

RENDERED: DECEMBER 23, 1999; 2:00 p.m.
 NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-000801-MR

DONALD R. NEWCOMB

APPELLANT

v. APPEAL FROM PULASKI CIRCUIT COURT
HONORABLE PAUL BARRY JONES, JUDGE
ACTION NO. 92-CR-00061

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING
*** *** *** *** ***

BEFORE: GUIDUGLI, JOHNSON AND KNOPF, JUDGES.

GUIDUGLI, JUDGE. Donald Ray Newcomb (Newcomb) appeals an order entered by Special Judge, Honorable Paul Barry Jones, in the Pulaski Circuit Court on March 11, 1999, denying his CR 60.02 motion. The special judge determined that Newcomb had failed to produced any evidence "to support a mistake, inadvertence, surprise, or excusable neglect, newly discovered evidence, which by due diligence could have been discovered, perjury, falsified evidence or fraud affecting the proceeding, or any other valid reason of extraordinary nature justifying the relief requested. The court also found that Newcomb's CR 60.02 motion was not

timely filed. We agree with the findings of the trial court and, hence, affirm.

Newcomb was indicted by the Pulaski County Grand Jury on March 25, 1992, on charges of first-degree assault (KRS 508.010) and of being a persistent felony offender (PFO) first degree (KRS 532.080). After a trial by jury, he was convicted of both charges and sentenced to twenty (20) years imprisonment. His conviction was affirmed by the Kentucky Supreme Court in an unpublished memorandum opinion on May 24, 1994 (Justice Stumbo dissenting without opinion). In the direct appeal, Newcomb raised ten (10) alleged errors that occurred during his trial.

On September 16, 1994, Newcomb filed a RCr 11.42 motion to vacate his judgment alleging generally that he received ineffective assistance of counsel. Specifically, he set forth four (4) areas where he believed his trial counsel to be ineffective. The trial court's denial of his motion, without a hearing, was affirmed by the Court of Appeals in an unpublished opinion rendered December 22, 1995.

Thereafter, Newcomb filed a motion styled "Petition for Court Order to Correct Presentence Investigation Report." Again, the trial court denied this motion. Again, the trial court's order was affirmed by the Court of Appeals in an unpublished opinion rendered November 26, 1997. Newcomb's motion to the Kentucky Supreme Court for discretionary review was denied February 11, 1998.

We now come to Newcomb's CR 60.02 motion, which is the subject of this appeal. Said motion was filed on March 16, 1998.

A special judge was appointed pursuant to Newcomb's repeated requests alleging that the trial judge was guilty of both "bias" and "misconduct" towards him. Special Judge Paul Barry Jones denied Newcomb's request for an evidentiary hearing and further denied his CR 60.02 motion in an order entered March 11, 1999. This appeal followed.

Newcomb's appeal can be affirmed on several legal principles. First, as the special trial judge stated, "this motion was not timely filed." CR 60.02 provides:

On a 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: (a) mistake, inadvertence, surprise or excusable neglect; (b) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59.02; (c) perjury or falsified evidence; (d) fraud affecting the proceedings, other than perjury or falsified evidence; (e) the judgment is void, or has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (f) any other reason of an extraordinary nature justifying relief. The 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. A motion under this rule does not affect the finality of a judgment or suspend its operation. (emphasis added).

Obviously, under (a), (b) and (c), Newcomb would have had to file his motion within one (1) year of the entry of the judgment (March 30, 1993), which he did not do. Under (d), (e), or (f), Newcomb must file within a "reasonable time." The trial court held, and we agree, that six years was not a reasonable time.

This is true, especially in light of the fact that Newcomb has not alleged any specific grounds sufficient to comply with the provisions of (d), (e) or (f).

Newcomb's appeal must also fail in that it is an impermissible consecutive collateral attack. In Gross v. Commonwealth, Ky., 648 S.W.2d 853, (1983), the Supreme Court held that a defendant must seek RCr 11.42 relief before seeking CR 60.02 relief. More particularly, the Court stated as follows:

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. CR 60.02 is not intended merely as an additional opportunity to raise Boykin defenses. It is 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... .

...

We hold that 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.

Next, we hold that a defendant is required to avail himself of RCr 11.42 while in custody under sentence or on probation, parole or conditional discharge, as to any ground of which he is aware, or should be aware, during the period when this remedy is available to him. Final disposition of that motion, or waiver of the opportunity to make it, shall conclude all issues that reasonably could have been presented in that proceeding. The language of RCr 11.42 forecloses the defendant from raising any questions under CR 60.02 which are "issues that could reasonably have been presented" by RCr 11.42 proceedings.

Id. at 856-57.

Each issue presented by Newcomb was or should have been raised in either his direct appeal to the Kentucky Supreme Court or in his previous RCr 11.42 motion. Newcomb is not entitled to continuous bites of the same apple. Despite his claims to the contrary, Newcomb has not presented any new claims, especially claims which demonstrate special or extraordinary relief, which could not or should not have been raised in his previous motions and appeals.

For the foregoing reasons, the order of the Special Judge of the Pulaski Circuit Court denying Newcomb's CR 60.02 motion is affirmed.

KNOPF, JUDGE, CONCURS.

JOHNSON, JUDGE, CONCURS IN RESULT ONLY.

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