

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001066-MR

JOHN JOHNSON

APPELLANT

v.

APPEAL FROM LARUE CIRCUIT COURT
HONORABLE JOHN DAVID SEAY, JUDGE
ACTION NO. 02-CR-00008

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: LAMBERT, MOORE, AND WINE, JUDGES.

LAMBERT, JUDGE: John Johnson appeals the trial court's denial of his motion for post-conviction relief pursuant to RCr 11.42 and CR 60.02(f), seeking to terminate the condition of his probation ordering him to pay \$300 in restitution to his victim. For the reasons set forth herein, we affirm.

On August 9, 2002, Johnson entered a guilty plea to three counts of theft by unlawful taking (value of \$300 or more), two counts of theft by unlawful taking (value less than \$300), and one count of fleeing and evading police in the second degree. A final judgment and conviction was entered on October 23, 2002, in which Johnson was found guilty of six of the abovementioned counts and sentenced to serve a total

effective sentence of five years in prison. An order of probation was entered that same day, with one of the conditions of probation being that he pay restitution of \$300 to the victim of his crimes.

On April 9, 2007, Johnson filed a motion for post-conviction relief pursuant to RCr 11.42 and CR 60.02(f). In his motion, he alleged that he is improperly being ordered to pay \$300 restitution to the victim of his crimes given that it was not a condition of his original plea agreement. The court denied the motion noting: (1) it was a condition of his probation to pay \$300 in restitution; (2) the claim under RCr 11.42 is time barred as it was brought more than three years after the final judgment was entered; (3) the motion was a procedurally improper successive motion for post-conviction relief; (4) the claim under CR 60.02(f) was also time barred as it was not brought within a reasonable time as required by the rule; and (5) KRS 532.032 mandates that a court order restitution to a known victim. This appeal followed.

RCr 11.42(10) expressly provides that “[a]ny motion under this rule shall be filed within three years after the judgment becomes final.” The final judgment was entered on October 23, 2002, but this motion was not filed until April 2007. The issue does not fall within any exception to the statute of limitations, therefore the trial court properly found the issue time barred and evading review under RCr 11.42.

CR 60.02(f) also expressly provides that a motion requesting relief pursuant to it “shall be made within a reasonable time.” The claim under CR 60.02(f), as discussed previously, was filed almost four and one-half years after the entry of final judgment and probation. Additionally, Johnson had filed at least one prior motion for CR 60.02 relief.

“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.” See *Gross v. Commonwealth*, 648 S.W.2d 853, 858 (Ky. 1983). We find that, under the totality of the circumstances, the trial court did not abuse its discretion in determining that four and one-half years was an unreasonable time to wait to bring this claim.

“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.” *Id.* at 856. Moreover, CR 60.02 is only appropriate “to correct or vacate a judgment upon facts or grounds, not appearing on the face of the record and not available by appeal or otherwise, which were not discovered until after rendition of judgment without fault of the party seeking relief.” *Harris v. Commonwealth*, 296 S.W.2d 700, 701 (Ky. 1956). Clearly the payment of restitution was known at the time of judgment given that the order for probation and final judgment were entered on the same day. The restitution issue, therefore, should have been raised in Johnson’s earlier CR 60.02 motion as the trial court stated. As a result, we agree with the trial court that this motion was a procedurally improper successive motion for post-conviction relief.

Finally, and most relevant to the specific argument raised by Johnson, KRS 532.032 *requires* restitution when there is a known victim. It states in pertinent part that:

(1) Restitution to a named victim, if there is a named victim, *shall be ordered* in a manner consistent, insofar as possible, with the provisions of this section and KRS 439.563, 532.033, 533.020, and 533.030 in addition to any other part of the penalty for any offense under this chapter. The provisions of this section shall not be subject to suspension or nonimposition.

(3) If probation, shock probation, conditional discharge, or other alternative sentence is granted, restitution *shall be a*

condition of the sentence.

KRS 532.032 (emphasis added). Therefore, in light of statutory authority directly on point, Johnson's contention that his constitutional rights were violated as a result of the court ordering restitution as a condition of probation is without merit.

Accordingly, we affirm the judgment of the Larue Circuit Court.

ALL CONCUR.

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