

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000360-MR

IRVIN EDGE

APPELLANT

v. APPEAL FROM WARREN CIRCUIT COURT
HONORABLE JOHN R. GRISE, JUDGE
ACTION NO. 92-CR-00610

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: DIXON AND NICKELL, JUDGES; KNOPF,¹ SENIOR JUDGE.

KNOPF, SENIOR JUDGE: Irvin Edge appeals an order of the Warren Circuit Court denying his CR 60.02 motion to vacate his criminal conviction. We affirm.

On May 17, 1993, after a jury trial, Edge was found guilty of murder.

On June 14, 1993, a final judgment was entered, and Edge was sentenced to life

¹ Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

imprisonment. Edge filed several appeals, and the conviction, as well as the trial court's denial of a petition for a writ of habeus corpus, was affirmed. Edge then filed an RCr² 11.42 motion with the trial court seeking to have his sentence vacated, set aside or corrected. Edge was granted a hearing on this motion and in an order entered August 12, 1996, it was denied. Edge appealed³ that order and on March 6, 1998, an opinion was rendered by this Court, affirming.

On November 23, 1999, Edge filed a CR⁴ 60.03 motion to be relieved of further execution of sentence. That motion was denied by the trial court in an order entered on February 21, 2000. On September 10, 2001, Edge filed a CR 60.02 motion for a new trial and a motion for an evidentiary hearing on his CR 60.02 motion. An evidentiary hearing was held on June 14, 2002, and the trial court denied the motion for a new trial in an order entered October 21, 2002. Edge appealed,⁵ and on December 21, 2003, this Court affirmed. On October 18, 2004, Edge filed another CR 60.02 motion to vacate the judgment against him. This motion was denied by the trial court in an order entered September 8, 2005. This appeal followed.⁶

Edge argues the following trial court errors: 1) overruling his CR 60.02 motion without holding an evidentiary hearing in order to resolve questions

² Kentucky Rules of Criminal Procedure.

³ 1996-CA-002314-MR.

⁴ Kentucky Rules of Civil Procedure.

⁵ 2002-CA-002248-MR.

⁶ On May 11, 2007 the Court granted Edge's motion to file a belated appeal.

of fact that could not be adjudicated by reference to the record alone; and 2) failing to hold an evidentiary hearing on Edge's claims of ineffective assistance of counsel. Edge argues that these errors caused him substantial prejudice and denied him due process of law.

A CR 60.02 motion is the process by which a party may move to be relieved from a final judgment or order based on mistake; inadvertence; excusable neglect; newly discovered evidence; fraud; or any other reason of an extraordinary nature justifying relief. CR 60.02. CR 60.02 "is not intended merely as an additional opportunity to relitigate the same issues that could 'reasonably have been presented' by direct appeal or RCr 11.42 proceedings." *McQueen v. Commonwealth*, 948 S.W.2d 415, 416 (Ky.1997) (quoting RCr. 11.42(3)). Thus, CR 60.02 "is available only to raise issues which cannot be raised in other proceedings." *Id.* "Before the movant is entitled to an evidentiary hearing, he must affirmatively allege facts which, if true, justify vacating the judgment and further allege special circumstances that justify CR 60.02 relief." *Gross v. Commonwealth*, 648 S.W.2d 853, 856 (Ky. 1983). "The standard of review of an appeal involving a CR 60.02 motion is whether the trial court abused its discretion." *See, e.g., White v. Commonwealth*, 32 S.W.3d 83, 86 (Ky.App. 2000).

Within Edge's CR 60.02 motion, he alleged that he was denied due process of law and equal protection of the law and had been convicted of an offense for which he was innocent. He attributed these errors to ineffective assistance of counsel. Specifically, Edge claimed that his counsel failed to

adequately investigate or properly prepare for trial. Edge's CR 60.02 motion, from which this appeal stems, was filed on October 18, 2004, almost 10 years after his initial conviction. Because this argument could have reasonably been presented by direct appeal or RCr 11.42 proceedings, a CR 60.02 proceeding is no longer appropriate. *McQueen, supra*. Edge was granted evidentiary hearings on prior RCr 11.42 and CR 60.02 motions, the denials of which were both affirmed by this Court. Furthermore, CR 60.02 mandates that "the motion shall be made within a reasonable time." CR 60.02. The filing of the motion almost ten years after the final judgment is not, in our opinion, a reasonable time. Accordingly, we do not find an abuse of discretion to be present.

For the foregoing reasons, the September 8, 2005, order of the Warren Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Brian Thomas Ruff
Assistant Public Advocate
LaGrange, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Clint E. Watson
Assistant Attorney General
Frankfort, Kentucky