

Commonwealth of Kentucky
Court of Appeals

NO. 2015-CA-001477-MR

JACKIE ADKINS

APPELLANT

v. APPEAL FROM SHELBY CIRCUIT COURT
HONORABLE CHARLES R. HICKMAN, JUDGE
ACTION NO. 00-CR-00087

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, MAZE, AND STUMBO, JUDGES.

MAZE, JUDGE: Jackie Adkins appeals *pro se* from an order from the Shelby Circuit Court denying his Kentucky Rules of Civil Procedure (CR) 60.02 motion for post-conviction relief. For the following reasons, we affirm.

Adkins was convicted of murder and sentenced to thirty-years' confinement with the Kentucky Department of Corrections. The Supreme Court of

Kentucky affirmed his conviction and sentence on December 19, 2002. *Adkins v. Commonwealth*, No. 2001-SC-000402-MR (Ky. 2002) (unpublished).

In late 2005, Adkins sought post-conviction relief pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42, which the circuit court denied. Adkins did not appeal from the order denying his motion. In July 2011, Adkins filed the same RCr 11.42 motion he filed in 2005, merely changing the dates on the Verification, Notice, and Certificate of Service pages. Again the trial court denied the motion and Adkins did not appeal. Then in December 2012, Adkins filed a *pro se* CR 60.02 motion asking the court to vacate its judgment. The trial court denied the motion and we affirmed on May 16, 2014. *Adkins v. Commonwealth*, No. 2013-CA-000196-MR, 2014 WL 2040160 (Ky. App. 2014).

On August 17, 2015, Adkins filed a second motion for post-conviction relief pursuant to CR 60.02. In that motion, Adkins claimed that his trial counsel failed to investigate an extreme emotional disturbance defense; the trial court failed to give a first degree manslaughter instruction; the trial court erred when it refused to answer a question posed by a juror; and the trial court erred when it “refused to instruct the jury that it could find Adkins guilty of manslaughter second if it believed he was intoxicated.” Adkins also moved for appointment of counsel and an evidentiary hearing. Without appointing counsel and without holding a hearing, the trial court denied Adkins’s second CR 60.02 motion on August 27, 2015. The court found that the grounds stated in Adkins’s motion were issues which could

have been raised in his direct appeal or in his RCr 11.42 motion. The court further found that Adkins's motion was untimely. This appeal followed.

In addition to the issues he raised at the trial court level, Adkins contends on appeal that the trial court erred in failing to grant him an evidentiary hearing on his CR 60.02 motion. The Commonwealth responds that the trial court properly denied his motion for the grounds stated. We agree with the Commonwealth.

CR 60.02 relief is extraordinary and is only available “when a substantial miscarriage of justice will result from the effect of the final judgment. *Wilson v. Commonwealth*, 403 S.W.2d 710, 712 (Ky. 1966). “A criminal judgment must be set aside only in extraordinary and emergency cases where the showing made is of such a conclusive character as to indicate the verdict probably would not have been rendered and there is a strong probability of a miscarriage of justice.” *Harris v. Commonwealth*, 296 S.W.2d 700, 702 (Ky. 1956). In *Gross v. Commonwealth*, 648 S.W.2d 853 (Ky. 1983), the Kentucky Supreme Court explained that the structure of post-conviction review is not haphazard or overlapping. *Id.* at 856. CR 60.02 may only be used in extraordinary circumstances not otherwise subject to relief by direct appeal or by RCr 11.42. *Id.* at 856. We review the trial court's denial of a CR 60.02 motion for abuse of discretion. *Brown v. Commonwealth*, 932 S.W.2d 359, 362 (Ky. 1996).

Here, the issues Adkins raises in his present CR 60.02 motion either relate to trial error, sufficiency of the evidence, or ineffective assistance of counsel

—matters which could have been raised on direct appeal or in a motion made pursuant to RCr 11.42. Pursuant to *Gross*, such matters may not now be asserted in a CR 60.02 motion. An evidentiary hearing was not necessary under these circumstances. Further, CR 60.02 states that “[t]he motion shall be made within a reasonable time, and on grounds (a), (b), and (c) not more than one year after the judgment, order, or proceeding was entered or taken.” “What constitutes a reasonable time in which to move to vacate a judgment under CR 60.02 is a matter that addresses itself to the discretion of the trial court.” *Id.* at 858.

Adkins filed his CR 60.02 motion fourteen years after the final judgment sentencing him for the crimes and he does not offer any excuse for the delay. Moreover, Adkins knew or should have known through the exercise of reasonable diligence of the alleged errors in time to have otherwise presented them to the court. *Barnett v. Commonwealth*, 979 S.W.2d 98, 101 (Ky. 1998). (“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.”). Consequently, we conclude the court did not abuse its discretion in denying the motion as not brought within a reasonable time following final judgment.

For the foregoing reasons, the order of the Shelby Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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