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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2005-CA-001596-MR

GEORGE ROBERT CLINE — APPELLANT

v.

APPEAL FROM DAVIESS CIRCUIT COURT
HONORABLE HENRY M. GRIFFIN, III, JUDGE
ACTION NO. 94-CR-00272

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: NICKELL AND TAYLOR, JUDGES; PAISLEY,[1] SENIOR JUDGE.

NICKELL, JUDGE: George Cline, pro se, brings this appeal from a July 19, 2005, order of the Daviess Circuit Court overruling a motion to alter, amend or vacate his sentence pursuant to Kentucky Rules of Civil Procedure (CR) 60.02(f). We affirm.

On November 8, 1994, George Cline was charged with multiple drug offenses, rape in the first degree, and being a persistent felony offender in the second

[1] Senior Judge Lewis G. Paisley sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

degree.[2] On March 12, 1997, with counsel at his side, Cline plead guilty to three drug offenses. As a result, he was sentenced to a term of 12 months in the county jail for both possession of marijuana and possession of a controlled substance in the third degree, and two years in the penitentiary for possession of drug paraphernalia, subsequent offense. All terms were ordered to run concurrently for a total of two years in the penitentiary. The rape and persistent felon charges were severed for later resolution.

On December 9, 1997, again with counsel at his side, Cline plead guilty to one count of rape in the first degree for which he received a sentence of 20 years. The persistent felon charge was dismissed. The "Motion to Enter Guilty Plea" signed by Cline says in relevant part:

> In return for my guilty plea, the Commonwealth has agreed to recommend to the Court the sentence(s) set forth in the attached "Commonwealth's Offer on a Plea of Guilty." Other than that recommendation, no one, including my attorney, has promised me any other benefit in return for my guilty plea nor has anyone forced or threatened me to plead "GUILTY."

The Commonwealth's written "Offer on a Plea of Guilty," also signed by Cline, did not recommend a specific sentence on the rape charge. However, it did list the rape charge as a Class B felony carrying a penalty range of ten to 20 years. This was actually a

[2] Cline was indicted on November 8, 1994, on charges of rape in the first degree, Kentucky Revised Statutes (KRS) 510.040, a Class A felony; possession of marijuana, KRS 218A.1422, a Class A misdemeanor; possession of a controlled substance in the third degree, KRS 218A.1417, a Class A misdemeanor; possession of drug paraphernalia, KRS 218A.500, a Class A misdemeanor for a first offense; and being a persistent felony offender in the second degree, KRS 532.080. In January 1995 to correct one of the original charges, Cline was indicted for possession of drug paraphernalia, subsequent offense, which is a Class D felony. On the Commonwealth's motion, both indictments were consolidated and the misdemeanor drug paraphernalia charge was dismissed.

reduction in charge since Cline was indicted for raping a ten-year-old girl which is a Class A felony due to the victim's age and carries a penalty of 20 years to life. KRS 510.040(2); KRS 532.060. It further said a separate sentencing hearing was to occur December 15, 1997, any sentence imposed on the rape conviction should run concurrently with any other sentence Cline was serving as a result of the same indictment, the persistent felony offender charge was to be dismissed, and court costs would be waived. During the guilty plea colloquy, defense counsel stated on the record: he had gone over the plea agreement "pretty extensively" with Cline; counsel had "extensive" discussions with both Cline and his family about the evidence; and, counsel recommended Cline enter a guilty plea based upon the evidence and the great difficulty encountered in securing defense witnesses. The trial court accepted Cline's guilty plea to the charge of rape in the first degree after finding it was made knowingly and voluntarily and that Cline understood it was being entered without any recommendation from the Commonwealth.

At a sentencing hearing held on December 15, 1997, the prosecution summarized the facts it would have established had the matter gone to trial including: (1) the female victim was ten years old at the time of the attack; (2) about 2:00 a.m. on October 8, 1994, the victim told her mother and stepfather that Cline had forcibly raped her; (3) when law enforcement arrived at the victim's home, Cline was still in the child's bed in her bedroom and that is where he was arrested; (4) a medical exam revealed bruising to the victim's inner thighs as well as a hymenal tear and vaginal bleeding; (5) a

vaginal swab collected from the victim revealed both Group A and Group B factors; (6) the victim is a Group A secretor and as such could not contribute the Group B secretions found on the vaginal swab; (7) Cline is a Group B secretor; (8) blood from the victim's stepfather, the only other male in the home at the time of the attack, was found to be Type O which excluded him as the source of the Group B secretions found on the vaginal swab; (9) blood found on Cline's clothing was compatible with the victim's blood; (10) semen was found on Cline's shirt and jeans; and finally, (11) the victim would positively identify Cline as the person who raped her on October 8, 1994. At the same hearing, Cline's attorney indicated the defense would have offered proof that Cline was highly intoxicated at the time of the attack due to the consumption of marijuana, crack cocaine, alcohol and prescription medication. Cline took the stand and testified he did not recall the attack.

At final sentencing on February 10, 1998, the trial court sentenced Cline to serve 20 years in the penitentiary for the crime of rape in the first degree. The sentence was ordered to run concurrently with the sentences for the prior drug crimes originating in the same indictment.

Cline did not file a direct appeal, but on August 10, 1998, he filed a motion pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42 claiming ineffective assistance of counsel. In denying the motion on September 28, 1998, the trial court found: Cline's supporting memorandum contained false allegations; Cline acknowledged on the record during the plea colloquy that he had talked with his attorney at length about

the case and that he was satisfied with his attorney's representation; Cline's attorney also stated on the record that he had discussed the case numerous times with both Cline and Cline's family; Cline's mental ability to enter a voluntary guilty plea was not in doubt as the record shows he understood the charges against him and actively participated in his defense during numerous court hearings; and, although Cline was taking medication at the time of his guilty plea, he acknowledged on the record that it did not prevent him from understanding the nature of the proceedings or his actions.

Years later, on November 16, 2001, Cline sought permission from the trial court to file a successive RCr 11.42 motion. That request was denied November 19, 2001, in a one line order. This Court affirmed the trial court's order denying relief in *Cline v. Commonwealth*, 2001-CA-2719-MR, not-to-be-published. On May 15, 2003, the Supreme Court of Kentucky denied Cline's request for discretionary review. *Cline v. Commonwealth*, 2002-SC-734-D.

Two years later, on November 26, 2003, Cline, acting pro se, moved the trial court to alter, amend, or vacate his sentence pursuant to CR 60.02(f). He claimed both the assistant prosecutor handling his case and the trial judge should have recused, and the Commonwealth reneged on a promise to recommend a ten year sentence on the rape charge if Cline provided evidence against a cell mate, Jerald Morris. Cline says he gave the Commonwealth handwritten notes from Morris detailing a murder/assault/kidnapping scheme, but when he refused to testify against Morris in court the Commonwealth reneged on its bargain and withdrew the promise to recommend a ten

year sentence on the rape charge. Cline did not ask that his judgment and conviction be set aside or vacated in toto, only that the Commonwealth be forced to honor its bargain and recommend a sentence of ten years.

On December 4, 2003, the Commonwealth filed a written response to the CR 60.02(f) motion stating: (1) as originally charged, Cline faced a potential life sentence for raping a ten-year-old girl, a Class A felony, however, as reflected on the Commonwealth's "Offer on a Guilty Plea," Cline plead guilty to a reduced rape charge, a Class B felony; carrying a maximum sentence of only 20 years; (2) the record says nothing about a ten year offer; (3) Cline plead guilty several months before Morris's case ended in a guilty plea; (4) Cline was not an active participant in the prosecution of Morris and was never called to testify; (5) before accepting Cline's guilty plea the trial court found the plea was being made knowingly and voluntarily; and, (6) there was no need for either the prosecutor or the judge to disqualify since Cline's case was unrelated to the prosecution of Morris. The Commonwealth also argued Cline's CR 60.02(f) attack was untimely as it was filed nearly six years after he plead guilty.

On December 19, 2003, the trial court granted Cline's request and appointed the Department of Public Advocacy to represent him. On February 28, 2005, Cline moved the trial court to schedule an evidentiary hearing. That same day, Marguerite Neill Thomas entered an appearance as counsel on Cline's behalf. On March 1, 2005, the trial court denied the request for a hearing pending a response from Thomas.

Thomas reviewed the case and asked the trial court to rule solely upon Cline's pro se pleading as there was no need to supplement his arguments. On July 19, 2005 the circuit court denied the motion because Cline had failed to prove the factual basis of his claims. This appeal followed.

As set forth above, Cline is no stranger to this Court. In 2002 we affirmed the trial court's denial of RCr 11.42 relief from this very same conviction, holding Cline should have appealed the denial of his first RCr 11.42 motion instead of filing a successive RCr 11.42 motion. Cline now contends this Court should overturn the circuit court's denial of CR 60.02(f) relief because the judge and prosecutor did not disqualify themselves from participating in the case and the Commonwealth allegedly reneged on an agreement to recommend a sentence of ten years on the rape charge.

CR 60.02 is an extraordinary measure with limited operation. It is not a second chance to argue issues that were forgotten or ignored on direct appeal or in an RCr 11.42 motion. Relief under CR 60.02 is available only for a claim that was "'unknown and could not have been known to the moving party by exercise of reasonable diligence.'" *Barnett v. Commonwealth*, 979 S.W.2d 98, 101 (Ky. 1998)(quoting *Young v. Edward Technology Group, Inc.* 918 S.W.2d 229, 231 (Ky.App. 1995)); *McQueen v. Commonwealth*, 948 S.W.2d 415, 416 (Ky. 1997). A trial court's denial of CR 60.02 relief will not be disturbed absent a finding of abuse of discretion by the trial court. *Barnett*, 979 S.W.2d at 101.

Cline filed a CR 60.02(f) motion in 2003 claiming: (1) the prosecutor reneged on a deal; (2) the prosecutor should have disqualified himself from the case; and, (3) the trial judge should have recused himself. Cline argues these claims did not come to light until this Court vacated and remanded the conviction of his former cell mate, Jerald Morris. *Morris v. Commonwealth,* 2000-CA-002443-MR, not-to-be-published. We disagree. Each of Cline's current claims could have, and indeed should have, been known to him prior to his decision to plead guilty to the charge of rape in the first degree in December, 1997. Likewise, Cline should have known of these claims in 1998 when he filed an RCr 11.42 motion. Since the claims he asks us to review now could have been resolved via an RCr 11.42 motion, we find the trial court did not abuse its discretion in denying CR 60.02 relief.

Additionally, even if CR 60.02(f) were a proper vehicle for garnering review of Cline's claims, he has not pursued the remedy in a timely fashion. A motion pursuant to CR 60.02(f) must be filed "within a reasonable time" of entry of the judgment or order being attacked. Cline waited nearly six years, from February 10, 1998, until November 26, 2003, to seek relief. Five years was determined to be an unreasonable time to seek such relief in *Gross v. Commonwealth*, 648 S.W.2d 853, 858 (Ky. 1983); 12 years was found to be unreasonable to pursue similar relief in *Ray v. Commonwealth*, 633 S.W.2d 71, 73 (Ky.App. 1982). In light of Cline's specific claims, we find a delay of nearly six years to be an unreasonable time to wait before seeking CR 60.02(f) relief.

Cline's final assertion, that the trial court should have held an evidentiary hearing, is equally unpersuasive. A hearing on a CR 60.02 motion is appropriate only when a factual issue cannot be resolved from the face of the record. Since Cline's claims should have been raised via an RCr 11.42 motion, there were no factual issues to be decided. Thus, the trial court did not abuse its discretion in denying relief without first holding an evidentiary hearing. *Land v. Commonwealth*, 986 S.W.2d 440 (Ky. 1999).

For the foregoing reasons, the order of the Daviess Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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