

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2007-CA-000119-MR

ERNEST SCHNITZLER

APPELLANT

v. APPEAL FROM BOONE CIRCUIT COURT  
HONORABLE ANTHONY W. FROHLICH, JUDGE  
ACTION NOS. 98-CR-00194 & 99-CR-00121

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: CAPERTON AND VANMETER, JUDGES; GUIDUGLI,<sup>1</sup> SENIOR JUDGE.

VANMETER, JUDGE: Ernest Schnitzler appeals *pro se* from the Boone Circuit Court's dismissal of his motion to correct a judgment. For the following reasons we affirm.

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<sup>1</sup> Senior Judge Daniel T. Guidugli 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.

Schnitzler was indicted by a grand jury on one count each of possession of a controlled substance in the first degree, possession of drug paraphernalia, and possession of marijuana. He was also charged as a persistent felony offender (PFO) in the second degree.<sup>2</sup>

On June 8, 1999, Schnitzler evidently was offered, but did not accept, a plea agreement which provided for dismissal of the PFO charge. Later that day, the court accepted Schnitzler's guilty plea which allegedly was entered in accordance with the Commonwealth's second offer. Pursuant to that agreement, Schnitzler was sentenced to five years on possession of a controlled substance, enhanced to ten years pursuant to his second-degree PFO status, to be probated for five years with service of 98 days. He was sentenced to 12 months on each misdemeanor count, to run concurrent with each other and the felony charge, with credit for 98 days already served. Schnitzler's probation subsequently was revoked, and the original ten-year sentence was reinstated with credit for 98 days served.

On July 26, 2006, Schnitzler filed his third postconviction motion alleging the sentence should have been five rather than ten years because at the time of his guilty plea, the Commonwealth agreed to drop the PFO charge. The trial court denied the motion. This appeal followed.

Although Schnitzler does not state the grounds for his motion, he waived his constitutional right to a direct appeal, and relief was not timely sought

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<sup>2</sup> The Commonwealth at one point referred to the charge as a PFO in the first degree, but the indictment clearly shows Schnitzler was actually charged as a PFO in the second degree.

pursuant to RCr<sup>3</sup> 11.42. Thus, CR<sup>4</sup> 60.02 provided the only possible basis for the requested relief. CR 60.02 states, in part,

[o]n motion a court may, upon such terms as are just, relieve a party . . . from its final judgment, order, or proceeding upon . . . (f) any other reason of an extraordinary nature justifying relief. The motion shall be made within a reasonable time[.]

The trial court is vested with discretion in deciding whether to grant relief pursuant to CR 60.02. *Gross v. Commonwealth*, 648 S.W.2d 853, 856 (Ky. 1983). Thus, the trial court's decision will be affirmed absent an abuse of its discretion and some showing of a "flagrant miscarriage of justice." *Id.* at 858. Relief under CR 60.02 should be considered the final step in postconviction proceedings because it "is not intended merely as an additional opportunity to relitigate the same issues which could 'reasonably have been presented' by direct appeal or RCr 11.42 proceedings." *McQueen v. Commonwealth*, 948 S.W.2d 415, 416 (Ky. 1997) (citations omitted). Further, a motion seeking CR 60.02(f) relief must be filed within a reasonable time, and the movant must exercise due diligence in bringing the claim. *Gross*, 648 S.W.2d at 858.

Here, as Schnitzler entered into a plea agreement, a direct appeal was not available to him. *See Johnson v. Commonwealth*, 120 S.W.3d 704, 706 (Ky. 2003) (holding that the right to appeal may constitutionally be waived in a plea agreement). Further, Schnitzler failed to seek RCr 11.42 relief during the time when it was available. Finally, Schnitzler filed two previous CR 60.02 motions in

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<sup>3</sup> Kentucky Rules of Criminal Procedure.

<sup>4</sup> Kentucky Rules of Civil Procedure.

which the issue raised in the current CR 60.02 motion could have been but was not raised. In any event, the video and written record do not support Schnitzler's claim, since he signed the plea agreement and verbally affirmed its terms when pleading guilty to the charges.

The order of the Boone County Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Ernest Schnitzler, *Pro se*  
Newport, Kentucky

BRIEF FOR APPELLEE:

Jack Conway  
Attorney General of Kentucky

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