

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-000584-MR

PAUL JOSEPH GIBSON

APPELLANT

v.

APPEAL FROM BOYD CIRCUIT COURT
HONORABLE KELLEY ASBURY, JUDGE
ACTION NO. 88-CR-00047

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: KNOX, JOHNSON, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: This is an appeal from an order denying appellant's motion filed pursuant to CR 60.02 and CR 59.01.

Appellant argues that certain improprieties occurred in the grand jury selection and indictment process. Because appellant pled guilty and waived the right to raise such claims of error and because his motion was untimely filed, we reject his arguments and, thus, affirm.

Appellant, Paul Gibson, was indicted by the Boyd County Grand Jury on May 20, 1988 on a charge of capital murder.

Pursuant to a plea agreement, appellant pled guilty to murder on August 23, 1988 and was later sentenced to thirty (30) years'

imprisonment. Since his conviction, appellant has filed four separate appeals challenging the validity of his conviction and sentence. The first two appeals were from orders denying motions brought pursuant to RCr 11.42 and CR 60.02, alleging ineffective assistance of counsel. This Court affirmed the denial of those motions. The third appeal was from an order denying a CR 60.02 motion challenging the parole board's decision to deny release for parole. This Court dismissed said appeal on grounds that it was untimely filed.

On February 18, 1998, almost ten years after his guilty plea, appellant filed this motion pursuant to CR 60.02 and CR 59.01, alleging numerous improprieties in the grand jury selection and indictment process. The trial court denied this motion and this appeal followed.

Appellant argues that the trial court erred in denying his motion which alleged at least ten (10) improprieties in the grand jury selection and indictment process. At the outset, we refer to the well-established principle that a guilty plea waives all defenses except that the indictment fails to charge an offense. Bush v. Commonwealth, Ky., 702 S.W.2d 46 (1986). Although appellant alleges several defects in the indictment process, most of the allegations stem from his claim that the grand jurors were improperly selected, and appellant does not allege that the indictment failed to charge an offense. Hence, he has waived all other claims of error.

We would also note that ordinarily, a motion raising an irregularity in the selection or summons of the jurors or

formation of the jury must precede the examination of the jurors. RCr 9.34. However, it has been held that a defendant can raise the issue of jury selection irregularities in a motion for a new trial if the defendant shows that he did not know, and in the exercise of reasonable diligence could not have known, of the defect before the jury was selected (or in this case, since no petit jury was selected, prior to his guilty plea). Bartley v. Loyall, Ky. App., 648 S.W.2d 873 (1982), see also Warren v. Commonwealth, Ky. App., 903 S.W.2d 907 (1994). In the instant case, appellant waited almost ten (10) years to raise the issue and makes no mention of when he learned of the alleged grand jury selection defect. Further, there has been no showing of due diligence in attempting to discover the defect.

Even if appellant could properly raise the issue in a motion for a new trial as he did here, both CR 59.01 and CR 60.02 have limitations governing the time period within which the motions must be brought. Assuming appellant brought the motion pursuant to the newly discovered evidence section of CR 60.02(b), appellant was still required to bring the motion within one (1) year after the final judgment. Likewise, under CR 59.02, a CR 59.01 motion must be brought within ten (10) days of the final judgment. Contrary to appellant's position in his motion, Glidewell v. Glidewell, Ky. App., 859 S.W.2d 675 (1993) does not hold that a CR 59.01 motion can be brought at any time. In fact, in that case, the CR 59.01 motion was brought after the trial in the matter, but prior to final judgment. Id.

_____ For the reasons stated above, the judgment of the Boyd
Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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