

Commonwealth Of Kentucky
Court Of Appeals

NO. 1999-CA-001670-MR

JOHN A. ROBINSON

APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JAMES M. SHAKE, JUDGE
ACTION NO. 78-CR-001456

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * **

BEFORE: GUDGEL, CHIEF JUDGE, BARBER, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: John A. Robinson appeals from an order of the Jefferson Circuit Court denying his motion for relief pursuant to CR 60.02. As the trial court did not abuse its discretion in finding that the CR 60.02 motion had not been filed within a reasonable amount of time, we affirm.

On October 31, 1978, appellant was indicted by the Jefferson County Grand Jury on one count of theft by unlawful taking over \$100 and one count of receiving stolen property over \$100. On February 22, 1979, appellant entered into a plea agreement with the Commonwealth in which, in exchange for his guilty plea to receiving stolen property over \$100, the Commonwealth recommended a sentence of two years, and dismissal

of the theft charge. On March 21, 1979, the court sentenced appellant in accordance with the Commonwealth's recommendation, and probated the two-year sentence for a period of five years.

On June 16, 1982, appellant filed a motion to set aside and/or vacate pursuant to RCr 11.42, requesting the court to set aside his February 22, 1979 guilty plea and the sentence imposed by the court on March 21, 1979. The record indicates that appellant's sole claim in the RCr 11.42 motion was that he was not guilty as he did not know that the property which was the subject of the charges was stolen at the time he purchased it. An evidentiary hearing was held, and on August 2, 1982, the court denied the motion.

On January 21, 1999, appellant filed a motion to vacate or dismiss his February 22, 1979 conviction pursuant to RCr 11.42 and/or CR 60.02. On February 9, 1999, the court entered an order requiring appellant to choose whether to proceed under either RCr 11.42 or CR 60.02, of which appellant chose CR 60.02.

A hearing was held on February 16, 1999, on which date the Commonwealth filed a motion to dismiss the CR 60.02 motion. Appellant did not attend the hearing as he was in a federal penitentiary. The court granted appellant time to file a response to the Commonwealth's motion, which he filed on April 6, 1999. On April 16, 1999, the court entered an order dismissing the CR 60.02 motion on the grounds that an unreasonable amount of time had passed between the 1979 conviction and the filing of the CR 60.02 motion in 1999. This appeal followed.

On appeal, appellant argues that the trial court erred in dismissing his CR 60.02 motion. Appellant contends he was entitled to relief under CR 60.02, as he "only recently became aware that his conviction violated his rights under the double jeopardy clause". Appellant further alleges that his plea was not voluntary and intelligent as he "just recently learned the elements of Receiving Stolen Property" and that the court did not determine if there was a factual basis for his guilty plea.

CR 60.02 states:

On 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.

A post-judgment motion made under CR 60.02 is for relief that is not available by direct appeal and not available under RCr 11.42, and the movant must demonstrate why he is entitled to this extraordinary remedy. Gross v. Commonwealth, Ky., 648 S.W.2d 853 (1983). We first note that the issues raised

in appellant's CR 60.02 motion should have been raised in his RCr 11.42 motion.

As in his motion to the trial court, appellant also fails to specify to this court under which section of CR 60.02 he is proceeding. As 19 years had elapsed between appellant's conviction and the filing of his CR 60.02 motion, he is clearly time-barred from filing a motion under CR 60.02(a), (b), or (c), as such motions must be filed within one year. Appellant does not allege the errors addressed by sections (d) or (e). Hence, we assume that appellant is attempting to proceed under section (g). The rule does not specify a time limit in which a motion under this section must be made, however it does require that the motion "shall be made within a reasonable time". CR 60.02.

"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." Gross, 648 S.W.2d at 858. Appellant entered his guilty plea on February 22, 1979, was sentenced on March 21, 1979, and filed the CR 60.02 motion nearly twenty years later on January 21, 1999. As such, the trial court found that an unreasonable amount of time had passed for the purposes of challenging the conviction per CR 60.02. Considering the facts of this case, it was clearly not an abuse of discretion for the trial court to so find. Id.

We further note that appellant has not alleged facts which would justify the extraordinary relief of CR 60.02. Gross, 648 S.W.2d at 856; McQueen v. Commonwealth, Ky., 948 S.W.2d 415, 416 (1997). The record, which contains the "Plea of Guilty"

dated February 22, 1979, refutes appellant's allegation that his plea was not voluntarily and intelligently made. Appellant's second allegation, that his guilty plea subjected him to double jeopardy, is also without merit. The record indicates that appellant had proceeded to trial on December 19, 1978, prior to entering his guilty plea. After the jury had been sworn in, appellant's counsel moved for a mistrial due to a misunderstanding concerning counsel's earlier request for a continuance, combined with the fact that substitute counsel was not properly prepared for trial. The court sustained the motion, and the trial was rescheduled for February 22, 1979, on which date appellant entered his guilty plea. Under these facts, as appellant moved for the mistrial, any double jeopardy bar to retrial was removed. Stamps v. Commonwealth, Ky., 648 S.W.2d 868 (1983). Hence, appellant's claim that he was subjected to double jeopardy is without merit.

The standard of review of a denial of a CR 60.02 motion is whether the trial court abused its discretion. Bethlehem Minerals Company v. Church and Mullins Corp., Ky., 887 S.W.2d 327 (1994). Having determined that the CR 60.02 motion was not filed within a reasonable amount of time, and that appellant's claims are without merit, we conclude that the trial court did not abuse its discretion in dismissing appellant's CR 60.02 motion.

The judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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