable amount of time. We agree with the trial court that under the circumstances, it was not reasonable for Robertson to wait fifteen years to file his CR 60.02 motion. We find no error in the trial court's holding in this regard.

Furthermore, as the trial court pointed out, most, if not all, of Robertson's arguments have been raised before, either in his direct appeal, or in his other post-conviction motions. As this Court has noted numerous times before, CR 60.02 motions are not to be utilized to raise previously addressed issues. Further, issues that have been raised or should have been raised in a direct appeal or RCr

11.42 are precluded from being raised in a subsequent CR 60.02 motion. *Gross, supra*, at 857.

Specifically, Robertson alleges that his trial counsel was ineffective for failing to request jury instructions on intoxication and extreme emotional disturbance. Robertson argues that the trial court should have granted an evidentiary hearing in order to determine whether his counsel was ineffective in this regard. Robertson raised this exact issue in his direct appeal to the Supreme Court, arguing that he could not be found guilty of intentional homicide because he was intoxicated and acting in self-defense. The Supreme Court noted that the jury was instructed to consider Robertson's intoxication in order to determine whether he had the requisite *mens rea* to be convicted of homicide. The Court noted that the jury was in the best position to judge the credibility of the witnesses who testified and to consider the evidence concerning Robertson's level of intoxication, as presented by experts and blood alcohol tests. This claim has been raised and rejected before, and was clearly refuted by the record. We find no error with the trial court's order denying relief in this regard, and noting that an evidentiary hearing was not warranted.

Robertson also argues that the prosecution erred when it failed to charge the victim posthumously with the offense of possession of a firearm by a convicted felon. Robertson provides no legal reasoning or support for this argument, other than his contention that it denied him due process rights and violated his rights under the Fourteenth Amendment, citing *Donnelly v.*

*DeChristoforo*, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed. 2d 431 (1974). A review of the record indicates that Robertson raised his claims about the prosecutor's conduct in his direct appeal to the Supreme Court. As that claim has been raised and adjudicated, we will not address it now in a post-conviction appeal.

Robertson next argues that his due process rights were violated when the court failed to instruct the jury on factual evidence that he argues supports his claim of innocence, arguing that evidence of his intoxication and emotional state should have been presented to the jury. Again, these arguments were presented to the Supreme Court on direct appeal or to this Court in Robertson's RCr 11.42 proceedings. Further, the jury was instructed on the defenses Robertson argues were appropriate, and it rendered a guilty verdict in spite of such evidence. The Supreme Court found no error, and we will not readdress this argument on appeal now.

Similarly, Robertson argued in his direct appeal to the Supreme Court that the trial court improperly excluded statements he made to arresting police officers, which he now again argues support his claims of innocence. As these arguments have already been presented and rejected, we will not address them here.

Finding no error, we affirm the McCracken Circuit Court's August 12, 2014, order denying Robertson's CR 60.02 motion for post-conviction relief.

ALL CONCUR.

BRIEF FOR APPELLANT:

Curtis Robertson, *Pro Se*  
Central City, Kentucky

BRIEF FOR APPELLEE:

Jack Conway  
Attorney General of Kentucky

Todd D. Ferguson  
Assistant Attorney General  
Frankfort, Kentucky