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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-000104-MR

JUAN SANDERS — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE THOMAS B. WINE, JUDGE
ACTION NO. 97-CR-001632

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: TACKETT, TAYLOR, AND VANMETER, JUDGES.

VANMETER, JUDGE: Juan Leotis Sanders appeals pro se from an order entered by the Jefferson Circuit Court denying his motion seeking CR 60.02 relief. For the reasons stated hereafter, we affirm.

In May 1998 a jury rejected Sanders' self-defense claim and found him guilty of first-degree manslaughter, second-degree assault, and fourth-degree assault. After Sanders and the Commonwealth reached a sentencing agreement whereby Sanders

waived his right to appeal, he was sentenced to a total of seventeen years' imprisonment.

Despite the agreement, Sanders filed an appeal which this court dismissed in August 1998. In June 1999, Sanders filed a motion seeking relief pursuant to RCr 11.42 and CR 60.02, raising allegations of various trial errors and asserting that he was afforded ineffective assistance of counsel. The trial court's denial of relief was affirmed by this court on appeal, and discretionary review was denied by the supreme court in August 2002. Several months later, Sanders filed another motion seeking CR 60.02 relief, which the trial court denied in January 2003. Finally, in May 2004 Sanders filed the underlying motion, which again sought CR 60.02 relief. The trial court denied the motion, and this appeal followed.

Sanders alleges that he is entitled to CR 60.02(b), (c), (d), (e) or (f) relief because he was denied due process when the Commonwealth failed to provide him with evidence of an exculpatory eyewitness's pretrial statement. According to Sanders' 2004 motion, around June 2003 he "met an inmate named Octavius Long at the Kentucky State Penitentiary who seen everything that occurred on the day [Sanders] shot and killed Antwan Chatman. He stated he divulged all that he saw to a detective, but the detective never contacted him." Sanders' motion was accompanied by Long's June 2003 affidavit, which

provided a description of events which was consistent with Sanders' defense at trial.

Sanders' claim clearly does not entitle him to relief pursuant to CR 60.02(b) or (c), as motions based on those grounds must be brought within "not more than one year after the judgment, order, or proceeding was entered or taken."[1] Moreover, on its face the claim does not fall within the grounds set out in CR 60.02(d)[2] or (e).[3] Finally, we are not persuaded that the allegation provided "any other reason of an extraordinary nature justifying relief" under CR 60.02(f).

Although CR 60.02 requires motions thereunder to be "made within a reasonable time," Sanders offers no explanation for the fact that the current motion was not filed until eleven months after Long's affidavit was executed. Moreover, although Sanders claims to have been unaware of Long's presence at the scene until June 2003, the record shows that Sanders was free on bond and able to investigate his case for several years after the shooting. Given Long's statement that he and three others observed the events from a porch across the street from the shooting, we are not persuaded that with the exercise of due

[1] CR 60.02.

[2] "[F]raud affecting the proceedings, other than perjury or falsified evidence[.]"

[3] "[T]he 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[.]"

diligence, Sanders could not have discovered the existence of the potential witness sooner than six years after the shooting.

In any event, the statements set out in Long's 2003 affidavit are substantially similar to those set out in the 1997 affidavit of Benny Kendall which accompanied Sanders' June 1999 motion for RCr 11.42 and CR 60.02 relief. In denying Sanders' claim that he was entitled to relief[4] because counsel failed to call Kendall and another witness to testify even though they were available at trial,[5] the trial court stated:

> A question of trial strategy is usually not second guessed. *Williams v. Armstrong,* 912 F.2d 924 (8th Cir., 1990). See also *McQueen v. Commonwealth,* Ky., 433 S.W.2d 117 (1998). It is clear that counsel discussed this matter with the Movant and made a reasoned decision. This is exactly the type of reasonable conduct expected of any defense counsel.

Likewise, it cannot be said that the failure to call an unknown witness, whose testimony would have been similar to Kendall's, constituted error which entitled Sanders to CR 60.02(f) relief. Further, we note that since the record shows that the statements made in Long's 2003 affidavit were consistent with the statements made during trial by Sanders and at least one other

[4] Sanders did not raise this particular issue in his appeal from the trial court's order.

[5] According to the order which denied the 1999 motion, Sanders indicated in a June 1998 letter to the trial court that trial counsel declined to call the two witnesses to testify "because of the way they looked and the way they were dressed."

witness, Long's testimony would have been merely cumulative and his affidavit did not indicate the existence of newly discovered evidence. As Sanders has not demonstrated a "reason of an extraordinary nature"[6] justifying CR 60.02(f) relief, the trial court did not abuse its discretion by denying his motion below.

Finally, Sanders asserts that the trial court erred by failing to conduct an evidentiary hearing to address his request for relief. However, as Sanders' 2004 motion did not include a request for an evidentiary hearing, the issue was not considered by the trial court and it will not be addressed by this court on appeal.

The court's order is affirmed.

ALL CONCUR.

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[6] CR 60.02(f).