

RENDERED: August 29, 2003; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2001-CA-002476-MR

ERSKIN THOMAS

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE REBECCA M. OVERSTREET, JUDGE
INDICTMENT NO. 97-CR-01069

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** * * * **

BEFORE: DYCHE, JOHNSON, AND PAISLEY, JUDGE

DYCHE, JUDGE. On June 13, 1997, at 2:45 p.m., Osama Shalash was shot to death in the parking lot of Perkins' Restaurant on Richmond Road in Lexington, Kentucky. Erskin Thomas was found guilty of Shalash's murder and sentenced to life imprisonment without the possibility of parole for twenty-five years. His

conviction was affirmed by the Kentucky Supreme Court in Young v. Commonwealth, Ky., 50 S.W.2d 148 (2001).

On October 29, 2001, Thomas filed for post-conviction relief pursuant to Kentucky Rule of Civil Procedure (CR) 60.02(f). He also moved for appointment of counsel and an evidentiary hearing. The Fayette Circuit Court summarily denied all relief on October 30, 2001. Thomas appeals, arguing that the trial court erred in denying the CR 60.02(f) motion without first appointing counsel. Thomas concedes that he has no constitutional right to be represented by counsel in this post-conviction proceeding. Fraser v. Commonwealth, Ky., 59 S.W.3d 448 (2001). However, arguing due process and equal protection concerns, Thomas insists that counsel would have been able to correct deficiencies in his belatedly obtained affidavit from an alleged eyewitness who claimed that someone other than Thomas was the gunman.

As the Commonwealth correctly points out, this claim of newly discovered evidence is governed by CR 60.02(b), which must be brought within one year of judgment. Thomas's motion pursuant to CR 60.02(f) allows relief for a "reason of an extraordinary nature." Thomas fails to demonstrate that counsel would have been able to make a colorable claim under CR 60.02(f). The trial court did not err in denying Thomas's motion for appointment of counsel.

The order of the Fayette Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Erskin Thomas, *Pro Se*
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BRIEF FOR APPELLEE:

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